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Hon. T.A. Mufamadi, MP
Chairperson: Standing Committee on Finance (National Assembly)
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Attention: Mr Allen Wicomb
Committee Secretary

Dear Mr Wicomb

Financial Services Laws General Amendment Bill (B29 – 2012)

Thank you for the opportunity to comment on the above-captioned Amendment Bill.

A. SECTION ONE: PRIORITY CONCERNS

1. Exemption from the Consumer Protection Act 68 of 2008

Clause 68 of the Bill amends Section 28 of the Financial Services Board Act 1990 (FSB Act) to give the Financial Services Board (FSB) absolute regulatory power over the financial institutions which they regulate. Section 28 (2)(b) of the FSB Act excludes the application of the Consumer Protection Act 68 of 2008 (CPA) to financial institutions under its legislative control. Banks currently fall outside the definition of financial institution and at present there is no equivalent exclusion from the CPA for banks as defined in the Banks Act, 1990 (Act No. 94 of 1990) (Banks Act).

In the context of the upcoming Twin Peaks regulatory architecture it is anticipated that banks' conduct and products will regulated in a similar manner as proposed by the changes to the FSB Act. Thus, it would seem appropriate at this stage to align the treatment of the bank's conduct and products in a similar manner to other financial institutions.

We recommend that banking services, as defined in the Banks Act, and the conduct of banks be excluded from the CPA in the same manner as those of financial institutions defined in the FSB Act.

The Bill needs to provide clearer definitions for financial sector legislation and non-financial sector legislation. It may be useful to have a schedule which lists the applicable financial sector legislation to avoid confusion.

2. Definitions in the Financial Advisory and Intermediary Services Act for 'product supplier' and 'financial product'

Clause 175 of the Bill amends the definition section of the Financial Advisory and Intermediary Services Act 30 of 2002 (FAIS) by changing the definition of "product supplier". We request clarity as to the intention behind removing words "*by virtue of an authority, approval or right granted to such person*

under any law, including the Companies Act, 1973 (Act No, 61 of 1973)" from the definition, and the application of this provision.

Clause 175 further amends the section 1(4) of the FAIS by amending the application of the FAIS Act. It is unclear what the intention of this amendment is, as if the intention was to include all deposit products then the removal of section 4 of the FAIS Act would have suffice. The implication of this amendment is that it will affect entities which use the current wording of sub-section (4) to exclude their deposit products from FAIS.

3. Remuneration in Long Term Insurance Act and Short Term Insurance Act

Clause 97 of the Bill amends section 49 of the Long-Term Insurance Act 52 of 1998 (Long-Term Insurance Act) by providing that remuneration to intermediaries or person providing services shall be compensated other than as contemplated in accordance with regulation. Clause 137 of the Short-Term Insurance Act 53 of 1998 (Short-Term Insurance Act) similarly provides that no compensation shall be paid to an intermediary other than in accordance with regulation.

The proposed amendments are premature. The FSB Intermediary Remuneration Review has not been completed and industry discussion regarding remuneration review is still underway. Furthermore, the appropriate regulations have not been put into place in respect of long term insurance, which would present serious risk to the industry. We recommend that the above two provisions are deleted from the Bill.

4. Demarcation in Long and Short Term Insurance Acts

Clause 257 of the Bill provides for an amendment to laws in the Schedule to the Bill, which includes the Medical Schemes Act 131 of 1998 (Medical Schemes Act). The Bill proposes to amend the definition of "business of a medical scheme" which provides the necessary carve out for the demarcation between the business of insurance and the business of a medical scheme, which is the subject of draft regulation. We recognise that the proposed demarcation is part of the Government's National Health Insurance (NHI) progamme; however, until the NHI is in place the proposed demarcation is premature as an individual's right to health care will be unjustifiably limited. In this regard, the proposed demarcation could be subject to constitutional challenge as there is no rationale connection between the draft regulation and the achievement of a legitimate government purpose.

