

LEPPARD LEGISLATION WATCH

MARCH 2019

In this issue of Leppard Legislation Watch, as we did in February, we continue to highlight some more of the provisions of the draft Conduct of Financial Institutions Bill. Some of the sections are more applicable to you as a broker than others, but one needs to have a general overview of how one's conduct is going to be regulated going forward.

Legislation for YOU

Draft Conduct of Financial Institutions Bill

As we said in the January issue of Leppard Legislation Watch, the Draft Bill presents the next phase of South Africa's reform of financial sector regulation towards a Twin Peaks model approved by Cabinet in 2011. The first phase involved the development, adoption and implementation of the Financial Sector Regulation Act (FSRA).

The current Draft Bill aims to deal with the second of the Twin Peaks by putting in place a single comprehensive law for the regulation of market conduct in the financial sector. It will be administered by the Conduct Authority. In this issue, we look at Chapter 6, which deals with the promotion, marketing and disclosure of financial products and financial services. The purpose of the Chapter and conduct standards prescribed therein is to: (i) Ensure that financial customers are given clear, complete and accurate information about a financial product or a financial service across its life cycle; (ii) Enable that customer to access whether it meets his or her needs, make comparisons across similar financial products and financial services; and (iii) Hold the financial institution to account for unfair treatment.

Principles: A financial institution must ensure that financial products and financial services are promoted and marketed to financial customers in a way that is clear, fair, unambiguous and not misleading. In addition a financial customer must be given adequate and clear information, and be kept appropriately informed to place him or her in a position to make informed decisions regarding the financial product or financial service. This must be done before, during and after the conclusion of a contract or agreement for the provision of such a product or a service. The financial customer must, amongst others, be placed in a position to make informed decisions about whether the product or service meets his or her needs and expectations.

Promotion and marketing: A financial institution: (i) Must, prior to publishing promotional and marketing material, take reasonable measures to ensure that the information provided in such material complies with Chapter 6 and the conduct

standards prescribed therein; (ii) Must at all times ensure that any publication of promotional and marketing material relating to its business, activities, financial products or financial services, published by another on its behalf or of which it is aware or ought to be aware, is likewise compliant; and (iii) Remains responsible for the manner in which a financial product issued by it or a financial service rendered by it is promoted or marketed, even where the financial institution relies on another person to promote or market it on its behalf. Promotional and marketing material of a financial institution: (i) Must be appropriate to the needs and reasonably assumed level of knowledge of the financial customers at whom it is targeted; (ii) May not be misleading or likely to mislead, deceptive, fraudulent, contrary to the public interest or contain incorrect statements; (iii) Must use clear, plain and unambiguous language, and take into account the needs and reasonably assumed level of knowledge of the retail financial customers to whom it is targeted. A financial institution which is not a small enterprise must have processes and procedures for the approval of promotional and marketing material by a person of appropriate seniority and expertise within the business of the financial institution. These processes and procedures must form part of the required governance policy.

Disclosure: A financial institution must make a financial customer aware of all relevant facts that could influence the financial customers' decisions relating to the financial product or financial service. This must be done before, during and after the conclusion of a contract for the provision of that product or service. The relevant facts that must be disclosed include, but are not limited to: (i) Benefits and risks in relation to the financial product or financial service; (ii) All costs to the financial customer in relation to the supply of that product or service; (iii) Contractual obligations on the financial customer and the financial institution; (iv) Consequences for each party should there be a breach of contract; and (v) Recourse options for the financial customer in the case of a dispute with the financial institution, or a related intermediary, in relation to its supply of the product or service. A financial institution must make disclosures to financial customers that: (i) Use plain language that is clear, unambiguous and appropriate for the target market; (ii) Are adequate, appropriate, timely, relevant and complete; (iii) Are factually correct and not misleading or deceptive; (iv) Promote understanding of the financial product or financial service being provided; and (v) Promote comparison across similar financial products or financial services. When making disclosures, a financial institution must take into account: (i) The nature and complexity of the financial product or financial service concerned; and (ii) The needs and reasonably assumed level of knowledge, understanding and experience of financial customers at whom the disclosure is targeted.

