



## GUIDANCE NOTE

### FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002 (ACT 37 OF 2002)

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#### GUIDANCE ON THE REAPPOINTMENT OF DEBARRED REPRESENTATIVES

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#### PURPOSE

1. The purpose of this Guidance Note is to –
  - (a) clarify the role of the Registrar of Financial Services Providers (Registrar) in the reappointment by an authorised financial services provider (FSP) of a representative that has been debarred in terms of section 14(1) of the Financial Advisory and Intermediary Services Act, 2002 (FAIS Act);
  - (b) clarify the responsibilities of an FSP that reappoints a debarred representative in terms of Board Notice 82 of 2003 (BN 82); and
  - (c) list the information an FSP must submit to the Registrar after it has reappointed a debarred representative.

#### BACKGROUND

2. It is necessary to give an overview of the regulatory architecture of the FAIS Act relevant to representatives in order to give context to the provisions relating to the reappointment of a debarred representative and the role of the Registrar.
3. The FAIS Act requires –
  - (a) of the Registrar –
    - (i) on application, to authorise persons to participate as principals in the rendering of “financial services”<sup>1</sup> - these persons are referred to as FSPs; and
    - (ii) to monitor compliance by FSPs with the initial and continuing fitness and propriety requirements and adherence to the law;

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<sup>1</sup> ‘Financial services’ is defined in s 1(1) of the FAIS Act as the furnishing of advice and/or the rendering of intermediary services.

- (b) of an FSP who wish to conduct financial services business with the assistance of an agent, or a network of agents engaged as its employees or mandataries –
  - (i) to accept responsibility<sup>2</sup> for the activities of their agents performed within the scope of, or in the course of implementing, the agent's mandate or service contract; and
  - (ii) to be responsible for the initial and continuing fitness and propriety of, and adherence to the law by, such persons. The FAIS Act refers to these agents as "representatives" irrespective of whether they are employees or mandataries of the FSP.
  
- 4. A "representative" is defined in the FAIS Act as:  
*"any person, including a person employed or mandated by such first-mentioned person, who renders a financial service to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandate, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity, which service-*
  - (a) does not require judgment on the part of the latter person; or*
  - (b) does not lead a client to any specific transaction in respect of a financial product in response to general enquiries;"*.
  
- 5. A representative may be either a natural person or a juristic person.
  
- 6. In terms of section 13, read with section 14 of the FAIS Act, an FSP is responsible for the market conduct and fitness and propriety of its representatives – both their entry and debarment.

#### ***Debarment of a representative under section 14(1) of the FAIS Act***

- 7. Section 14 of the FAIS Act provides that an FSP must –
  - (a) debar a representative if that representative is no longer fit and proper or have contravened a provision of the FAIS Act in a material manner;
  - (b) remove the name of the debarred representative from the FSPs representative register; and
  - (c) within 15 days of the debarment of a representative, inform the Registrar and provide the Registrar with the reasons for the debarment.

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<sup>2</sup> See s 13(1)(b)(i)(bb) of the FAIS Act.

8. 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. A debarment, therefore, has an industry wide-effect. This was confirmed by the Supreme Court of Appeal in the Barthram matter<sup>3</sup> where the Court stated the following:

*“The court below appears to have misinterpreted the legal effect of a debarment in terms of s 14(1) in holding that it precludes the representative from acting as such only in respect of the debarring FSP. The absurdity of such an approach is patent. The debarment of the representative by a FSP is evidence that it no longer regards the representative as having either the fitness and propriety or competency requirements. A representative who does not meet those requirements lacks the character qualities of honesty and integrity or lacks competence and thereby poses a risk to the investing public generally. Such a person ought not to be unleashed on an unsuspecting public and it must therefore follow that any representative debarred in terms of s 14(1), must perforce be debarred on an industry-wide basis from rendering financial services to the investing public.” [emphasis added]*

9. Section 14(1) confers administrative decision-making power on the FSP.<sup>4</sup> This power is not conferred on the FSP merely by virtue of the fact that it is an employer. It is conferred on the FSP by virtue of the fact that it has been authorised as an FSP. The FSP, therefore, must comply with the Promotion of Administrative Justice Act, No. 3 of 2000 (“PAJA”), when it exercises the power to debar a representative in terms of section 14(1) of the FAIS Act. PAJA gives effect to the right to administrative action that is lawful, reasonable and procedurally fair.

