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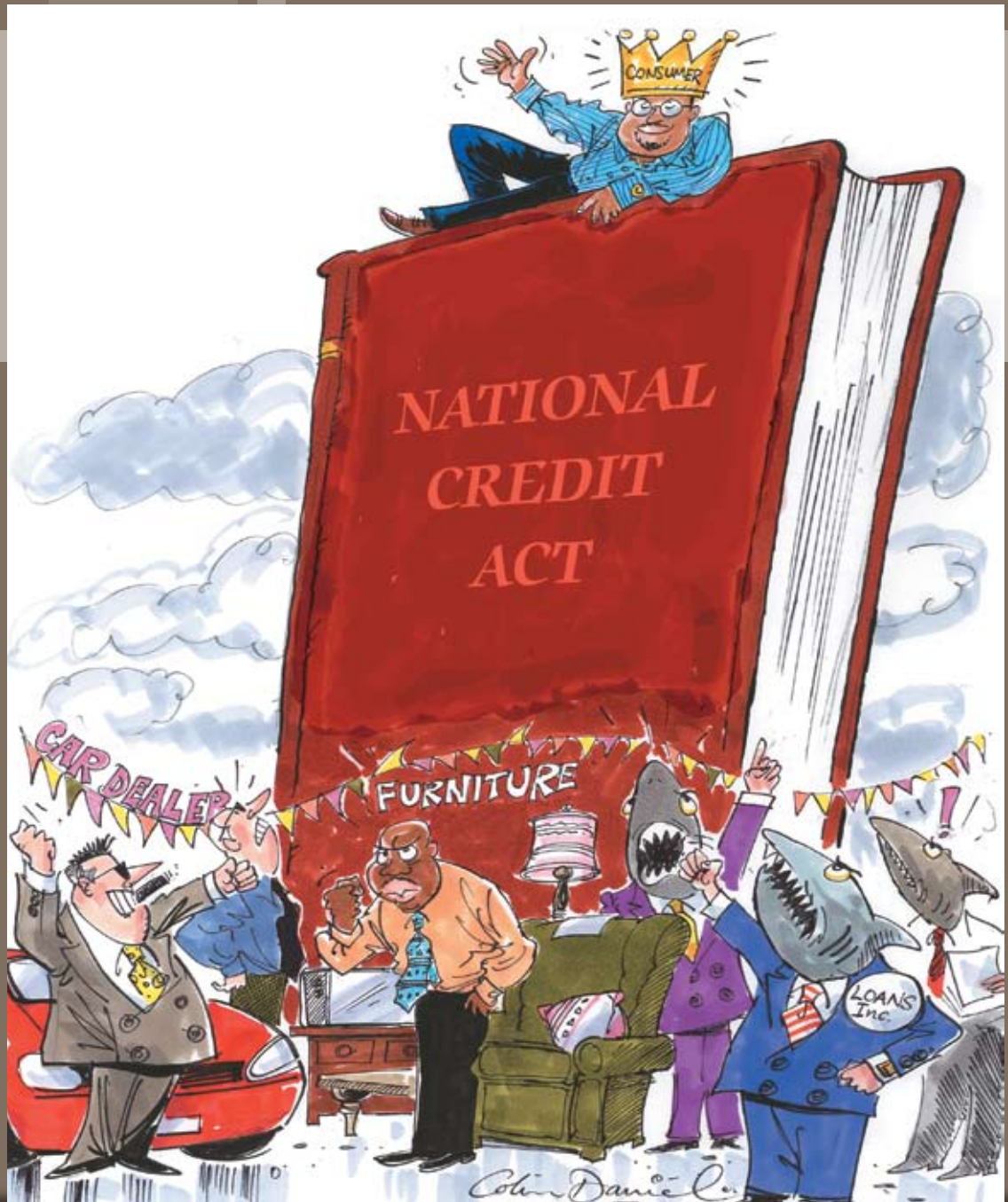
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THE FSB BULLETIN

is available on the Internet:
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FSB to get tough

A scheme for applying administrative sanctions such as fines for failing to comply with the laws governing financial institutions has been drawn up by the FSB.

Explaining the reasons to Parliament's finance committee, Rob Barrow, the executive director of the FSB, said the board would continue to enhance its enforcement structures. "Often we are not seen to be effective," he said.

"The only sanction we have is to hand the matter over to the National Prosecuting Authority (NPA) for criminal prosecution."

He said that the FSB has now finalised proposals for an administrative process under which a tribunal within the FSB - acting independently of the executive board of the organisation - would be able to hand down sanctions for failing to comply with legislation.

But he added: "We shall continue to assist the National Prosecuting Authority

"Hopefully through this process we will be seen to be handing out stiff fines, and naming people and dealing with people in the public eye. Hopefully we will be seen to be a lot more effective than we have in the past."

with their endeavours to prosecute white collar crime."

Barrow told members of the committee: "Hopefully through this process we will be seen to be handing out stiff fines, and naming people and dealing with people in the public eye. Hopefully we will be seen to be a lot more effective than we have in the past."

The establishment of the enforcement tribunal is to be part of a Financial Institutions Amendment Bill, which has yet to be introduced.

In the meantime the FSB is talking to the NPA to have legislation which comes under the board to be included in training programmes for prosecutors.

**Michael Hamlyn, I-Net Bridge
23 October 2007**



Rob Barrow, executive director of the FSB.

Pension regulator gets more teeth

The Registrar of pension funds has been given greater regulatory power with the promulgation of the Pension Funds Amendment Act, 2007.

The Amendment Act empowers the Registrar to:

- Suspend or withdraw the approval granted to a fund administrator;
- Impose an administrative penalty of up to R5-million a day;
- Conduct a compliance visit of the business and affairs of a fund;
- Intervene in the management of a fund.

The Act also clarifies the surplus utilised improperly in terms of section 15B of the Act and other provisions regarding the process of surplus

apportionment. These amendments give clarity to boards of trustees when apportioning surplus, and endeavour to close loopholes that allow for creative interpretations of the Pension Funds Second Amendment Act, 2001.

It brings the regulation of retirement funds established through bargaining council arrangements under the regulatory auspices of the Registrar of Pension Funds. Bargaining council funds not registered under the Act must register on or before 1 January 2008. This will ensure consistency in fund governance and dispute resolution across bargaining council funds and other occupational funds.

Further, a retirement annuity fund may

not prohibit the transfer of business from that fund to another.

The jurisdiction of the Pension Funds Adjudicator is clarified and provision is made for the appointment of a deputy and acting adjudicator.

There is also clarity on how to deal with divorce orders and maintenance claims in respect of pension benefits.

Editor's note: The Amendment Act came into operation on 13 September 2007 (Government Gazette 30297 of 2007, Notice 29 of 2007/09/13)

**Source: FSB media release,
31 August 2007**

FAIS: Providers, compliance officers and product suppliers under the spotlight

By Anton Swanepoel, Counsellor on FAIS

Three years after the implementation of the Financial Advisory and Intermediary Services Act, 2002 (FAIS Act), providers and compliance officers are still battling to come to grips with some vital aspects of the legislation.

Although there has been a lot of positive growth in the compliance arena since 30 September 2004, there are still some critical problem areas that have to be addressed to turn FAIS into the success that it should be.

