Global Financial Services Regulatory Guide - South Africa

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# 1. Who regulates banking and financial services in your jurisdiction?

## Who regulates banking and financial services in your jurisdiction?

The National Treasury, headed by the Minister of Finance, is responsible for setting policy regarding the regulation of private and public sector investment in South Africa. The South African Reserve Bank (SARB) is tasked with financial stability. The SARB also oversees the National Payment System and the Financial Surveillance Division of the SARB, which is responsible for the administration of exchange controls in South Africa.

The following regulatory authorities are responsible for overseeing activities by participants in the financial sector:

The Prudential Authority, operating within the administration of the SARB, is primarily responsible for overseeing banks, insurers, cooperative financial institutions, financial conglomerates and certain market infrastructures, and ensures that these institutions operate within a financial system that is inherently safe and sound.

The Financial Sector Conduct Authority (FSCA) is a statutory body that supervises market conduct in relation to the provision of financial products and financial services in South Africa, including the conduct of financial institutions licensed in terms of various financial sector laws, such as banks, insurers, retirement funds and administrators, and market infrastructures. The mandate of the FSCA is significantly broader than that of its predecessor, the Financial Services Board.

The SARB is the primary regulatory authority for payment systems and is responsible for the safety and soundness of the national payment system. SARB, in terms of the National Payment System Act, 1988, recognizes the Payment Association of South Africa as a payment system management body that has as one of its objectives the organizing, managing and regulating of the participation of its members (primarily banks) in the payment system.

The Financial Intelligence Centre is responsible for implementing regulations to combat money laundering and the financing of terrorist activities.

The National Credit Regulator is responsible for registering credit providers and supervising compliance with prescribed regulations for consumer credit.

The Information Regulator (akin to a data protection authority) is responsible for monitoring and enforcing compliance with the provisions of the Protection of Personal Information Act, 2013.

In some industries, certain regulatory functions are delegated to associations or self-regulatory organizations. In terms of the Financial Markets Act, 2012, licensed exchanges, central securities depositories and independent clearing houses operate as self-regulatory organizations that create rules and regulate their members and participants that are subject to the provisions of the Financial Markets Act.

South Africa is in the process of implementing a "twin peaks" approach to financial sector supervision, which commenced with the enactment of the Financial Sector Regulation Act in August 2017 and the creation of the Prudential Authority and FSCA in April 2018. The Treasury seeks to implement the transition of the South African financial sector regulation to a twin peaks model in two phases. As part of Phase 1, which has now been implemented, existing industry-specific legislation has been allocated to one of the new regulators as the principal regulatory authority for an industry, but both regulators will have the power to exercise supervisory powers and to apply and enforce the industry-specific legislation on a financial institution — the Prudential Authority in respect of prudential aspects and the FSCA in respect of market-conduct issues. The new regulators are also able to issue conduct and prudential standards to supplement industry-specific legislation.

Phase 2 represents the creation of a new consolidated regulatory framework that combines the regulation of, and the standards applied to, the various financial subsectors into overarching legislation applicable to all financial institutions. Existing financial sector legislation is currently fragmented, with a distinct statute applying to each of the different types of financial institutions providing a particular type of financial product or service, namely, securities exchanges, insurance companies, pension funds, collective investment schemes, banks, mutual banks, friendly societies, financial advisors, and intermediaries. Although existing sector-specific legislation will remain in place for an interim period, the National Treasury has confirmed that some or all of these laws will be replaced and consolidated by the overarching Conduct of Financial Institutions Act as part of the next phase of implementing the twin peaks model.

# 2. What are the main sources of regulatory laws in your jurisdiction?

## What are the main sources of regulatory laws in your jurisdiction?

The following primary statutes and regulations govern "financial institutions," including: (i) financial products or service providers; (ii) market infrastructures; (iii) holding companies of financial conglomerates; or (iv) persons required to be licensed in terms of a financial sector law.

**Legislation affecting participants in the financial sector generally**

The **Financial Sector Regulation Act, 2017** provides an overarching framework for regulating and supervising activities and participants in the South African financial sector. Please see the discussion under question 1 for more information.

The **Financial Institutions (Protection of Funds) Act, 2001**provides for the laws relating to the investment, safe custody and administration of funds and trust property by financial institutions.

The **Financial Intelligence Centre Act, 2001**establishes the Financial Intelligence Centre and a Money Laundering Advisory Council to combat money laundering activities and the financing of terrorist and related activities. It also imposes identification, record-keeping and reporting obligations upon "accountable institutions," including banks, attorneys, accountants, estate agents, investment managers and authorized users of securities exchanges.

