

GUIDANCE NOTICE 1 OF 2019 (FAIS)

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002

FINANCIAL SECTOR REGULATION ACT, 2017

GUIDANCE NOTICE ON THE DEBARMENT PROCESS IN TERMS OF SECTION 14 OF THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002

1. PURPOSE OF THE GUIDANCE NOTICE

The purpose of this guidance notice, which is published in terms of section 141 of the Financial Sector Regulation Act, 2017 (No. 9 of 2017) (“the FSR Act”), is to –

- 1.1 provide guidance on the application of section 14 of the Financial Advisory and Intermediary Services Act, 2002 (No. 37 of 2002) (“the FAIS Act”), particularly with regard to the rationale to be applied and process to be followed by authorised financial services providers (“FSPs”) when effecting debarments;
- 1.2 highlight the salient factors that require consideration when FSPs effect debarments; and
- 1.3 clarify the function of the Financial Sector Conduct Authority (“Authority”) upon receipt of the notification of such debarments.

2. BACKGROUND

2.1 The guidance notice is informed by –

- 2.1.1 the substitution of section 14 of the FAIS Act by the FSR Act, with effect from 1 April 2018;
- 2.1.2 failures by FSPs to follow the procedure set out in section 14(3) of the FAIS Act;
- 2.1.3 decisions of the Financial Services Tribunal (“Tribunal”) handed down since inception of section 230 of the FSR Act on 1 April 2018.¹ In some

¹ In terms of section 230 read with section 218(b) of the FSR Act, a person aggrieved by a decision of an FSP to debar a person in terms of section 14 of the FAIS Act may apply to the Tribunal for a reconsideration of such a decision by the Tribunal.

cases providers did not follow the prerequisite procedure as set out in section 14(3) of the FAIS Act before debarring a person; and

- 2.1.4 misconceptions about the Authority's function upon receipt of a notification by an FSP of the debarment of a person.
- 2.2 The requirement and duty imposed by the FAIS Act on FSPs to debar representatives was enacted in 2002 as a measure of self-regulation of functions of advice and intermediary services. The legislature saw fit to clothe FSPs with the statutory power to debar representatives.
- 2.3 Debarments in terms of section 14(1) of the FAIS Act is a regulatory tool aimed at ensuring that only persons who comply with the provisions of the FAIS Act and satisfy the fit and proper requirements are allowed to render financial services. A debarment decision by an FSP constitutes the exercise of a statutory power and amounts to administrative action.²

3. DEBARMENT PROCESS AND SALIENT FACTORS

3.1 Obligation on FSPs to debar persons

- 3.1.1 A debarment must relate to -
 - (a) the non-compliance by a representative or a key individual of such representative with the fit and proper requirements as postulated by section 13(2)(a) of the FAIS Act; or
 - (b) a contravention or failure to comply by a representative or a key individual of such representative with a provision of the FAIS Act, in a material manner.
- 3.1.2 An FSP may only exercise the powers envisaged in section 14(1) of the FAIS Act in respect of a -
 - (a) representative of the FSP; or
 - (b) key individual of a juristic representative of the FSP.
- 3.1.3 Prior to the amendment of section 14 of the FAIS Act, the FAIS Act did not specifically deal with the timing of when a debarment may or should be effected, particularly where a person had ceased to be a representative of the debarring FSP. Clarity in this regard has now been provided in sections 14(1)(b) and 14(5) of the FAIS Act, which provide that an FSP retains the obligation to debar a person who no longer is a representative of that FSP, provided that the -
 - (a) reason for a debarment must have occurred and become known to the FSP while the person was still a representative of the FSP³ (the first requirement); and
 - (b) debarment must commence no longer than six (6) months from the date that the person ceased to be a representative of the FSP⁴ (the second requirement).

² See for example *PW Basson vs Associated Portfolio Solutions (Pty) Ltd and Others* [WC – Case No. 16224/2017] at para 5 and *Odendaal v ABSA Brokers (Pty) Ltd and another* [2015] JOL 34944 (FB) at par 20

³ Section 14(1)(b) of the FAIS Act.

⁴ Section 14(5) of the FAIS Act.

- 3.1.4 The first requirement means that, if the reason for debarment occurred or only became known after a representative had ceased to be a representative of the FSP, the FSP may not debar the representative and must refer the matter to the Authority.
- 3.1.5 The second requirement means that if the first requirement is satisfied, i.e. the reason for the debarment occurred and became known whilst the person was still a representative of the FSP, the FSP may still (and is required) to proceed with the debarment notwithstanding the fact that the person may at the time of commencement of the debarment process no longer be a representative of the FSP. Under such circumstances it is, however, required that the FSP should take all reasonable steps to commence debarment proceedings within six (6) months from the date on which the person had ceased to be a representative. Although the debarment proceedings must commence within six (6) months, it is not necessarily implied that the said proceedings must be completed within six (6) months (a specific period). Having said this, as the decision amounts to administrative action, such action is subject to the specific requirements of section 14 of the FAIS Act as well as the overarching requirements of the Promotion of Administrative Justice Act, 2000 (Act No. 2 of 2000) (“PAJA”). In terms of PAJA, a failure to take a decision also constitutes administrative action. This is echoed in section 218(g) of the FSR Act in that the failure to take a decision within a reasonable period may become the subject of an application for reconsideration to the Tribunal in terms of section 230 of the FSR Act.
- 3.1.6 Where a representative’s relationship with an FSP is terminated and the circumstances of the first requirement are present, it is incumbent upon the FSP to commence with debarment proceedings within six (6) months. An FSP may not abdicate this and the Authority may require of FSPs to show what steps had been taken to timeously commence debarment proceedings. Failure to comply with the obligation under section 14 of the FAIS Act may lead to regulatory action against the FSP.