Financial services providers did not take full responsibility

Responses from more than 1 000 providers throughout South Africa indicate that not more than 3% of financial services providers (FSPs) have read the FAIS Act and the General Code of Conduct. The majority trust their compliance officers blindly when it comes to compliance issues and it appears that they have passed that responsibility to their compliance officers. This may just turn out to be their biggest mistake as FAIS primarily regulates the services of providers, not compliance officers. Many FSPs are under the impression that their compliance officers will be responsible if a client complains and wins the case. Unfortunately, if a client complains and the Ombud finds in favour of the client, the provider is liable under the FAIS Act. The FSP may perhaps claim against the compliance officer if there was negligence on his/or her side, but then it will be too late! The damage will have been done and it could take years and a lot of money to settle the case.

When one takes a closer look at the

main objectives of the FAIS Act and its subordinate measures, it becomes clear that providers are underestimating the importance of the *advice risk* they have to assume under the FAIS Act. As the core business of any provider is the rendering of advice and/or intermediary services, it means that the advice and intermediary service process and adequate record-keeping are vital under FAIS. If a provider's advice process and record-keeping are below par, the effects may only be felt if a client complains, and this may happen years after the advice and/or intermediary service has been provided. As it is possible for only one client's complaint to destroy a provider's business, providers have to make the content of their advice process and record-keeping their primary concern. This, most providers have not done as they have outsourced that function to people less skilled than themselves in the area of financial planning and the rendering of financial services under the FAIS Act. Providers simply cannot continue to blindly trust their compliance officers with templates and processes.

Compliance officers are falling short

An independent investigation into compliance services has revealed some concerning facts regarding their value proposition to providers.

1. The FAIS Act and the General Code of Conduct sets one framework for

FAIS compliance in South Africa. Unfortunately, every compliance officer has his/her own standard and interpretation of the law. Different interpretations of the Act and the General Code of Conduct are confusing providers and as a result they become irate with the compliance officers and even with the regulator.

2. Compliance officers in general appear to have missed the most vital 20% of the FAIS Act that is responsible for 80% of FAIS compliance, namely the fundamentals of the advice and intermediary service process and the associated *advice risk* the providers face under the FAIS Act.

3. Many compliance officers do not have experience as providers, nor have they studied the vital parts of the FAIS Act in depth. These compliance officers have turned into tick-box operators, regardless of the fact that the FSB and the FAIS Ombud have warned providers against this practice. The FAIS compliance industry is bombarded with tick-box compliance officers who have been sending many "trusting" financial services providers on the wrong track since 30 September 2004. The question must be asked: "*What is the point of keeping good records of poor evidence?*" There is a major difference between record-keeping and recording good evidence. In practice compliance officers look at a document that is titled "Needs analysis" or "Risk profile", they tick the



box and the provider passes the audit. Unfortunately *it is not the title of the page that will pass the ultimate test, but the content of the document.* Mervyn King, chairman of the King Commission on Corporate Governance has also warned against the “mindless ticking of boxes” by compliance officers.¹

4. Most compliance officers have failed to set their compliance standards in accordance with that required by the Ombud for Financial Services Providers. Mr. Charles Pillai is the referee and he sets the highest standard in the industry when it comes to evaluating whether the provider complied with the provisions of the FAIS Act. One can only wonder how long it is going to take before a provider sues his/her compliance officer on the basis of providing the provider with a false sense of security.

5. Most compliance practices have put their emphasis on the *Client Advice Record* or *Record of Advice* in their audit

process. Most compliance practitioners have also designed these documents on behalf of providers. A formal study of these records indicates that these documents are currently some of the most overrated compliance documents in the files of providers based on its poor content.

The fundamentals of the essence of FAIS compliance are not in place

It appears that leading advisory and intermediary services businesses and even prominent compliance practitioners have underestimated the significance of the underlying legal relationship that exists between every provider and the client. This is the case, despite the fact that the importance of the *contractual relationship* between provider and client is highlighted in the FAIS Act², the General Code of Conduct³ and has been reported on, on numerous occasions⁴.

The FAIS Manual contains the following valuable information regarding the legal relationship between provider and client. *“Financial services in terms of the Act...necessarily imply the existence of an agreement or contract between the person who furnishes the advice or renders the intermediary services and a client as defined in section 1(1) of the FAIS Act. This underlying agreement or contract comes into existence through offer and acceptance, (irrespective of whether the offer emanates from the client, the adviser or intermediary services provider).⁵*

If the law of contract fundamentally underlies all rendering of financial services under the FAIS Act as correctly pointed out by Van Zyl in the FAIS Manual, the question is: *Why don't financial services providers have contracts with their clients on*

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file? There are different contracts concluded between providers and their clients under the FAIS Act on a daily basis and yet providers and their compliance officers continue to ignore the importance of written agreements as part of their record-keeping obligations. This may prove to be the single most important oversight by these players.

Records of advice offer little or no evidence of FAIS compliance

Providers appear to be using the records of advice designed by their compliance officers without considering the following:

1. Most of these documents do not contain the relevant material information required in terms of section 16(2) of the Act and the General Code of Conduct;
2. Some of the documents contain waiver of rights clauses, which the FAIS Ombud has already ruled on as an act of non-compliance;
3. Most of these documents have a list of statements or questions and it then leaves a gap for the provider to complete (without knowing what the Act requires because most providers have not even read the Act);
4. These documents are not signed by the client on every page, nor where additional information is added to the document;
5. These documents have not been founded on the law of contract and

therefore offers second-rate evidence – the type of evidence you can ill afford as an FSP under the FAIS Act; 6. I had the pleasure of interviewing a top financial adviser with one of the life offices and asked him whether he believes his company's Client Advice Record (CAR) is sufficient. He answered: "No, that is why I submit my CAR document to the company in order to get paid, but I keep an additional record that my client signs if I had to defend myself before the FAIS Ombud. Even some of our major life offices seem to be missing the essence of the Act.

Product suppliers have not come to the party

From a FAIS point of view, product suppliers have missed a great opportunity to simplify the process of compliance for providers. Although product suppliers are obliged to supply providers with the necessary product disclosures in terms of the Policyholder Protection Rules⁶, in practice this is not the case. Many product suppliers do not provide the necessary disclosures, terms, conditions and exclusions as required in terms of the FAIS Act and General Code of Conduct. Although most of the terms, conditions and exclusions are disclosed in the contract issued by the product supplier, these terms are only disclosed to the client after the contract is issued. In view of the

disclosures being made to the client after conclusion of the transaction, the provider is not in a position to comply with the provisions of the General Code of Conduct.⁷

Providers eagerly include the fund fact sheets of investment companies in their written proposals to clients while being under the impression that these fund fact sheets comply with the product disclosures of the FAIS Act. Unfortunately there is no alignment between the disclosure requirements under the Collective Investment Schemes Control Act, 2002, or the disclosure guidelines currently offered by the Association of Collective Investments. Fortunately Di Turpin, Chief Executive of the Association of Collective Investments (ACI) has indicated that the Association is willing to look into the matter. On another positive note, the Deputy Executive Officer of the FSB, Dube Tshidi has indicated that if there is a gap between the various regulations, the stakeholders should collectively look for appropriate solutions that will enhance the integrity of the financial services industry.⁸ Hopefully this collective effort will take place sooner rather than later because in the meantime providers continue to be non-compliant in their attempts to disclose relevant material product information due to no fault of their own.

