www.fsca.co.za

FSCA REGULATORY ACTIONS REPORT

1 APRIL 2022 -
31 MARCH 2023

FSCA REGULATORY ACTIONS

1 APRIL 2022 - 31 MARCH 2023

Contents

Abbreviations

AFU	Asset Forfeiture Unit
CFDs	Contracts for Difference
CISCA	Collective Investment Schemes Act, No. 45 of 2002
COFI Bill	Conduct of Financial Institutions Bill
Constitution	Constitution of the Republic, 1996
FAIS	Financial Advisory and Intermediary Services
FAIS Act	Financial Advisory and Intermediary Services Act, No. 37 of 2002
FAIS General Code	General Code of Conduct for Authorised Financial Services Providers and Representatives, 2003
FIA	Financial Institutions (Protection of Funds) Act, No. 28 of 2001
FIC	Financial Intelligence Centre
FICA	Financial Intelligence Centre Act, No. 38 of 2001
FMA	Financial Markets Act, No. No. 19 of 2012
FSA	Friendly Societies Act, No. 25 of 1956
FSCA	Financial Sector Conduct Authority
FSP	Financial Services Provider
FSRA	Financial Sector Regulation Act, No. 9 of 2017
Insurance Act	Insurance Act, No. 18 of 2017
LTIA	Long-term Insurance Act, No. 52 of 1998
MOU	Memoranda of Understanding
NCR	National Credit Regulator
NPA	National Prosecuting Authority
ODPs	Over-the-counter-derivative providers
PAIA	Promotion of Access to Information Act, No 2 of 2000
PAJA	Promotion of Administrative Justice Act, No. 3 of 2000
PFA	Pension Funds Act, No. 24 of 1956
SAPS	South African Police Services
STIA	Short-term Insurance Act, No. 53 of 1998

List of Figures

List of Tables

Executive Summary

South Africans need to have confidence and trust in financial institutions as they rely on a range of financial products and services to transact, save, and insure against risk. A high level of trust and confidence in the financial sector boosts economic activity and stimulates growth to the benefit of all South Africans. The FSCA, therefore, as one of its strategic objectives[1], aims to maintain and support confidence and integrity in the financial sector by acting decisively and visibly against misconduct.

To support regulatory transparency, the FSCA publishes all enforcement sanctions and interventions on its website and through media releases. **This report enhances the FSCA's commitment to transparency by communicating all of the regulatory actions it has taken over the period 2022-23 financial year – including enforcement actions - in aggregated and summary format, making relevant information more readily available to stakeholders.** Going forward, the FSCA will continue to annually publish its regulatory actions, to monitor developments over time. The FSCA will further develop the type and depth of information on which it will report to ensure it is meaningful and comparable. This report therefore serves as a baseline on which the FSCA will build on in future.

The report not only provides insight into the activities of the FSCA's enforcement effort during the period: 1 April 2022 to 31 March 2023, but also **seeks to augment credible deterrence through visible enforcement, create awareness of regulatory requirements and the FSCA's expectations for embedding good conduct and ensuring fair outcomes for customers.** Emerging trends and risks are therefore highlighted, and case studies are used to illustrate principles and provide practical application.

The FSCA has a variety of regulatory tools available to enable the performance of its functions and achievement of its objectives. During the reporting period, the FSCA actively utilised nearly the entire range of regulatory tools in its response to misconduct[2].

The FSCA's enforcement function is supported by the collaboration and cooperation with international and domestic counterparts and other regulatory authorities. During the reporting period, the FSCA collaborated on 45 matters with international counterparts in terms of bi-lateral and multi-lateral MoUs[3]. The FSCA further collaborated with domestic counterparts and enforcement agencies, including the FIC and AFU, in preserving assets under threat, to the amount of R19 million[4].

The FSCA opened 481 new investigation cases, finalised 406 and have 329 ongoing cases[5]. The majority of the investigation cases relate to unauthorised FAIS and insurance business. To deal with ongoing cases more effectively, the FSCA increased the capacity of its Enforcement Division.

The FSCA imposed R153 864 300 in administrative penalties on 44 investigated parties[6]. Subtracting penalties that were suspended or that were set aside on reconsideration to the Financial Services Tribunal, **a total of R100 644 300 administrative penalties were payable.** Most of the administrative penalties imposed[7] relates to non-compliance with the FAIS Act.

1 See FSCA's 2021-2025 Regulatory Strategy.
2 See Figure 1: Summary of Enforcement Interventions.
3 See Tables 1 and 2.
4 See paragraph 5 of this report.
5 See Table 3.
6 See Table 5.
7 R68 740 000 of administrative penalties were imposed in respect of contraventions of the FAIS Act. See Table 5.

The FSCA further suspended the licences of 984 FSPs, withdrew 420 licences[8] and debarred 210 persons[9] from providing financial services. The majority of the suspensions and withdrawals relate to the non-submission of statutory returns and/or non-payment of levies; most of the debarments involved dishonest conduct. The number of suspensions constitute approximately 8% of the total number of FSP licenses and the number of withdrawn licences constitutes approximately 4% of the total number of FSP licences.

To warn the public of possible unauthorised or illegal activities, the FSCA published 47 public warnings. The warnings mainly related to the rendering of unauthorised financial services.

Interventions taken by the FSCA relating to curatorships[10] , statutory management[11] , enforceable undertakings[12] and removal of persons from positions[13] mostly occurred in the retirement funds industry.

The FSCA took 1 668 administrative action decisions during the reporting period, of which approximately 1,4% were set aside on reconsideration to the Financial Services Tribunal[14].

The data reflected in this report will assist the FSCA in identifying high incidence of cases, changes in industry behaviour and consumer education needs, that in turn will inform the FSCA's supervisory and regulatory activities and focus.

8 See Table 6.
9 See Paragraph 10.
10 See Table 8.
11 See Table 9.
12 See Table 10.
13 See Table 11.
14 See Table 12.

Part I: Introduction and Summary of Enforcement Interventions

1. INTRODUCTION

1.1 South Africans rely on a range of financial products and services to transact, save, and insure against risk. They need to have confidence and trust in financial institutions that they will be treated fairly and that financial markets will function efficiently, effectively and with integrity. Misconduct in the financial sector has far reaching consequences for consumers and negatively impacts their confidence in the financial sector.

1.2 To act decisively and visibly against misconduct in order to maintain and support confidence and integrity in the financial sector is, therefore, one of the five strategic objectives of the FSCA[15]. Timeous and visible enforcement plays a critical role in achieving this objective. It provides a credible deterrence to poor customer and market outcomes and drives positive behavioural changes in the financial sector.

1.3 To give effect to the FSCA's strategic guiding principle of transparency, the FSCA publishes all enforcement sanctions and interventions on its website and social media platforms. This serves the purpose of increasing awareness of misconduct and of the actions taken by the FSCA to improve consumer protection and deter future misconduct.

1.4 The FSCA's enforcement process is designed to be efficient, fair and consistent and for administrative penalties and other sanctions to be meaningful, but appropriate. It is acknowledged that consumer confidence and trust is augmented when misconduct is identified and dealt with quickly.

1.5 The FSCA is focusing on enhancing its performance and responsiveness, as an institution by improving its service delivery commitments through increased digitalisation and optimised business processes. In line with the Data-Driven Digital Strategy of the FSCA, investigation and enforcement methods are increasingly relying on digital optimization and transformation to accelerate results, specifically with reference to finding evidence that is part of significant data sets obtained during the investigation process.

2. PURPOSE OF REPORT

2.1 The purpose of the report is to give effect to the strategic guiding principle of transparency, to enhance awareness of requirements and our expectations for embedding good conduct, and to provide insight into the activities of the FSCA's enforcement effort.

15 See FSCA's 2021 - 2025 Regulatory Strategy.

2.2 The report provides statistics on the enforcement interventions taken by the FSCA during the period 1 April 2022 to 31 March 2023. The FSCA will publish the information set out in this report annually, to make information relating to its regulatory actions more frequently available. The FSCA will further develop the type and depth of information on which it will report to ensure it is meaningful and comparable. This report therefore serves as a baseline on which the FSCA will build on in future.

2.3 The report assists in identifying high incidence of cases, changes in industry behaviour and consumer education needs. It will further inform supervisory and regulatory activities and focus.

2.4 Emerging trends and risks are highlighted, and case studies are used to illustrate principles and provide practical application.

3. SUMMARY OF ENFORCEMENT INTERVENTIONS

3.1 The FSCA takes enforcement action or measures, inter alia, to change the behaviour of the person who is the subject of the intervention(s), to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance, and where practical, to remedy the harm caused by the non-compliance. This is all done for the ultimate purpose of protecting financial customers.

3.2 Figure 1 below summarises the enforcement interventions taken by the FSCA during 1 April 2022 to 31 March 2023. The statistics show that the FSCA has actively utilised nearly the entire range of sanctions or interventions available to it to respond to misconduct. All sanctions were published as another step towards credible deterrence through visible enforcement.

