

**ADMINISTRATIVE ACTION PROCEDURES  
OF THE FINANCIAL SECTOR CONDUCT  
AUTHORITY IN TERMS OF SECTION 92(1)  
OF THE FINANCIAL SECTOR REGULATION  
ACT, 2017**

## ADMINISTRATIVE ACTION PROCEDURES

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### **Introduction**

1. The FSR Act empowers the FSCA to determine procedures for the administrative action it takes in terms of the financial sector laws that it administers.<sup>1</sup>
2. Before a financial sector regulator determines an administrative action procedure in terms of section 92, the financial sector regulator must publish on its website a draft of the proposed procedure and a notice calling for written public comment within a period stated in the notice, which must be at least 30 days from the date of publication of the notice, and submit a draft of the proposed procedure to the Director-General and the other financial sector regulator; and consider any comments received.
3. The FSCA complied with these requirements and now determines these Procedures.

### **Purpose of the Procedures**

4. The purpose of the Procedures is to ensure that the FSCA takes a fair and consistent approach to administrative action and that the actions of the FSCA are consistent with the principles of the Promotion of Administrative Justice Act and any applicable requirements of a financial sector law as contemplated in section 92(1) of the FSR Act.
5. Furthermore, the Procedures aim to inform affected persons what to expect and what their rights are.

### **Financial sector laws**

6. Financial sector laws are defined in the FSR Act.<sup>2</sup> They include the FSR Act, the Protection of Funds Act, Regulations under the FSR Act and regulatory instruments made in terms of the financial sector laws. The FSCA is the responsible authority for the following financial sector laws and their regulatory instruments<sup>3</sup>:
  - 6.1 Pension Funds Act;
  - 6.2 Friendly Societies Act;
  - 6.3 Long- and Short-term Insurance Acts;

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<sup>1</sup> Section 92(1) of the FSR Act.

<sup>2</sup> Section 1 of the FSR Act.

<sup>3</sup> Schedule 2 of the FSR Act.

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- 6.4 Financial Advisory and Intermediary Services Act;
- 6.5 Collective Investment Schemes Control Act;
- 6.6 Financial Markets Act; and
- 6.7 Credit Rating Services Act.

### **Objective of the FSCA**

- 7. The objective of the FSCA is to enhance and support the efficiency and integrity of financial markets, to protect financial customers and to assist in maintaining financial stability. The FSCA protects financial customers by ensuring that financial institutions treat them fairly and by providing them with financial education programs.<sup>4</sup>
  
- 8. The FSCA has been granted a wide range of functions and powers to fulfil this objective.<sup>5</sup> The FSCA achieves this objective by, among others,-
  - 8.1 applying fit and proper testing to persons who provide financial products or financial services by requiring that those persons are appropriately licensed, and to revoke the licence of a financial institution that is no longer fit and proper; and
  - 8.2 taking enforcement action against persons who contravene the financial sector laws.

### **What guides fair administrative action**

- 9. Administrative actions are governed by the Constitution and Promotion of Administrative Justice Act. The Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.<sup>6</sup> The general principle encapsulated in the Promotion of Administrative Justice Act is that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Fair administrative procedure depends on the circumstances of each case.
  
- 10. Procedurally fair administrative action requires that the decision-maker must give the person in respect of which administrative action is to be taken:
  - 10.1 adequate notice of the nature and purpose of the proposed administrative action;

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<sup>4</sup> Section 57 of the FSR Act.

<sup>5</sup> Section 58 of the FSR Act.

<sup>6</sup> Section 33(1) of the Constitution.

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- 10.2 a reasonable opportunity to make representations;
- 10.3 a clear statement of the administrative action;
- 10.4 adequate notice of any right of review or internal appeal, where applicable;  
and
- 10.5 adequate notice of the right to request reasons.

### **When must the Promotion of Administrative Justice Act be applied<sup>7</sup>**

- 11. The Promotion of Administrative Justice Act applies to any administrative action taken by the FSCA in terms of a financial sector law.<sup>8</sup> However, the FSCA may depart from specific requirements of the Promotion of Administrative Justice Act if it is reasonable and justifiable in the circumstances.<sup>9</sup> The FSCA may determine different procedures for different types of administrative actions and different circumstances.<sup>10</sup>

### **What are administrative actions?**

- 12. The Promotion of Administrative Justice Act defines “administrative action” as, among others:  
Decisions by organs of state exercising public functions in terms of any legislation, that-
  - (a) adversely affect the rights of any person, and
  - (b) have a direct, external legal effect.
- 13. The FSR Act defines administrative action with reference to the Promotion of Administrative Justice Act. Persons aggrieved by most of the decisions of the FSCA that constitute administrative action may apply to the Financial Services Tribunal for a reconsideration of the decision. A decision for purposes of the Tribunal is defined as ‘a decision by a financial sector regulator in terms of a financial sector law in relation to a specific person’.<sup>11</sup> An aggrieved person is one with a legal grievance, i.e. the person’s legal rights have been affected and not a person who is dissatisfied with the decision. The failure to take a timely decision may also constitute administrative action.<sup>12</sup>

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<sup>7</sup> In accordance with sections 3(4), 4(4) and 5(4) of the Promotion of Administrative Justice Act.