In closing

It appears that providers, compliance officers, product suppliers and the regulator still have some work left before the wheels of FAIS can turn smoothly. Unfortunately the provider is the one that is left out in the cold if a client complains. It must be remembered that many clients have entered into financial transactions with providers between September 2004 and now and some of the gaps have been left by other industry players. I am not convinced that the Ombud is going to look favourably on a provider who did not comply due to the actions of his/her compliance officer or the product supplier concerned. Providers beware!

References

¹Mervin King made this statement during his address at the Association of Collective Investments Convention on the 29 August 2007.

²See section 20(3) of the FAIS Act

³See sections 3(1)(d), 7(1)(a) and 8(1)(c) of the General Code of Conduct

⁴See Van Zyl: FSB Bulletin Second Quarter 2004: p.12; Swanepoel 2005: FSB Bulletin 2nd Quarter 2005: p.10 See Van Zyl 2004: *FAIS Manual*, JUTA: P 1-72 to 1-73; Swanepoel 2004: Comply like a pro; Swanepoel 2004: Sake-Rapport 28 March, FA News Supplement April 2004: 28; FSB Bulletin 2nd Quarter 2005: p. 10; The Six-Step-Process & Compliance

(2006)

⁵Van Zyl 2004:1-71

⁶See Rules 5.2 and 7.1(d) of the Policyholder Protection Rules [Long-term Insurance], 2004 [Notice 1129 of 2004 in Gazette 26854 of 30 September 2004] and Policyholder Protection Rules [Short-term Insurance], 2004 [Notice 1128 of 2004 in Gazette 26853 of 30 October 2004]

⁷See sections 3(1)(a)(iv), 7(1)(a), 7(1)(c)(vii), 7(1)(c)(x) and section 8(2) of the General Code of Conduct

⁸This comment was made during a panel discussion at the ACI Convention on 29 August 2007

How does the Consumer Protection Council of Nigeria operate?

By Diane Terblanche, South African liaison on behalf of the Consumer Protection Council of Nigeria

The Consumer Protection Council (CPC) is the main consumer protection agency of the Federal Republic of Nigeria, responsible for protecting the rights of Nigerian consumers in all areas of products and services. The CPC reports to a council consisting of various government representatives.

The CPC was established by the Consumer Protection Council Act, 1992 (CPC Act), in line with the United Nations' Guidelines for Consumer Protection. The Council has been carrying out consumer protection activities since 1999.

Nigeria is an established democracy and has a federal political system. Consumer protection is a concurrent national and state (provincial) competency. There are 36 states divided into six geopolitical zones. The CPC has its head office in Abuja (the Federal Capital Territory of Nigeria), a liaison office in Lagos and six geopolitical zonal offices in other parts of the country.

Parallel to the CPC structure, at state level, there are State Consumer Protection Agencies (State Committees) operating in some of the states. The State Committees are similar to the South African provincial Consumer Affairs Offices and operate under state law.

The CPC Act aims, among others, to seek redress for consumers, enforce quality standards, pursue increased

public consumer awareness, eliminate hazardous products from the market, encourage the formation of voluntary consumer associations and ban the sale,

advertisement and distribution of products which do not comply with safety or health regulations.



National Credit Act makes consumer king

The protection of consumers against unfair credit practices by credit providers got a shot in the arm with the final implementation of the National Credit Act, 2005 (NCA) on 1 June this year.

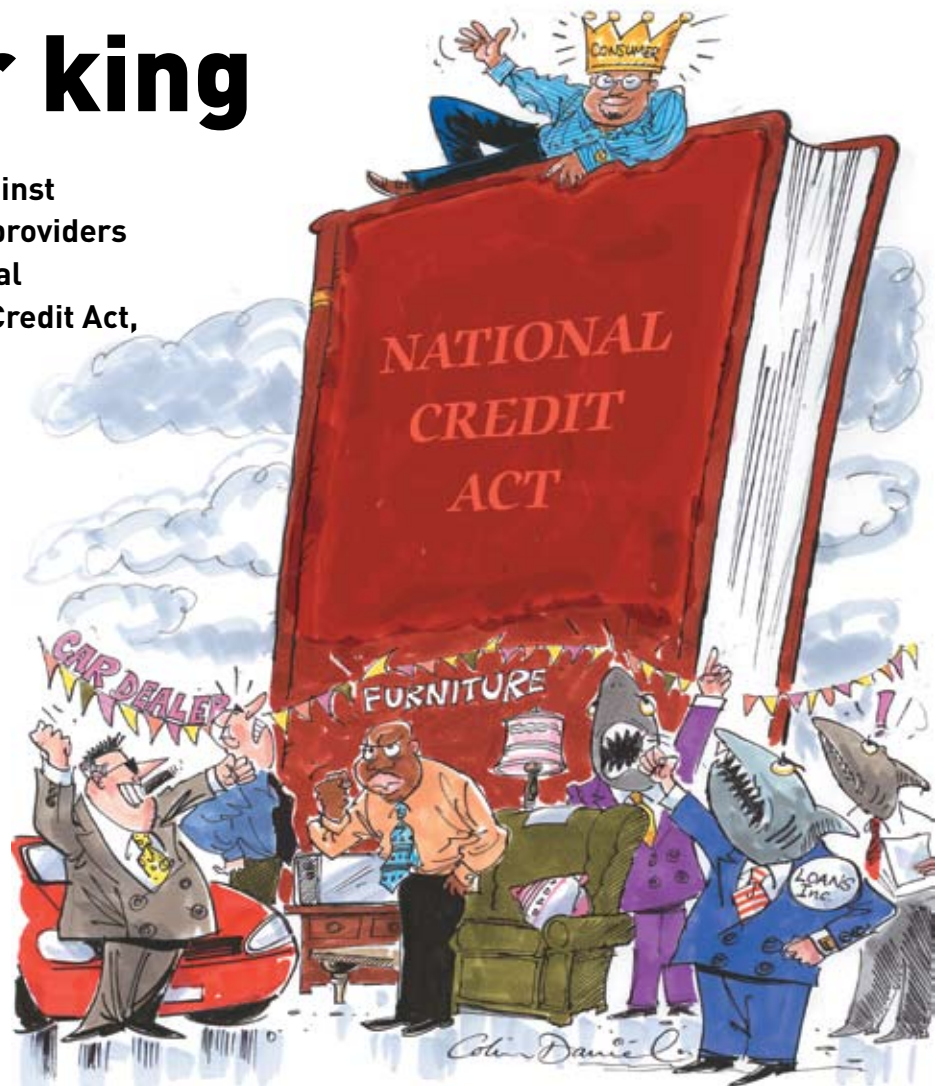
The Act - which was enacted in March 2006 and became effective on 1 June 2006 - introduced a new era in consumer credit regulation and consumer protection. With the Act comes significant changes in the relationship between consumers and credit providers, with increased consumer protection.

Gabriel Davel, CEO of the National Credit Regulator (NCR), explains that the Act replaced the Usury Act, 1968, the Credit Agreements Act, 1980 and the Exemption Notice - which regulated micro-lending transactions. The NCA applies to banks, retailers, micro-lenders and all other credit providers.

