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THE ARRIVAL OF THE FINANCIAL SECTOR CONDUCT AUTHORITY

In a recent letter to stakeholders, Mr Abel Sithole, in his capacity as Commissioner of the newly established Financial Sector Conduct Authority ("FSCA"), announced that the Financial Services Board ("FSB") had been "transformed" into the FSCA as of 1 April 2018.

SUMMARY

As of 1 April 2018, the FSB transforms into the FSCA.

Both the FSCA and the Prudential Authority have been formally established.

The FSCA's mandate is to ensure improved market conduct outcomes and it has an impressive regulatory toolkit to ensure this.

The FSCA Executive Committee will be made up of a Commissioner and Deputy Commissioners and this appointment process will begin soon. In the meantime, the FSCA will be managed by a Transitional Committee.

There will not be a "big bang" approach to the implementation of the FSCA's mandate. The FSCA will make gradual changes over the current year.

The FSCA's new website is live: www.fsca.co.za.

The Financial Services Tribunal is established.

The FSCA will publish, before 30 September 2018, their regulatory strategy.

Memoranda of understanding will be published, before 30 September 2018, between the various Authorities as to how to co-ordinate activities.

TWIN PEAKS AND THE FSCA: A REMINDER

Mr Sithole announced that the transformation from the FSB to the FSCA marks the formal implementation of the Twin Peaks model of financial sector regulation.

Readers will remember that the Financial Sector Regulation Act ("FSR Act") is now law. The FSR Act introduces the Twin Peaks regulatory and supervisory framework for Financial Institutions (which are product and service providers and persons licensed under Financial Sector Laws – such as retirement funds and administrators). The FSR Act takes precedence over other Financial Sector Laws and has different effective dates for its various sections, that is, not all the sections come into operation at the same time.

The FSR Act creates a number of new authorities (including the FSCA and the Prudential Authority), one of which is the FSCA. The FSCA is the market conduct regulator and it promotes, amongst other things, the fair treatment of customers. The FSCA regulates funds and administrators and is intended to be outcomes focused and to take a risk-based approach to supervision. The Prudential Authority is a juristic entity that sits within the South African Reserve Bank and exists to promote the safety and soundness of institutions it supervises.

Mr Sithole, in his letter, stated that the Minister of Finance had signed the Commencement Notice for the FSR Act which formally established both the FSCA and the Prudential Authority.

WHAT DOES THE FSCA DO?

The letter reminds stakeholders of the FSCA's mandate to ensure improved market conduct outcomes and that its objectives are to:

- protect financial customers by promoting their fair treatment by Financial Institutions (such as funds and administrators), providing financial education programs and promoting financial literacy;
- enhance and support the efficiency and integrity of financial markets; and
- assist in maintaining financial stability.

The letter goes on to state that, importantly, the FSCA is also required to support overall policy objectives of financial inclusion and transformation of the financial sector.

AN IMPRESSIVE REGULATORY TOOLKIT

The FSCA goes on to remind stakeholders of its impressive and extensive regulatory toolkit that ensures its ability to meet its objectives. This includes those powers it currently has in existing financial sector laws (which currently remain in force) plus its new powers under the FSR Act.

Under the FSR Act the FSCA has new powers which include the issuing of conduct standards that apply to institutions or representatives. These conduct standards deal with the fair treatment of customers, including disclosure of information, product design, marketing and complaints management.

The FSR Act also contains information gathering, on-site inspection and investigation powers which are intrusive and comprehensive in nature.

In addition to this, the FSR Act establishes enforcement powers that include Guidance Notices (non-binding interpretations), Interpretation Rulings (statements to provide clarity, consistency and certainty on the law), Directives (which require institutions or key persons to perform an action), the power to require Enforceable Undertakings to the FSCA from a person, the power to institute court proceedings, debarment orders and the power to enter into leniency agreements with persons who co-operate with an investigation. In addition to this the FSCA has the power to licence or refuse a license and to levy administrative penalties.