5. Code of Conduct on consultation

The Bill proposes the removal of the industry advisory committee from the Collective Investment Schemes Control Act 45 of 2002; the Long-term Insurance Act; FAIS; the Short-term Insurance Act; and the Pensions Fund Act 24 of 1956 (Pension Funds Act), and to include a code of conduct for consultation. At present the advisory committee serves an important function of providing a forum for industry engagement with the regulator, as well as providing technical expertise. The advisory committee provides an important level of oversight and its removal will give the FSB extensive autonomous powers. We are unable to determine whether the code of conduct provides the same benefits to industry as a draft code of conduct has not been released for comment.

We recommend that a draft code of conduct be released for comment to provide the industry with an indication of its effects. We further recommend that the code of conduct provide the industry with similar opportunities for engagement with the regulator.

B. SECTION TWO: GENERAL COMMENTS

6. On-site visits and inspections

We stand by our initial comments in respect of the introduction of the concept of on-site visits or inspections. The Bill provides for on-site visits to be conducted by "suitable persons" in several of the Acts[1] and expands on the Acts which already provided for on-site visits or inspections.[2] On a reading of these clauses in the Bill it seems the legislature intends on creating a regulatory framework similar to that found in the competition law regulatory framework. The term 'suitable persons' is too broad and gives the Registrar a broad discretion which does not balance the relevant inspected person's and entities' constitutional right to privacy. It is submitted that the Bill should require only qualified inspectors, who have been appointed in terms of legislation to conduct the 'on-site visits or inspections'. These inspectors must be authorised to conduct such inspections or visits by means of a warrant only, as their powers are very extensive. Further the Bill must set out the specific powers and functions of these inspectors; and provide that the warrant authorising the inspection must specify the name of the inspectors, the powers of the inspectors in respect of that inspection or visit, and the date of the authorised inspection or visit. It is advised that all on-site visits and inspections should be conducted by inspectors who are appointed in terms of the Inspection of Financial Institutions Act 80 of 1998 (IFA).

On a reading of the provisions contained in the Competition Act 89 of 1998[3] (the Competition Act) it is clear that the clauses contained in the Bill are not sufficient, do not provide enough detail or afford enough regulation of inspectors while affording protection to those who will be "inspected" or "visited".

We raise concern with the power of the inspector to publish onsite information in respect of their investigation. The provision does not state that the investigation needs to be finalised which would cause significant reputational damage to a financial institution under investigation but which is later cleared of suspicion of wrongdoing.

We further raise concern as to the investigation of the premises of compliance officers. We note that the business residence of certain compliance officers may also be their personal residences. We note that alerting these compliances officers to an inspection may be appropriate in certain circumstances and highlight the importance of inspections conducted in accordance with a warrant.

[1] The Bill introduces on-site visits into the Long-Term Insurance Act 52 of 1998; Short-Term Insurance Act 53 of 1998; and Collective Investment Schemes Control Act 45 of 2002.
[2] The Inspection of Financial Institutions Act 1998.
[3] Section 46 to 49 of the Competition act 89 of 1998, deals with inspections and the seizing of material.

It is recommended that the clauses in the Bill that deal with on-site visits and inspections should be redrafted, to provide more clarity and limitations as to when and how an on-site or inspection visit may take place. Further on an analysis on the provisions which deal with on-site visits and inspections it would seem the legislature intends to conduct 'raids' on financial institutions; that is these 'on-site visits' and 'inspections' will occur without warning. The Bill should provide specific requirements for individuals who are authorised to conduct on-site visits and inspections, in this regard it is submitted that only inspectors appointed in terms of the Inspection of Financial Institutions Act, 1998 should conduct these functions. If it is intention of the legislature to conduct 'surprise visits' then the Bill should provide for stricter boundaries as to when and how these 'raids' are conducted, as found in the sections of the Competition Act.

We further recommend that publication of an investigation ought to occur only after the investigation is finalised and a decision has been reached.