It covers all credit agreements, including mortgages, credit cards, motor vehicle finance, furniture finance and micro-loans. The total size of the consumer credit market in South Africa is in excess of R750bn.

The Act was preceded by extensive research and rigorous consultation with all role players. This included a comparison with credit legislation in other countries. The Act is a response to serious problems in the credit market, which included misleading disclosure, excessive credit life insurance premiums, reckless lending and increasing over-indebtedness among consumers.

According to Davel, the National Credit Act will go a long way towards creating a credit market that is based upon responsible credit granting and greater fairness in the treatment of



consumers. "This is a comprehensive piece of legislation which will promote responsible lending and prohibit reckless credit granting. It further provides for a consistent enforcement framework on consumer credit."

The NCA was implemented in phases, starting with the establishment of the National Credit Regulator and registration of credit providers and credit bureaux. The second phase was the implementation of certain sections of consumer credit information and the establishment of the National Consumer Tribunal. The National Credit Act's compliance sections only came into

effect on 1 June 2007.

The National Credit Regulator was established as the regulator under the National Credit Act and is responsible for the regulation of the South African credit industry. It is tasked with carrying out education, research, policy development, registration of industry participants, investigation of complaints, and ensuring the enforcement of the Act.

The Act also requires that the Regulator promotes the development of an accessible credit market, particularly to address the needs of historically disadvantaged persons, low income persons, and remote, isolated or low-

By Bongwiwe Gambu, Media Office, National Credit Regulator

density communities.

The NCR is also mandated with the registration of credit providers, credit bureaux and debt counsellors, as well as the enforcement of compliance with the Act.

Davel says the NCR has had numerous engagements with banks, retailers, micro-lenders and credit bureaux and pointed out that there has been a huge effort by all these parties to prepare for the implementation of the Act.

The Act regulates credit bureaux and consumer credit information, providing for free access to this information, kept by credit bureaux, and for a process by which any errors on the credit records can be corrected.

On 1 June 2007 certain information was removed from consumers' credit bureaux records, including specified judgments and adverse listings.

This was necessitated by the regulations on data cleansing, which were published on 30 November 2006 and lists information reflected on consumer credit records as at 1 September 2006, which was to be removed from the credit bureaux records by 1 June 2007.

According to the regulations, the following consumer credit information must be removed:

- Adverse consumer credit information in respect of a debt of less than R500;
- All consumer credit information relating to accounts, excluding credit facilities and any accounts where there was no contractual requirement for monthly payment to be made, that have been dormant for a period of at least 24 months on 1 September 2006;
- Where there is a civil court judgment of up to R500 except if a consumer has more than two unpaid judgments;
- Civil court judgment of up to R5 000 if the judgment is older than 18 months provided the consumer has not more than two unpaid judgments on his or her records;
- Civil court judgment of up to

R50 000 if the full amount in respect of the judgment was paid by the consumer by 1 September 2006;

- Civil court judgment of up to R50 000 reflected on a consumer's records on 1 September 2006 if the full amount in respect of the judgment was paid by 1 September 2007.

Provision is also made in the Act for the registration of debt counsellors and debt restructuring for over-indebted consumers.

The training for debt counsellors started in February 2007. The sections of the Act relevant to over-indebtedness and restructuring of debt came into effect on 1 June 2007.

From 1 June 2007 debt counselling services became available to consumers, who are unable to honour in a timely manner, all credit agreements to which they are party, as indicated by their history of debt repayment.

Debt counsellors are required to register with the NCR. Their role is to assist consumers who are experiencing debt-related problems and are having difficulty making their monthly payments by providing them with budget advice, support and mediation with credit providers.

Debt counsellors also give highly indebted consumers basic information necessary to resolve their everyday credit problems so that they do not revert into the debt trap. Debt counsellors

can work independently or as part of an organisation. In terms of the Act, debt counsellors cannot be part of organisations that provide credit, debt collection agencies or credit bureaux. A consumer who is over-indebted may approach a debt counsellor directly, or he/she may be referred to a debt counsellor by his/her creditor/s or by the magistrate court.

To ensure proper and effective implementation of the Act, the Justice College, the institution responsible for the training of magistrates, has been running a training programme for magistrates.

Davel says magistrates from across the country have invested considerable time in training on the requirements of the Act. "This will make a huge difference to the effective application of the Act in the thousands of debt-related cases that the magistrates deal with every month," he adds.

Is the implementation of the Act negatively affecting industries such as the car and home loan industry? Davel explains that the Act is new for everyone and as a result there are bound to be challenges that all interested parties will need to navigate.

But Davel pointed out, however, that the Act will be of benefit to everybody in the long term and encouraged all parties to make the Act work.

Other key features of the National Credit Act:

- Language in credit agreements must be simple and understandable;
- Quotes must be given on all credit agreements, and are binding for five days;
- Advertising and marketing must contain prescribed information on the cost of credit;
- Credit sales at a person's home or work are strictly limited;
- Reasons must be provided if a credit application is declined;
- Automatic increases in credit limits are regulated;
- Reckless lending is prohibited;
- Interest and fees are regulated on all agreements, including micro-loans;
- Credit bureaux information is regulated and consumers have the right to a free credit bureaux record annually.



Consumer Protection Bill will help consumers make informed decisions

By Magauta Mphalele, Project Manager: Consumer Law Reform, Department of Trade and Industry.

This is part two of the article. The first part appeared in the FSB Bulletin, Second Quarter 2007.

The system of consumer law in South Africa is outdated, fragmented and built on principles contrary to the democratic system. South Africa does not have a comprehensive consumer protection statute that clearly spells out the rights and obligations of all market participants. For consumers to participate effectively in the market economy, it is important that they are given basic rights in a comprehensive consumer law that sets guiding principles for market conduct.

Consumers have encountered the following problems:

- Lack of disclosure and limited choice,

- Misleading information, advertising and representations,
- Poor quality and safety of goods and services and cumbersome product liability regime,
- Unfair contract terms,
- Invasion of privacy and abuse of consumer information,
- Fraudulent schemes like pyramid schemes,
- Inadequate legal remedies,
- Lack of redress, and
- Fragmented legislation and uncoordinated enforcement mechanisms.

If the regulatory framework is not changed, consumers will continue to buy goods and services that do not meet their expectations, consequently incurring unnecessary transaction costs. Additional transaction costs can result from the time and money consumers have to invest in lodging complaints and

repairing defective products. Research conducted by the Office of Consumer Protection in Australia quantified the total cost of consumer detriment in one year as amounting to \$3.15 billion, representing 1.1% of the gross domestic product. The detriment was distributed equally between three categories of costs:

- Repairing and replacing faults encountered in goods and services,
- Following up and resolving problems (mainly out of pocket costs associated with travel, postage, telephone calls, etc), and
- Personal time, leading to lost workdays.

In this context that the Consumer Protection Bill aims to ensure a fair, competitive and responsible market that works well for consumers and ethical businesses. The Bill is a complete revamp and modernisation of the existing consumer protection framework in South Africa. It provides for new and improved rules of conduct as well as a more effective enforcement and redress

framework. This it achieved through

- creating upfront rules of conduct to create certainty in the market,
- promoting better self-regulation through a code approval process,
- a tougher approach to enforcement, including simpler investigative procedures and more substantial penalties to deter unethical business practices,
- coordinating and streamlining consumer protection across all sectors of the economy, and
- providing for simple and quick alternative dispute resolution and remedies.

