

Financial Sector Regulation Act, 2017

Joint Guidance Notice 1 of 2019

Guidance on the application of section 5 of the Insurance Act, 2017

Objective of this guidance notice

This guidance notice explains section 5(1) read with section 5(2) of the Insurance Act, 2017, and the relationship between these sections and the Short-term Insurance Act, 1998, Long-term Insurance Act, 1998, and Financial Advisory and Intermediary Services Act, 2002.

This guidance notice also articulates the supervisory approach of the Prudential Authority and Financial Sector Conduct Authority in respect of these sections.

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1. Application

1.1 This guidance notice has general application and is published in terms of section 141 of the Financial Sector Regulation Act, 2017 (FSRA).

2. Purpose

2.1 The purpose of this notice is to –

2.1.1 provide guidance regarding the application of section 5(1) read with section 5(2) of the Insurance Act, 2017 (the Act), including the relationship between these sections and section 8(3) of the Long-term Insurance Act, 1998 (LTIA), section 8(2)(d) of the Short-term Insurance Act, 1998 (STIA) and the Financial Advisory and Intermediary Services Act, 2002 (FAIS Act); and

2.1.2 articulate the supervisory approach of the Prudential Authority (PA) and Financial Sector Conduct Authority (FSCA) in respect of these sections.

3. Section 5(1) of the Act

3.1 Section 5(1) of the Act provides as follows:

“(1) No person may conduct insurance business in the Republic unless that person is licensed under this Act.”

3.2 Section 5(1) must be read with sections 5(2) and 5(8)(a)(i) of the Act and Prudential Standard GOI 7 - Miscellaneous Regulatory Requirements for Insurers (GOI 7).

3.3 Section 5(2) of the Act sets out when a person is regarded as conducting insurance business in South Africa. This subsection is explained in paragraph 4 below.

3.4 Section 5(8)(a)(i) of the Act provides that the PA may prescribe that certain types, kinds or categories of insurance business are, subject to any requirements prescribed by the PA, excluded from the application of the Act.

3.5 GOI 7 prescribes that insurance business carried out by the following persons may be carried out without the need to be licensed under the Act by the PA:

3.5.1 a pension fund organisation registered under the Pension Funds Act, 1956, or exempted under section 2(3)(a) of that Act from the requirement to be so registered, provided it acts in accordance with that Act;

3.5.2 a friendly society registered under the Friendly Societies Act, 1956, or exempted under section 3(2) of that Act from the requirement to be so registered, provided the value of the policy benefits to be provided under any life or non-life insurance policy issued by it does not exceed R15 000 per member;

3.5.3 a fund established in terms of an agreement referred to in section 23 of the Labour Relations Act, 1995, provided it acts in accordance with the provisions of such agreement;

3.5.4 a medical scheme registered under the Medical Schemes Act, 1998, provided it acts in accordance with that Act;

3.5.5 an agricultural co-operative registered under the Co-operatives Act, 2005, or allowed to continue to operate in terms of section 97 of that Act, provided it, as part of its main objectives, conducts non-life insurance business, and provides benefits, the amount of which is not guaranteed and in respect of which its liability is limited to the amount standing to the credit of a fund specifically maintained for that purpose; and

3.5.6 the unemployment insurance fund established by the Unemployment Insurance Act, 2001, provided it acts in accordance with that Act.

3.6 This means that unless a person has been explicitly excluded from the application of the Act in accordance with GOI 7 or is licensed under the Act, that person may not conduct insurance business in South Africa.

- 3.7 In accordance with section 69(1)(a) of the Act, a person that contravenes or fails to comply with section 5(1) of the Act commits an offence and is upon conviction liable to a fine not exceeding R10 million.
- 3.8 Also, in accordance with section 67(1) of the Act, the PA may, if a person that contravened or is contravening section 5(1) of this Act, in addition to any other action that the PA may take under the Act or under the FSRA –
- 3.8.1 direct that person to make arrangements to the satisfaction of the PA to discharge all or any part of the obligations under insurance policies entered into or purported to be entered into by that person; or
- 3.8.2 apply to the court for the sequestration or liquidation of that person, whether he, she or it is solvent or not, in accordance with the Insolvency Act, 1936, the Companies Act, 2008, the Co-operatives Act, 2005 or the law under which that person is established or incorporated.

4. Section 5(2) of the Act

- 4.1 Section 5(2) of the Act provides as follows:

“(2) A person is regarded as conducting insurance business in the Republic if –

- (a) the person conducts business similar to insurance business outside the Republic; and*
- (b) that person or another person, in relation to the business referred to under paragraph (a), directly or indirectly acts in the Republic on behalf of the first-mentioned person, including, but not limited to, by rendering a financial service within the meaning of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002), in respect of that business.”*

- 4.2 Both the criteria set out in paragraphs (a) and (b) of section 5(2) must therefore be met for a person to be regarded as conducting insurance business in South Africa.
- 4.3 Whether or not a person will be regarded as conducting insurance business in South Africa is therefore dependent on the circumstances and in each particular case the criteria set out in section 5(2) of the Act will have to be tested.
- 4.4 The first requirement contained in paragraph (a) essentially captures an insurer operating in a foreign jurisdiction (foreign (re)insurer).
- 4.5 In turn, the purpose of the second requirement contained in paragraph (b) is to ensure that a foreign (re)insurer does not circumvent the requirement of having to be licensed within the South African jurisdiction as an insurer under the Act. This would include instances where a foreign (re)insurer does not technically contract or conduct insurance business within the South African jurisdiction, but still directly (through its own conduct) or indirectly (through the conduct of another person) solicits insurance business in or from South Africa, or influences in any way the placement of insurance business from the South African jurisdiction to the relevant offshore jurisdiction.

