

FINANCIAL SECTOR REGULATION ACT, 9 OF 2017

OMBUD COUNCIL RULES FOR THE OMBUD FOR FINANCIAL SERVICES PROVIDERS, 2024

STATEMENT OF NEED, INTENDED OPERATION and EXPECTED IMPACT

Date of publication: 1 July 2024

1. BACKGROUND AND PURPOSE.

- 1.1.** This Statement accompanies the Ombud Council Rules for the Ombud for Financial Services Providers (the Rules) proposed by the Ombud Council under sections 201(1) and (2) read with sections 201(6) and 301(2) of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017) (FSR Act). The Statement is published in accordance with section 103(1)(a) of the FSR Act and provides context to the making of the Rules and the need for, expected impact of, and intended operation of the Rules.
- 1.2.** The Ombud for Financial Services Providers (FAIS Ombud) is established by section 20 of the Financial Advisory and Intermediary Services Act, 37 of 2002 (FAIS Act), with the objective to consider and dispose of complaints relating to financial services providers and their representatives in a procedurally fair, informal, economical, and expeditious manner.
- 1.3.** In terms of section 20A of the FAIS Act, read with the definition of "statutory ombud scheme" in the FSR Act, the FAIS Ombud is a statutory ombud scheme for purposes of the FSR Act.
- 1.4.** Section 26 of the FAIS Act empowers the Financial Sector Conduct Authority (FSCA), being the successor to the former Financial Services Board, to make rules on various matters regarding the proceedings of the FAIS Ombud. A set of such Rules, titled the *Rules on Proceedings of the Office of the Ombud for Financial Services Providers, 2003* was published under Board Notice 81 in Government Gazette 25299 of 8 August 2003; and amended by Board Notice 100 under Government Gazette 26844 of 29 September 2004 ("previous FAIS Ombud Rules").
- 1.5.** Section 301(2) of the FSR Act was subsequently promulgated and provides that Rules made under section 26 of the FAIS Act that were in force immediately before section 301(2) came into effect, have effect as Ombud Council Rules, and may be amended or revoked by Ombud Council Rules in accordance with the FSR Act.
- 1.6.** As explained in more detail in section 2 below, the Ombud Council's rule-making powers are contained in section 201 of the FSR Act, read with sections 97 to 104 of that Act.
- 1.7.** For reasons set out in paragraph 3.2.2 below, a need was identified to amend a provision of the previous FAIS Ombud Rules, by increasing the maximum compensation amount the

FAIS Ombud may award in accordance with Rule 4 of the previous FAIS Ombud Rules.

- 1.8.** The FSCA published a draft Amendment Notice on 6 July 2022, in accordance with section 26 of the FAIS Act, and received public comment during August 2022.
- 1.9.** However, after subsequent engagement between the FSCA and the Ombud Council, the FSCA's power to make rules under this section was reconsidered, considering the rule-making powers and statutory objective of the Ombud Council.
- 1.10.** The Ombud Council's statutory objective as per section 176 of the FSR Act is to assist in ensuring that financial customers have access to, and are able to use, affordable, effective, independent, and fair alternative dispute resolution processes for complaints about financial institutions in relation to financial products, financial services, and services provided by market infrastructures. The Ombud Council has, amongst other powers, been afforded powers to make rules for ombuds and ombud schemes aimed at ensuring this objective is met. (See more detail in section 2). The Ombud Council also has statutory functions to monitor and enforce compliance by ombud schemes with the FSR Act and specific financial sector laws, such as the FAIS Act, in so far as they relate to ombud schemes.
- 1.11.** The Ombud Council and the FSCA came to the joint conclusion that it is more appropriate for the Ombud Council to take responsibility for the scope and content of the FAIS Ombud Rules, as Ombud Council Rules.
- 1.12.** The Ombud Council will therefore make new Ombud Council Rules for the Ombud for Financial Services Providers ("the new Ombud Council Rules"), to revoke and replace the previous FAIS Ombud Rules made under section 26 of the FAIS Act.
- 1.13.** As set out in more detail in section 3, the new Ombud Council Rules propose to give effect to the compensation limit increase previously consulted on by the FSCA, as referred to in paragraph 1.8 above. However, they also propose several other changes to the previous FAIS Ombud Rules, aimed at removing outdated references and clarifying certain procedural and jurisdictional matters.