3.3 The statistics are broken down further in Part II of this report . As indicated in paragraph 2.2, this report serves as a baseline for future reports. Therefore, comparative statistics and analyses of those statistics, will only be provided in future reports.

Figure 1: Summary of FSCA Enforcement Interventions

* Debarments by FSPs are not included in the summary.

Part II: Cooperation and Collaboration with International and Domestic Regulatory Bodies

4. INTERNATIONAL COOPERATION

4.1 The globalised nature of economies, financial markets and financial services create a highly interconnected financial ecosystem that is further aided by the development of digital technologies. As a result, the provision of cross-border financial services and the uptake of such services by retail customers has grown over the years due to the ease of use, and the widespread availability of such technologies. This gives rise to several regulatory challenges, e.g. fraud through the internet and other electronic communications, and jurisdictional issues that the FSCA endeavours to overcome through close co-operation and collaboration with international counterparts and enforcement agencies[16].

4.2 International co-operation and collaboration are enabled through 92 bi-lateral and multi-lateral MoUs with regulatory counterparts. The main purpose of the MoUs is to enable regulators to combat cross-border crime and misconduct through the sharing of information and by assisting with investigations[17].

4.3 During the reporting period the FSCA made several requests to foreign regulators to assist with ongoing FSCA investigations and provided assistance in respect of 5 investigations by its foreign counterparts[18]. The FSCA further, on an unsolicited bases, provided foreign regulators with information of suspected misconduct or information that it considered likely to be of assistance to those regulators in securing compliance with the laws applicable in their jurisdictions.

4.4 Tables 1 and 2 on the next page set out the number of requests received and made during the reporting period, and unsolicited information provided and received by the FSCA. The information provided excludes requests for verification of good standing.

16 In terms of section 58(4) of the FSR Act, the FSCA is empowered to do anything reasonably necessary to achieve its objectives, including co-operating with its counterparts in other jurisdictions. Section 251 of the FSR Act further empowers the FSCA to share information with such counterparts.

17 The FSCA is empowered under section 135(1)(b) of the FSR Act to exercise its investigation powers where it reasonably believes that an investigation is necessary to achieve a request by a foreign authority in terms of a bilateral or multilateral MoU.

18 Investigation assistance that are provided to foreign counterparts ranges from obtaining information (a re quest for the production of information or documents or questioning a person under oath) to search and seizures.

Table 1: Requests for Assistance

Requests for Assistance	
Requests for assistance made by the FSCA to Foreign Regulators	16
Requests for assistance made by Foreign Regulators to the FSCA	7

Table 2: Sharing of Unsolicited Information

Unsolicited Information	
Unsolicited information provided by FSCA to Foreign Regulators	15
Unsolicited information received by FSCA from Foreign Regulators	7

5. DOMESTIC COOPERATION

5.1 The FSCA's enforcement function is further supported by the collaboration and cooperation with domestic counterparts (e.g., Prudential Authority, FIC, National Consumer Commissioner and the NCR) that are facilitated by bilateral and multilateral MoUs to ensure that a collaborative and coordinated approach is followed when these regulatory agencies perform their respective functions.

5.2 In addition, the FSCA has referred 70 cases during the reporting period to the SAPS. Given the nature of the cases these referrals are mostly to the Specialised Commercial Crime Units and Commercial Crime Courts. The FSCA is currently providing active assistance to the SAPS and the NPA in seven complex commercial crime cases that resulted from investigations undertaken by the FSCA. This includes assistance to the NPA in their efforts to extradite Mr Steynberg, the kingpin in the Mirror Trading International case.

5.3 It is important to note that the FSCA is not responsible or mandated to conduct criminal investigations and prosecutions. The FSCA has no control over either of these functions; that is the exclusive domain of the SAPS and the NPA.

5.4 The FSCA further collaborates with the FIC and AFU in preserving assets under threat. During the reporting period, at the initiative of the FSCA, the AFU in Johannesburg successfully applied for an order to preserve the funds, in the amount of R19 million, in the bank accounts of Classic Financial Services One (Pty) Ltd and its director, Mr JS Geldenhuis.

Part III: Overview of Statistics per Enforcement Intervention

6. ENFORCEMENT POWERS

6.1 The FSR Act provides the FSCA with comprehensive powers to deliver on its mandate and in terms of which it may take enforcement action when the laws supervised by it are contravened. In addition, the FICA provides the FSCA, as supervisory body, powers to sanction for FICA non-compliance.

6.2 The FSCA uses the enforcement power that most effectively remedy the effects of and penalises the misconduct, and that will deter others from similar conduct.

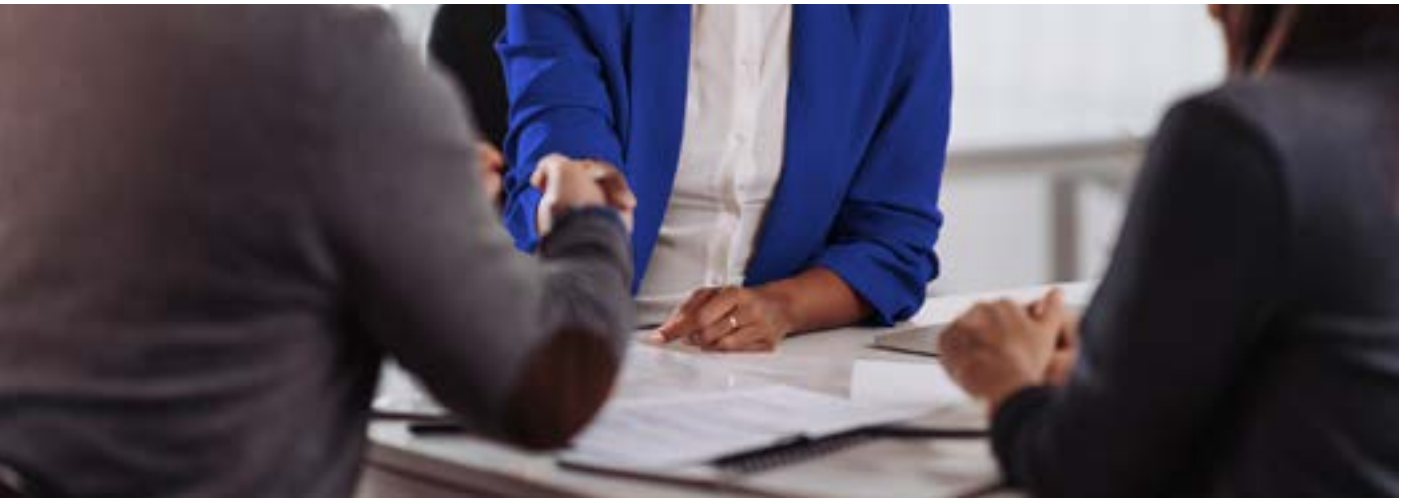
6.3 The enforcement powers used by the FSCA during the reporting period are set out in the sections below, including the number of interventions taken categorised per financial sector law allegedly contravened.

7. INVESTIGATIONS[19]

7.1 The FSCA has a wide range of investigative powers to conduct in-depth investigations. These include conducting interviews under oath, the power to subpoena documents and, in appropriate instances, executing search and seizure warrants.

7.2 During the reporting period the FSCA opened 481 new investigation cases, finalised 406 and have 329 ongoing cases. Table 3 on the next page reflects the number and status of the investigations per financial sector law.

7.3 It is important to note that new, ongoing, and finalised cases in Table 3 will not reconcile as finalised cases were not necessarily received during the reporting period, and new cases were not necessarily finalised in the same period.



19 Sections 134 to 139 of the FSR Act sets out the FSCA's investigation powers.

Table 3: Type, no. and status of Investigation cases*

TYPE OF INVESTIGATION	NEW	ONGOING	FINALISED
FMA (Market Abuse)	38	63	29
FMA (Over-the-Counter Derivative Providers)	23	7	25
FAIS Act	245	182	178
Insurance Act*	91	58	65
PFA	-	2	1
CISCA	-	1	2
Friendly Societies Act	1	-	1
Other	3	1	4
No jurisdiction**	76	11	101
FSR Act	4	4	-
Totals	**481**	**329**	**406**

** Includes investigations into contraventions of the Long-term Insurance Act and the Short-term Insurance Act.*
*** Cases where FSCA conducted a desktop investigation and concluded that it does not have jurisdiction to investigate the matter.*

7.4 Table 3 reflects that the FSCA has registered 481 new cases and finalised 406. This resulted in an increase in ongoing cases. The FSCA therefore augmented the capacity of its Enforcement Division to timeously deal with investigations.

7.5 Most of the investigations referred to in Table 3 are conducted in respect of alleged contraventions of the FAIS and Insurance Acts. The majority of the FAIS matters relate to unauthorised business. Operating as a FSP without the required authorisation has the appeal for offenders that it provides access to the funds of customers without rules or oversight. Given the extent of unauthorised FAIS business and the impact on customers, it remains a focus area for the FSCA.

7.6 The insurance investigations relate mostly to unregistered insurance business, the majority of which was conducted by funeral parlours. To enhance its response to this type of misconduct that generally impacts the most vulnerable part of consumers, the FSCA established a dedicated team responsible for the investigation of these cases.