<sup>8</sup> See section 91 of the FSR Act.

<sup>9</sup> Section 92(2) of the FSR Act.

<sup>10</sup> Section 92(3).

<sup>11</sup> Section 218(a).

<sup>12</sup> Section 218(f) and (g) provide that an omission to take a decision within the period prescribed or specified in a financial sector law, rules, or other requirements pertaining to the decision-

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14. The decisions of the FSCA which are administrative actions may be divided into the following broad categories:

### **Decisions in connection with the licensing of financial institutions**

15. These decisions include the granting or refusal of an application by a person to be licensed as a financial institution<sup>13</sup>, suspension or revocation of a licence<sup>14</sup> or varying of licence conditions<sup>15</sup>, the approval of key persons and other statutorily prescribed persons in connection with the financial institution, for example directors and auditors, and the approval or refusal to approve significant owners, beneficial owners or other shareholders of a financial institution<sup>16</sup>.

### **Enforcement action**

16. The FSCA is empowered to take various types of enforcement actions, including,-
- 16.1 issuing directives to financial institutions requiring them to take actions specified in the directive<sup>17</sup>;
  - 16.2 the making of debarment orders in respect of natural persons, which prohibits the debarred person from providing, or being involved in the provision of, specified financial products or financial services, generally or in circumstances specified in the order<sup>18</sup>; and
  - 16.3 the imposition of administrative penalties<sup>19</sup>.

### **General administrative actions**

17. Decisions to grant or refuse various kinds of applications by financial institutions and other persons, including exemption applications.

### **What are not administrative actions?**

18. Decisions or actions taken by the FSCA that do not adversely affect the rights of any person or do not have a direct, external legal effect do not constitute

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maker, or an omission to take a decision within a reasonable period, if the applicable financial sector law, or rules of, or other requirements pertaining to, the decision-maker require the decision to be taken but without prescribing or specifying a period.

<sup>13</sup> Section 116 of the FSR Act, and all the financial sector laws referred to in paragraph 6, except the Long-and Short-term Insurance Acts, empower the FSCA to grant or refuse licence applications.

<sup>14</sup> Sections 120 and 121 of the FSR Act, among others.

<sup>15</sup> Section 119 of the FSR Act.

<sup>16</sup> Section 158 of the FSR Act.

<sup>17</sup> Sections 144 and 145 of the FSR Act.

<sup>18</sup> Section 153 of the FSR Act.

<sup>19</sup> Section 167 of the FSR Act.

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administrative action. These actions include conducting a supervisory on-site inspection at the premises of a supervised entity in terms of Part 3 of chapter 9 of the FSR Act, or the appointment of an investigator in terms of section 134 of the FSR Act, or the instruction of an investigator to conduct an investigation, or any of the actions taken by the FSCA or an investigator during an inspection or investigation. Applications to court by the FSCA in terms of the Protection of Funds Act or the financial sector laws to appoint curators or statutory managers do not fall within the ambit of the definition of administrative action. An assessment of a levy issued to a specific person is also not considered to be administrative action.<sup>20</sup>

### **What is the FSCA's approach to administrative action?**

19. The following principles inform the FSCA's approach to administrative action:
  - 19.1 The effectiveness of the regulatory regime envisaged in the FSR Act depends to a significant degree on fostering and maintaining an open and co-operative relationship between the FSCA and the financial institutions that it regulates. Regulated persons must have the comfort that the FSCA will act in a fair and consistent manner.
  - 19.2 The FSCA will seek to take administrative action in a manner that is transparent, proportionate, responsive to the issue, and consistent with its objective and statutory mandate.
  - 19.3 The FSCA will endeavour to achieve a consistent approach to administrative action.
  - 19.4 The FSCA aims to ensure fair administrative action as required by the Promotion of Administrative Justice Act.
  - 19.5 When enforcement action is required to be taken; the FSCA will aim to change the behaviour of the person who is the subject of its action, to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance, and where appropriate, to remedy the harm caused by the non-compliance, and ultimately to protect financial customers.
  