The recommendation provided for this Bill should be extended to all other financial legislation being published to ensure one set procedure for inspections and on-site visits in the financial sector. *Providing an alternative draft section, may be the best way of addressing this point in the submission.*

7. Penalties

The penalties in most of the Acts the Bill deals with have been increased[4], and in many cases more than doubled. We note that the increase is excessive as it increases the serious of certain offences. Some of the infringements subject to a fine are for fairly minor contraventions.

8. Official website

We stand by our initial comments in respect of the proposal that notices, directives and exemptions to be published on the 'official website' set up by the Financial Services Board ("the FSB").[5] The Bill amends the current requirement of the specific Registrar, depending on the statute, publishing notices in the *Government Gazette*. We note the intention to reduce the cost of publication in the *Government Gazette*; however, our concerns are that the current FSB website (http://www.fsb.co.za/) is not user friendly, is not regularly updated and that there is a risk that industry will not be aware when a new notices, directives or exemptions are published. There is currently no obligation in the Bill for the Registrar to maintain the website in an up to date; fully functional, and user friendly fashion.

There is a concern that the abovementioned difficulties in respect of the website would affect the industry's ability to ascertain which notices and information are law, and which information on the website is for general information. Further it would make it difficult to ascertain which information is current and in force. There needs to be clarity on what information a financial

[4] The penalties of the following statutes have been increased: The Pension Funds Act 24 of 1956; Long-Term Insurance Act 52 of 1998; Short-Term Insurance Act 53 of 1998; Financial Institutions (Protection of Funds) Act 28 of 2001; and Collective Investment Schemes Control Act 45 of 2002.

[5] Sections 13, 15, 51 and 60 of the Long-Term Insurance Act 52 of 1998; sections 4, 8, 13 and 15 of the short-Term Insurance Act 53 of 1998; sections 4, 9, 14, 11, 17 of the Financial Advisory and Intermediary Services Act 37 of 2002; sections 5 and 114 of the Collective Investment Schemes Control Act 45 of 2002.

institution must comply with, and this certainly is not only drawn from the content of the document but also through the means of how the relevant document is published.

In various instances the Bill does not make provision for a draft notice, directive or exemption first being published for comment. It would seem the Bill allows for the Minister to publish with no comment period. It is unclear whether the Registrar would be required to release notices for comment before publishing them officially on the website. (For example in terms of the amendments to the FAIS Act the Registrar may 'by notice on the official website' publish fit and proper requirements and standards.)

We recommend that the relevant document should be published in an official and clear manner in order to avoid ambiguity; and that provision be made for industry consultation. We further recommend that a provision be included for the Registrar to be obliged to maintain the website in an up to date; fully functional, and user friendly state.

9. Media

The Bill amends the various pieces of legislation by not only allowing notices to be published on the official website but by further allowing the Registrar to make notice of an application by 'such other media' or 'any other appropriate media'. The Bill does not define what 'media' is and which forms of media would meet the obligation.

It is recommended that a decision will have to be taken on which notices on the official website require a comment process before becoming official notices. The Bill should be amended to retain the requirement of information to be published through the *Government Gazette*, and allow for the information to be also published on the official website. Where the Bill provides for certain information to be published on the website then there should be an obligation on the regulator to keep the website updated. The Bill should provide a definition for 'media'.

10. Alignment with the Companies Act, 2008

The Bill seeks to align the various pieces of legislation with the Companies Act 71 of 2008 ("the Companies Act") by ensuring references to the Companies Act refer to the 2008 Act and not the 1973 Act.

11. Business Rescue

The Bill introduces the concept of business rescue into the various pieces of legislation and makes it applicable to financial institutions.[6] There are two types of business rescue proceedings envisaged, those instituted by affected parties and those instituted by the specific Registrar. When business rescue proceedings are instituted at the instance of the financial institution, the Bill requires, the approval of the applicable Registrar be obtained in regards to the resolution to begin business rescue proceedings, the appointment of a business rescue practitioner, the adoption of a business rescue plan, and the exercise of a power by the business rescue practitioner under the Companies Act.