2. PROCESS FOLLOWED IN MAKING THE NEW OMBUD COUNCIL RULES.

- 2.1.** Section 201(1) of the FSR Act empowers the Ombud Council to make rules for or in respect of ombud schemes, aimed at ensuring that the Council's statutory objective set out in paragraph 1.9 above is met.
- 2.2.** As noted above, section 301(2) of the FSR Act provides that Rules made under section 26 of the FAIS Act that were in force immediately before section 301(2) came into effect, have effect as Ombud Council Rules, and may be amended or revoked by Ombud Council Rules in accordance with the FSR Act.
- 2.3.** Paragraph (d) of the definition of "regulatory instrument" in the FSR Act confirms that Ombud Council Rules are regulatory instruments as contemplated in the FSR Act.
- 2.4.** In terms of the process set out in section 98(1)(a) of the FSR Act, a regulatory instrument must not be made unless the maker (in this case the Ombud Council) has published –
 - (i) a draft of the regulatory instrument;
 - (ii) a statement explaining the need for and intended operation of the regulatory instrument;
 - (iii) a statement of the expected impact of the regulatory instrument; and
 - (iv) a notice inviting submissions in relation to the regulatory instrument and stating

where, how and by when submissions are to be made.

- 2.5.** The Ombud Council duly published a Notice inviting submissions on draft Ombud Council Rules for the Ombud for Financial Services Providers, 2023, in accordance with subsections 98(1)(a)(i) and (iv) of the FSR Act, on 4 September 2023, with the comment period open to 16 October 2023.
- 2.6.** The Ombud Council has also published a separate Consultation Report setting out the issues raised in the submissions received, and our responses to them, as required by sections 103(1)(b) and 104(2) of the FSR Act.
- 2.7.** Section 3 of this document sets out the need for, intended operation and expected impact of the proposed new Ombud Council Rules, as required by subsections 98(1)(a)(ii) and (iii) of the FSR Act. As explained in the Consultation Report, changes have been made to the proposed Rules as compared to the draft Rules published for comment on 4 September 2023. Section 3 therefore deals with the updated version of the Rules.
- 2.8.** On 4 March 2024, the Ombud Council submitted an updated version of the draft Ombud Council Rules, together with this statement of need, intended operation, and expected impact and a Consultation Report to the National Treasury to facilitate submission to Parliament in terms of Section 103(1) of the FSR Act, for a period of 30 days while Parliament was in session. The documents appeared on Parliament's Announcements, Tablings and Committee Reports on 10 April 2024. No inputs were received from Parliament. The Parliamentary process was completed when the 30-day period elapsed on 14 May 2024.

3. STATEMENT OF NEED FOR, INTENDED OPERATION AND EXPECTED IMPACT OF THE PROPOSED NEW OMBUD COUNCIL RULES.

3.1. General considerations.

3.1.1. Overall need for and intended operation of the new Ombud Council Rules.

Generally, the purpose of the new Ombud Council Rules is the same as that of the previous FAIS Ombud Rules made under section 26 of the FAIS Act: To provide for practical procedural matters regarding the operation of the office of the FAIS Ombud, as contemplated in Part I of Chapter VI of the FAIS Act. These matters include but are not limited to matters provided for in section 26(1) of that Act being, in summary:

- types of complaints and complainants dealt with by the FAIS Ombud
- rights of complainants in connection with complaints
- rights and duties of financial service providers or representatives on receipt of complaints
- circumstances under which the FAIS Ombud may summarily dismiss complaints
- setting of time limits by the FAIS Ombud
- liaison between the FAIS Ombud and the FSCA.

The proposed new Ombud Council Rules retain the substance of the previous Rules. However, the revocation of the previous Rules presents an opportunity for necessary updates to outdated terminology used in the previous Rules; refinement of aspects of the FAIS Ombud's jurisdiction; and process improvements based on the FAIS Ombud's practical experience.

In addition to the specific provisions discussed in paragraph 3.2 below, the new Ombud Council Rules differ from the previous Rules in the following respects:

- Outdated references to the "Board", being the former Financial Services Board,

are replaced with references to the "Authority", being the Financial Sector Conduct Authority (FSCA), which replaced the Financial Services Board with the promulgation of the FSR Act.

