



FINANCIAL SERVICES BOARD

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, NO. 37 OF 2002

FAIS INFORMATION CIRCULAR 4/2015

DATE: 7 SEPTEMBER 2015

APPLICATION OF SECTION 13(1)(c) ON TRIPARTITE AGREEMENTS AND SECTION 7(3) OF THE ACT

1. Purpose of circular

The purpose of this information circular is to-

- (a) reflect the manner in which the Registrar of Financial Services Providers (the Registrar) will apply section 13(1)(c) of the Financial Advisory and Intermediary Services Act, 2002 (the Act), on agreements in which representatives are cited; and
- (b) clarify that section 13(1)(c) does not impact on the requirement in section 7(3) of the Act that provides that a financial services provider (FSP) may only conduct financial services related business with a person rendering financial services if that person is authorised to render those services or is a representative.

2. Background

2.1. It has come to the Registrar's attention that a practice has developed whereby the FSPs cite their representatives as contracting parties to the agreements between the FSPs and the relevant product suppliers.

2.2. The question that arises is whether a representative who is a party to such an agreement will be acting in contravention of the provisions of section 13(1)(c) of the Act which provides as follows:

"13(1) A person may not-

- (a) ...*
- (b) ...*
- (c) render financial services or contract in respect of financial services other than in the name of the financial services provider of which such person is a representative."*

2.3. It has further been brought to the attention of the Registrar that FSPs are of the view, as a result of the introduction of section 13(1)(c), that they are no longer required to ensure compliance with section 7(3) of the Act when interacting with representatives in respect of financial services related business.

3. Application of section 13(1)(c) on agreements

3.1. Section 13(1)(c) of the Act is clear and unambiguous in its ambit and provides that a representative may not render financial services or contract in its own name. The requirement was inserted into the legislation, *inter alia*, to-

- (a) ensure that consumers of financial services know with whom they are contracting and who will ultimately be responsible to perform in terms of the contract;
- (b) remove any uncertainty as to whether the representative is acting for or on behalf of a principal, or on its own behalf; and
- (c) prevent the undesirable business practice of "renting a licence".

3.2. A tripartite agreement, in essence, means a contract between three distinct parties with each of those parties being a contracting party with rights and obligations *vis-à-vis* each other in terms of the agreement. A representative, therefore, cannot be a party to a tripartite agreement as it will become a contracting party.

3.3. Tripartite agreements should be contrasted to agreements where three parties may be cited, mentioned or referred to, but where only two parties are the contracting parties with rights and obligations *vis-à-vis* each other.

3.4. A third party may be mentioned, referred to or introduced in such an agreement as the party that may carry out an obligation or enforce the entitlement of one of the contracting parties (an agent for one of the contracting parties), not in its own name but on behalf of that other contracting party. In such an instance the third party does not become a contracting party.

3.5. Therefore, depending on the context in which a representative is mentioned, referred to or introduced in an agreement it may be acting in contravention of section 13(1)(c) if the terms of the agreement are such that the representative is contracting in its own name to obtain rights and obligations *vis-à-vis* one of the other parties in its own right. The converse applies and the agreement merely reflects the fact that the FSP is the contracting party with all the rights and obligations in respect of that agreement and that the representative is mentioned, referred to or introduced merely to record that it acts on behalf of the FSP in performing those activities detailed in the contract, the representative would not necessarily be acting in contravention of section 13(1)(c).

3.6. Section 13(1)(c) will be contravened if the purpose or import of the agreement is merely an attempt at creating a veneer of legitimacy whilst *de facto* the FSPs is actually “renting” its licence and/or the representative is a contracting party with rights and obligations. Such an agreement, whilst portraying the agreement in one way, but actually disguising a different intent of the parties (i.e. the FSP and representative), will amount to a simulated transaction. For example, an agreement between a FSP and a product supplier that provides for the following in the agreement may be indicative of a simulated transaction-

- (a) the relationship between the FSP and the representative is for the FSP to only provide compliance management or a business support structure to the representative whilst ensuring that the representative’s business, client base and commissions, are ring-fenced from that of the FSP or other representatives of the FSP;
- (b) the representative is liable towards the product supplier for any clawbacks, repayments or other monetary claims in respect of any commission received by the representative for financial services rendered under the licence of the FSP;
- (c) the representative is responsible for obtaining and providing sureties to the product supplier and/or excludes the FSP from any liability in respect of such sureties;
- (d) the representative must maintain professional indemnity insurance and any claims in respect of financial services rendered by the representative under the licence of the FSP must be submitted to under that insurance; or
- (e) the FSP regards the clients canvassed or obtained by the representative as the clients of that representative in the event that the relationship between the FSP and representative terminates.

3.7. The purpose of a FSP and representative relationship is not to provide only a business support structure or compliance management function to the representative but to allow the FSP to conduct financial services business with the assistance of its agents and to accept vicarious responsibility for the activities of those agents performed within the scope of, or in the course of implementing, the agent’s mandate or service contract.

3.8. A FSP would be “renting” its licence, *inter alia*, where the FSP has no real involvement in the rendering of financial services by the representative, the FSP limits its liabilities/responsibilities in respect of financial services rendered by the representative,

the FSP has no real oversight (other than a compliance management function) over the activities of the juristic representative or where there is a disconnect between the FSP and the clients.

Conclusion

3.9. A representative may be mentioned, referred to or cited in a contract between its FSP and another party (e.g. a product supplier) provided it does not obtain any rights or obligations in its own right *vis-à-vis* one of the other parties to the contract and the purpose is merely to record that it acts on behalf of the FSP in performing those activities detailed in the contract, not in its own name but on behalf of the FSP who is the contracting party. Any agreement with a third party that confers upon a representative any rights or obligations as a contracting party will constitute a contravention of section 13(1)(c) of the Act.

4. Application of section 7(3) of the Act

4.1. Section 7(3) of the Act requires FSPs and representatives to ensure that they only conduct financial services related business with a person rendering financial services, if that person, where lawfully required, has been authorised as a FSP or is a representative of an authorised FSP.

4.2. Section 13(1)(c) does not impact on the requirement in section 7(3) of the Act. Therefore, a FSP is positively enjoined when interacting with a representative in respect of financial services related business to determine whether or not that representative is appointed as a representative of an authorised FSP to render the particular financial service.

4.3. Section 7(3) also does not impact on the responsibility of a FSP to ensure that its representatives comply with the Act. The section merely places an additional duty on other FSPs who are conducting financial services related business with persons who are rendering financial services to ensure that such persons render financial services in compliance with sections 7(1) and 13(1) of the Act.



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