[6] The concept of business rescue is introduction into the following statutes: Long-Term Insurance Act 52 of 1998; Short-Term Insurance Act 53 of 1998; Collective Investment Schemes Control Act 45 of 2002; and Financial Advisory and Intermediary Services Act 37 of 2002.

Further the Bill states that any reference to the Companies and Intellectual Property Commission (the Commission) shall also be construed as a reference to the applicable Registrar. In the instance where the Registrar applies for business rescue proceedings to be instituted it would seem that this reference is incorrect. The process of administrating business rescue proceedings should be within the exclusive control of the Commission.

Business rescue is an internally sensitive issue. In terms of the Companies Act, business rescue proceedings are instituted voluntarily by the board of a company. It is a decision taken by those who have personal knowledge of the company. The Registrar being an external party to the company would not have the business sensitive information to assess whether a company should resolve to institute business rescue proceedings. Further there are no boundaries to the Registrar's power to institute these proceedings, which have a serious effect on a company's reputation.

The Companies Act provides strict time lines for business rescue proceedings; it is questionable whether these time lines will be met if the approval of the Registrar is required for various stages of the business rescue process.

The proceedings of business rescue should be within the exclusive jurisdiction of the Commission. The Bill should not create dual jurisdiction in regards to business rescue. Further thought needs to be applied on whether business rescue is feasible, as in certain instances the business rescue provisions are extended to apply to entities which are not companies.

12. Commission

In several places in the Bill, where it discusses provisions of the Companies Act it makes reference to 'the Commission' but does not define the term. The Bill must either use the full name of the Commission, being the Companies and Intellectual Property Commission or define the term 'the Commission' in the definition section of the specific Acts. The amendment will lead to certainty in the cross referencing of provisions across the different statutes.

C. SECTION THREE: INDIVIDUAL ACTS

13. Pension Funds Act 24 of 1956

Clause 17 of the Bill contains an amendment to section 13A by adding subsection (8) to section 13A of the Pension Funds Act. Section 13A(8) imposes personal liability on shareholders and directors of a company, members of a close corporation or an employer for compliance with section 13A of the Pension Funds Act. Section 13A deals with the payments by employers who are members of a fund to that particular fund. In terms of clause 47 of the Bill which amends the penalties section of the Pension Funds Act, section 37; a person who contravenes section 13A is liable to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years. The amendment effecting imposes a criminal sanction on companies who are employers and members of a fund who do not comply with the provisions of the Pension Funds Act.

Clause 18 of the Bill amends section 13B of the Pension Funds Act. The Bill provides for the insertion of subsection (1A) and (1B) into the Pension Funds Act, which deal with an application for approval to administer a fund. Section 13B(1A)(c) refers to an applicant satisfying the Registrar that the applicant

'complies with the requirements for a fit and proper administrator'. On top of an applicant meeting the fit and proper requirements it should also provide information on the applicant's 'personal character qualities of honesty and integrity, the competence and operational ability of the applicant to fulfil the responsibilities imposed by the Pension Funds Act and the applicant's financial stability'. The Bill does not indicate what these requirements may be. In regards to the further information to be provided by the applicant there is no guidance as to what information would meet/satisfy the criteria of information listed in the section.

Section 13B(1B)(b) states 'the Register may take into consideration any other information regarding the applicant, derived from any source, including any other regulatory or supervisory authority, if such information is disclosed to the applicant and the applicant is given reasonable opportunity to respond'. The Registrar should only take into account information which is required for the assessment of the application and which relates to the application. If the Registrar were to take into account any information regarding the applicant, this could lead to applicants not being assessed on the same criteria which could lead to unfairness in the application process. Though the Bill does provide that the applicant should be afforded an opportunity to respond this is not sufficient where the Registrar can take into account any information. Further the Bill allows the Registrar to accept information from any source, this section is too wide and should be confined to a specific list of individuals to ensure fairness in the application process.

