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BILLS DIGEST

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Financial Advisers Bill 2007

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Portfolio:	Commerce
Select Committee:	As at 01 February, 1st reading not held.
Published: 05 February 2008 Prepared by John McSoriley BA LL.B, Barrister Legislative Analyst P: (04) 471-9626 (Ext. 9626) F: (04) 471-1250	Caution: This Digest was prepared to assist consideration of the Bill by members of Parliament. It has no official status. Although every effort has been made to ensure accuracy, it should not be taken as a complete or authoritative guide to the Bill. Other sources should be consulted to determine the subsequent official status of the Bill.

Purpose

The Bill regulates financial advisers.

Background

The need for the Bill

"The Bill establishes a co-regulatory regime for financial advisers, where the Securities Commission and industry-based approved professional bodies (APBs) will work together to create and monitor standards for financial advisers. The industry-based APBs will be front line day-to-day regulators, while the Securities Commission will be responsible for the oversight and maintenance of standards of APBs and for ensuring the overall health of the sector"¹.

The Financial Service Providers (Registration and Dispute Resolution) Bill 2007

This is a companion measure to this Bill and this Bill and that Bill are to be dealt with together. This Digest should be read together with Bills Digest 1600.

Comment

These two Bills should form one Act. Their separation introduces an unnecessary degree of complexity in the interpretation of each of them.

¹ Financial Advisers Bill, 2007 No 192-1, Explanatory note, General policy statement, p. 1.

Main Provisions

Prohibition

The Bill prohibits a person from providing a financial adviser service for a member of the public unless that person is a member of an approved professional body and registered. The Bill also prohibits a person from providing a financial adviser service for a member of the public if that person is a disqualified person under the Financial Services Providers (Registration and Dispute Resolution) Bill (see Bills Digest No 1600) (*Part 2, Clause 10*).

The term "financial adviser service" means the giving of financial advice in the course of business, or the receipt, handling, payment, or investment of money or other property that is connected to, the result of, or performed in anticipation of a financial decision, or both those activities (*Part 2, Clause 10; Part 1, Clause 5(1), definition of "financial adviser service"*).

Comment

This definition would appear to cover both investment advisers and also investment brokers.

"Financial advice"

The Bill defines "advice" as a recommendation, an opinion, or guidance that is given in the course of business. "Financial advice" means primarily any advice relating to the financial implications of a "financial decision" which is any decision made or contemplated by a person in relation to any of the following:

- saving money;
- investing, holding or realising money or property;
- borrowing money;
- incurring a debt;
- giving a security, including a guarantee or indemnity;
- taking out insurance;
- making financial provision for the future (*Part 1, Clause 6, definitions of "Advice", "Financial advice", "Financial decision"*).

"Financial adviser"

The Bill defines the term "financial adviser as a person who:

- is a member of an approved professional body; and
- is registered under the Financial Services Providers (Registration and Dispute Resolution) Bill; and
- performs a financial adviser service in the course of the business of that person or of another person.

A lawyer who performs a financial adviser service in the course of that person's professional practice as a lawyer is specifically excluded from the definition (*Part 1, Clause 5, definition of "registered"; Clause 7 ("Meaning of financial adviser"); Clause 8*).

Disclosure by financial advisers

The Bill provides for disclosure requirements broadly similar to the current law in the Security Markets Act 1988 (*Part 2, Clauses 12 to 24 (generally carrying over the provisions of Sections 41A to 41N of the Security Markets Act 1988)*).

Financial advisers' conduct obligations

The Bill specifically obliges financial advisers to act with integrity and competently, not to do anything that is misleading or deceptive, not to advertise deceptively, misleadingly, or confusingly and not to recommend or receive money for the acquisition of securities if the offer for subscription is illegal. The Bill also requires financial advisers to treat client money and property as trust money or property with corresponding obligations to pay client money into a separate account, to account for client money and property, to observe restrictions on the use of client money and property, and to keep records of client money and property (*Part 2, Clauses 25 - 35*).

Approved professional bodies

The Bill provides for the approval of professional bodies, sets out a template for its rules, and defines the role of the Minister who approves the professional body and the role of the Securities Commission, which must first make a recommendation as to approval. Steps for the approval of professional bodies are set out in detail, leading finally to the decision of the Minister whether or not to grant approval. Grounds are provided for the Minister to withdraw approval. The Bill deals in great detail with other aspects of professional bodies including rules and the role of the Securities Commission. An approved professional body is not liable for anything it may do or fail to do in the course of the exercise or intended exercise of its functions or duties under this Bill, "unless it is shown that it acted in bad faith or without reasonable care". Similar protections are afforded officers, employees or persons acting on behalf of the approved professional body (*Part 3, Clauses 36 - 66*).

Enforcement and remedies

Generally, the enforcement and remedies provisions reflect those currently in the Securities Markets Act 1988. The Bill, however, includes several new offences, that have no current parallels in the Securities Markets Act 1988, as follows:

- the offence of performing a financial adviser service for a member of the public without being a member of an approved professional body and registered;
- the offence of falsely representing that the person making the representation is
 - a member of an approved professional body; or
 - registered under the Financial Service Providers (Registration and Dispute Resolution) Bill; or
 - not a disqualified person under section 13 of the Financial Service Providers (Registration and Dispute Resolution) Bill (*Part 4, Clauses 67 - 129*).

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