When would a foreign (re)insurer, or person be acting on behalf of a foreign (re)insurer (directly or indirectly) in the Republic in relation to the foreign (re)insurer's insurance business?

- 4.6 With regards to which direct or indirect "acts" would fall within the scope of paragraph (b), it must be noted that the wording in paragraph (b) is very wide and the "acts" that would fall within the scope of that paragraph is not limited to intermediary services¹ (although it does include the latter).
- 4.7 The direct or indirect "acts" that fall within the ambit of paragraph (b) could therefore include acts such as a foreign (re)insurer visiting policyholders/potential policyholders,² or even the South African insurance industry in general, with a view to, in the context of its insurance business, provide support to the South African insurance industry.
- 4.8 It is not possible to provide an exhaustive list of "acts" falling within the scope of paragraph (b) and each scenario must be assessed on its own facts.
- 4.9 In interpreting paragraph (b) it must also be determined on whose behalf the relevant "act" is being performed and whether the "act" is being performed
- 4.10 directly or indirectly by a foreign (re)insurer.

Acting directly (no intermediation)

- 4.11 Where a South African based customer, for example, on its own accord seeks and secures insurance (whether for purposes of its business or in his/her personal capacity) with a foreign (re)insurer directly, then the actions of the foreign (re)insurer in accepting such business would not fall within the ambit of section 5(2)³ and the foreign (re)insurer would therefore not be regarded as conducting insurance business in South Africa.
- 4.12 The above would also be the case where the policyholder is an insurer seeking reinsurance (i.e. where a local insurer approaches a foreign reinsurer with the purpose of reinsuring its risk).
- 4.13 However, where a foreign (re)insurer, for example, directly contacts or otherwise solicits a South African based customer (including a local insurer) with the purpose of enticing or swaying the customer to secure insurance from the foreign (re)insurer, such a foreign (re)insurer would, in the context of section 5(2), be regarded as conducting insurance business in South Africa.

Acting indirectly (intermediation)

- 4.14 In principle, where a person (for example a Financial Services Provider as defined in the FAIS Act) seeks and secures insurance from a foreign (re)insurer on behalf of a South African based customer, regardless of whether the person is acting on a direct instruction from the customer or whether the person has recommended the specific foreign (re)insurer to the customer, such person is

¹ As defined in the Financial Advisory and Intermediary Services Act, 2002.

² Including a policyholder that is an insurer that reinsures its risk with a reinsurer.

³ As the foreign (re)insurer did not perform any act in South Africa relating to its insurance business.

rendering services as intermediary⁴ in the context of section 8(3) of the LTIA / section 8(2) of the STIA and must obtain approval from the FSCA to place the business offshore.⁵ However, please note that section 8(3) of the LTIA / section 8(2) of the STIA does not apply to the rendering of services as intermediary in respect of reinsurance business.

- 4.15 In addition, the person seeking and securing insurance from a foreign (re)insurer on behalf of a South African based customer as set out above would also be rendering intermediary services as defined in section 1 of the FAIS Act and is therefore also subject to the requirements of the FAIS Act (in relation to the intermediary services it renders, whether in respect of direct insurance or reinsurance).
- 4.16 Whether or not the foreign (re)insurer is, in the context of section 5(2) of the Act, regarded as conducting insurance business in the above instance (as set out in paragraph 4.13) is dependent on whether the foreign (re)insurer in any way appointed, instructed or influenced the person to place the customer's business with the foreign (re)insurer. In other words, it will depend on whether the person is in any way acting on behalf of the foreign (re)insurer when placing the business with such insurer.
- 4.17 Therefore, the fact that a third party is rendering services as intermediary / intermediary services in relation to a policy that is to be placed with a foreign (re)insurer does not automatically mean that the foreign (re)insurer is conducting insurance business in South Africa within the context of section 5(2) of the Act. It must still be determined whether the foreign (re)insurer acted indirectly in South Africa through the third party (i.e. whether the third party was in any way acting on behalf of the foreign (re)insurer).
- 4.18 The requirements contained in the FAIS Act, section 8(3) of the LTIA / section 8(2) of the STIA, and section 5(2) of the Act are therefore not interdependent and each respective requirement must be applied and measured separately.