20. As the Administrative Action Procedures aim to promote a fair and consistent approach to administrative action taken by the FSCA, a uniform approach has

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<sup>20</sup> In terms of section 242(1) of the FSR Act. See also section 218(l).

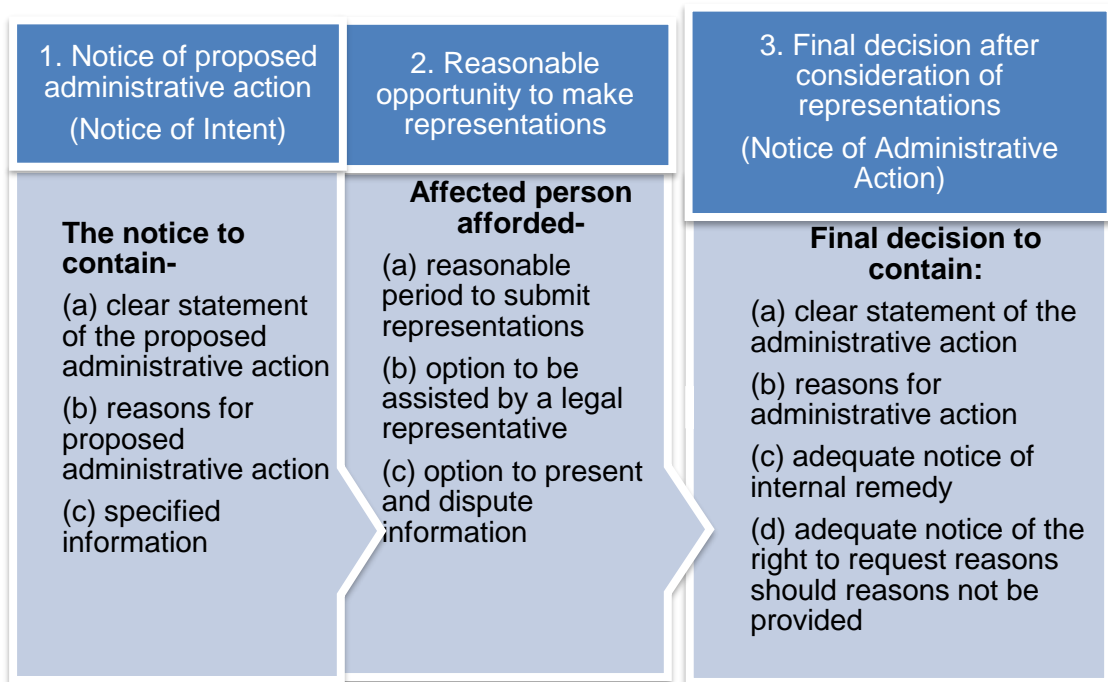
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been adopted as far as possible in respect of different types of administrative actions.

### What procedure will the FSCA follow before taking action?

21. The empowering provisions in the financial sector laws in terms of which the FSCA may make decisions or take action may prescribe a specified process to be followed. The FSCA will in all instances endeavor to follow the prescribed processes. The general principle underlying all the prescribed procedures is to ensure that the administrative action is *procedurally* fair. The following is a schematic presentation of the FSCA's three stepped approach to administrative action aimed at achieving procedural fairness:



### Notice of intent

22. The FSCA must provide an affected person **adequate notice** of the **nature and purpose** of proposed administrative action.

### Format

23. The notice must be in writing and in the format prescribed by the specific financial sector law, if any. For example, draft debarment orders<sup>21</sup> and proposed directives<sup>22</sup> must be provided to the affected person for consideration together with the Notice of Intent.

<sup>21</sup> Section 154(1)(a).

<sup>22</sup> Section 146(1)(a).



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### ***Service of notice on licensed or previously licensed persons***

24. The FSR Act prescribes how notices in terms of, or relating to, a financial sector law must be served or given to a licensed<sup>23</sup>, or previously licensed, person. The notice must be “served on or given” to the affected person.<sup>24</sup> In the event that the affected person cannot be found after reasonable inquiry, the FSCA must serve or give the notice to some other person apparently involved in the management or control of a place where the person carries or carried on the licensed activities.<sup>25</sup>
25. The FSCA interprets the words “given to” in a wide context which includes electronic means such as e-mail or facsimile. Thus, the FSCA may choose to serve the notice at a physical business address or *via* electronic means.