10. In the Barthram matter the Supreme Court of Appeal further held that:

*“the FSP having itself gone through a vetting process at the hands of the Registrar is eminently suited to subject its representatives to a similar initial vetting and thereafter to exercise oversight in respect of them”.*

11. Section 14 affords the Registrar a relatively minor role, mainly relating to the updating of the central register of representatives and the publication of the debarment in the form of a list of debarred representatives. The section does not empower the Registrar to intervene in or overrule a debarment effected by an FSP or to review or “uplift” such a debarment.

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<sup>3</sup> Financial Services Board v Barthram and Another [2015] 3 All SA 665 (SCA)

<sup>4</sup> See Odendaal v ABSA Brokers (Pty) Ltd and another [2015] JOL 34944 (FB)

12. The purpose of the notification (section 14(3)) to the Registrar of the debarment by an FSP is to enable the Registrar:
  - 12.1. to consider the possible referral of the representative's actions for criminal investigation or enforcement action as contemplated by section 6A of the Financial Institutions (Protection of Funds) Act, 2001;
  - 12.2. to be in possession of relevant information as to the debarment when notified of the reappointment of a debarred representative by another FSP. Such information is required in order to enable the Registrar to assess whether or not there has been compliance by the reappointing FSP with all the requirements for the reappointment as contemplated by BN 82; and
  - 12.3. to be satisfied that the debarment relates to the issues of fitness and propriety and not to issues outside the ambit of the FAIS Act. If, for example, any form of dishonesty or *mala fides* on the part of the debarring FSP is detected from the information furnished to the Registrar, the latter may investigate possible regulatory action against that FSP.
13. As indicated, a debarment decision by an FSP constitutes the exercise of administrative action. It will stand until set aside by a Court or until the debarred person has been reappointed in accordance with BN 82. The Registrar is not empowered to adjudicate whether or not the debarment was lawful. This does not mean that the Registrar will not consider the actions of the debarring FSP and more specifically to determine whether or not the debarment was effected for the purpose for which it was intended.
14. However, such consideration and enquiry by the Registrar does not affect or impact the act of debarment. If the Registrar is of the view that the debarring FSP had abused the debarment power, it may take action against the FSP, i.e. suspension or withdrawal of its licence.
15. Neither the keeping of the central register, nor the placing of a debarred representative's name on the list of debarments, amount to administrative action by the Registrar. They do not adversely affect rights and do not have any direct, external legal effect; they merely serve the function of giving notice to the public of a debarment that has already occurred.

16. The frequency of representative complaints reported to the Registrar's office, and the intensity of debate around the issue of debarments by FSPs in terms of section 14(1), prompted the Registrar on 5 November 2013 to issue a revised Guidance Note regarding the application of that section. The Guidance Note can be accessed via the website of the Financial Services Board.
17. In order to provide further clarity as regards an FSP's responsibilities, an amendment to section 14 was proposed to and passed by Parliament during August 2017. The aim of the amendment, *inter alia*, is to entrench the provisions of PAJA in the FAIS Act to ensure that FSPs act fairly and follow due administrative process when exercising the power to debar a representative. The amendment not only enhances the requirements FSPs must comply with when exercising the power to debar representatives but also provides a representative who was debarred by an FSP a right of appeal to the Appeal Tribunal. The amendment will come into effect on a date to be determined by the Minister of Finance.