The Consumer Protection Bill will go a long way to unite consumer protection under one umbrella. It is a law that will apply to all sectors of the economy, except for those that are already subject to comparable specific regulation. Some sectors will be exempted while the Minister, through regulations, will exempt others following an assessment to identify the extent to which they provide acceptable levels of consumer protection. The draft Bill exempts FAIS regulated advisory services.

The objectives of the Bill

- To establish a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible,
- To reduce and ameliorate any disadvantages of the most vulnerable consumers in accessing the supply of goods and enforcing consumer rights,
- To promote fair business practices and protect consumers from unfair, unreasonable or unjust trade practices and deceptive, misleading, unfair or fraudulent conduct,
- To promote social and economic responsibility in consumer markets,
- To improve consumer awareness and information and encourage responsible and informed consumer choice and behaviour,
- To promote consumer confidence, empowerment and the development of a culture of consumer responsibility

through individual and group education, vigilance, advocacy and activism, and

- To provide an accessible, consistent, harmonised, effective and efficient system of redress for consumers, including an efficient system of consensual resolution of disputes.

The Bill will also give consumers the following rights:

- *Right to equal access to the consumer market:* Outlaws discrimination on the grounds outlined in the Constitution.
- *Right to confidentiality and privacy:* Provides for consumers to pre-emptively block unsolicited marketing communications through an "opt out" register and places an obligation on suppliers to provide avenues for consumers to be removed from marketing lists and not be contacted.
- *Right to disclosure and information:* Provides for disclosure relating to price as well as terms and conditions of entering into a transaction or agreement. Also provides for contracts to be in plain and understandable language.
- *Right to choice:* Provides for consumers to be able to cancel certain contracts, gives them a five-day cooling off for transactions arising out of direct marketing and prohibits the practice of sending consumers unsolicited goods or providing unsolicited services.
- *Right to fair and responsible marketing and promotion:* Outlaws certain marketing and selling practices such as bait and negative option marketing, obliges all marketing not to be misleading, deceptive or fraudulent. It also regulates promotional competitions.
- *Right to honest dealings and fair agreements:* Concept of unfair contract terms is introduced and any terms that are meant to force consumers to contract out of their rights are outlawed.
- *Right to fair value, good quality and safety:* Provides a statutory warranty for goods and services, introduces product liability, and provides consumers with the right to return defective goods and either be refunded or have the defective product replaced.

- *Right to be heard and obtain redress:*

The Bill makes provision for various kinds of redress for consumers, such as quick refunds and replacements, interim relief, prohibiting a product by interdict, administrative fines for suppliers and issuing consent orders. It further establishes the National Consumer Commission (NCC) to enforce the legislation. The NCC will develop and promote voluntary codes of conduct, promote legislative reform, promote the interests of consumer protection in state institutions, and do research. It will also work to increase public awareness of consumer protection matters, develop and maintain relations with other regulatory authorities as well as the provinces, monitor trends in the consumer market and industry, specifically regarding the needs and interests of disadvantaged consumers, and report to and advise the minister who will report to Parliament.

Where enforcement and redress are concerned, the NCC will promote informal dispute resolution, receive complaints, investigate complaints, issue compliance notices and negotiate undertakings and consent orders.

The Bill will repeal and consolidate the following Acts into the new Bill: Consumer Affairs (Unfair Business Practices) Act, 1988 ; Trade Practices Act, 1976; Sales and Service Matters Act, 1964; Business Names Act, 1960; Price Control Act, 1964; Businesses Act, 1991; Sections 2-13, and sections 16-17 of the Merchandise Marks Act, 1941; and Lotteries Act, 1997 (section 54 and regulations only).

The Bill still has to undergo a third round of consultations through Parliament and will therefore be subjected to further changes. Once Cabinet has approved the third draft, it will be published for further comment by the Portfolio Committee of Trade and Industry. It is envisaged that this will take place during July. All stakeholders are

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Administrators making secret profits' — FSB

The FSB, which regulates industries worth more than R1-trillion, said in its recently published annual report it had found that "various practices that skimmed off revenue into the hands of administrators without the knowledge of pension fund trustees were widespread in the industry".

Rob Barrow, executive director of the FSB, reported that one of two most significant regulatory issues in the financial year ended in March had been the detection of "secret profits being made by pension fund administrators".

This is, at least in part, a reference to the bulking practices discovered at financial house Alexander Forbes last year. In brief, Alexander Forbes "bulked" the credit balances of the retirement fund bank accounts that it managed and bargained for higher interest rate payments, pocketing the profit.

But Barrow said, without naming names, that there were others who had done the same. And although the likes of Alexander Forbes had agreed to repay the amounts to pension funds,

the FSB was "still dealing with certain administrators who are resisting making refunds to their pension fund clients".

Fidentia

Apart from this issue, and the complicated curatorship of failed pension fund manager Fidentia where the FSB openly accused Fidentia's public relations company of launching an irresponsible smear campaign against the FSB, the FSB took in less than half of the fines than it did for market abuse last year.

Fines and penalties amounted to R1,9m as opposed to R4,2m. But Barrow said the reduction could have indicated an improvement in compliance by the industry. This would be preferable to any reduced effectiveness in the FSB's abilities to investigate, impose and collect fines and penalties.

In other news about the FSB itself, Barrow said that despite budgeting for a deficit, the FSB made a surplus of R61,4m for the financial year ended

March. Further, the FSB was sitting on more than R122m in cash. The introduction of the Financial Advisory and Intermediary Services Act, 2002 (FAIS Act) had put a strain on the FSB's resources in the past but in light of its surplus it said it would rebate R23m in total, spread across the pension funds industry, the insurance industry and collective investment schemes (unit trusts).

The FSB's staff complement had grown to 309 people in the financial year but three unnamed senior staff members had been dismissed. In more information on staffing, certain charts showed that in most instances the FSB was well ahead of its empowerment targets, with 74% of its staff being black.

Business Day, 1 October 2007

* *The FSB's Annual Report 2007 is available electronically on www.fsb.co.za or contact Alicia Paladh at tel no 012-428 2823 or aliciap@fsb.co.za.*



Protection Bill from p 11

encouraged to engage with this Bill to ensure a relevant and workable piece of legislation.

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Baileys sentenced for pension fund surplus stripping scheme

Rowland Bailey and his wife Shirley who were involved in a pension fund surplus stripping scheme involving the Mitchells Cotts Pension Fund, were convicted in August of fraud and money laundering in the Johannesburg Specialised Commercial Crime Court after entering a plea and sentence agreement with the State.

Rowland Bailey (64) pleaded guilty and was convicted of fraud, contravening sections of the Financial Institutions (Protection of Funds) Act, 2001 (FI Act) and money laundering. His wife, Shirley (63) pleaded guilty and was convicted of contravening sections of the Proceeds of Crime Act, 2002 and the Prevention of Organised Crime Act, 1998.

On the fraud charge, Rowland was sentenced to ten years' imprisonment, wholly suspended for five years on condition that he fully complies with the settlement agreement he had entered into with the Mitchell Cotts Pension Fund liquidator and is not convicted of fraud or theft during the period of suspension.