The **Prevention of Organized Crime Act, 1998**provides measures for combatting organized crime, money laundering and criminal gang activities.

The **Currency and Exchanges Act, 1933** (and the regulations issued in terms thereof) regulates,inter alia*,* legal tender and currency and the export of capital from South Africa, the holding of foreign currency in South Africa, and the retention of the South African rand abroad.

The **Electronic Communications and Transactions Act, 2002** provides for the facilitation and regulation of electronic communications and transactions.

The **Protection of Personal Information Act, 2013** regulates the manner in which personal information may be processed by prescribing minimum threshold requirements for the lawful processing of specified personal information in line with international data protection laws.

The **Trust Property Control Act, 1996** aims to regulate control of trust property, which is to be administered in accordance with a trust instrument.

The **Consumer Protection Act, 2008**under the Financial Sector Regulation Act provides that the Consumer Protection Act does not apply to (a) any transaction product or service that is subject to the National Payment Systems Act, 1988 or any financial sector law, and which is regulated by the FSCA, the SARB, the Prudential Authority or the Prudential Committee in terms of the Financial Sector Regulation Act; and (b) any transaction that constitutes a credit agreement in terms of the National Credit Act. To the extent that any goods or services provided by an institution falls outside the scope of financial sector laws, the Consumer Protection Act will apply to those goods or services.

The **Prevention and Combating of Corrupt Activities Act, 2004**  provides for the strengthening of measures to prevent and combat corruption and corrupt activities.

The **Conduct of Financial Institutions Bill, 2020** (the "**Bill**") will, once enacted, give legislative effect to the market conduct policy approach, including the implementation of the Treating Customers Fairly principles. The Bill aims to establish a consolidated and comprehensive regulatory framework for the conduct of financial institutions that will protect financial customers; promote the fair treatment of financial customers by financial institutions; support fair and efficient financial markets; promote innovation and the development of and investment in innovative technologies, processes and practices; promote competition; promote financial inclusion, and promote the transformation of the financial services sector.

**Legislation applicable to the banking sector**

The **Banks Act, 1990** and the regulations published in terms thereof provide for the regulation and supervision of the taking of deposits from members of the public and of related activities.

The **South African Reserve Bank Act, 1989** regulates the SARB and the South African monetary system.

The **Mutual Banks Act, 1993** provides for the regulation and supervision of the activities of a juristic person that is registered as a mutual bank and its members.

The **Co-operative Banks Act, 2007** provides for the regulation and supervision of cooperative banks. The legislation acknowledges member-based financial services cooperatives as a different tier of the official banking sector.

**Other sector-specific financial regulations**

The **National Payment Systems Act, 1988**, together with regulations and notices issued thereunder, provides for the management, administration, operation, regulation and supervision of payment, clearing and settlement systems in South Africa.

The **Financial Advisory and Intermediary Services Act, 2002** provides for the regulation and supervision of rendering certain financial advisory and intermediary services to clients and the marketing of financial products and services.

The **National Credit Act, 2005** regulates the provision of consumer credit and provides for the registration of credit providers, credit bureaus and debt counselors.

The **Home Loans and Mortgage Disclosure Act, 2000**promotes fair lending practices, which require disclosure by financial institutions of information regarding the provision of home loans and establishes an Office of Disclosure.

The **Credit Rating Services Act, 2012** provides for the registration and regulation of credit rating agencies in accordance with international regulatory principles.

The **Financial Markets Act, 2012** provides for the regulation of financial markets, including, inter alia, the establishment, licensing and operation of market infrastructures for the trading, custody and administration of securities and the clearing and settlement of transactions, as well as the conduct of authorized users of, or participants in, any market infrastructure. Users or participants must also comply with the rules of the relevant exchange or central securities depository. The Financial Markets Act also deals with the prohibition on insider trading.

The **Insurance Act, 2017**replaced and consolidated parts of the Long-term Insurance Act, 1998 and the Short-term Insurance Act, 1998. The Insurance Act aims to bring stability to the South African insurance market, in part by introducing stricter regulation for certain entities such as foreign-based insurers in the local market. It also creates a legal framework for the micro-insurance industry, thus promoting financial inclusion and unifying insurance-related regulations.

The **Short-term Insurance Act, 1998** deals with the registration of short-term insurers and the regulation of short-term insurance providers and intermediaries, as well as the provision of policy benefits under short-term policies such as engineering, guarantee, miscellaneous, motor, accident and health, property, or transportation policies.

The **Long-term Insurance Act, 1998** provides for the registration of long-term insurers and the regulation of long-term insurance providers and intermediaries in relation to the provision of policy benefits under long-term policies, which include assistance policies, disability policies, fund policies, health policies, life policies or sinking fund policies. Further amendments to the Short-term Insurance Act and Long-term Insurance Act are pending.