7.7 The market abuse investigations in respect of the FMA are broken down in Table 4 into the suspected contraventions that formed the basis of the investigation. Most of the cases investigated related to insider trading.

Table 4: Breakdown of Financial Markets Investigation cases

Type of contraventions investigated	Total*
Prohibited Trading Practices	34
Insider Trading	43
False and Misleading Statements	14
Foreign Request: Market Abuse	1

** The statistics are based on ongoing and finalised cases only.*

8. ADMINISTRATIVE PENALTIES[20]

8.1 The FSCA may impose administrative penalties in appropriate cases to promote general and specific deterrence. The process the FSCA uses for imposing penalties is designed to fully comply with administrative law principles, and respondents are afforded reasonable opportunity to reply to the allegations and to provide reasons why a penalty should not be imposed.

8.2 Table 5 reflects the administrative penalties imposed by the FSCA during the reporting period. A total of R153 864 300 in administrative penalties was imposed on 44 persons. Subtracting penalties that were suspended or that were set aside on reconsideration to the Financial Services Tribunal, a total of R100 644 300 administrative penalties were payable.

20 See section 167 of the FSR Act.

Table 5: Administrative penalties imposed[21]

Financial Sector Law	No. of Cases	No. of persons	Penalties Imposed	Penalties suspended for specific period	Penalties set aside on reconsideration	Total Penalties payable
FMA – Market Abuse	3	6*	R70 020 000	-	R50 000 000	**R20 020 000
FMA - ODPs	3	3	R130 000	-	-	R130 000
PFA	1	6	R622 300	-	-	***R622 300
FICA[22]	3	3	R940 000	R520 000	-	****R420 000
CISCA	5	1	R10 639 000	-	-	*****R10 639 000
Insurance Act	2	2	R75 000	-	-	R75 000
FAIS Act	10	19	R71 440 000	-	2 700 000	******R68 740 000
TOTALS	**27**	**44**	**R153 866 300**	**R520 000**	**R52 700 000**	**R100 646 300**

** Of the 6 affected persons, 4 were jointly and severally liable for a R50 000 000 penalty*

*** Penalty of R20 000 000 imposed on 1 person is subject to reconsideration by the Financial Services Tribunal.*

**** Penalties are subject to reconsideration by the Financial Services Tribunal. Five of the six persons brought an application for reconsideration.*

***** Penalty of R400 000 imposed on 1 person is subject to appeal by the Financial Intelligence Centre Appeal Board.*

****** Penalty of R10 000 000 subject to reconsideration by the Financial Services Tribunal.*

******* Penalties of R20 250 000 subject to reconsideration by the Financial Services Tribunal.*

8.3 Of the rand value of administrative penalties imposed and that are payable, 68% was in respect of contraventions of the FAIS Act and 20% in respect of contraventions of the FMA (Market Abuse).

21 Some penalties subject to reconsideration by the Financial Services Tribunal.

22 Penalties issued in terms of section 45(c)(1) of the FIC Act.

9. WITHDRAWAL AND SUSPENSION[23] OF AUTHORISATION

9.1 The FSCA may withdraw authorisations, *inter alia*, if a licence condition has been contravened, the licensee has materially contravened a financial sector law, failed to comply with a directive, or defaulted on an enforceable undertaking. The primary consideration is to protect consumers against risk and financial harm.

9.2 The FSCA may also suspend a licence. This remedy, in general, is used if it is considered that the non-compliance forming the basis for the suspension may be rectified, e.g., in the case of the non-submission of statutory returns. In all such matters, a licensee is advised of the FSCA's intention to suspend its licence for such non-compliance and is provided with an opportunity to rectify the non-compliance or to provide reasons why its licence should not be suspended. If the non-compliance is not rectified and no good reason exists why the suspension should not proceed, the FSCA will suspend the licence for a specified period of time[24]. During the period that a licence is suspended, the licensee may not provide financial services. The FSCA may lift the suspension (reinstate the licence) if, during the suspension period, the non-compliance is rectified.

9.3 During the reporting period, the FSCA suspended the licences of 984 FSPs. The number of suspensions constitute approximately 8% of the total number of FSP licenses[25]. Of the total number of suspensions, 938 (95%) suspensions related to the non-submission of statutory returns and/or non-payment of levies. In 522 (53%) matters the suspension of the licence was lifted.

9.4 The FSCA further withdrew the licences of 420 FSPs of which approximately 380 (90%) related to the non-submission of statutory returns and/or non-payment of levies. The number of withdrawn licences constitutes approximately 4% of the total number of FSP licences[26].

Table 6: No. of suspensions, withdrawals and reinstatements of licences

Suspensions	Withdrawals*
984	420
Reinstatements**	
522	

** Includes the cases that were set aside by the Financial Services Tribunal.*

*** Excludes cases where withdrawal decisions were set aside by the Financial Services Tribunal.*

23 The FSCA may withdraw and suspend authorisations in terms of the financial sector laws in respect of which the authorisations were granted.

24 In the case of FAIS Act contraventions, the licence is suspended for a specified period of time (usually 3 months) during which time the licensee must rectify the non-compliance. Failing to do so, will generally result in the withdrawal of the licence.

25 As at 31 March 2023 the total number of authorised FSPs were 11 826.

26 As at 31 March 2023 the total number of authorised FSPs were 11 826.

9.5 During the reporting period the FSCA, with the concurrence of the Prudential Authority and the South African Reserve Bank, also withdrew the licence of a market infrastructure in terms of the FMA for prolonged non-compliance with the liquidity and capital adequacy requirements of an exchange.

10. DEBARMENTS[27]

10.1 The FSCA may debar a natural person if such person has contravened a financial sector law, an enforceable undertaking, a foreign law that corresponds to a financial sector law or attempted, conspired with, aided, abetted, induced, incited or procured another person to contravene a financial sector law, in a material manner. A debarment prohibits the person, for a specified period, from -

- providing, or being involved in the provision of, specified financial products or financial services, generally or in circumstances specified in the order;
- acting as a key person of a financial institution; or
- providing specified services to a financial institution, whether under outsourcing arrangements or otherwise

10.2 As with the case of a withdrawal of a licence, the primary consideration of the FSCA when debarring a person is to protect consumers.

Debarments by FSCA

10.3 During the reporting period the FSCA debarred a total of 210 persons from providing financial services. In the majority of cases, the reasons for debarment involved dishonest conduct. A substantial number of debarments resulted from the submission of fabricated policies by representatives (discussed more fully under trends below). Other common causes of debarments include providers misappropriating clients' funds, acting contra mandate, trading and investing clients' funds in their own names, misrepresenting investments and investment results and lack of oversight over juristic and natural representatives.

Debarments by FSP

10.4 FSPs must in terms of section 14(1) of the FAIS Act debar a representative if that representative is no longer fit and proper or have contravened a provision of that Act in a material manner. A debarment under section 14 prevents a person from rendering any financial services as a representative of any FSP and not only the FSP who brought about the debarment.

10.5 The FSPs must inform the FSCA who must publish the debarment in the Central Register of Debarred Persons. During the reporting period, FSPs debarred 1137 representatives, of which approximately 96% was for dishonest conduct. The number of debarred representatives constitutes approximately 0.6% of the total number of appointed representatives[28].

10.6 Table 7 provides a breakdown of the main reasons for the debarment.

27 See section 153 of the FSR Act.

28 As at 31 March 2023 the total number of appointed representatives were 180 126.

Table 7: Debarments by FSPs

Debarment reasons	Total
Non-compliance with competency requirements	37
Dishonesty	1100
TOTAL	**1 137**

11. PUBLIC WARNINGS

11.1 Where the FSCA becomes aware of apparent unauthorised or illegal activity, the FSCA endeavours to warn the public of harmful or suspicious investment offers and circumstances that may create risk for the public. Such warnings are published in media releases and placed on the FSCA website. It may relate to regulated or unregistered entities and may be as a result of a desktop or full investigation.

11.1 During the reporting period the FSCA published 47 public warnings. The warnings mainly related to the rendering of unauthorised financial services in respect of online forex and derivative platforms, funeral policies and persons impersonating or using the name of an authorised FSP, Ponzi schemes and unauthorised financial services business.

11.1 The FSCA, to further ensure that the public/consumers receive financial information and are aware of investment risks and scams, conducts various consumer education activities on digital and traditional media platforms. The FSCA's messaging focuses on warning the public to only deal with authorised FSPs and to ensure that FSPs are licenced to sell the particular product or service they require. Consumer education campaigns have reached approximately 27,527,852 consumers during this period.

12. STATUTORY MANAGERS & CURATORS

12.1 The FSCA may apply to the High Court, on an ex parte basis, for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution, or it can appoint a curator by agreement with the institution concerned and without the intervention of the court. Curatorship is an important tool that the FSCA uses to protect the interests of financial customers. Curators divest those in control or responsible for the management of the business of an institution and are thus appointed to take control of and manage the business of such institutions.