- Definitions of and appropriate cross-references to the FSR Act are provided for, and certain terminology is updated to align with terminology used in the FSR Act.
- References to "the Office" of the FAIS Ombud, as distinct from the FAIS Ombud, are no longer used. These references are deemed superfluous as the FAIS Act provides that the functions of the Office are performed by the Ombud. The FSR Act also does not make this distinction.
- The sequence of provisions of the Rules has been changed to group provisions more logically and improve the flow of the Rules.
- Certain provisions dealing with matters that are dealt with in the FAIS Act itself or in the FSR Act have not been retained as they are superfluous.

Aside from the operation of specific provisions as set out in paragraph 3.2 below, the general intended operation of the new Ombud Council Rules is similar to that of the previous Rules.

The new Ombud Council Rules will come into operation on the date of final publication on the Ombud Council's website, after completion of all prescribed consultation processes under the FSR Act. As the Rules do not impose any new obligations on financial services providers or other stakeholders, and do not materially change the FAIS Ombud's administrative processes, no transition period is necessary.

3.1.2. General expected impact of the new Ombud Council Rules.

Other than to the extent highlighted in paragraph 3.2, the new Ombud Council Rules do not entail any material changes in the FAIS Ombud's complaint handling processes, and do not impose any new obligations on financial services providers or representatives.

3.2. Specific provisions of the new Ombud Council Rules.

3.2.1. Rule 4(1)(a) - complaints within jurisdiction.

Need for and intended operation of the provision.

The FSR Act provides that the Ombud Council may make rules on the definition and type of complaints to be dealt with by specified ombud schemes (section 201(2)(d)); and that the Ombud Council may designate ombud schemes to deal with types of complaints in various circumstances. Subsections 4(1)(a)(ii) and (iii) of this Rule are therefore necessary to enable the FAIS Ombud to deal with complaints in terms of such Ombud Council rules or designations, should they be made. The provision will apply in circumstances where the Ombud Council uses the rule-making or designation powers concerned.

Expected impact of the provision.

The provision supports the Ombud Council's ability to ensure flexibility of the ombud system to address jurisdictional gaps through the Ombud Council's rule-making and designation powers. The Ombud Council would need to ensure that the FAIS Ombud has the necessary capacity to deal with any jurisdictional changes introduced by such rules or designations, before making them.

3.2.2. Rule 4(1)(e) - compensation limit increase.

Need for and intended operation of the provision.

This Rule increases the amount of compensation the FAIS Ombud may award for a

particular kind of financial prejudice or damage from the maximum of R800,000.00 in the previous Rules, to a maximum of R3,500,000.00.

The Ombud Council has considered the motivation for increasing the maximum provided by the FSCA in FSCA Communication 20 of 2022 (FAIS), published by the FSCA on 6 July 2022. The Ombud Council agrees with and supports the FSCA's motivation.

In particular, the Ombud Council agrees with the FSCA's statement that the proposed limit of R3,500,000.00 is appropriate when "considering factors such as the market realities of consumers' risk exposure and the fact that a very low financial limit for awards to complainants jeopardises the restitution outcome of determinations".

The Ombud Council is also in agreement with the recommendation made by the World Bank Group in its Diagnostic study titled *South Africa – Financial Ombud System Diagnostic*¹ (the World Bank Diagnostic study) in relation to the FAIS Ombud compensation limit. Recommendation B6 of the Diagnostic study was that the maximum compensation limit for the FAIS Ombud, which was set in 2004 at R 800,000.00 should be speedily reviewed. The World Bank Group highlighted that, indexed to the South African Consumer Price Index, that would have been equivalent to well in excess of R2 million in 2020; and that many stakeholders had raised the fact that the limit applicable to the FAIS Ombud is notably low.

At the time the proposed Rules were published for comment, the Ombud Council had oversight over seven financial sector ombud schemes. Aside from the FAIS Ombud, two other schemes, the Ombudsman for Banking Services and the Ombudsman for Short-term Insurance, had maximum monetary compensation limits. The remaining four schemes, the Pension Funds Adjudicator, Credit Ombud, JSE Ombud Scheme and Ombudsman for Long-term Insurance, had no maxima.

