

**STATEMENT SUPPORTING THE DRAFT
DETERMINATION RELATING TO FOREIGN
COLLECTIVE INVESTMENT SCHEMES SOLICITING
INVESTMENTS IN THE REPUBLIC**

June 2024

1 PURPOSE OF THE STATEMENT

- 1.1 This Statement relates to the publication of the draft FSCA CIS Notice [-] of 2024 (draft Notice), which was previously published under Board Notice 257 in Government *Gazette* No. 37123 (BN 257) on 13 December 2013, and is proposed to be made by the Financial Sector Conduct Authority (FSCA) in terms of section 65 of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002) (CISCA).
- 1.2 The purpose of this Statement is to provide context to the draft Determination, including why the FSCA deems the draft Determination necessary, what the draft Determination entails, and how the FSCA sees the potential impact of the draft Determination.

2 CONTEXT AND PROBLEM DEFINITION

- 2.1 In South Africa Collective Investment Schemes (CIS) are regulated and supervised under CISCA. CISCA, amongst others, distinguishes between local and foreign schemes. With respect to the latter, and as it pertains to soliciting investments within South Africa, CISCA further makes provision in terms of how the relevant applications are to be made and conditions attached thereto.
- 2.2 The erstwhile Financial Services Board (FSB) dealt with the applications of foreign collective investment schemes (foreign CISs) to market products under section 65 of CISCA. The requirements for such applications and approval of foreign CISs are specifically dealt with under sections 65 to 67 of CISCA, read together with BN 257.
- 2.3 The application process stated above remained in use and effective up until recently, owing to several developments, challenges and difficulties, which now necessitates the review of approval of foreign CISs and their application process. It is worth noting that previously, the FSB provided guidance for categorization of both local and foreign CIS's under Guidance Note 2 and subsequently Guidance Note 2A to provide further guidance to the industry albeit with remaining challenges as will be evident below.
- 2.4 The shift from a predominantly rules-based approach of regulation to a principles-based approach, has necessitated the review of BN 257 and the publication of the draft Notice.
- 2.5 Secondly and more importantly, another key reason for the draft Notice is the Financial Services Tribunal's (Tribunal) decision in the matter of *Greenman Investments S.C.A., Sicav-Fis vs Financial Sector Conduct Authority* (Greenman)¹, which essentially dealt with powers FSCA has with respect to the assessment and approval of foreign CIS's when soliciting and or advertising for business in South Africa.
- 2.6 The succinct facts in respect of Greenman is that at the end of 2020, the Authority declined their application for a foreign CIS to be categorised as a CIS in Qualified Hedge Funds on the basis that it did not comply with section 95(1)(b) of CISCA. Section 95(1)(b) determines that a manager may not sell or offer for sale any participatory interests and may not lend or advance any money from the fund. The reason for declining Greenman's application is that it was lending or advancing monies in contravention of section 95. Greenman applied for reconsideration of the decision in terms of section 230 of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017).

¹ Case No.: A2/2021.

- 2.7 In May 2021, the Tribunal, held, amongst others, that a manager of a foreign CIS is not to be made subject to the limitations applied to a manager in terms of CISCA, where an application is made to the Authority for permission to solicit investments in South Africa, unless it is specified in legislation as being applicable to foreign schemes. Further, the Tribunal noted that the Authority's argument assumed that its regulations may be interpreted on the basis that they override the provisions of CISCA. The Tribunal found that paragraph 5(2) of BN 257 does not contemplate the Authority categorising a scheme and then selecting the sections of CISCA which it thinks should apply to that scheme. Put differently, the Authority does have the discretion to categorise foreign CIS's for the purpose of applying legislation that is not pre-stated as being applicable to foreign schemes, but such discretion is limited to a specific purpose, being to apply the provisions of CISCA.
- 2.8 As a result of all these developments, it was decided that BN 257 should be reviewed and updated to reflect international best practices which have developed in the preceding years and that the draft Notice be issued for public consultation.

3 SUMMARY OF THE DRAFT NOTICE

- 3.1 The draft Notice mainly set out principle-based requirements for the determination of conditions in terms of which a foreign collective investment schemes may advertise for and solicit investments in South Africa.
- 3.2 The draft Notice contains, *inter alia*, requirements and conditions relating to –
- 3.2.1 The prescribed format of an application for approval in terms of section 65(1) of CISCA; and
- 3.2.2 Conditions that a foreign scheme must comply with for purposes of being approved under section 65(1) of CISCA. The conditions include, amongst other things, that -
- a foreign scheme must be authorised and supervised by a foreign regulator which has a regulatory framework equivalent to the regulatory framework established under CISCA;
 - the foreign scheme/operator will act responsibly and will be able to satisfy certain principles or general requirements, including that it will not lend out investor's funds, be sufficiently liquid, regularly do redemptions, have an appropriate pooling structure, and the like;
 - the investment strategies and approaches utilised by the foreign scheme/operator is appropriate and not overly complex or risky;
 - the operator does not make any statements or disseminates information which the operator or the representative of the operator reasonably knows to be false, misleading and the like. In addition, the operator must also comply with any prescribed requirements relating to advertising and disclosure that are applicable to CIS managers (e.g. Board Notice 92 of 2014);
 - the foreign CIS/operator avoids any conflict between the interests of the foreign CIS/operator and the interests of an investor;
 - the foreign CIS/operator enters into a representative agreement with a representative office established in the Republic or with a manager registered under CISCA. The representative agreement must provide for various matters, including that it must impose an obligation on the foreign CIS/operator to comply with section 65 of CISCA and the Determination and that it must include an undertaking by the representative office/local manager to take reasonable steps to ensure the foreign CIS/operator complies with section 65 of CISCA and the Determination;

- the foreign CIS/operator must submit financial statements to the FSCA on an annual basis;
- the foreign CIS/operator may not utilise certain investment strategies or approaches; and
- the foreign CIS/operator must immediately notify the FSCA if it suspends the repurchase of participatory interests, unless the suspension is a scheduled suspension of which investors are notified in the ordinary course of business.

4 ENVISAGED IMPACT OF THE DRAFT NOTICE

- 4.1 This draft Notice is representative of a process of updating an existing Board Notice 257 to better reflect international best practice and the supervisory experiences pertaining to applications by foreign collective investments schemes since its publication in 2013.
- 4.2 It is expected that the draft Notice, once implemented, will result in a stronger and more appropriate regulatory framework governing the advertisement and solicitation of foreign collective investment schemes in South Africa, thereby resulting in better protection for financial customers.
- 4.3 The FSCA envisages that the cost implication of the draft Determination will not be too significant, as the Determination is largely based on existing requirements contained in Board Notice 257 and the associated guidance notices. Notwithstanding, commentators are requested to provide specific input on the envisaged cost implications as this will assist the FSCA to better consider the costs vs benefits of the draft Determination.

5 CONCLUSION

- 5.1 The draft Notice applies to all foreign collective investment schemes which intends advertising for and soliciting investments in South Africa.
- 5.2 The final Notice will be made once the public consultation process has concluded.
- 5.3 The draft Notice is intended to come into operation on the date of publication.
- 5.4 Following the implementation of the Notice, the Authority will assess and evaluate the effect of the Notice on a continuous basis as part of its regulatory and supervisory responsibilities.