The letter also goes on to provide that “[t]hese powers are balanced by strict accountability measures and an obligation for us [FSCA] to monitor our progress in delivering fair outcomes for customers”.

THE FSCA LEADERSHIP

The Executive Committee of the FSCA will be made up of a Commissioner and Deputy Commissioners. We know that there may be between two and four Deputy Commissioners and the letter does not state exactly how many Deputies there will be. Mr Sithole stated that he expects that this appointment process will begin soon. The Regulations that govern these appointments set out a fairly exhaustive process, so we expect this process to take some time. The process begins with advertisements on the National Treasury website for the posts. In the meantime, the Finance Minister has determined that the FSCA will be managed by a Transitional Committee.

The Transitional Committee is made up of:

- The members of the former FSB Executive Committee (Adv D Tshidi, Mr J Dixon, Mr P Kekana, Mr J Boyd, Mr M Du Toit and Ms C Da Silva);
- Mr Abel Sithole (Chairperson of former FSB Board); and
- Ms Katherine Gibson (National Treasury appointee).

As of 1 April 2018, and during the interim period, this Transitional Committee will perform the functions of the FSCA Executive Committee and Mr Sithole will perform the functions of the FSCA Commissioner, on a caretaker basis. These Transitional Committee members will stay on in an advisory capacity for three months after the Commissioner has been appointed, to ensure a smooth transition.

NO “BIG BANG” ON 1 APRIL 2018

Mr Sithole stated that there will not be a “big bang” approach to the implementation of the FSCA's mandate. The FSCA will make gradual changes over the current year as the various sections of the FSR Act come into effect. He stated that interactions between Financial Institutions and the FSCA should largely be business-as-usual in the short-term. He then announced a few immediate changes, which are:

- The above-mentioned transitional management changes;
- All communications, regulatory actions and decisions are in the name of the FSCA, using new branding and e-mail addresses;
- The FSCA's new website is live: www.fsca.co.za. It contains the information from the old FSB website; and
- The Financial Services Tribunal is established. The letter states that any entity aggrieved by a FSCA decision can approach the Tribunal to request reconsideration of the decision. The Regulations require that the Chairperson of the Tribunal makes Tribunal rules in accordance with the FSR Act. Until the Chairperson has made these rules, the rules and other practices designated by the Chairperson of the Appeal Board and the Board or Review will apply, if the FSR Act does not specify the procedure. The current members of the FSB Appeal Board, the Board of Review and the FIC Appeal Board have been appointed to constitute the Tribunal. Members are appointed on a three year basis. Judge Yvonne Mokgoro (a retired judge) serves as the Chairperson of the Tribunal and Judge Louis Harms (a retired judge) as the Deputy Chairperson of the Tribunal.

FURTHER CHANGES THIS YEAR

The FSCA are planning the following changes:

- New functional organisational design;
- Up-skilling of current staff and recruitment of new skill and expertise (including better analytical, technical and research capability);
- The publication, before 30 September 2018, of the regulatory strategy, including strategic focus for the next three years, for example financial inclusion, Fintech* and more proactive, intrusive and judgement-based supervisory approach. This will also provide more information relating to the FSCA's new responsibilities (i.e. responsibilities that the FSB did not have) for example, banking activities, payment service providers** and some aspect of credit provision;
- The publication of memoranda of understanding, before 30 September 2018, between the FSCA, the Prudential Authority, the Reserve Bank and the National Credit Regulator as to how to co-ordinate activities. Interim co-ordination agreements are already in place between these Authorities. It is noteworthy that if the Authorities can achieve meaningful and practical co-operation (and not just co-operation on paper) this will greatly enhance their supervisory effectiveness; and
- Ongoing communication and engagement regarding their new mandate and powers.

A separate publication will be issued dealing with information about the Prudential Authority.

** “Fintech” refers to computer programmes and other technology used to support or enable banking and financial services. For example, robo-advisers.*

*** “Payment service providers” refer to those service providers who provide a service to facilitate payments either to or from a Financial Customer.*