The **Pension Funds Act, 2008** and regulations issued thereunder provide for the registration, incorporation, regulation and dissolution of pension funds.

The **Collective Investment Schemes Control Act, 2002** regulates and controls the establishment and administration of collective investment schemes and the marketing of domestic and foreign investment schemes or funds to South African residents.

# 3. What types of activities require a license in your jurisdiction?

## What types of activities require a license in your jurisdiction?

Various role players and activities are regulated in South Africa, including the following:

**Accepting deposits from the general public** – Subject to a few exceptions, this activity would generally include the following:

Acceptance of, soliciting of, or advertising for deposits from the general public (including persons in the employ of the person accepting such deposits) as a regular feature of a business – this would cover typical retail banking activities under the Banks Act or deposit-taking by member-based organizations such as stokvels, co-operative finance institutions, co-operative banks, friendly societies and mutual banks in terms of legislation specific to those organizations

Utilization of money accepted by way of deposit for: (i) the granting of loans to other persons; (ii) investment by any person acting as an investor in such person’s name or through the medium of a trust or a nominee; or (iii) the financing, to any material extent, by any person of any other business activity conducted by such person in his or her own name or through the medium of a trust or a nominee

Obtaining of money through the sale and repurchase of assets, to any person other than a bank, as a regular feature of the business

**Dealing in foreign exchange -** No person (other than an authorized dealer) is permitted to buy or borrow any foreign currency or any gold from, or sell or lend any foreign currency or any gold to, any person not being an authorized dealer unless they have obtained the requisite approval from the SARB through an authorized dealer. An authorized dealer is a person authorized by the Financial Surveillance Department of the SARB in respect of any transaction involving gold or foreign exchange or to deal in gold or foreign exchange.

**Payment services and money remittances –** This includes persons who, as a regular feature of their business, accept money or payment instructions from multiple payers on behalf of a beneficiary or from a payer on behalf of that payer to multiple beneficiaries.

Any of the following "securities services," which are regulated in terms of the Financial Markets Act:

**Dealing in securities** – including the buying or selling of securities as part of a business, the use of a securities exchange to buy or sell listed securities, or the furnishing of advice relating to security to any person

**Operating a securities exchange** – providing infrastructure for the trading of listed securities

**Operating a clearing house** – providing infrastructure for the clearing of transactions in listed or unlisted securities

Providing or participating in **clearing and settlement processes**

**Operating a securities depository** – the provision of infrastructure for holding uncertificated securities, including a securities settlement system

**Custody and administration services** –a person (referred to as a participant) authorized by a central securities depository to perform custody and administration services in terms of the central securities depository rules

**Maintaining records of securities transactions** –a person (referred to as a trade repository) who maintains a centralized electronic database of records of securities transaction data

**Providing advisory or intermediary services in relation to a financial product or financial service** – "Advice" includes any recommendation, guidance or proposal of a financial nature to any person in respect of the purchase of, or investment in, any financial product; the conclusion of any other transaction aimed at incurring any liability or acquiring of any right or benefit in respect of any financial product; or on the variation of any term or condition applying to a financial product. "Intermediary services" include any act other than the furnishing of advice the result of which is that a client may enter into any transaction in respect of a financial product, including actions taken with a view to buying, selling or otherwise dealing in, managing, administering, keeping in safe custody, maintaining or servicing a financial product; collecting or accounting for premiums; or processing claims. Businesses typically affected by the Financial Advisory and Intermediary Services Act are investment managers, investment advisers, insurance brokers and advisers, foreign exchange intermediaries (persons who trade foreign exchange as an asset class for clients), financial planners and advisers.

**Collective investment schemes** – This involves establishing and managing an investment scheme into which individual investors' funds are pooled for investment purposes and marketing of domestic or foreign collective investment schemes or funds.

**Loans to consumers** **-** The National Credit Act, 2005 applies to all credit agreements entered into or having an effect in, South Africa and which contemplates a credit facility, a credit transaction, a credit guarantee or any combination of these products or transactions being provided to a consumer. All credit providers must apply to be registered as a credit provider with the National Credit Regulator unless one of the following exceptions apply:

The borrower is a juristic person with a total asset value or annual turnover exceeding the specified threshold (currently at ZAR 1 million).

The borrower is a juristic person with a total asset value or annual turnover not exceeding the above threshold and the credit agreement is a mortgage agreement; or any other credit transaction where the principal debt amounts to ZAR 250,000 or more.