12.2 The FSCA may also appoint a statutory manager, by agreement with a financial institution and without the intervention of a court, if it appears that the financial institution has in a material respect failed to comply with a law, is likely to be in an unsound financial position or is maladministered. The appointment of a statutory manager is to protect the interests of customers. They do not divest the existing management of the institution of their powers but participate in the management of the affairs of the financial institution concerned.

12.3 Table 8 and 9 below reflect the number of new, ongoing and finalised curatorships and statutory managers appointed per sector.

Table 8: No. and status of Curatorships per sector

FINANCIAL SECTOR	NEW	ONGOING	FINALISED
FSPs	-	3	-
Retirement Funds	-	6	1
Collective Investment Schemes	-	1	
TOTAL	**-**	**10**	**1**

Table 9: No. and status of Statutory Managements per sector

FINANCIAL SECTOR	NEW	ONGOING	FINALISED
Retirement Funds	1	3	1

13. ENFORCEABLE UNDERTAKINGS[29]

13.1 The FSCA may enter into an enforceable undertaking with any person. The investigated person undertakes to implement specific remedial action – which may include customer redress. Enforceable undertakings improve enforcement efficiency, especially where the outcome of a matter is predictable or a high level of cooperation is present, by obviating the need to impose formal regulatory or enforcement actions. During the reporting period, the FSCA entered into 2 Enforceable Undertaking relating to the retirement funds sector.

Table 10: No. of Enforceable Undertakings per sector

Financial Sector	Total
Retirement Funds	2

29 Section 151 of the FSR Act empowers the FSCA to enter into enforceable undertakings.

14. REMOVAL OF PERSONS FROM POSITIONS[30]

14.1 The FSCA may remove a person from a specified position or function in or in relation to a financial institution who has contravened a financial sector law or has been involved in a financial crime.

14.1 A person may also be removed if it is responsible for, or in any way participated in, or failed to take steps open to him or her aimed at preventing a contravention of a financial sector law by the financial institution; or the financial institution being involved in financial crime, or no longer complies with applicable fit and proper person requirements.

14.1 During the reporting period, the FSCA removed[31] 5 board members of a retirement fund and 1 principal officer. See Case Study 1 on the next page.

Table 11: No. of Persons removed

Financial Sector	Number of cases	Number of affected persons
Retirement Funds	1	6

30 The FSCA may remove persons in terms of section 145, read with section 144, of the FSR Act or in terms of the provisions of the other financial sector laws.

31 In terms of section 26(4) of the PFA.

Case Study 1: Duties of the board members of a retirement fund

Failure by the board and the principal officer of the retirement fund to comply with their fiduciary duties led to material sanction.

The PSSPF is a pension fund organisation registered in terms of the PFA. Following findings of an on-site inspection by the Retirement Funds Conduct Supervision Department during 2017, the FSCA's Enforcement Division conducted an investigation into the affairs of the PSSPF, specifically in relation to the appointment of its 13B administrator. On 21 September 2018, the FSCA appointed statutory managers to the board of management of the PSSPF in terms of section 5A(1) of the FIA.

The statutory managers' appointment followed a Deed of Settlement that was made an Order of Court under case number 36090/2018 ("court order") in the Pretoria High Court on 13 September 2018.

Following three separate investigations (the forensic investigation commissioned by the statutory managers, the on-site inspection and the investigation by the FSCA's Enforcement Division) into the affairs and management of the PSSPF, the following findings were made:

- The board of the PSSPF deviated from its own procurement policy and processes in the appointment of service providers, without any justifiable basis;
- Agreements in respect of the appointment of service providers were inconsistent with service providers' tender proposals;
- Tender negotiations with service providers took place after conclusion of the tender process, in violation of applicable regulations;
- The rates paid to board members during the 2017 financial period were higher and inconsistent with the PSSPF's Trustee Remuneration Policy; and
- Some board members attended a Golf Day and the Batseta Conference and were remunerated for attending the events.

The FSCA concluded that the board members –

- failed to take all reasonable steps to ensure that the interests of members, in terms of section 7C of the PFA, were always protected;
- failed in their fiduciary duty of acting with due care, diligence and good faith, by not ensuring that the procurement of service providers was done in a cost-effective manner; and
- failed to ensure that the resources of the PSSPF were utilised in a sound and cost effective manner, which constituted a breach of the board's duties in terms of the PFA and the FIA;

The FSCA also concluded the Principal Officer was no longer fit and proper to hold office as contemplated in section 8(5)(a) and (c) of the PFA.

The Authority considered the above misconduct and breaches serious enough to warrant appropriate regulatory action, which included the imposition of administrative penalties on individuals (in their personal capacity) and removal of board members in terms of the PFA.

Some of the respondents applied to the Financial Services Tribunal for reconsideration of the FSCA's decision(s). At the time of this report, hearing of the reconsideration applications by the FST, have not taken place.

The duties of a board in managing pension funds include ensuring compliance with the laws and rules governing pension funds and ensuring that pension funds' assets are not abused. The improper management of pension funds can cause significant financial prejudice for the funds and its members, ultimately compromising their benefits at retirement and resulting in old-age poverty.

Part IV: Financial Services Tribunal Reconsiderations

15. PROTECTION OF RIGHTS

15.1 The FSCA strives to be fair, objective and consistent in its enforcement actions. A component of fairness is to ensure that all person's rights are protected during the investigation and enforcement process. As such the FSCA ensures compliance with the Constitution, the PAJA and the PAIA.

15.1 Subject to statutory exceptions that may apply in specific cases, the FSCA provides investigated parties with the opportunity to comment on the allegations and intended administrative sanctions before a final decision is made. Aggrieved persons have the right to make application for reconsideration of decisions of the FSCA that adversely affect them to the Financial Services Tribunal, and a review to the High Court post the Tribunal decision.

15.1 The FSCA welcomes discussions on possible agreed enforcement outcomes that may lead to the recovery of funds of complainants. Withdrawal of licences and debarment of individuals are employed as remedies when the FSCA is of the opinion that the persons involved represent a risk to the public and are no longer fit and proper to operate as providers.

16. STATUS OF APPLICATIONS FOR RECONSIDERATION LODGED WITH THE FINANCIAL SERVICES TRIBUNAL

16.1 During the reporting period 58 applications for the reconsideration of the FSCA's decisions were lodged with the Financial Services Tribunal. See Table 12 for the status of those applications.

16.2 Table 13 provides a breakdown of the outcome of the cases finalised. The FSCA's decisions were upheld in 12 cases and in the 4 cases where the applications were withdrawn, the FSCA' decisions continued to be in force. The decisions of the FSCA were set aside in 3 cases and in the remaining 22 cases the FSCA agreed, by way of consent orders, that its decisions be set aside and referred back to the FSCA for further consideration.

16.3 In a number of instances, the FSCA agreed to set its decision aside by consent where the reason for the decision was the non-payment of levies or submission of statutory returns and the respondents had subsequent to the decisions, paid the levies, submitted returns or made satisfactory arrangements in this regard.

Table 12: Status of applications lodged with Financial Services Tribunal

Reconsiderations logged during the Reporting Period	Finalised	Ongoing
59	41	18

Table 13: Outcome of finalised cases

Applications withdrawn	Dismissed	Consent Order	Decision set aside
4	12	22	3

16.4 During the reporting period the FSCA took 1 688 administrative action decisions. Of that number, 59 applications for reconsiderations were lodged with the Financial Services Tribunal of which 25 decisions were set aside. The number of decisions that were set aside during the reporting period constitute approximately 1,4% of all administrative action decisions taken by the FSCA.

Part V: Focus Areas

17. FOCUS AREAS AND TRENDS

17.1 The FSCA recognises the importance of a robust inclusive financial sector in South Africa. As such its enforcement effort is aimed at visible, meaningful and procedurally fair enforcement sanctions against those who jeopardise financial well-being and the fair treatment of financial customers and the efficiency and integrity of the financial markets. It is also important that enforcement focuses its efforts on harmful developments in the industry. Some of these areas are discussed below, and where possible with reference to case studies.

18. UNLICENCED OVER-THE-COUNTER-DERIVATIVES PROVIDER ACTIVITIES

18.1 The regulations relating to ODPs came into operation on 9 February 2018. Operators in the market were granted a general exemption that allowed them to continue to conduct ODP business if they applied for an ODP licence before 14 June 2019. Many entities applied, but the industry remained saturated with unregistered operators. In some instances, FSPs did not apply because they held the bona fide belief that they did not require a licence.

18.2 In other instances, operators simply ignored the regulations. Because ODP business is a zero-sum game (the losses of the clients are the gains of the unlicenced ODP provider posing as an intermediary), some operators carried on business to maximise their profits at the expense of their clients – sometimes misrepresenting the true situation to their clients.

18.3 Case study 2 on the next page highlights when an ODP licence is required.

Case Study 2: Globex 360 (Pty) Ltd

The FSCA decision on whether Globex acted as intermediary or as seller of CFDs is an important parameter in establishing when an ODP license is required.