For contravening the FI Act, Bailey was fined R200 000 or three years' imprisonment, suspended for five years. In lieu of the fine, he must pay the liquidator of the Mitchells Cotts Pension Fund R300 000 for the direct benefit of the existing pensioners.

On the money laundering charge,



he was fined R3 million or six years imprisonment, suspended for five years on condition that he is not convicted of the same offence during the suspension period and that he must pay the liquidator of the Mitchell Cotts Pension Fund R500 000 for the direct benefit of the existing registered pensioners.

Shirley has been fined R1 million or sentenced to five years' imprisonment on condition that she pays the liquidator of the Mitchell Cotts Pension Fund R200 000 for the benefit of the existing registered pensioners.

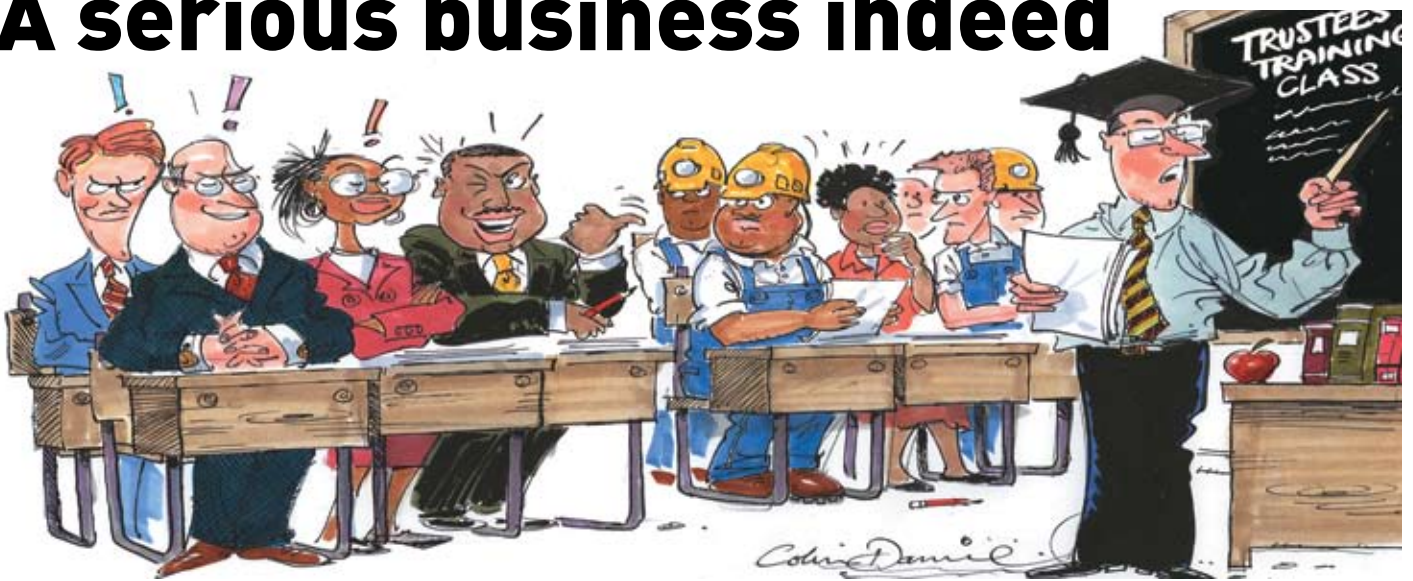
In terms of the plea bargain agreement, they will give their full cooperation to the liquidator of the fund in providing evidence and facts relevant to the surplus stripping transactions and any other information which the liquidator might require.

They have agreed to transfer, cede and assign all their worldwide assets, together with the balances of all other bank accounts and investments to the liquidator. The total amount paid over to pay the liquidator is R20, 648, 990. They have also waived their rights to any surplus in the Mitchell Cotts Pension Fund as well as any pension they were entitled to receive, other than that agreed to with the liquidator in terms of the Settlement Agreement.

Rowland Bailey has agreed to testify in any criminal proceedings against other persons and entities involved in the so-called surplus stripping schemes.

Source: FSB Media release, 27 August 2007

Managing other peoples' money: A serious business indeed



By Olivia Davids, Head: Consumer Education, FSB

Never before have we heard so much about the need to institute programmes for training retirement fund trustees. Although financial sector and tertiary educational institutions have had trustee training programmes for some years now, maybe it is the broader acceptance that governance matters are very much applicable in this sector as well that it

In March 2006, the International Organisation of Pension Supervisors undertook a research project on *Supervisory Education, Outreach and Communication and Training of Trustees*. The project objective was to collect information about the purpose, structure and operation of these types of programmes with the goal of developing guidelines and principles of good practice in supervisory education. The reason for this research was that pension supervisors are increasingly being called upon to perform an educational function in addition to their regulatory responsibilities. It makes good sense to educate and provide the tools (in this case, legal knowledge) as part of any compliance initiative as one would need to know what has to be complied with

before compliance is possible. Once the information and knowledge have been appropriately imparted, nobody can attribute non-compliance to ignorance.

Questionnaire

The questionnaire asked about the provision of pensions education, outreach and communication, understanding legal obligations, whether the provision of pensions education is legislated, the target groups for pensions education, the forms of education, whether there are technical guidance services such as guidance notes and fiduciary support services such as handbooks or codes of practice. There were also some questions dealing with the evaluation of the effectiveness of trustee/fiduciary

support services and the process followed for conducting a training needs analysis. From this it can be seen that there is an international focus on pensions education. One of the results of this research was a set of guidelines for best practice in the provision of pensions education. One of the important principles indicates that as trustees are major stakeholders in the success of the pensions industry, they should be offered professional development on a regular basis so that they can be better equipped to carry out their affairs in the management of schemes.

As part of its response to the need for pensions education, the FSB produced Circular PF No 130: *Good Governance of Retirement Funds*. The crux of this Circular is captured as follows:

The assets of a retirement fund are administered for the sole purpose of providing the benefits promised in terms of the (registered) rules of that fund. The board of a fund (sometimes referred to as "trustees") holds assets in "trust"

for persons who will benefit from them. They stand in a "position of trust" or in a "fiduciary relationship" to funds and should be persons of integrity. This relationship and the manner in which the board of the fund deals with the assets or affairs of the fund are regulated or governed by pensions law, the common law, customary law, regulations and the registered rules of the fund.

The above underlines the importance of the function of trustees and all functionaries of the board of a fund. There is a legal obligation to manage the fund efficiently and effectively to ensure optimal benefits and minimal risks. It is important to note that as a group as well as individually, *board members may be held liable by members for any breach in the governance which results in any loss to the fund and members.* Any member or the board as a whole can be held legally at fault if they neglected to implement the governance principles which resulted in a loss to the fund and its members.

Good governance

Good governance in relation to a board of a fund means avoiding conflicts of interest in decision making and actions, acting ethically, communicating clearly with members, having a code of conduct and having an investment policy statement and performance assessment tool.

This circular contains 13 principles with detailed explanations of each. The more one reads this document, the clearer it becomes that to conduct the business of the fund appropriately and legally, there is a definite need for continuous professional development of the fund's board (trustees, principal officers and others) and for members to be kept informed and encouraged to play an active role in managing their pensions.