The credit agreement is not concluded on arm's length terms (i.e., related party transactions).

The agreement or transaction relates only to incidental credit, the letting of immovable property, an insurance policy, credit provided for the payment of insurance premiums, or a transaction between a stokvel and its members in accordance with the rules of the stokvel.

**Credit rating services** – This refers to the analysis, evaluation, approval, issuing or review of data and information for purposes of providing a credit rating that determines the creditworthiness of an entity, a security or financial instrument, or an issuer of a security or financial instrument.

**Establishing and operating a retirement fund**

**Providing short-term or long-term insurance products**

**Supplying any financial product** – If the provision of a particular financial product is not regulated under any specific financial sector law, the product provider will be required to register under the Financial Sector Regulation Act.

**Crypto-assets or cryptocurrencies** – Crypto-assets are regulated as "financial products" in South Africa under the Financial Advisory and Intermediary Services Act (the FAIS Act). On 19 October 2022, the FSCA issued a declaration (Declaration) confirming that crypto-assets are included under the definition of "financial products" in terms of the FAIS Act. The Declaration also provides a wide definition for crypto-assets, being a digital representation of value that:

is not issued by a central bank but is capable of being traded, transferred or stored electronically by natural and legal persons for the purpose of payment, investment or other forms of utility;

applies cryptographic techniques; and

uses distributed ledger technology.

The effect of the Declaration is that any person who provides advice or renders intermediary services in relation to crypto- assets for or on behalf of a client or product supplier must be authorized under the FAIS Act as a financial service provider and must comply with the requirements of the FAIS Act. In terms of section 7 of the FAIS Act, a person may not act or offer to act as a financial services provider unless such a person has been issued with a license under section 8 of the FAIS Act.

# 4. How do the licensing requirements apply to cross-border business in your jurisdiction?

## How do the licensing requirements apply to cross-border business in your jurisdiction?

There is no single system by which foreign financial services or product providers can apply to supply such services or products to South African residents. Currently, this is determined by each financial subsector, as indicated below.

Banking – An institution established in a foreign jurisdiction and which lawfully conducts the business of a bank in such jurisdiction may establish the following:

A representative office in South Africa, after obtaining the written consent of the Prudential Authority pursuant to a written application to be submitted to the Prudential Authority, together with the prescribed fee and a certificate from the competent authority in the foreign jurisdiction in which such institution conducts a business similar to the business of a bank – A representative office may not conduct the business of a bank in South Africa and instead serves to promote and facilitate the business of the foreign bank outside of South Africa.

A branch of the foreign bank in South Africa to conduct the business of a bank in South Africa, with the prior written authorization of the Prudential Authority and subject to the prescribed conditions and such further conditions, if any, as the Prudential Authority may determine – The foreign bank will be required to lodge with the Prudential Authority an application in the form set out in the Regulations relating to Banks together with the prescribed fee. The application must include information regarding the nature and extent of supervision exercised or to be exercised by the responsible supervisory authority of the foreign institution’s country of domicile. The Prudential Authority will not approve an application unless they are satisfied that proper supervision is or will be exercised by the responsible supervisory authority of the foreign institution’s country of domicile. The foreign institution will also be required to register as an external company (in accordance with the Companies Act, 2008).

Financial advisors and intermediaries – In terms of the Financial Advisory and Intermediary Services Act, a financial services provider who is not a resident may submit an application to the FSCA in the form and manner determined by the authority, which must be accompanied by information to satisfy the FSCA that the applicant complies with the prescribed fit and proper requirements. Broadly speaking, the FSCA acknowledges that foreign financial service providers may be subject to similar regulation and supervision by regulators in their home jurisdictions. Accordingly, provided the licensing requirements of the foreign regulator are at a standard acceptable to the FSCA, foreign financial service providers and their compliance officers may be able to obtain exemptions from compliance with some local fit and proper and auditing requirements prescribed in terms of the Financial Advisory and Intermediary Services Act. The FSCA has, in practice, required that a company operating as a financial advisor or intermediary to customers in South Africa be registered as an external company in South Africa.

Collective investment schemes – The manager or operator of a foreign investment fund must apply to the Registrar of Collective Investment Schemes, which is a functionary of the FSCA, for the registration of the particular investment fund and each relevant portfolio as a collective investment scheme in terms of the Collective Investment Schemes Control Act prior to soliciting investments in any such fund from members of the public in South Africa. The foreign investment fund must comply with the following requirements to be registered:

The investment fund must be registered and supervised in a jurisdiction that is acceptable to the FSCA.

The operator of the investment fund must be subject to at least the same standard of regulation and supervision as South African collective investment schemes.