Globex 360 (Pty) Ltd (Globex) is an authorised FSP. Globex has a Category 1 licence and is authorised to provide advice and render intermediary services in respect of inter alia derivative instruments (CFDs in equities, currencies, indices and commodities). Globex is not an authorised ODP as envisaged in the ODP Regulations.

Globex is technology-enabled to immediately and seamlessly hedge all positions of its clients and to be completely market-neutral as a result.

The FSCA found that Globex is the seller of CFDs and acts as an ODP without authorisation and therefore contravened section 2 of ODP Regulations read with section 111(1) of the FSR Act. Because of the substantial cooperation of Globex during the investigation and enforcement process, the risk management that it had in place, the fact that Globex took immediate action to regularise their business, and because the transgression was not caused by a wilful desire to evade regulations, but an erroneous understanding of the legal position, the FSCA imposed an administrative penalty of R50 000 and took no other administrative action.

If an FSP operates in such a manner that it is fully hedged or conducts so called "back-to-back trading", it essentially means that two CFD's are issued – one by the FSP and an identical one between the FSP and the issuer of the CFD that serves as the hedging transaction. It does not matter that the two derivatives are entered into automatically and seamlessly (so called "straight through processing"), or that the FSP is market neutral. In these instances, the FSP is operating as a ODP provider and requires an ODP licence. The intermediary must not be the counter party to the CFD with the client. An intermediary must not be able to amend the terms of the CFD and the intermediary must have no liability towards the client if the market turns in favour of the client.

If there are two platforms involved in the execution chain, it is a strong indication that the FSP is acting as an ODP.

It is important to be mindful that if an FSP acts as intermediary to CFDs; the liquidity provider or ODP provider must be properly licenced to issue CFDs, failing which the FSP will be in breach of section 2 of the FAIS General Code (not acting with due care and diligence).

An intermediary to FSPs must also ensure that it is correctly licenced (derivative licence versus forex licence). This is dependent on whether the CFD offering is a "foreign currency denominated investment instrument" or not. Consideration should be given to whether South Africans are investing in a ZAR denominated or foreign currency denominated CFD with the product provider of CFDs.

Administrative Penalty Order (Click here)

19. DUTIES OF A KEY INDIVIDUAL

19.1 The FSCA, in various forums and on numerous occasions, emphasised the importance of the duties of key individuals. Notwithstanding, the FSCA still deals with many cases where key individuals have failed materially in their duties, leading to clients suffering financial losses.

19.2 A key individual must be able to adequately and appropriately manage or oversee the activities of the FSP relating to the rendering of financial services, i.e., must have the necessary operational ability for it. One of the functions is to have management policies, procedures and systems of corporate governance, risk management and internal controls to ensure compliance by the FSP with the FAIS Act and the like.

19.3 Recently the Financial Services Tribunal confirmed the duties of a key individual and the consequences of non-compliance. See Case Study 3 on the next page.

Case Study 3: Smart Billion Investments (Pty) Ltd

The decision of the FSCA and the Financial Services Tribunal is an important reminder of the oversight responsibilities of Key Individuals and main role players of FSPs.

Smart Billion Investments (Pty) Ltd (Smart Billion) is a private company (in liquidation) and was authorised as an FSP. Mr Renault Otto Kay (Kay) and Mr Melusi Ntumba (Ntumba) were the directors. Ntumba was the Chief Executive Officer and one of its representatives. The FSCA took enforcement action against Ntumba, and Ntumba filed a reconsideration application. As the matter is pending the Ntumba part of the case will not be discussed in this case study. Kay was its Key Individual.

Smart Billion traded in CFDs on an online trading platform at GT247 (Pty) Ltd (GT247). Smart Billion opened a trading account at GT247 in its own name, pooled clients' funds and traded on the platform. Smart Billion calculated and distributed each client's profits or losses. Not all clients' funds were utilised for trading. When a client requested a withdrawal, Smart Billion simply used deposits from other clients in the bank account to pay the withdrawal requests.

The FSCA found that Kay contravened section 42 of Board Notice 194 of 2017 (BN194) (in his capacity as key individual of Smart Billion), in that Kay was unable to maintain the operational ability to fulfil the responsibilities imposed on Smart Billion and therefore no longer met the fit and proper requirements as envisaged in Section 8A of the FAIS Act. Consequently, the FSCA debarred Kay for a period of 5 years and imposed an administrative penalty of R500 000 on him.

Kay took the decision on reconsideration to the Financial Services Tribunal. The Tribunal delivered their judgement on 6 December 2022 and made some important points. Parts of the judgment are quoted below.

"Kay failed in his statutorily imposed responsibilities to manage and oversee the activities of Smart Billion. Kay failed in his obligations as key individual and admitted that there was no oversight; his only responsibility was to source traders and manage general online trading.

His professed lack of knowledge of anything the company did is feigned and although the Authority accepted some of his explanations, I, on reconsideration do not. His version is improbable and to the extent true, shows a reckless, if not intentional, disregard of his duties as key individual.

In sum, he did not manage the rendering of financial services and he did not oversee the rendering of financial services at all. He had no management policies, procedures and systems of corporate governance, risk management and internal controls in place to ensure compliance by the FSP with the FAIS Act."

The Application for reconsideration was dismissed in its entirety.

The Tribunal judgment leaves no room for doubt about the responsibilities of a key individual. It is not a justification for key individuals that they were not involved in the day-to-day business of the FSP or did not have knowledge of the compliance failures.

Key individuals must carefully consider their responsibilities when they are appointed. Their duties and responsibilities are specific, especially with reference to compliance by the FSP with financial sector laws. They must ensure that they have the operational ability to manage and oversee the financial services related activities of the FSP.

The fit and proper requirements for key individuals and representatives relate to personal character qualities of honesty and integrity. For an FSP, key individual or representative to remain authorised, approved or appointed as required by section 8A of the Act, such person must at all times comply with the relevant fit and proper requirements.

Tribunal Decision (Click here)

20. UNAUTHORISED CRYPTO RELATED FINANCIAL SERVICES

Declaration of crypto assets as a financial product

20.1 The international crypto asset market capitalisation stands at over USD 1 trillion, notwithstanding the recent woes of the crypto market. One of the major issues with crypto currency from a regulatory perspective is the high volatility of the asset.

20.2 The volatility of crypto impacts on a very important regulatory concern, i.e., suitability of the asset as an investment for a large segment of the public. One of the focus areas of the FSCA, therefore, is the matching of the risk tolerance of clients with the risk profile of the financial product that is under advisement. Unfortunately, this element is sometimes neglected in favour of the earning potential for the advisor.

20.3 The FSCA remains of the view that crypto asset related activities pose significant risks to financial customers. Declaring crypto assets as a financial product under the FAIS Act on 19 October 2022 was viewed as a critical interim step towards protecting customers in the crypto asset environment, pending the conclusion of broader developments surrounding crypto assets through, for example, the COFI Bill.

20.4 The declaration has the effect that any person who, as a regular feature of his business, renders financial services (as defined in section 1 of the FAIS Act) in relation to crypto assets, must be authorised as an FSP or be appointed as a representative of an FSP. Such persons must now comply with the requirements of the FAIS Act and its subordinate legislation, including section 2 of the FAIS General Code that provides that an FSP must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry. The FAIS General Code also deals with other important issues like conflicts of interest, disclosure, suitability of advice, advertising requirements, and complaints- and risk management.

20.5 To facilitate transition, the FSCA also published a general exemption from section 7(1) of the FAIS Act alongside the declaration. Persons are temporarily exempted from the requirement to be licenced, on certain conditions.

The distinction between derivative crypto trading and direct trading in crypto assets

20.6 There seems to have been some confusion about the requirement of derivative crypto traders to be licenced. Some providers, both licenced and unlicensed, have aligned themselves with the convenient view that no licence was required to provide financial services in crypto asset derivative instruments (mostly crypto contracts for difference).

20.7 The FMA defines a “derivative instrument” as a financial instrument or contract that creates rights and obligations and whose value depends on or is derived from the value of one or more underlying asset, rate or index, on a measure of economic value, or on a default event. A crypto derivative has therefore always been a derivative instrument and as such a security as defined in the FMA - thus a financial product in terms of the FAIS Act.

20.8 This means that financial services rendered in relation to crypto asset derivatives (or any other derivatives) have always been subject to the FAIS Act.

20.9 There are several examples of enforcement action taken by the FSCA based on crypto derivatives trading (before crypto assets were declared a financial product). The most notable example is the Mirror Trading International case. Given the high-risk nature of a derivative instrument, it has been regulated as a financial product for many years.

20.10 It is therefore important to note that the declaration does not affect financial services rendered in relation to crypto asset derivatives; FSPs providing financial services in relation to crypto asset derivatives are already subject to the requirements of the FAIS Act and cannot benefit from the general exemption discussed above.

21. COPY TRADING

21.1 Copy trading, also known as mirror trading, has become increasingly popular on CFD trading platforms. In essence, the platforms enable experienced traders to have their transactions copied by clients. There seems to be an erroneous believe that a copy trader does not require any form of a financial services licence. The case study on the next page illustrates that this is not correct.