Some areas which should be included in continuous professional development

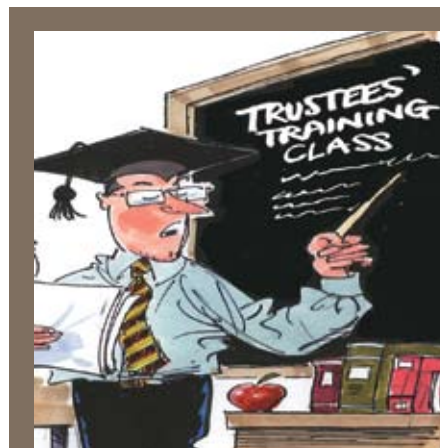
programmes are accountability and the informed investment of fund assets; the role of the chairperson and principal officer (these two functions should be separated and not held by one person); the roles and responsibilities of trustees and members; conflicts of interest; the importance of independent, impartial action by the board; the importance of confidentiality; the need for a code of conduct; the importance of skills and capacity on the board; the use of "professional" trustees; the need for terms of reference to act as a guide in running the fund's business; training for new board members; breach of code of conduct; oversight responsibilities of the board; need for registration/accreditation of expert advisers; the importance of risk management; the need for fidelity cover; communication (in terms of what should be communicated and report backs such as on the performance of fund investments); access to information; protection of members' rights and compliance with the requirements of regulatory authorities.

The above list is not comprehensive. There are many other specific areas such as those dealing with taxation matters where specialised knowledge is needed. There is also a need for members to actively participate in the management of their funds. Knowing which questions

to ask trustees will help members with this.

Trustee training programmes

In South Africa, as said, there are a number of trustee training programmes which have been running for some time. Many of these are run by financial institutions and can deal with matters relating to their own particular spheres of operation, while others run more general programmes. Some universities, usually through law faculties, offer programmes or certificate courses which include a focus on the legislative aspects of fund management. These courses have entry requirements and are generally targeted at professionals such as lawyers and accountants. However, it appears that South Africa is ready for more easily accessible trustee training programmes offered at different levels and possibly targeted at specific functions of the board. There are suggestions that South Africa needs a standardised training programme for retirement fund trustees - a generic programme which is for the most part, portable and familiar to all parts of the country and which can be complemented by industry-specific training. As one of government's identified priorities and an area of need, the time to address this need is right now.



References:

1. International Organisation of Pensions Supervisors (IOPS), 2006. *Supervisory Outreach and Communication, including Training of Trustees*. Research report prepared by Technical Services Committee.
2. The Financial Services Board (FSB), 2007. Circular PF No. 130: *Good Governance of Retirement Funds*

A high powered panel of long- and short-term insurance experts has listened to over 20 hours of evidence on practices in the consumer credit insurance market and their impact on the consumer.

The enquiry panel, appointed by the Life Offices' Association (LOA) and the South African Insurance Association (SAIA), is being chaired by Judge Peet Nienaber, recently retired Ombudsman for Long-term Insurance.

The other members of the panel are Desmond Smith (former LOA chairman and director of companies), Ronnie Napier (former SAIA chairman and senior partner of law firm Webber Wentzel Bowens), Louis Wessels (former head: legal at the FSB) and Moses Moeletsi (chairman of the Board of the Ombudsman for Short-term Insurance and a member of the Long-term Ombudsman's Council).

The main aim of the enquiry is to identify and eradicate undesirable practices prevalent in the consumer credit insurance market negatively affecting consumers.

The LOA announced its intention to launch an enquiry into consumer credit insurance practices during the middle of July this year, following media reports alleging contraventions by member companies active in the consumer credit insurance market of the commission and remuneration regulations of the Long-term Insurance Act, 1998, and the LOA Code of Conduct.

The LOA was joined by the SAIA, equally concerned that member companies may be contravening regulations to the detriment of consumers.

The panel had requested written submissions from interested parties, including members of the public, during September. A total of four public hearings were held during October, both in Johannesburg and Cape Town. The

Public hearings into consumer credit insurance practices

By Gerhard Joubert, CEO of the Life Offices' Association (LOA)



panel heard evidence from life insurers, short-term insurers, credit providers, a member of the public, both the LOA and SAIA, and the Ombudsmen for Long- and Short-term Insurance.

Representatives from National Treasury and the FSB attended the hearings as observers.

Members of the panel as well as the observers were impressed with the level of co-operation they received from the LOA and SAIA member offices

and commented on the quality of presentations made to the panel.

The panel was particularly impressed with the degree of openness displayed by companies that testified at the hearings. All companies were prepared to give evidence in the public domain and only one part of a submission had to be heard in camera for strategic reasons as cited by the company concerned.

The panel of enquiry was guided by the following terms of reference:

- Improper and inappropriate marketing and distribution practises
- The payment of excessive commissions or other improper fees or incentives
- The fairness of standard terms and conditions
- The adequacy of the overall value provided to consumers
- Pre- and post-sale disclosures and information provided to consumers
- Promoting greater consumer understanding of credit life products, their benefits and the consumer's rights.

The panel now needs to consider all the evidence heard and the written submissions received, before deciding on the next steps. The panel may call for further evidence and request responses to questionnaires if the need arises.

At the end of its deliberations, the panel will prepare a report on its findings and develop proposals on how best to address current short-comings to ensure greater consumer protection in this market.

Loopholes

This may include identifying gaps in the regulatory environment as well as loopholes in the Codes of Conduct of the LOA and the SAIA.

This is essentially an enquiry into market practices that may impact negatively on consumer protection rather than on the practices of individual companies. Should it nevertheless be deemed necessary to single out one or more companies in the report, such company or companies will be afforded a reasonable opportunity of responding to what is proposed to be said about it or them in the report.

The report will be made public and will also be submitted to National Treasury, the FSB, the Parliamentary Portfolio Committee on Finance, the National Credit Regulator as well as to the boards of the LOA and the SAIA.

Hundreds of millions 'plundered'

Finance Minister Trevor Manuel, introducing the National Treasury's annual report to Parliament, observed that "there have been some instances of flagrant disregard of the high ethical and fiduciary responsibilities expected of people in our financial institutions".

He goes on: "These often involve hundreds of millions of rands plundered from companies or from ordinary South Africans who spend a lifetime saving relatively small amounts annually."

In his introduction to the report, tabled in Parliament and circulated on 26 September 2007, he declares: "Neither organised criminal activity nor abuse of stewardship obligations should be allowed to squander the gains of our hard-earned democracy, and such activity will be addressed with the necessary resolve."

Looking elsewhere in the financial activities for which Manuel is responsible, the report points out deficiencies in the Preferential Procurement Policy Framework Act, 2000, which fails to achieve government's objectives in the Broad Based Black Economic Empowerment Act, 2003.

In February of this year, Cabinet directed that the procurement legislation should be aligned with the

empowerment strategy. The Treasury together with the Trade and Industry Department is now finalising draft amendments to the Act.

Similarly, work is also continuing on amendments to the Public Finance Management Act, 1999 to align it with the Municipal Finance Management Act, 2003.

The amendment process has involved broad and extensive discussions," the report says. The amendment bill has now been delayed from August 2006 as originally planned, to October this year.