The operator must either: (a) enter into a representative agreement with a South African collective investment scheme manager that is authorized in terms of the Collective Investment Schemes Control Act; or (b) establish and maintain a representative office in South Africa (which must be a company incorporated under the Companies Act, 2008).

The operator must satisfy certain requirements by the Registrar, including the liquidity of the investment fund and that the assets of investors are properly protected by the principle of segregation and identification.

# 5. What are the requirements to obtain authorization in your jurisdiction?

## What are the requirements to obtain authorization in your jurisdiction?

The primary legislation applying to each of the different types of financial institutions and financial services providers generally sets out the specific requirements that an applicant for a specific financial sector license must satisfy. Broadly speaking, the following requirements must be met to the satisfaction of the sector-specific authority:

Fit and proper – The applicant must provide the FSCA with information evidencing that the fit and proper requirements have been satisfied in respect of the personal character, competence, operational ability and financial soundness of the individual applying for a license or key individuals or management of a legal entity applying for a license. The individual requirements will, however, vary according to the type of license sought by the applicant.

Assets and resources – The applicant must implement an effective and reliable infrastructure and have adequate assets and resources within South Africa to ensure that it will comply with the requirements of financial sector laws in relation to the license. Relevant resources include financial, management and human resources with appropriate experience to perform its licensed function.

Governance arrangements – Governance arrangements must, inter alia, be clear and transparent, promote the safety and efficiency of the financial market infrastructure, and support the stability of the broader financial system, while taking into account relevant public interest considerations and the objectives of relevant stakeholders.

Surveillance, supervision and monitoring – The applicant must demonstrate arrangements for the efficient and effective surveillance, supervision and monitoring of all transactions, authorized users and general compliance. The nature and scope of surveillance, supervision and monitoring arrangements that an applicant must demonstrate will depend on the specific activity that is the subject of the license application. The applicant must demonstrate that it will be able to comply with the surveillance, supervision and monitoring obligations prescribed in terms of the specific legislation applicable to authorized entities in the relevant sub-sector.

Risk management – The applicant must implement arrangements to efficiently and effectively monitor and manage the material risks associated with the relevant activity.

Record keeping and reporting – The applicant must demonstrate that it has arranged for efficient and effective security and back-up procedures to ensure the integrity of the records of transactions.

Prudential requirements and/or liability insurance – The applicant must comply with the minimum capital requirements or comply with the prescribed insurance, a guarantee, compensation fund or other warranty requirements, which are prescribed for the particular sub-sector under sector-specific legislation.

Public interest – The relevant authority must consider whether issuing the license to the applicant would be contrary to the interests of financial customers, the financial sector or the public.

In terms of the FAIS Act and the Determination of Fit and Proper Requirements, financial services providers, key individuals and representatives of the provider must comply with the prescribed "fit and proper requirements." The Determination of Fit and Proper Requirements sets out the honesty, integrity and good standing; competency; operational ability; and financial soundness requirements for all financial services providers, key individuals and representatives. Individuals exercising oversight over the rendering of financial services by a financial services provider authorized under the FAIS Act (referred to as “key individuals”) or who represent the authorized financial services provider in rendering financial services to clients (referred to as “representatives”) must complete certain regulatory examinations prescribed under the Determination of Fit and Proper Requirements.

# 6. What is the process for becoming authorized in your jurisdiction?

## What is the process for becoming authorized in your jurisdiction?

The licensing process for the various financial sector activities is currently prescribed under the various sector-specific statutes and subordinate legislation. The application process involves, inter alia, the completion of required sector-specific application forms, the submission of supporting information and documents evidencing compliance with the requirements referred to under question 5 generally and as set out in the specific financial sector legislation, and in the case of financial services providers, the completion of regulatory examinations prescribed by the FSCA.

The various sector-specific application forms, together with explanatory notes, may be obtained from the respective official websites of the primary regulators:

The Prudential Authority: www.resbank.co.za/PrudentialAuthority/Pages/default.aspx

The FSCA: www.fsca.co.za

The National Credit Regulator: www.ncr.org.za

The Payments Association of South Africa: [http://www.pasa.org.za](http://www.pasa.org.za/)

Financial Intelligence Centre: https://www.fic.gov.za/

In the event that the proposed financial sector activity does not fall within the scope of any sector-specific legislation, the entity is required to submit an application in terms of the Financial Sector Regulation Act and in accordance with standards to be published in terms thereof.

# 7. What financial services passporting arrangements does your jurisdiction have with other jurisdiction?

## What financial services passporting arrangements does your jurisdiction have with other jurisdiction?

South Africa does not have a financial services passporting regime.

# 8. Authors and contact information

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