Clause 35 of the Bill amends section 25 of the Pension Funds Act which deals with inspections and investigations. The comments on 'on-site visits and inspections' above apply.

The Bill should be amended to remove criminal liability for the non-compliance with the Pension Funds Act. Clause 16 should be amended to provide clear requirements for the application for approval as an administrator to ensure fairness and certainty in the application process.

14. Financial Services Board Act 97 Of 1990

Clause 67 of the Bill amends section 23 of the FSB Act, by removing liability for damage caused as a result of anything done or omitted to be done by a person who was exercising any power or duty under the FSB Act, the Acts listed under the definition of financial institution, the IFA, or the Financial Institutions (Protection of Funds) Act, 2001. The amendment provides for the exclusion of gross negligence. It is submitted that one cannot preclude liability based on gross negligence. Further the section excludes *any* loss sustained or damage. Section 23 of the FSB Act should not be amended and should retain an individual's right to claim for gross negligence. Further the Bill creates broad mechanisms for various processes that may take place in the prevention of 'systemic risk', it is submitted that a financial institution should have recourse where those mechanisms were instituted grossly and caused loss and/or damage to the financial institution.

15. Long-Term Insurance Act 52 Of 1998

Clause 69 amends the definition section. The Bill uses the terms 'independent intermediary' and 'representative' but does not provide or include a definition for these terms. The current Long-Term Insurance Act does not have a

definition for these terms. The Bill should be amended to provide for a definition for these terms.

Clause 72 of the Bill amends section 4 of the Long-Term Insurance Act which deals with the special provisions concerning the Registrar and the Registrar's powers. Section 4 is amended by the inclusion of sub-section (8) which deals with on-sites visits. The comments on 'on-site visits and inspections' above apply.

Clause 76 amends section 12 of the Long-Term Insurance Act, which allows the Registrar under certain circumstances to prohibit a long-term insurer from carrying on business. The Bill adds further criteria if not met, that may cause the Registrar to impose this prohibition. In particular section 12(1)(bD) states that if 'in the opinion of the Registrar [the business of the long-term insurer is] not managed in accordance with sound corporate governance principles, or owned or managed by persons who are not fit and proper' the Registrar may impose the prohibition. Section 12(1)(bD) is vague and does not indicate which sound corporate governance principles would meet the requirement. The section affords the Registrar a wide discretion. Section 12 should be amended to ensure that the circumstances under which the Registrar may apply this prohibition are clear and afford as little discretion as possible.

Clause 91 of the Bill amends section 40 which deals with approved transactions. Section 40 is amended by removing all references to an order of court being required and replacing it with an approval by the Registrar. The amendment goes on to state that an officer of the Deeds Registry must effect transfer of the relevant bond, title deed or registration certificate upon the presentation of the certified approval. The Master of the High Court deals with the Deeds Registry and is acts on instruction of the High Court. It would be inappropriate for the Bill to usurp the powers of the court. The Bill should not remove the reference to the court and court order as found in the current version of the Long-Term Insurance Act.

Clause 102 of the Bill amends section 62, by substituting section 62 for a section which deals with the protection of policyholders. The section provides that the Registrar may make rules aiming to ensure to that policies are entered into, executed and enforced in accordance with sound insurance principles and practice in the interests of the parties and in the public interest generally. Section 62(5) states that if circumstances necessitate the immediate publication of the rule, the Registrar may publish the rule without complying with the comment process provided for in section 62(4). The Bill does not provide any indication what would be qualify as circumstance necessitating immediate publication. The section affords the Registrar a wide discretion. Clause 99 of the Bill should be amended to provide clear circumstances under which the rules may be published with no comment period. It is debateable whether this power to publish with no comment should even be in the legislation.

16. Short-Term Insurance Act 53 Of 1998

Clause 111 amends the definition section. The Bill deletes the definition of 'independent intermediary' but the Bill continues to use the concept in various amendments of the Short-Term Insurance Act. Clarity is needed as to whether this term is deleted or whether it survives after the commencement of the Bill.