Some of these limits have subsequently been increased. In addition, four of the above ombud schemes, being the schemes for Banking, Credit, Short-term Insurance and Long-term Insurance, have subsequently amalgamated to form a new scheme, the National Financial Ombud Scheme South Africa (NFO). The Ombud Council has granted the NFO recognition as an industry ombud scheme under the FSR Act effective 1 March 2024. The NFO continues the jurisdiction of each of the four predecessor schemes, through four separate divisions of the NFO. Under this structure, the Banking Division has a maximum compensation limit of R5 million; the Credit Division now also has a maximum limit of R5 million; the Non-Life (Short-term) Insurance Division's limits are R10 million for buildings insurance and R5 million for other insurance; while the Life (Long-term) Insurance Division's compensation amounts remain uncapped.

The FAIS Ombud's current limit of R800 000.00 is clearly significantly out of line. This misalignment creates the further anomaly that where a complaint relates to the financial product concerned a complainant is potentially eligible for compensation significantly in excess of the maximum compensation available where the complaint relates to advice or intermediary services in relation to the same product.

The increased limit is therefore necessary to ensure that the monetary compensation the FAIS Ombud is empowered to award:

- Takes account of changes in the value of money and market realities since the compensation limit was first set two decades ago.
- Is somewhat more consistent with the compensation levels available from other financial sector ombud schemes.

¹ The Diagnostic study was commissioned by the National Treasury and the FSCA to provide an independent review of South Africa's financial ombud system and recommended wide-ranging reforms to enhance the effectiveness of the ombud system and financial customer protection. The study was published in June 2021 and is available on the Ombud Council's website at www.ombudcouncil.org.za.

- Does not compromise the effectiveness of the ombud system by inappropriately restricting financial customers' access to affordable, effective, independent, and fair alternative dispute resolution for complaints against financial services providers and representatives, leaving them to have to resort to formal litigation to seek redress.

Expected impact of the provision.

The increased compensation limit is expected to ensure that financial customers with complaints that are within the FAIS Ombud's jurisdiction will be eligible for compensation at more appropriate levels than the current outdated and unduly restrictive R800 000.00 level.

The FAIS Ombud is already empowered to deal with complaints involving amounts higher than R800 000.00 if the complainant abandons the amount in excess of the limit or if the respondent agrees to the limit being exceeded. The limit increase will therefore not necessarily significantly increase the number of complaints submitted to the FAIS Ombud but will reduce the number of cases where the FAIS Ombud is unable to order fair compensation.

To the extent that the amendment may result in an increase in complaint volumes, the Ombud Council believes this would be indicative of the relevance and need for the change.

This impact is consistent with the Ombud Council's statutory objective to ensure that financial customers have access to affordable, effective, independent, and fair alternative dispute resolution processes and its function to take steps to facilitate access by financial customers to appropriate ombuds (sections 176 and 177(e) of the FSR Act).

The change in the maximum compensation limit does not entail any procedural changes to the complaint handling processes of the FAIS Ombud or those of financial services providers.

Summary of and response to previous FSCA consultation process on compensation limit increase.

The FSCA has shared the comments received through its previous consultation process, referred to in paragraph 1.8, with the Ombud Council. Four commentators made submissions to the FSCA on the draft amendment. Having considered these submissions and the FSCA's views on the comments, the Ombud Council's view is as follows:

Most submissions queried the basis on which the proposed new compensation limit of R3,500,000.00 had been calculated, pointing out that it was in excess of the inflation rate over the period. Some commentators proposed that the increase should be limited to an inflationary increase. As explained in paragraph 3.2.2 above under *Need for and intended operation of the provision*, inflation was not the only factor considered in proposing the revised limit. Other factors include market realities faced by consumers – which would include their exposure to financial risk – and misalignment with the compensation approach of other ombud schemes.

A concern was also raised that the limit increase would lead to an increase in the volume of complaints submitted to the FAIS Ombud. In this regard, see our view above under *Expected impact of the provision*. We also point out that the Ombud Council would expect responsible financial services providers to welcome the opportunity to have disputes resolved through an ombud scheme, with the option of applying to the Financial Services Tribunal for reconsideration of the Ombud's decision, rather than facing the prospect of litigation.

One commentator suggested that a percentage of the complaint amount be paid by the

complainant before a complaint will be accepted. This proposal is inconsistent with the Ombud Council's strong view, shared by the World Bank Group in the Diagnostic study recommendations, that access to ombud schemes should be free to eligible complainants.