Conduct standards: The Financial Services Conduct Authority is to be empowered to prescribe conduct standards providing for additional requirements, limitations or prohibitions on promotion, marketing and disclosure, including, but not limited to: (i) The design, positioning of words, display and presentation of promotional and marketing material; (ii) Information, data, descriptions and disclosures in promotional and marketing material; (iii) The appropriateness of the medium used for promoting and marketing a financial product or service; (iv) Identification of the financial institution that is financially liable or accountable for the product or

service; (v) Direct marketing, product and services descriptions, bait marketing, negative option marketing; (vi) Inducements, third party arrangements, loyalty programmes and competitions; (vii) The publication of prices, investment performance and projected values contained in material; (viii) Comparative promotional and marketing practices; (ix) False, misleading or deceptive representations, and prohibited and predatory marketing practices; (x) Puffery, endorsements and value judgments, matters of opinion or subjective assessments; (xi) Remedial actions to be taken for inaccurate, unclear, misleading or fraudulent material; (xii) The provision of information in plain and understandable language; (xiii) Standardised point-of-sale disclosure documents, or key information documents; (xiv) Restrictions on unsolicited communications between a financial institution that provides a financial product or financial service and a financial customer before contracting and once the contractual relationship is terminated; and (xv) Disclosures in relation to financial products where membership is a requirement of employment. With regard to disclosures, the Conduct Authority may prescribe conduct standards relating to: (i) The person responsible for making certain disclosures; (ii) Required disclosures; (iii) The appropriateness of certain disclosures; (iii) The content of and accuracy of disclosures; and (iv) The method and timing of disclosures; Conduct standards may distinguish between promotional and marketing materials and disclosures: (i) Targeted at different segments of financial customers; or (ii) Relating to different financial products and financial services. They may include providing that: (i) Certain requirements do not apply in relation to a category, sub-category or type of financial customer, financial product or financial service; or (ii) More stringent requirements apply in relation to a specified category, sub-category or type of financial customer, financial product or financial service.

Legislation for YOU and YOUR CLIENT

Financial Intelligence Centre Act: Draft Regulations

Electronic transfer of money to SA or from SA Draft regulations have been gazetted to supplement the provisions of section 31 of the Act, which section has not commenced yet. The net effect of the draft regulations, read with section 31, will be to provide that: (i) An accountable institution that sends R5 000,00 or more by EFT out of South Africa, or receives R5 000,00 or more by EFT from outside of South Africa on behalf of another person, or on the instruction of another person must:

- As soon as possible, but not later than 3 days after a natural person or any of his or her employees, or any of the employees of officers of a legal person or other entity, has become aware of a fact of an international funds transfer that has exceeded R5 000,00;
- Make an international funds transfer report, together with the prescribed particulars concerning the transfer, to the Centre;
- (ii) Any person or institution which fails to provide the information to be reported concerning an international funds transfer report is guilty of an offence, and is non-compliant and subject to an administrative sanction:
- Any person or institution convicted of an offence under regulation 29 is liable to imprisonment for a period not exceeding three years or a fine not exceeding R1 million;
- A person convicted of an offence mentioned in

section 56 (failure to report electronic funds transfers), is liable to imprisonment for a period not exceeding 15 years or to a fine not exceeding R100 million; and • Section 45C (administrative sanctions) will apply to a person that is subject to an administrative sanction.

Cash transactions The draft regulations also propose amending the requirements relating to cash transaction reporting. The net effect of the draft regulations, read with section 28 (cash transactions above prescribed limit), will be to provide that an accountable institution and a reporting institution must: (i) Report to the Centre the prescribed particulars, as amended, concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of R50 000,00 is: • Paid by it to the client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or • Received by it from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting; and (ii) A cash threshold report must be sent to the Centre as soon as possible but not later than 3 days after a natural person or any of his or her employees, or any of the employees of officers of a legal person or other entity, has become aware of a fact of a cash transaction that has exceeded R50 000,00.

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