Clause 114 of the Bill amends section 4 of the Short-Term Insurance Act which deals with the special provisions concerning the Registrar and the Registrar's powers. Section 4 is amended by the inclusion of sub-section (8) which deals with on-sites visits. The comments on 'on-site visits and inspections' above apply.

Clause 118 amends section 12 of the Short-Term Insurance Act, which allows the Registrar under certain circumstances to prohibit a short-term insurer from carrying on business. The Bill adds further criteria if not met, that may cause the Registrar to impose this prohibition. In particular section 12(1)(bD) states that if 'in the opinion of the Registrar [the business of the short-term insurer is] not managed in accordance with sound corporate governance principles, or owned or managed by persons who are not fit and proper' the Registrar may impose the prohibition. Section 12(1)(bD) is vague and does not indicate which sound corporate governance principles would meet the requirement. The section affords the Registrar a wide discretion. Section 12 should be amended to ensure that the circumstances under which the Registrar may apply this prohibition are clear and afford as little discretion as possible.

Clause 133 of the Bill introduces the concept of business rescue into the Short-Term Insurance Act, but the Bill goes on to provide that whether the short-term insurer is a company or not the business rescue provision found in the Companies Act shall apply. The Bill is effectively introducing the concept of business rescue to entities which are not companies as defined in the Companies Act. Certain financial service providers who conduct short term insurance business are individuals, for whom the provisions of business rescue are inappropriate. Taking into account the complexities the current business rescue provisions present for companies it would seem inappropriate to extend the concept to entities which are not covered by the Companies Act. Clause 133 should be amended by removing the words 'whether or not it is company' from the clause.

17. Inspections Of Financial Institutions Act 80 Of 1998

There are extensive amendments made to this Act, which makes room for the argument that only inspectors in terms of the IFA should conduct on-site visits and inspections. Inspectors are confined to act within the powers given to them in terms of the IFA and only certain individuals may qualify to be inspectors. E.g. Inspectors are required to carry certificates which state they are inspectors and must produce the certificate on request.

Clause 153 of the Bill, inserts section 6A into IFA. Section 6A(3) provides that any entry and search must be executed by day, unless the execution thereof by night is justifiable and necessary. An entry and search, particularly of an institution should be done during business hours to ensure that the correct documents are seized and to ensure that representations of the institution are present. It is doubtful whether a search and entry on an institution at night would be justifiable. Any reference to night searches should be removed from the Bill.

In regards to institutions, the IFA does not require a warrant to search or seize items from an institution but does require a warrant in regards to individuals. **It is recommended** that the requirement of a warrant be extend to institutions as well.

Clause 154 of the Bill amends section 7 of IFA subsection (2) which allows for self incrimination. The section requires any person who is 'examined' under section 4 or 5 of IFA to answer any question put to him even if the answer will incriminate the person. The incriminating answer is not admissible as evidence in criminal proceedings in court except where the criminal proceedings are for an offence relating to the administering of an oath or the making of an affirmation, the giving of false evidence, the making of a false statement or a failure to answer questions full or satisfactorily. The following section may be unconstitutional. The Constitution provides in section 35(3)(j) that every accused person has the right not to be compelled to give self-incriminating evidence. Section 35 of the Constitution further provides that an accused has the right to remain silent. Clause 150 should be removed from the Bill as it is potentially unconstitutional and may not survive constitutional scrutiny.

Clause 156 amends section 11 of the IFA which deals with the costs of inspections. The amendment provides that the costs of an inspection may now be recovered not only from the institution but from 'a director, servant, employee, partner, member or shareholder of such institution'. The section seems overly broad and it is not clear what circumstances would result in a 'servant' or 'employee' being imposed with the costs. Section 11 of the IFA should not be amended and left as is.