Case Study 4: Financial Services Tribunal confirmed FSCA's decision in the Pioneer FX (Pty Ltd) case

The FSCA decision confirmed by the Financial Services Tribunal is an important reminder that copy-trading or mirror-trading arrangements requires an FSP licence.

Mr Quinton Moorcroft (Moorcroft) was the sole director and in control of Pioneer FX. Neither Moorcroft nor Pioneer FX were authorised to conduct financial services. Moorcroft/Pioneer FX opened a multi account manager (MAM) account with a platform derivative trader enabling it to trade in derivative instruments (CFDs) based on foreign currency pairs and other commodities. The MAM function permitted Moorcroft to open a master trader account. No transactions were actually executed on the master account; it was merely a means to enter instructions that are executed on the accounts of the clients (the so-called copy traders) of Moorcroft.

During a period of approximately five months, 276 copy trader-clients linked to Moorcroft's MAM account, deposited R2,788,957 into their respective accounts. Moorcroft received compensation, including a performance commission/fee. At the end of the five months the margin on the accounts were depleted due to trading losses resulting from the decisions of Moorcroft.

The FSCA found that Moorcroft and/or Pioneer FX contravened section 7(1) of the FAIS Act in that they conducted unregistered financial services as defined in the FAIS Act. In addition, Moorcroft attempted, or conspired with, aided, abetted, induced, incited, or procured Pioneer FX to contravene section 7(1) of the FAIS Act in a material way. In effect Moorcroft made investment decisions on behalf of his clients (the copy accounts) and therefore required a discretionary FSP (Cat II) licence. The fact that these trading decisions was executed through the IT-enabled platform has no impact on the matter.

The FSCA imposed a penalty of R2 million on Moorcroft and debarred him for 10 years. The FSCA considered the need to deter this conduct, the nature, duration, seriousness and extent of the contravention, the extent of any financial or commercial benefit to Moorcroft, the degree to which the person co-operated, whether the person has previously contravened a financial sector law.

The matter was taken on reconsideration to the Financial Services Tribunal, but the application was dismissed.

Many trading platforms are MAM enabled. These MAM accounts are being used by traders to essentially trade on behalf of clients. The configuration of the master/copy account relationship varies from case to case. In its most simple form master traders simply inform copy traders of their transactions and the traders elect whether they want to follow the trades. In some instances, copy traders are informed automatically of the master trades and in the more advanced operations master trades are automatically copied on the copy trader accounts (and no trades are executed on the master account).

No matter what the construct of these accounts are, the master trader requires an FSP licence to practice his trade, either in the form of a Cat I licence (for advice and/or intermediary services) or a Cat II licence (for discretionary services).

Tribunal Decision (Click here)

Media Release (Click here)

22. CIRCUMVENTION OF MAXIMUM COMMISSION REGULATIONS

22.1 The FSCA and its predecessor, the FSB, have communicated its concerns on several occasions over the last few years to the industry over certain remuneration practices identified over time that appeared to contravene a number of financial sector laws, including the LTIA, STIA, Regulations published under the LTIA and STIA and the FAIS General Code.

22.2 The concerns relate to the emergence of certain distribution arrangements between life insurers, intermediaries or associates of intermediaries. In terms of these arrangements, it appeared as if additional fees (referred to as "Netco" or "Servco" fees) were being negotiated for the rendering of certain distribution-related services or functions, such as new business administration, marketing, sales management and commission management systems.

22.3 The aforementioned "Netco" or "Servco" fees were calculated on the basis of commission generated for sales in respect of particular life insurance products. Some concerns were noted in this regard. The services or functions being performed in terms of these arrangements were services or functions already being remunerated through other means (for example commission, binder fees or fees for outsourced services or functions).

22.4 The services or functions being performed in terms of these arrangements constituted the rendering of services as an intermediary and remuneration for these services or functions would result in total commission payable exceeding the thresholds provided for in the LTIA Regulations. The fees being negotiated under these arrangements are often not reasonably commensurate[32] with the services or functions being performed.

22.5 Any of the above would constitute contraventions of section 49 of the LTIA read with Part 3 of the LTIA Regulations or section 49A of the LTIA read with Part 6 of the LTIA Regulations or section 3A(1) of the FAIS General Code. The FSB has previously initiated regulatory action in respect of Servco models and agreed on remediation plans.

22.6 In November 2014, the FSB published the outcomes of its Retail Distribution Review (RDR), outlining a number of key risks identified in the prevailing financial product distribution landscape, including certain inherently conflicted distribution models that potentially undermine the duty of product suppliers (e.g., insurers), financial advisors and other intermediaries to act in the best interests of their shared customers (e.g., policyholders).

22.7 One such example that was explicitly highlighted in the paper was the so-called "netco" or intermediary "franchise" model, where insurers establish or contract with separate entities to provide various support services, on behalf of the insurer, to so-called "independent intermediaries" contracted to market the product suppliers' products.

32 The principle of "reasonably commensurate" was incorporated in Regulation 6.4(1) of the LTIA Regulations, section 3A(1)(a)(iii), (iv), (v) and (vii) of the FAIS General Code and paragraph 6.4 of the Outsourcing Directive

22.8 Notwithstanding the regulatory concerns consistently communicated previously as highlighted above, it has recently come to the FSCA's attention that Servco arrangements continue to be perpetuated across the insurance sector. These arrangements relate, among others, to the outsourcing of broker training, quotation, presentation support and other administration functions of insurers to third parties that are directly or indirectly affiliated with intermediaries acting on behalf of such insurers.

22.9 The FSCA has identified several concerning characteristics in respect of these arrangements. These include potential duplication and/or unreasonableness of remuneration being paid for certain functions and activities as well as lack of transparency and inadequate mitigation of potentially conflicted relationships that could undermine the delivery of fair outcomes to policyholders.

22.10 Examples of such arrangements include the following:

a. Arrangements that seem to be initiated by the intermediary who appears to be the actual recipient of the outsourced services in question, rather than the insurer in whose name the outsourced arrangement is concluded. In some cases, it is apparent that the relevant insurer has very little input into, or oversight of, such agreements.

b. Arrangements whereby the Servco fee or remuneration structure is directly linked to sales volumes of intermediaries in the distribution chain, resulting in an apparent duplication of payment for commission-related activities thereby contravening regulated commission limits. This includes increases in "service fees" when certain sales thresholds are exceeded in respect of policies sold by the relevant intermediary.

c. It has also been brought to the FSCA's attention that insurers who currently do not have Servco-type arrangements in place are being approached by intermediaries to enter into such arrangements as part of market movement negotiations.

22.11 The FSCA wishes to emphasise the undesirability of these practices, which are clearly inconsistent with current financial sector laws. Based on information provided regarding some existing Servco arrangements, the FSCA has several ongoing investigations looking into possible regulatory breaches by insurers in this regard.

22.12 The FSCA is cognisant of the potential harm to both policyholders and the sector as a whole if these arrangements are allowed to endure. It is clear that the potential conflicts of interest inherent in these types of complex structures exacerbate the risk of unfair outcomes to policyholders, but these arrangements also risk creating unlevel playing fields between market participants and damaging the reputation of the insurance sector at large. For this reason, the FSCA intends taking serious and meaningful enforcement action against entities who are found to be engaging in these practices in contravention of financial sector laws.

22.13 Insurers that currently have Servco arrangements in place or that are contemplating entering into such arrangements are strongly advised to take steps to review and regularise these structures in line with the regulatory prescripts outlined in this communication.

22.14 Those insurers that have been approached to enter into Servco-type arrangements should contact their respective supervisory liaisons at the FSCA to obtain guidance and clarity on regulatory expectations in this regard.

22.15 To assist the FSCA in its ongoing investigations and preserve the integrity of the sector, any person who has information regarding existing Servco arrangements are encouraged to contact the Enforcement Division of the FSCA. All communications will be kept confidential, and if requested, the FSCA will treat such communications as protected disclosures.

23. FICTITIOUS INSURANCE POLICIES

23.1 The FSCA has dealt with an alarming number of cases involving fictitious policies submitted by representatives of FSPs to insurers. In most of the cases the modus operandi is essentially the same. The representatives obtain the bank account details of unsuspecting members of the public and forge their signatures on policy application forms. The applications are submitted in the name of the victims and the premiums are deducted from their bank accounts.

23.2 When (and if) these premium deductions are queried by the victims, the insurer or relevant FSP launces an investigation and where fraud is uncovered, it results in the debarment of the representative, either by the FSP or FSCA. The FSCA is grateful for the extensive assistance from the industry in investigating these matters and drawing same to the attention of the FSCA.

23.3 Submission of fictitious policy applications is of concern and the FSCA has taken the first step in responding to this behaviour by substantially increasing the debarment periods for this type of fraud. However, the FSCA intends to give more attention to this issue in the coming year and welcome any suggestions to avoid or reduce this unfortunate trend. Case study 5, on the next page, is an example of one such case.