#### **REAPPOINTMENT OF DEBARRED REPRESENTATIVES**

18. Section 13(1)(b)(ii) read with BN 82, allows for the reappointment of a debarred representative and sets out the requirements for such reappointment.
19. A debarred representative cannot render financial services unless reappointed as a representative. An FSP cannot reappoint a debarred representative unless it has complied with the requirements in BN 82.
20. The reappointment of a representative is the prerogative of an FSP. The Registrar only becomes aware of the reappointment of a debarred representative in consequence of an FSP's compliance with the conditions attached to its licence to inform the Registrar of any change to its representative register. The reappointment of a debarred representative will result in a change to the FSP's register as it has the effect of that person becoming a representative of the FSP. A failure to comply with the licence condition referred to above does not affect the validity or lawfulness of the reappointment of a representative by an FSP.
21. A debarred representative may be reappointed as a representative of an FSP if the requirements of BN 82 have been met. The BN 82 does not require of the Registrar to make enquiries with the debarring FSP regarding the matters referred to in paragraph 2 of BN 82 or empower the Registrar to consider or confirm a reappointment in order for it to

have or take effect. Any failure by the Registrar to make such enquiries or to consider a reappointment has no effect on the validity of a reappointment because they are not prerequisite requirements for a reappointment. The purpose of the notification of the reappointment of a debarred representative to the Registrar and the consideration by the Registrar of the information supporting a reappointment is set out in paragraphs 12 to 14 above.

22. As in the case of the appointment of a representative, the Registrar is not empowered to interfere in a reappointment by an FSP of a debarred representative. The Registrar is a creature of statute and may only act within the confines of the legislation. The legislative architecture of the FAIS Act does not afford the Registrar any power to approve, uplift or review a reappointment after being notified of such reappointment. The Registrar, at most, will satisfy herself that the process of reappointment was followed correctly, in other words, that the requirements of BN 82 have been complied with.
23. Should the Registrar be of the view that a reappointment was not proper or not in line with statutory provisions, the Registrar's remedies lie elsewhere, for example, the Registrar may take action under section 9 (suspension or withdrawal of licences) against the reappointing FSP or debar the representative in terms of section 14A.

#### **REQUIREMENTS OF BN 82**

24. In terms of BN 82 a debarred representative (the applicant) can apply to an FSP for the reappointment as a representative of that FSP. The applicant can only be reappointed if, on the date of reappointment -
  - (a) at least 12 (twelve) months since the debarment date must have elapsed, unless the debarment was consequent on the applicant not having qualified as contemplated in section 13(2)(a) of the Act, and the applicant has within that period qualified as so contemplated;
  - (b) all unconcluded business of the applicant as former representative, referred to in the proviso to section 14(1) of the Act, has been properly concluded;
  - (c) all –
    - (i) complaints or legal proceedings (if any) submitted by clients to the applicant or the debarring provider, or the Ombud or any court of law; or
    - (ii) other administrative or legal procedures or proceedings in terms of the Act or any other law,

arising out of any acts or omissions in which the applicant was directly or indirectly involved prior to the debarment date, have been properly and lawfully resolved or concluded, as the case may be, and that the applicant has fully complied with any decision, determination or court order in connection therewith, given or issued in respect of the applicant;

- (d) all fit and proper requirements as contemplated in section 8(1)(a) and (b), read with section 13(2), of the Act are complied with.

25. BN 82 further requires, where necessary, that compliance with the requirements referred to above must be proved by the submission by the applicant to the appointing FSP and, where appropriate, the debarring FSP or any other person, of relevant original substantiating documentation or certified copies thereof, including affidavits (if any).

***Twelve month period***

26. The requirement that at least 12 months should have elapsed since the time of the debarment has generally been assumed to refer to a fixed minimum period. However, the provision in the BN 82 is subject to the following proviso: *“unless the debarment was consequent on the applicant not having qualified as contemplated in section 13(2)(a) of the Act, and the applicant has within that period qualified as so contemplated.”*
27. The “qualification” referred to in the proviso does not only refer to the competency requirements, but also encompasses the fit and proper requirements of honesty and integrity. This is so because section 13(2)(a) requires FSPs to be satisfied that their representatives are competent to act and that they comply with the fit and proper requirements contemplated in paragraphs (a) and (b) of section 8(1) of the FAIS Act.
28. The fit and proper requirements in section 8(1)(a) of the FAIS Act are the personal character qualities of honesty and integrity. Section 8(1)(b) sets out the competency and operational ability requirements.
29. The proviso therefore allows for the reappointment of a debarred representative within a period of less than 12 months. However, where the debarment was effected due to dishonesty or a lack of integrity, the appointing FSP will have to be satisfied that the representative has been rehabilitated or reformed, i.e. that the representative has qualified with regard to the personal character qualities of honesty and integrity.