Reinsurance

- 4.19 The analysis above applies equally to foreign insurers and foreign reinsurers. It must be noted that the Act facilitates a new reinsurance regulatory framework that allows for a wider recognition of reinsurance, including through the use of branches, with appropriate recognition of the risks of different reinsurance structures, in a manner that is consistent with South Africa's international trade obligations. The new framework also establishes a level playing field, increases competition, addresses certain supervisory concerns relating to inward reinsurance, facilitates the maintenance and improvement of the current skill levels of the South African reinsurance industry for the benefit of the wider economy and enhances and strengthens the ongoing development of the local reinsurance industry as a hub for reinsurance business into Africa.

⁴ As defined in the Long-term Insurance Act Regulations and Short-term Insurance Act Regulations, respectively.

⁵ Approval under section 8(3)(b) of the LTIA / 8(2)(d) of the STIA.

4.20 As said above, the Act does not prohibit insurers from placing reinsurance offshore. The manner in which different reinsurance arrangements are taken into account for financial soundness purposes is regulated in the Prudential Standards made under the Act.

5. Supervisory approach of the PA and the FSCA in respect of section 5(1) read with section 5(2) of the Act

Responsible authority

5.1 The PA is the responsible authority for the Act and therefore also for section 5(1) read with section 5(2).

5.2 However, on 1 October 2018 the PA, in accordance with section 77 of the FSRA, delegated the regulation and enforcement of section 5(1) to the FSCA in respect of persons that are conducting unlicensed insurance business under the Act, with the exception of persons conducting unlicensed reinsurance business.⁶

5.3 Section 5(2) must be read in the context of section 5(1), and as a consequence the interpretation of section 5(2) is also relevant when regulating and enforcing the requirements of section 5(1).

5.4 Therefore, the FSCA is the responsible authority for regulating and enforcing compliance with section 5(1) read with section 5(2) of the Act in respect of all instances other than where –

5.4.1 a person may be conducting reinsurance business in contravention of section 5(1) of the Act; or

5.4.2 an insurer or reinsurer licenced under the Act is conducting insurance business in a class or sub-class of insurance business not included in its licence.⁷

Engagement with foreign insurer / reinsurer and its financial sector regulator

5.5 Where the PA or FSCA is of the view that a foreign insurer or reinsurer is conducting insurance business in South Africa without being licenced here, the PA or FSCA, in the first instance will engage with the foreign insurer or foreign reinsurer in respect of these actions. Should the entity fail to regularise its acts in South Africa, the PA and/or FSCA will engage with the financial sector regulator of that insurer or reinsurer and request the financial sector regulator to assist in securing compliance with the Act. If these attempts at corrective measures fail the PA or the FSCA may take regulatory action.

⁶ The PA is therefore still fully responsible for regulating and enforcing unlicensed reinsurance business.

⁷ Conducting insurance business in a class or sub-class for which the insurer is not licensed would constitute a contravention of section 25(4) of the Act.

Attachment 1: Examples

1. The practical application of section 5(2) may be illustrated through a number of examples. These examples are based on common queries received by the PA and the FSCA:
 - 1.1 A South African based commercial entity seeks and secures insurance for its business or parts thereof with a foreign insurer. The foreign insurer has no presence in South Africa and did not solicit the insurance business from the entity. All financial services relating to the insurance policy are dealt with offshore. *In this scenario, section 5(2) does not find application.*
 - 1.2 An insurer directly seeks and secures insurance for its insurance business or parts thereof with a foreign reinsurer. The foreign reinsurer has no presence in South Africa and does not solicit the insurance business from the entity. All financial services relating to the reinsurance policy are dealt with offshore. *In this scenario, section 5(2) does not find application.*
 - 1.3 A South African based commercial entity or an insurer appoints a financial services provider to seek and secure re/insurance on its behalf. The financial services provider facilitates the placement of re/insurance offshore. The financial services provider acts only on behalf of the commercial entity or insurer. All financial services relating to the insurance policy is dealt with offshore. *In this scenario, section 5(2) does not find application.*
 - 1.4 A foreign insurer or reinsurer solicits business from South African entities, regularly visits South Africa to support or share knowledge with the South African insurance industry or establishes a representative office in South Africa. *In these scenarios, section 5(2) finds application.*
 - 1.5 A foreign insurer or foreign reinsurer appoints a financial services provider registered in South Africa or another jurisdiction to solicit business from South African entities or provide financial services in South Africa on its behalf. The financial services provider acts on behalf of the foreign insurer or foreign reinsurer or on behalf of more than one foreign insurer or foreign reinsurer. It does not act on behalf of the South African based policyholder or potential policyholder. *In these scenarios, section 5(2) finds application.*
 - 1.6 A financial services provider registered in South Africa on a regular basis compiles a panel of reinsurers, which it recommends to insurers that approach it to seek reinsurance for their insurance business. The panel is constituted of foreign reinsurers selected after a thorough assessment of their fitness and propriety, ability to meet insurance obligations and fair treatment of policyholders or potential policyholders. The financial services provider does not act on behalf of the foreign reinsurers, but on behalf of the South African insurers. *In this scenario, section 5(2) does not find application.*