23.4 Another area of concern is FSPs and representatives misrepresenting to insurers that they are the persons who rendered financial services to clients, whilst it was not the case. This modus operandi is colloquially referred to as employing “runners”; a practice that seems to be widespread in industry.

23.5 Not only does this practice negate the entire regulatory framework, but it also compromises the management and key individual of the FSPs in terms of their oversight and management responsibilities. Case study 6 highlights the importance of FSPs ensuring that only lawfully appointed representatives engaged with clients, and that FSPs must at all times exercise proper oversight.

Case Study 5: Debarment of representative from submitting fictitious policies.

The debarment of Ms Motau highlights that the FSCA has zero tolerance for dishonesty.

Ms. Gloria Masesi Motau (Motau) was appointed as a representative of Mutual Interest Financial Services (Pty) Ltd and in that capacity submitted an application form for a funeral policy on behalf of a client to Assupol Life Limited (the Insurer).

It was established that Motau provided false personal information on the application form, forged the client's signature and the application was made without knowledge or consent of the client.

The FSCA debarred Motau for not meeting the fit and proper requirements relating to honesty and integrity and non-compliance with the general duty to render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.

Case Study 6: The illegal practice of employing runners.

Misrepresenting to Insurers that the FSP rendered the financial services whilst it was rendered by another person to clients, is dishonest and will result in the withdrawal of the licence.

Mr Nyaniso Bojana (Bojana) entered into a 'brokers contract' with Sanlam Life Insurance Limited ('Sanlam') and was rendering financial services under a broker's code issued to Bojana Insurance Brokers of which he was the owner, sole director and key individual. Sanlam was made aware that although Bojana declared that he rendered the financial services to the clients, it was in fact Mr Jija (Jija) who rendered those services under Bojana's Sanlam code. (Jija's FSP licence was withdrawn during 2020 and he was also debarred during 2019.)

Bojana initially admitted that he knew that Jija's license was suspended yet he permitted Jija to operate under his license. He also allowed Jija to give advice to clients in his absence and admitted to paying commission to Jija. Bojana, after Sanlam's investigation, changed his version. He claimed that he was accompanied by Jija when he consulted with clients and that he was the one who rendered the financial services. Also, the monies paid to Jija was a spotter's fee and he did not know that Jija was debarred and assumed that his license was suspended due to unpaid levies.

The Tribunal dismissed Bojana's version and found that the evidence reflects that he compromised his honesty and integrity. He permitted a debarred FSP, Mr Jija, whose license had been withdrawn to operate under his FSP license. He was dishonest in his dealings with the FSCA as well as his clients and his conduct were unbecoming of an FSP.

Bojana's application for reconsideration was dismissed.

Tribunal Decision (Click here)

24. GUARANTEE POLICIES

24.1 The FSCA identified an issue of concern in the industry relating to persons posing as legitimate guarantee policy issuers after receiving numerous complaints and queries regarding various entities that were issuing performance guarantee policies. These entities are licensed by the NCR. The FSCA is of the view that these guarantee policies are insurance products and as such can only be issued by a licenced insurer. The entities are not licenced insurers and argues that the policies are credit facilities and sureties that falls under the NCR.

24.2 Municipalities and government departments (State entities) require performance guarantees from successful bidders for infrastructure projects. The performance guarantee is requested by the State entity in terms of the General Code of Contractors that is a document issued by National Treasury. Once a tender is awarded, the successful bidder (construction company) needs to provide the State entity with a guarantee policy. In the event of a contractor defaulting or not performing, the State entity may call on the guarantor to honour its payment obligations in terms of the guarantee policy.

24.3 These policies should only be issued by an entity with the required capital adequacy and risk management equivalent to licenced underwriters. The matters have been investigated by the FSCA revealed an alarming pattern. The entities that issued these policies unlawfully were not in a financial position to honour claims if they arose.

24.4 The FSCA has taken enforcement action against these entities (debarments, withdrawal of FSCA licences and administrative penalties), some of which have challenged the FSCA's findings.

24.5 One such matter is the case of Ilse Becker, Eugene Becker and Fusion Guarantees (Pty) Ltd / FSCA, Minister of Finance and NCR. The licence of Fusion Guarantees (Pty Ltd (Fusion), an authorised FSP, was withdrawn on 8 February 2011 due to, among others, the fact that it had contravened section 7(1) of the Short-Term Insurance Act, by issuing guarantee policies without being registered as a short-term insurer.

24.6 On 8 March 2013, following the withdrawal of Fusion's FSP license, Becker (the director and person in control) was debarred in terms of the FAIS Act from rendering financial services for a period of five years. Becker lodged an appeal with the Appeal Board against the decision to debar her. During January 2015, the Appeal Board upheld Becker's appeal on certain aspects. However, the Appeal Board agreed with the finding by the Registrar that Fusion's business constituted the issuing of guarantee policies in contravention of the Short-Term Insurance Act and that Becker was responsible for Fusion having carried on unregistered short-term insurance.

24.7 On 9 April 2015, the Registrar of Short-Term Insurance issued a Directive to Fusion, directing it to cease issuing performance guarantees without being registered as a short-term insurer. On 21 April 2015, Fusion lodged an appeal with the Appeal Board against the 2015 directive and an application for interim relief. The defence raised was that the Fusion's product offering constituted credit agreements regulated by the NCR, and therefore it is not insurance business. FSCA has always maintained – the FSB Appeal Board, High Court, and Financial Services Tribunal agreed – that the two jurisdictions are not mutually exclusive.

24.8 On 15 May 2015, the Appeal Board dismissed Fusion's application for interim relief. On 8 November 2017 the High Court dismissed Fusion's review application. On 1 November 2018, the Supreme Court of Appeal dismissed leave to appeal against the outcome of the review application.

24.9 Based on findings (inter alia, breach of the directive) in a 2019 investigation report, the FSCA issued a notice of intention to, inter alia, impose administrative penalties. Becker launched an application to interdict the FSCA from imposing the penalties pending final determination of the relief sought which is an order declaring certain sections of the FSR Act unconstitutional. On 1 February 2022 the application was dismissed with cost. Becker and Fusion applied for leave to appeal to the Supreme Court of Appeal and leave has been granted.

24.10 Thus, the High Court and the Appeal Board have agreed with the FSCA that Fusion's business constituted the issuing of guarantee policies in contravention of the Short-Term Insurance Act (Now the Insurance Act). The FSCA has since successfully defended various other cases before the Financial Services Tribunal on a similar basis, One such matter, Fern Finance (Pty) Ltd and the FSCA, also ended up before the High Court, where the High Court confirmed the legal position pleaded by the FSCA in the Fusion Review application.

24.11 The FSCA will continue to enforce the law as it stands.

25. REGULATORY EXAMINATIONS

25.1 The FSCA has observed an alarming number of fraudulent activities being conducted in respect of the Financial Advisory and Intermediary Services regulatory examinations. These activities include candidates knowingly buying forged or fake examination certificates, unlawfully altering examination certificates (certificate fraud), paying other persons to impersonate them when writing the examination (identity fraud) and paying persons who supposedly have some form of control over the examination process to guarantee a successful pass.

25.2 The FSCA is currently investigating 121 cases of suspected regulatory examination fraud. Of that number 75 cases relate to certificate fraud and 46 cases to identify fraud.

25.3 The FSCA considers this conduct in a very serious light. It is of utmost importance that the public must be able to trust their advisors. Not only are these people not qualified but they have displayed that the fall short of the required character qualities of honesty and integrity. The FSCA will take every necessary step to ensure that these persons are kept out of the industry.

25.4 The FSCA is investigating ways to curb certificate fraud and will communicate with the industry in due course.

26. FAILURE TO IMPLEMENT A PROGRAMME FOR ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING RISK MANAGEMENT AND COMPLIANCE

26.1 The FSCA is designated as a supervisory body in terms of item 1 of Schedule 2 to the FIC Act and is responsible for supervising and enforcing compliance with the FIC Act. The relevant accountable institutions are listed under items 4, 5 and 12 of schedule 1 to the FIC Act, and include FSPs, collective investment scheme managers and authorised users of an exchange.

26.2 The failure to identify money laundering (ML)/terrorist financing (TF) risks, and to conduct customer due diligence (CDD) continues to be a serious concern. This includes the failure by accountable institutions to determine whether clients are listed[33] by the Security Council of the United Nations and the failure to register or to update registration related information with the Financial Intelligence Centre.

26.3 The FSCA has taken a number of supervisory interventions to monitor compliance with the FIC Act and AML/CFT obligations, and to generate awareness. These are key outcomes which contribute towards effective regulatory enforcement action, and which are important for purposes of compliance with FATF recommendations. Discussed below is an example of sanctions being imposed and where specific measures were undertaken by the entity to remediate the deficiencies.

33 In terms of section 25 of the Protection of Constitution Democracy against Terrorist and Related Activities Act, 2004 (POCDATARA)

Case Study 7: Ravensberg Advisory and Consulting Services (Pty) Ltd

Administrative Sanction imposed in terms of section 45C of the FIC Act on Ravensberg Advisory and Consulting Services (Pty) Ltd

Ravensberg Advisory and Consulting Services (Pty) Ltd (Ravensberg) is an authorised FSP and an accountable institution as envisaged in terms of item 12 of schedule 1 of the FIC Act.