Commentators did not raise any other significant issues in their submissions to the FSCA.

The Ombud Council therefore did not believe that the submissions to the FSCA warranted any change in the proposed revised compensation limit of R3 500 000.00 and retained this proposed limit in the version of the Rules published for comment.

As explained in the Consultation Report, no objections and no further substantive comments have been received regarding the compensation limit, other than some commentators expressing their explicit support for the new limit. The proposed revised compensation limit of R3 500 000.00 is therefore proposed to be retained in the final published Rules.

3.2.3. Rule 4(1)(g) and Rule 10(2) - complaints related to persons not authorised as financial services providers.

Need for and intended operation of the provision.

Section 26(1)(a)(iii) of the FAIS Act provides that FAIS Ombud Rules may be made in respect of the type of complaint justiciable by the Ombud, "including a complaint relating to a financial service rendered by a person not authorised as a financial services provider or a person acting on behalf of such first-mentioned person". Rule 4(d) of the previous Rules in turn provides that the Ombud may entertain "a complaint relating to a financial service rendered by a person not authorised as a financial services provider or by a person acting on behalf of such a person." The effect of this provision was to grant the FAIS Ombud jurisdiction to deal with complaints where advice or intermediary services were provided by persons illegally operating without the requisite FAIS authorisation, in contravention of the FAIS Act.

This has proven problematic in practice. Ombud schemes are typically not capacitated to conduct the level of investigation required to determine the extent and impact of this type of unauthorised conduct, nor do they have the necessary powers or capacity to secure cooperation of unauthorised respondents. This has also been the FAIS Ombud's experience. Predictably, such illegal operators usually refuse to cooperate with the FAIS Ombud's efforts to resolve such complaints. In practice, on receipt of such a complaint, the FAIS Ombud has therefore been able to do little more than refer the matter to the FSCA for enforcement action and pass such information as the Ombud has managed to ascertain over to the FSCA, which has the necessary enforcement and investigative capacity.

The FSCA rightly emphasises the importance of dealing with FAIS-authorised financial services providers and intermediaries in its consumer education messaging. One of the benefits of doing so is to grant financial customers access to the dispute resolution services of the FAIS Ombud. In the case of unauthorised conduct, the FAIS Ombud is not in a position to provide comparable recourse to affected consumers.

The new Ombud Council Rules therefore introduce a different approach. Rule 4(1)(g) provides that for a complaint to be considered by the FAIS Ombud it must relate directly or indirectly to a financial service rendered by a person authorised as a financial services provider or by a person on their behalf. Rule 10(2) obliges the Ombud to refer complaints relating to such unauthorised business, including relevant supporting information, to the FSCA to consider appropriate action, and to advise the complainant of the referral.

These new Rules more accurately align to the nature of the action the FAIS Ombud is in practice able to take, and currently does take, on receipt of a complaint involving

unauthorised business - namely to refer the complaint to the FSCA for investigation and potential enforcement action. The Rule also makes such referral a positive obligation of the Ombud.

Expected impact of the provision.

This approach does not change the current practical role of the FAIS Ombud in relation to complaints about unauthorised conduct. It mitigates the risk of raising unrealistic expectations and false hope of financial customers that the FAIS Ombud can secure compensation for damages they may have incurred due to illegal conduct, which is typically not achievable. It also alleviates the burden on the FAIS Ombud's office of using resources to attempt to address complaints which are unlikely to be resolved by the office.

3.2.4. Rule 4(1)(c) - attempted resolution with respondent.

Need for and intended operation of the provision.

This Rule largely retains the previous requirement that the complainant must endeavour to resolve the complaint with the respondent, and that the respondent must have failed to address the complaint satisfactorily within six weeks, before the FAIS Ombud will deal with the complaint. However, the further previous requirement that the complainant must produce the final response (if any) of the respondent together with their reasons for disagreeing with the response, as a strict prerequisite for having their complaint dealt with, has not been retained. This requirement is unduly restrictive on complainants and has been replaced with more flexible provisions.

Rule 4(1)(c) must be read with Rule 5(2), which requires the Ombud to advise the complainant that they must, where necessary, provide available documentation including correspondence with the respondent; and that they are subsequently entitled to submit further information and must do so if requested by the Ombud. In addition, Rule 6(3)(c) requires the respondent to disclose relevant information or documentation to the Ombud, where the Ombud deems this necessary.