### ***Register of debarred representatives***

30. A debarred representative can only be reinstated as a representative if it is reappointed in terms of BN 82. Therefore, even if the 12 month period referred above has lapsed, the name of the debarred representative will not automatically be removed from the list of debarred persons. A debarred representative's name can only be removed from that list when he or she is reappointed in terms of BN 82 as a representative of an FSP.
31. Apart from informing the public, the register of debarred persons kept by the Registrar's office also serves an important disclosure function to FSPs when it comes to the reappointment of debarred representatives. FSPs who may be considering the appointment of a representative will invariably check whether the intended appointee's name is on the list of debarred representatives. The list thus ensures disclosure of the fact of a debarment (which may not be disclosed by the intended appointee to the FSP) as well as providing details of the reasons for the debarment. The process of disclosure enables the FSP to follow the requirements of BN 82 for the reappointment of the representative.

## **INFORMATION THAT MUST BE SUBMITTED TO THE REGISTRAR**

### ***Notification of reappointment***

32. An FSP that has reappointed a debarred representative must update its representative register as contemplated in section 13(3) of the FAIS Act. The FSP must, in compliance with the conditions attached to its licence, within 15 days after a change has taken place in respect of the FSP's representative register, inform the Registrar of that change. The notification referred to above can be made as follows:
- (a) subject to paragraph 36, by electronically uploading the required information in the prescribed electronic format onto the central register kept by the Registrar; and
  - (b) by submitting Form FSP 5 of the Application by Financial Services Providers for authorisation by the Financial Services Board, 2009.
33. At present, FSPs cannot notify the Registrar of the change to its representative register, in the case of a reappointed representative, in electronic format; i.e. by electronically uploading the reappointment onto the central register kept by the Registrar. This is so because the electronic system used by the Registrar's office to update the central register (section 13(5)) was designed in such a way that a person whose name appear on the list of debarred persons will be "blocked" from being electronically uploaded to the central register until that person's name has been removed from the list of debarred persons.



34. The removal of a person's name from the list of debarred persons requires the Registrar's Office to perform a manual process. As such, it is required of the reappointing FSP to inform the Registrar that it reappointed a debarred representative. That notification must be accompanied with Form FSP 5 as referred to in paragraph 32(b).
35. As stated, the reappointment is the prerogative of the appointing FSP and the Registrar plays no role in that reappointment other than to update the records of this Office upon receiving the notification and Form FSP 5 referred to above.
36. The Registrar is in the process of updating its electronic system to allow for the electronic uploading of a reappointed representative's information onto the central register kept by the Registrar and will communicate with industry once that process has been finalised.

***Information that must accompany notification***

37. The notification by the FSP of the reappointment of a debarred representative must be accompanied by, at least, the following documentation to enable the Registrar to monitor compliance with the requirements of BN 82:
  - (a) Affidavit from the reappointed representative confirming that –
    - (i) all matters referred to in paragraph 2(b) and (c) of BN 82 have been resolved or concluded and, where applicable, that it has complied with all decisions, determinations or court orders; and
    - (ii) it complies with all the fit and proper requirements.
  - (b) The affidavit referred to in subparagraph (a), where the representative was debarred due to a lack of honesty and integrity, must set out the reasons for reform or rehabilitation.
  - (c) Any other information / documentation considered by the appointing FSP in the reappointment of the debarred representative.
  - (d) Confirmation from a key individual of the FSP that he or she is satisfied that the representative had complied with all requirements for reappointment as set out in BN 82.