On 1 February 2022, the FSCA imposed an administrative sanction on Ravensberg for non-compliance with sections 42(1), 42(2), 28 and 22A of the FIC Act, for the following reasons: (i) Ravensberg had not implemented its Risk Management Compliance Programme (RMCP) by failing to inter alia risk rate its clients and to conduct customer due diligences in terms of the risk rating as set out in the RMCP; (ii) the RMCP was not compliant with relevant provisions of the FIC Act; (iii) failure to file a cash threshold report to the FIC; and (iv) failure to keep transaction records.

Ravensberg lodged an appeal with the Appeal Board of the Financial Intelligence Centre. Pursuant to engagements between the FSCA and Ravensberg, both parties agreed to settle the appeal. The settlement agreement between the parties has been made an order of the Appeal Board in terms of section 45D(7)(b) of the FIC Act.

The Consent Order provides that, having found Ravensberg's non-compliance with the FIC Act to be negligent, an amount of R505,000.00 of the financial penalty of R780,000.00 was suspended for three years. This was conditional upon Ravensberg not contravening sections 42(1), 42(2), 28 and 22A of the FIC Act during the period of suspension.

Administrative sanction Notice (Click here)

Consent Order (Click here)

27. SELECTED LITIGATION

27.1 Given the conflictual nature of the enforcement activities of the FSCA, it often leads to litigation. The FSCA has designed its investigation and enforcement processes to be fair and compliant and it jealously guards these processes against legal challenges.

27.2 We deal below with a few cases that received substantial media attention during the reporting period.

Case Study 8: Viceroy Research Group

Selling a "research report" to a hedge fund- Hedge fund takes short positions – then publishing material statements widely – publisher sharing in the profits made by the hedge fund – international nature of securities markets in the digital age – foreign peregrinus – section 81 of the FM Act

**An application by the FSCA to review the majority decision of the Financial Sector Tribunal is still in progress.

During 2018 persons referring to themselves as Viceroy Research Group published a document titled Capitec: A wolf in sheep's clothing" wherein they made material adverse statements regarding Capitec Bank Holdings Limited ("Capitec"), a company listed on the Johannesburg Stock Exchange ("JSE"). The allegations included that Capitec should immediately be placed under curatorship given massive overstatement of financial assets and income, together with opaque reporting of loan cash flow and reckless lending practices. Viceroy Research deliberately distributed and publicised the statements widely in South Africa and on the day when the wolf document and excerpts thereof were published the share price of Capitec decreased by more than 20% to an intraday low, wiping out more than R24 billion off Capitec's market capitalisation, before it recovered to end 3% down on the day.

Viceroy Research was a partnership established in terms of the laws of New York and it had one British and two Australian citizens as partners. Viceroy profited from the fall in the Capitec share price through an agreement that it had with a hedge fund based in the Cayman Islands through which it received 12.5% of the net profit from short positions that the fund took in Capitec securities. Viceroy made the wolf document available to the hedge fund before they went public with the document. The obvious purpose of this sequencing was to enable the hedge fund to take short positions in Capitec before the negative news was disclosed to the market.

It was estimated that the hedge fund made a profit of approximately R82 million from shorting Capitec securities, with Viceroy's share being approximately $744 482.

The FSCA found that Viceroy contravened Section 81 of the FMA in that they published false, misleading or deceptive statements, promises or forecasts regarding material facts about Capitec, which they ought reasonably to have known were not true. Further, notwithstanding being made aware that what they had published was false, Viceroy failed to publish full and frank corrections thereof, as required by Section 81(2) of the FMA. The FSCA imposed an administrative penalty of R50 million on Viceroy in terms of section 167 of the FSRA.

The Tribunal decision

Viceroy applied to the Financial Sector Tribunal for reconsideration of the FSCA's decision to impose the administrative penalty. A majority of the Tribunal upheld the application for reconsideration and set aside the FSCA order on the basis that the FSCA did not have jurisdiction over the person of the Viceroy partners.

The FSCA has launched an application to the High Court to review and set aside the Tribunal's decision. Given this pending application it is apposite to only briefly mention that the Tribunal found that the FSCA had jurisdiction over the conduct in this instance (the general rule is that the offending conduct must have been performed in South Africa or must have had an effect in South Africa for a financial sector law such as the FM Act to be contravened) but the majority of the Tribunal held that the FSCA did not have jurisdiction over the person of the Viceroy partners being foreign peregrini. A link to the Tribunal order is included at the end of this document.

The efficacy of agreements between international securities regulators has been shown in this case where the FSCA was able to determine who or what Viceroy Research Group was, how they went about these publications, to whom they provided the publications and when, what relevant agreements they had in place etc. This co-operation mechanism is vital given the international nature of modern securities markets.

Whilst motive and renumeration for publishing statements could play a role in determining an appropriate penalty for someone found to have contravened Section 81 of the FM Act, that is not in itself an element of the contravention. The key question remains whether the publication was a materially false, misleading or deceptive statement, promise or forecast.

Those that intend to publish statements (positive or negative) regarding listed companies must ensure that they take the utmost care, and implement each and every possible measure to ensure that what they intend to publish is true, that what they publish is presented in a factually accurate, unambiguous, and frank manner and that if they had made a mistake, that they publish a full and frank correction as soon as they are made aware of any inaccuracy.

Administrative penalty Order (Click here)

Tribunal Decision (Click here)

Case Study 9: Markus Jooste (Steinhoff Limited)

The Financial Sector Tribunal provided guidelines regarding the calculation of a suitable and reasonable penalty for an insider with inside information who influenced traders to sell their Steinhoff shares during November 2017.

Mr Markus Jooste (Mr Jooste) was the CEO of Steinhoff International Holdings NV (Steinhoff) and a director of various of Steinhoff's subsidiary companies until his resignation on 5 December 2017. Mr Jooste proactively partook in the financial management of subsidiary companies and the yearly consolidation of the financial statements (FS). Mr Jooste attended most of the subsidiary board meetings, and the European cluster consolidated figures were submitted to Mr Jooste for his review and input first before it was submitted to the Steinhoff CFO. Therefore, during the finalisation of the consolidation of the FS and yearly audit for the financial year ending 30 September 2017, Mr Jooste had extensive knowledge of the group financial affairs and audit process which included the strong likelihood that the group auditors would not sign off the FS without a forensic investigation.

With his extensive knowledge as insider, Mr Jooste on 30 November 2017 sent a warning SMS to a select group of friends and business associates (none were insiders). The SMS read: "Jy het altyd my opinie gevra … Steinhoff gaan lank sukkel om al die bad nuus en Amerika te verwerk so daar is beter plekke om jou geld te belê, vat onmiddelik die huidige prys en delete hierdie sms en moenie aan enige iemand noem nie". (Steinhoff will struggle for a long time to process the bad news coming out of America so there are better investments to make with your money, sell immediately at the current price and delete this SMS and do not disclose it to anyone.)

One of the recipients disregarded the SMS and did not trade. Three recipients heeded the warning and sold Steinhoff shares and deleted the SMS.

The FSCA found that Mr Jooste contravened section 78(4)(a) and 78(5) of the FMA. The FSCA also found that three recipients contravened section 78(1)(a) and/or 78(2)(a) of the FMA. Mr Jooste and a recipient, Ocsan took the decision of the FSCA on review to the Financial Services Tribunal (Tribunal). The Tribunal set aside the decision for the contraventions of section 78(1)(a), 78(2)(a) and 78(4)(a) and referred the calculation of an appropriate penalty for Mr Jooste for contravening section 78(5) back to the FSCA for consideration.

The Tribunal ruled that the requirement of specific or precise inside information was not established. According to the Tribunal "Reading the message holistically, it was an encouragement to deal justified with reference to vague and imprecise information." This impacts on the liability of the recipients of the information but not on the case against Jooste for encouraging persons to trade.

The FSCA originally calculated the penalty for Mr Jooste for the contraventions of section 78(4) and (5) (combined) in terms of section 82 of the FMA. The penalty consisted of the amount of loss avoided by each recipient (three), plus an amount of three times that loss avoided for each recipient, plus investigation cost. An amount of R1 million was also added for the fourth recipient that decided not to trade. The total penalty consisted of an amount of R161 566 066.

When the matter against Mr Jooste was referred back to the FSCA, the FSCA recalculated the penalty (taking into account the guidance of the Tribunal) – utilising different days to determine the absorbed price of the negative news and imposed a penalty of R20 million. Mr Jooste lodged an application for reconsideration.

The current case is a relatively small part of the bigger investigation that is ongoing.

Media release (Click here)

Tribunal Decision (Click here)

FSCA REGULATORY ACTIONS REPORT

www.fsca.co.za

012 428 8000

Riverwalk Office Park, Block B,
41 Matroosberg Road, Ashlea
Gardens, 0081