### ***Service of notice on unlicensed persons***

26. The FSR Act does not prescribe how notices in terms of, or relating to, the FSR Act and other financial sector laws, must be served or given to a person who is not or was not licensed. For the sake of consistency, the FSCA will serve or give a notice to an affected person in the same manner described in paragraphs 23 and 24, and in the case of where the affected person cannot be found after reasonable inquiry, the FSCA will serve or give the notice to some other person apparently involved in the management or control of a place where the person carries or carried on the relevant activities.

### ***Draft debarment orders***

27. The FSR Act specifically deals with the manner in which notice of a draft debarment order may be served on or be given to an affected person. If the FSCA after taking all reasonable steps, including through electronic means, cannot locate a person to be given a document or information under section 154 of the FSR Act or a debarment order, it must deliver the document or information to the person’s last known e-mail or physical business or residential address.<sup>26</sup>

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<sup>23</sup> The FSR Act defines ‘licence’ as a written licence, registration, approval, recognition, permission, consent or any other authorisation in terms of a financial sector law, however it is described in that law, to provide a financial product, financial service or a market infrastructure.

<sup>24</sup> Section 286(1)(a) of the Act.

<sup>25</sup> Section 286(1)(b) of the Act

<sup>26</sup> Section 155 of the Act

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### ***Contents of the notice of intent***

28. The notice of intent must set out the **nature and purpose** of the proposed administrative action against an affected person. It must contain the following:
- 28.1 A **clear statement of the proposed administrative action**, which includes-
- 28.1.1 the **nature of the proposed administrative action** (details of the proposed administrative action). For example, that the FSCA intends to issue a debarment order against the affected person or the withdrawal of the affected person's licence;
  - 28.1.2 the intended terms and conditions attached to the proposed administrative action, where applicable. For example, any terms to be attached to the suspension or withdrawal of a licence of an authorised financial services provider;<sup>27</sup>
  - 28.1.3 reference to **applicable administrative consequences** of the proposed administrative action. For example, the peremptory publication of a debarment order<sup>28</sup> or the manner of payment of an administrative penalty order;<sup>29</sup>
- 28.2 **reasons for the proposed administrative action**, which includes-
- 28.2.1 the **grounds** for the proposed administrative action, otherwise referred to as the jurisdictional factors. For example, the FSCA may issue a written directive to a financial institution, if the financial institution has contravened or is likely to contravene a financial sector law. The reliance on this ground and relevant provision that has been contravened must be clearly stipulated;<sup>30</sup>
  - 28.2.2 the **relevant evidence** (facts and information) that informs the grounds for the proposed administrative action. The FSCA must disclose, with due regard to any applicable limitations on disclosure of information,<sup>31</sup> the gist or substance of the case against an affected person in as much detail as is necessary to enable an affected person to make meaningful representations to the FSCA on the case against the affected person;

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<sup>27</sup> Section 9(2)(b) of the Financial Advisory and Intermediary Services Act.

<sup>28</sup> Section 153(7) of the Act.

<sup>29</sup> Section 168 of the Act.

<sup>30</sup> Section 144(1)(d)(i) of the Act.

<sup>31</sup> See for example Chapter 17, Part 1 of the Act.

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28.2.3 the **prescribed factors** that the FSCA must have regard to before taking the proposed administrative action. For example, the factors the FSCA must take into account before imposing a penalty order (such as the affected person's level of co-operation with the FSCA).<sup>32</sup>

### **Reasonable opportunity to make representations**

29. The FSCA must afford an affected person a **reasonable** opportunity to make representations (that is to state the person's case or version of events). This means that the FSCA must afford an affected person sufficient time to consider a notice of an intended administrative action and to provide a response. What constitutes a "reasonable" opportunity is determined on a case-by-case basis, where the applicable legislation does not specify a period.
30. In some instances, a financial sector law may specify a minimum period which the FSCA must afford to affected persons. For example, at least **one month** must be afforded in respect of the varying, suspending and revoking of licences<sup>33</sup> and the making of debarment orders.<sup>34</sup>
31. Affected persons should make written submissions within the specified timeframe. They may obtain assistance and legal representation for purposes of making their submissions. However, the unavailability of a legal representative is not a ground for an extension of the timeframe within which affected persons are to make representations and which the FSCA, in its discretion and for a valid reason, may allow.
32. The FSCA may, in its discretion which will be exercised on a case-by-case basis, in exceptional cases or under exceptional circumstances, afford an affected person an opportunity to make the submissions in person.

### **Final decision (notice of administrative action)**

33. The FSCA must advise all affected persons of its final decision in respect of proposed administrative action. It must do so within the period prescribed or specified in a financial sector law, if applicable, or within a reasonable period.

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<sup>32</sup> Section 167(2)(a) of the Act.