These provisions will enable the FAIS Ombud to adopt a relatively more flexible approach to resolving complaints, while retaining the requirement that the complainant first seek resolution directly with the respondent; and still enabling the Ombud to have access to the respondent's response, either from the complainant or the respondent. This is consistent with the Ombud Council's FSR Act function to take steps to facilitate access by financial customers to appropriate ombuds (section 177(1)(e) of the FSR Act).

Expected impact of the provision.

The revised more flexible approach removes a potential obstacle to customers having their complaints resolved. It does not impose any new requirement on financial service providers.

3.2.5. Rule 5(1) - oral complaints.

Need for and intended operation of the provision.

The previous Rules allow the FAIS Ombud to receive non-written complaints in any manner which conveys the complaint in comprehensible form, but only "in circumstances deemed appropriate". The low levels of literacy in South Africa, particularly among the most vulnerable financial customers, mean that a requirement for complaints to be submitted in writing could render ombud schemes inaccessible to these complainants. For this reason,

the World Bank Diagnostic study² recommended that a standard definition of "complaint" should apply to all financial institutions and ombud schemes and should include an oral expression of dissatisfaction and not require a complaint to be in writing (Recommendation A1 of the Diagnostic study). The Ombud Council supports this recommendation. The definition of "complaint" proposed in the Draft Conduct of Financial Institutions (COFI) Bill, which is expected to apply to complaints dealt with by all financial institutions and ombud schemes, also proposes the inclusion of oral complaints.

Rule 5(1) therefore makes it a requirement, rather than dependent on circumstances, for the FAIS Ombud to receive non-written complaints that reasonably convey the complaint in comprehensible form, explicitly including oral complaints.

The provision is in line with the Ombud Council's function to take steps to facilitate access by financial customers to appropriate ombuds (section 177(1)(e) of the FSR Act).

Expected impact of the provision.

The FAIS Ombud has confirmed to the Ombud Council that it already accepts oral (telephonic) complaints as part of its standard processes. No immediate change in processes is therefore envisaged, although the Ombud may in due course need to refine its administrative processes to appropriately ensure transcription, recordal and where necessary translation of such complaints in a structured manner. The provision does not impose any new requirement on financial service providers.³

3.2.6. Rule 6(1) - respondent timelines.

Need for and intended operation of the provision.

The previous FAIS Ombud Rules provide that a respondent must acknowledge receipt of a complaint as soon as reasonably possible after receipt, where the complaint "cannot within three weeks be addressed by the respondent"; and also, that if the respondent has still not been able to resolve the complaint within six weeks of receipt, the respondent must advise the complainant that they may approach the FAIS Ombud.

This process is unnecessarily complicated and rigid and will be simplified in the new Ombud Council Rules. New Rule 6(1) will still require the respondent to acknowledge a complaint as soon as reasonably possible but will not stipulate that this only applies after three weeks. The requirement to advise the complainant within six weeks that they may approach the FAIS Ombud is however retained.

Expected impact of the provision.

The provision allows for greater flexibility in relation to acknowledgment of complaints by respondents rather than a "one size fits all" timeline, while still ensuring that such acknowledgment is required, and that the complainant is advised within six weeks of the option to approach the FAIS Ombud where a complaint remains unresolved.

3.2.7. Rule 7 - dismissal and summary dismissal of complaints.

Need for and intended operation of the provision.

Rule 7 of the previous Rules is titled "Summary dismissal of complaints" and sets out the circumstances in which the FAIS Ombud may dismiss a complaint without referral to another

² See Footnote 1

³ When the above-mentioned COFI Bill comes into operation, it is expected that financial institutions will similarly be required to deal with oral complaints.

party. In practice, the Ombud may become aware of several of these circumstances at a later stage once investigation of the complaint has already commenced. The title of the corresponding Rule 7 in the new Ombud Council Rules has therefore been updated to refer to "Dismissal of complaints" and provision for dismissal at any stage (on the same grounds as would have warranted summary dismissal) has been provided for in new Rules 7(3) and 7(4).

Rule 7(2) now also describes summary dismissal as including dismissal of a complaint "without consideration of its merits". This change is to align the wording of the Rule with that of the enabling provision in section 26(1)(a)(vii) of the FAIS Act. Rule 7(5) also now requires the Ombud to provide reasons for a decision to dismiss a complaint, in line with current practice.