18. Financial Institutions (Protection Of Funds) Act 28 Of 2001

Clause 163 of the Bill introduces the concept of a statutory manger into our law through an insertion of section 5A in the Financial Institutions (Protection of Funds) Act (FIPFA). The purpose of the statutory manager would be to control the management of the affairs of the institution to the exclusion of its executive directors or managers. The appointment of a statutory manager must be done with the approval of the Registrar and be approved by the High Court. The High Court will appoint a statutory manger where an institution has in a material respect failed to comply with a law; is likely to be in an unsound financial position or is maladministered; and the High Court considers it in the interest of the clients of the institution or the financial system to make the appointment. The statutory manager once appointed must report to the Registrar and must indicate what steps should be taken to ensure that the institution complies with the law, becomes financially sound and is properly administered.

In regards to section 5A(8) the section states should the statutory manager consider that it is not practicable to take steps to manage the institution or try make it financially sound again he must indicate to the Registrar 'whether steps should be taken to transfer the business of the institution to appropriate person and if so on what terms or whether the institution should be wound up or put under curatorship'. It is unclear whether the section when referring to the transfer of the business means a sale of business, where the business of the institution will be sold on to another entity. Further the section states that the statutory manager can advise that the institution be placed under curatorship. It is unclear what the difference between curatorship and statutory management is. By making specific reference to curatorship it means the drafters intended statutory management to be something totally different from curatorship. Whereas it would seem the two processes are similar.

The statutory manager must comply with directives issued by the Registrar from time to time in relation to his or her functions. Further section 5A(12) provides that a statutory manager is not liable for loss suffered by the institution unless it is established that the loss was caused by the statutory manager's fraud, dishonesty or wilful failure to comply with the law. The clause introduces a very invasive mechanism to deal with an institution which is failing in its protection of funds. The section should be reviewed. Business input is required on whether this section is necessary. The most alarming thing about this section is that once appointed the statutory manager runs the institution to the exclusion of the executive directors and managers.

19. Financial Advisory And Intermediary Services Act 37 Of 2002

Clause 180 amends the FAIS Act by introducing section 6A into the FAIS Act which contains provisions on fit and proper requirements. The section provides good boundaries as to the areas in which the Registrar can make fit and proper requirements. Section 6A(2)(e) provides that the Registrar can make standards for 'continuous professional development'. It is unclear what this term means and what it would entail. Section 6A(4) allows the Registrar to amend the fit and proper requirements from time to time and requires those affected by the FAIS Act to comply with them, there is no indication whether these amendments will be done in consultation with those affected and the section does not make provision for a draft to first be published and comments received.

Clause 182 allows for notices of withdrawals and suspension of authorisation to be published on the official website and not in the Gazette. The comments in regards to the official website referred to above, apply hereto.

Clause 201 amends the FAIS Act by introducing sections 38A, 38B and 38C, which deals with business rescue, sequestration or liquidations and directives. The comments in regards to business rescue provided above, apply hereto. Section 38B(1) provides that after an on-site visit, if the Registrar considers it, that the interests of the clients of a financial services provider or of members of the public so require, may apply for sequestration or liquidation, whether or not the provider is solvent. The section creates a wide discretion on the part of the Registrar. Interest is a wider concept and embodies more than rights, further the application can be made without taking into account the solvency of the provider. The clause should be amended to be in line with the common law requirements for liquidation and sequestration. It is accepted that Parliament can change the common law by enacting statute but it is argued it would be undesirable to change the common law requirements for insolvency. Further the section does not confine the concept of interests, it is submitted that if the section is retained then the 'interests' referred to, should be confined to 'financial interests'.

20. Collective Investment Schemes Control 45 Of 2002

Clause 212 of the Bill amends section 14 of the Collective Investment Schemes Control Act by substituting the current section 14 for a section that deals with investigations and inspections. The comments on 'on-site visits and inspections' above apply.

The comments in regards to business rescue provided above, apply hereto.

Thanking you.

Yours faithfully

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Nicky Lala-Mohan
General Manager – Legislation and Regulatory Oversight