<sup>33</sup> Section 123(1)(a)(b) of the Act

<sup>34</sup> Section 154(2) of the Act

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34. What constitutes a “reasonable” period will be determined on a case-by-case basis (e.g. the complexity of the facts).
35. The same principles apply as with the service of the notice of intent as described in paragraphs 23 to 25 to the FSCA’s final decision (notice of administrative action) should it decide to take administrative action against a person.
36. The notice of administrative action must give -
- 36.1 a **clear statement of administrative action**. The FSCA’s final decision must be clearly set out with reference to the specific provision in terms of which the action is taken, for example the notice must state that the FSCA is withdrawing the licence of a financial services provider in terms of section 9 of the Financial Advisory and Intermediary Services Act;
  - 36.2 **reasons for the administrative action**. The notice of administrative action must contain a clear explanation of the reasons for the action and must include the material facts and information on which the decision is based;
  - 36.3 a **clear statement of the consequences where a person does not comply with certain administrative actions**, where relevant. For example, the filing of an administrative penalty order in terms of section 167 of the Act with the registrar of a competent court in order to enforce the order similar to a civil judgment;<sup>35</sup>
  - 36.4 notice of an affected person’s **right to apply to the Financial Services Tribunal**<sup>36</sup> for a reconsideration of the decision<sup>37</sup>; and
  - 36.5 notice of the **right to request reasons**, should the notice of the administrative action not contain the reasons<sup>38</sup>.

### **Departure from procedure**

37. The FSCA may depart from the process in terms of these Procedures to the extent allowed under the Promotion of Administrative Justice Act or provided for in a financial sector law. For example:

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<sup>35</sup> Sec 170 of the FSR Act

<sup>36</sup> The Financial Sector Tribunal established under section 15 of the FSR Act. Upon application by aggrieved persons, the Tribunal, which is an independent body reconsiders decisions of decision-makers, including the FSCA as defined in terms of section 218 of the FSR Act

<sup>37</sup> Section 228 of the Act

<sup>38</sup> Sections 228 and 229 of the Act.

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- 37.1 Section 9(3) of the Financial and Advisory and Intermediary Services Act provides that the FSCA may under urgent circumstances, where it is satisfied on reasonable grounds that substantial prejudice to financial customers or the general public may occur, provisionally suspend or withdraw a licence without first affording an affected person a reasonable opportunity to submit representations, provided that the FSCA comply with the requirements applicable for such a departure. The licensee must then be informed of grounds for, and period and terms of the suspension, and be given a reasonable opportunity to provide reasons why the provisional suspension or withdrawal should be lifted.
- 37.2 Section 123(3) of the FSR Act provides that the FSCA may vary, suspend and revoke a licence without giving the licensee notice of the proposed action and a statement of the reasons for it or inviting the licensee to make submissions, should the delay involved in complying with such procedures be likely to prejudice financial customers, prejudicially affect financial stability or defeat the object of the action. The licensee must then be given a written statement of the reasons why that subsection was not complied with. The licensee may make submissions within one month after being provided with the statement, which must be considered by the FSCA.<sup>39</sup>

### **Commencement**

38. The Procedures comes into operation on the date of publication.

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<sup>39</sup> Section 123(4) of the FSR Act.

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### List of abbreviations

<b>Abbreviation</b>	<b>Term</b>
<b>Collective Investment Schemes Control Act</b>	Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002)
<b>Constitution</b>	Constitution of the Republic of South Africa, 1996
<b>Credit Rating Services Act</b>	Credit Rating Services Act, 2012 (Act No. 24 of 2012)
<b>Director-General</b>	The Director-General of the National Treasury
<b>Financial Advisory and Intermediary Services Act</b>	Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002)
<b>Financial Markets Act</b>	Financial Markets Act, 2012 (Act No. 19 of 2012)
<b>Friendly Societies Act</b>	Friendly Societies Act, 1956 (Act No. 25 of 1965)
<b>FSCA</b>	Financial Sector Conduct Authority established in terms of section 56 of the FSR Act
<b>FSR Act</b>	Financial Sector Regulation Act, 2017 (Act No. 9 of 2017)
<b>Long-term Insurance Act</b>	Long-term Insurance Act, 1998 (Act No. 52 of 1998)
<b>Pension Funds Act</b>	Pension Funds Act, 1956 (Act No. 24 of 1956)
<b>Promotion of Administrative Justice Act</b>	Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)
<b>Protection of Funds Act</b>	Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001)
<b>Short-term Insurance Act</b>	Short-term Insurance Act, 1998 (Act No. 52 of 1998)