The provision will ensure greater alignment with the enabling provisions of the FAIS Act and confirm the stages at which the FAIS Ombud can dismiss complaints on the stated grounds. It should also be noted that persons aggrieved by the Ombud's decision to dismiss a complaint have access to the mechanism for reconsideration of the complaint in accordance with Chapter 15 of the FSR Act.

Expected impact of the provision.

The provision confirms current practices and does not create new obligations or require a change in processes.

3.2.8. Rule 8(3) and Rule 10(1) - consequences of failure to cooperate with Ombud.

Need for and intended operation of the provision.

Rule 8(3) has been expanded from the previous position, in order to grant the Ombud discretion to dispose of a complaint on available facts and information not only where a party to a complaint fails to respond timeously (as per the previous Rules), but also where they otherwise fail to comply with the Rules. This is necessary to allow the Ombud more flexibility to resolve complaints, where appropriate, despite a lack of cooperation from one of the parties.

Rule 10(1) is a new provision requiring the FAIS Ombud to advise the FSCA of material contraventions of the Rules, or persistent or material failure to cooperate with the Ombud by a financial services provider or representative. Such conduct is inconsistent with a financial adviser or representative's general obligation under the General Code of Conduct for Authorised Financial Services Providers and Representatives, made under the FAIS Act, to render financial services honestly, fairly, with due skill, care, and diligence, and in the interests of clients (section 2 of the General Code). It is also inconsistent with their specific obligations under Chapter XI of the General Code regarding complaint management and engagement with the FAIS Ombud. Reporting this conduct to the FSCA is therefore necessary to enable the FSCA to consider enforcement action for contraventions of these provisions. The Rule provides that the FAIS Ombud must notify the financial services provider or representative that their conduct has been reported to the FSCA.

This reporting requirement complements the requirement in section 217(3)(a) of the FSR Act for all financial sector ombuds to report material contraventions of financial sector laws to the FSCA.

Expected impact of the provision.

The provision will reinforce the effectiveness of the FAIS Ombud scheme by promoting cooperation with the Ombud and ensuring that material cases of non-cooperation are

brought to the FSCA's attention to enable appropriate enforcement consequences.

3.2.9. Rule 9 - removal of case fee provisions.

Need for and intended operation of the provision.

Rules 9(a) to (c) of the existing Rules, enabling the FAIS Ombud to charge respondents a non-refundable case fee of up to R1000.00 will not be retained in the new Ombud Council Rules. In practice, the Ombud does not charge such fees and the provision is considered superfluous.

Expected impact of the provision.

The change in approach reflects current practice.

3.2.10. Rule 11(2) - confidentiality.

Need for and intended operation of the provision.

The provision mirrors the corresponding provision in Rule 11(b) of the previous Rules in confirming the confidentiality of information provided to the FAIS Ombud and the circumstances in which such information may be disclosed. The new Rule adds a reference to section 251 of the FSR Act, which governs information sharing between financial regulators and designated authorities and confirms that information sharing between the FSCA and the FAIS Ombud is subject to that section. The FAIS Ombud is a "designated authority" for purposes of section 251 (see section 250(i) of the FSR Act).

Expected impact of the provision.

The provision ensures alignment between the Rules and the relevant FSR Act information sharing provisions.

3.2.11. Deletion of provisions in previous Rules dealing with appeals against decisions.

Need for and intended operation of the deletion.

The provisions of the previous Rules dealing with the process for making appeals against determinations by the FAIS Ombud, including provision for the FAIS Ombud granting leave for such appeals, are not retained. The provisions of the previous Rules are outdated, as they still envisage the appeal board processes that had existed under the former Financial Services Board. Those processes were replaced by the Financial Services Tribunal reconsideration process provided for in the FSR Act some years ago.

Expected impact of the deletion.

The deletion of these provisions removes outdated references that are inconsistent with the FSR Act. The procedure for reconsideration of FAIS Ombud decisions is addressed in Chapter 16 of the FSR Act, read with applicable provisions of the FAIS Act and the Rules of the Financial Services Tribunal made under the FSR Act. There is therefore no need to deal with the matter in the new Ombud Council Rules.