Progress in developing tenders for an integrated financial management systems project has also been delayed. The report blames "difficulty in accessing appropriate information and communication technology skills by the State Information Technology Agency." As a result, projected expenditure for the next phase has been put off for a year.

In his report on various programmes of the Treasury, the director-general Lesetja Kganyago points out that the year under review was the first year in which all high-capacity municipalities were required to comply with the Municipal Finance Management Act, 2003.

"This posed challenges for the majority of the municipalities, in relation to compliance with the new accounting standards," he says. "The accountant-general is working with local government, the auditor-general and the ASB (Accounting Standards Board) to address these challenges."

Source:

I-Net Bridge, 26 September 2007



Turbulence in international markets subsided somewhat

Since the previous meeting of the Monetary Policy Committee, the turbulence in the international financial markets has subsided somewhat. South Africa's financial markets have emerged from this episode relatively unscathed.

According to a statement by Tito Mboweni, Governor of the Reserve Bank on behalf of the Monetary Policy Commission on 11 October 2007 the rand exchange rate has returned to levels that prevailed before the recent turbulence in the financial markets, and the All-share index on the JSE Limited has recovered and has reached new highs.

Inflation has remained above the upper limit of the inflation target range and inflation expectations have risen somewhat in the wake of the higher inflation trend. Risks to the inflation outlook persist although there are some

signs that the economy is responding to the tighter monetary policy stance. Inflation reacts with a lag to monetary policy changes, and the challenge for the MPC was to assess whether the observed response will be sustained and sufficient to bring inflation back to within the target range.

Recent developments in inflation

CPIX inflation measured 6,4 per cent in both May and June of 2007 and then increased to 6,5 per cent in July before moderating to 6,3 per cent in August. Broader underlying pressures remain evident, and if food and energy were excluded, CPIX inflation would have measured 5,0 per cent in July and August. Food prices increased at year-on-year rates of 10,2 per cent and 11,3 per cent in July and August respectively, despite some moderation in meat price increases.

Services price inflation continued its steady upward movement, measuring 5,8 per cent in August, compared to 4,6 per cent in January 2007. Administered

prices excluding petrol increased by 6,8 per cent and 7,4 per cent in July and August respectively, having been steady around the 5,5 per cent level for the first half of the year.

Petrol price reductions in both July and August resulted in a 6,0 per cent year-on-year increase in petrol prices in July, and a 0,5 per cent decline in August, which, along with further declines in the prices of clothing, footwear and furniture, contributed to the slight moderation seen in the August inflation rate.

Production price inflation has declined steadily after peaking at 11,3 per cent in May 2007. In August it measured 9,5 per cent, with imported goods inflation and domestic goods inflation measuring 9,7 per cent and 9,3 per cent respectively. Both agricultural and manufactured food prices have continued to accelerate, indicating further food price pressures at the retail level in the near term. Agricultural food prices increased at a year-on-year rate of 22,9 per cent in August, while manufactured food prices increased by 14,9 per cent.

The outlook for inflation

The most recent central forecast of the Bank indicates a modest deterioration in the inflation outlook, particularly in the short term, when compared to the forecast considered at the previous MPC meeting. CPIX inflation is now expected to remain above the upper level of the inflation target range and to peak in the first quarter of 2008 at an average of 6,8 per cent before declining to the upper end of the inflation target range in the following quarter. Thereafter CPIX is expected to continue its downward path, and reach around 5,2 per cent by the end of 2009. The higher trend results from a higher-than-expected second quarter inflation outcome and revised administered price assumptions.

Inflation

Inflation expectations increased in the third quarter of 2007. According to the survey conducted by the Bureau for Economic Research (BER) at the University of Stellenbosch, CPIX inflation is expected to average 5,9 per cent in 2007 and 5,8 per cent and 5,6 per cent in the next two years. These expectations are 0,5 percentage points higher for 2007 and 2008 than those measured in the second quarter, and 0,4 percentage points higher for 2009. Although expectations are generally still within the inflation target range, the upward trend of expectations is of concern given the significant role that these expectations play in wage and price-setting decisions.

Despite the upward drift in expectations, the view is still that inflation will decline over time. This is confirmed in part by the inverted yield curve and also by the medium-term inflation expectations indicated in the break-even inflation rates, as measured by the yield differential between conventional bonds and inflation-linked bonds of similar maturity. This measure has recently declined to just below 5,2 per cent, compared to 5,8 per cent in July.

The higher inflation expectations

are also reflected in wage trends.

According to Andrew Levy Employment Publications, the average level of wage settlements for the nine months ending 30 September 2007 was 7,2 per cent compared to 6,4 per cent at the end of September 2006. Unit labour cost increases, which adjust for labour productivity changes, measured 5,5 per cent in the second quarter which is consistent with the inflation target range.

The MPC identified a number of risks to the inflation outlook and is of the view that these risks remain on the upside.

Exogenous factors, namely oil and food prices, continue to cloud the inflation outlook. International oil prices have increased since the previous MPC meeting when North Sea Brent crude oil was trading at around US\$72 per barrel.

After declining to US\$68 per barrel in August, the upward trend was resumed and the price reached levels in excess of US\$80 per barrel in September. At present the price is around US\$78 per barrel. The appreciation of the rand against the dollar in September moderated the impact of the international price on the domestic petrol price. In October, the domestic price of 95 octane petrol increased by 10 cents per litre, following a reduction by the same amount the previous month. While a possible moderation of global growth could take some pressure off the oil prices, at this stage the risks to inflation emanating from this source are still considered to be on the upside.

Food prices

Food price developments also remain a risk. Domestic food prices have been influenced by adverse domestic supply conditions and by international developments, including the impact of biofuel demand. Over the past two years maize and wheat prices have increased significantly.

The longer-term outlook for food prices as reflected in lower futures prices appears more promising. However, as indicated earlier, prices are expected to remain elevated as a result of pressure

from production prices.

One of the key inflation risks identified in previous meetings has been the strong growth of household consumption expenditure. More recently there has been evidence of some moderation. After increasing at an annualised rate of 7,4 per cent in the first quarter of 2007, household consumption expenditure increased at a rate of 5,5 per cent in the second quarter. This was the lowest quarterly increase since the second quarter of 2003. The main contributor to this slowdown was an annualised 10 per cent decline in durable goods expenditure.

Retail sales have lost some momentum in recent months, having increased by 0,3 per cent in the three months to July compared to the previous three months. On a year-on-year basis, retail sales increased by 4,9 per cent in real terms in July 2007 compared to 7,1 per cent in June. The subdued trend in motor vehicle sales also continued, particularly with respect to passenger car sales. New commercial vehicle sales have also declined recently. The FNB/BER Consumer Confidence Index, which reached an historically high level in the first quarter of 2007, declined in the second and third quarters.

The moderation observed in the growth of household consumption expenditure is not reflected to the same extent in the credit extension data. Nevertheless, tentative signs of restraint are evident.

Twelve-month growth in the banks' loans and advances extended to the private sector has continued at a brisk pace. This rate declined from 27,7 per cent in June 2007 to 25,0 per cent in August. This trend is also observed if securitisation transactions are adjusted for, although at a higher level. Twelve-month growth in loans and advances to the household sector has continued its downward trend, measuring 20,9 per cent in August compared to 21,7 per cent in June.



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