3.2 Requirements for debarment

Section 14(3) of the FAIS Act sets out the requirements with which an FSP must comply when debarring a person. These requirements must be contained in an FSP’s policies and procedures governing its debarment process.⁵ The following steps aim to record these requirements in a practical manner:

Step 1: Give adequate notice in writing to the person:

- The notice should state:
 - the FSP’s intention to debar the person;
 - the grounds and reasons for the debarment. Grounds refer to the factors stated in paragraph 3.1.1 and reasons mean the facts that inform these factors; and

⁵ Section 14(3)(a)(ii) of the FAIS Act.

- any terms attached to the debarment, including, in relation to unconcluded business, any measures stipulated for the protection of the interests of clients (section 14(3)(a)(i));
- The FSP should, through the notice, provide the person with a copy of its written policies and procedures governing the debarment process (section 14(3)(a)(ii));
- The FSP should further, through the notice, give the person a reasonable opportunity to make a submission in response (section 14(3)(a)(iii)).

What constitutes “adequate notice” and “reasonable opportunity” will depend on the circumstances of each case. For example, when there are reasonable grounds to believe that substantial prejudice to clients or the general public may occur, this may warrant that debarment proceedings are carried out on an urgent basis.

It has been noted that representatives approach the Authority, after the debarment, to request the documentation and reasons for the debarment by the FSP from the Authority. In this regard, the Authority urges the FSP to also provide a representative with the documentation that informed the decision to debar the representative when it gives the representative notice of its intention to debar the representative. This will also enable the representative to formulate a proper response.

Step 2: Consider (together with all available facts and information) any response received from the person that the FSP intends to debar (section 14(3)(b)), and (where applicable) have regard to information regarding the conduct of the person that is furnished by the Authority, the Ombud or any other interested person (section 14(6)).

Step 3: Take a decision whether or not to debar the person and immediately notify the person in writing of -

- the FSP’s decision;
- the persons’ rights in terms of section 228 of the FSR Act, i.e. the right to –
 - i) request reasons for the decision; and
 - ii) have the decision reconsidered by the Tribunal (section 14(3)(c)).

3.3 Conduct of representatives

3.3.1 The purpose of the process envisaged in terms of section 14(3) of the FAIS Act is to afford a representative an opportunity to make submissions in response to the grounds and reasons that inform an FSP’s intention to debar him/her. An election by a representative not to make use of this opportunity does not prevent the FSP from considering the matter and taking a decision concerning the debarment of that person.

3.3.2 It has come to the attention of the Authority that a practice has developed whereby certain representatives, who anticipate their debarment, try to avoid the debarment by resigning employment or terminating his/her mandate. For the reasons stated above, an FSP retains its power to debar a person who is no longer a representative of that FSP, provided that the first and second requirement set out in sections 14(1)(b) and 14(5) of the FAIS Act are met.

3.4 Oral hearing not required

3.4.1 Section 14 of the FAIS Act does not require that an oral hearing be held.

3.4.2 The debarment process may form part of employment related disciplinary proceedings which may be embarked upon by the employer against a representative. Should an FSP conduct a disciplinary hearing with a representative, it is advisable for the FSP to combine its policy and procedures governing the debarment process⁶ with the FSP's policies and procedures in respect of disciplinary hearings. In the event that this is not done, an FSP cannot summarily debar a person based on the outcome of a disciplinary hearing without following the steps set out in section 14(3).

3.5 Abuse

3.5.1 A debarment should only be effected in circumstances referred to in paragraph 3.1.1 above, and should not be used by FSPs to satisfy contractual or other grievances. FSPs may, subject to the contract, terminate an agreement with a representative and key individual without debarring him/her, where the reason for the termination of the agreement does not constitute grounds for debarment. Debarment proceedings should not be abused for ulterior purposes.

3.5.2 To guard against abuse, a debarment of a person should only be effected by a person duly authorised by the provider to do so. Such a person should preferably be a key individual of or hold the rank of senior management in the provider.

3.5.3 FSPs must exercise their duties without bias. If the FSP might be perceived as biased, it is recommended that an independent person be designated to evaluate whether there are valid grounds for debarment.

3.6 Rationality

3.6.1 As stated above, a debarment decision by an FSP constitutes the exercise of administrative action. Such action is subject to the specific requirements of section 14 of the FAIS Act as well as the overarching requirements of PAJA.

3.6.2 It is required of FSPs exercising the debarment power to act reasonably and rationally. This means that the decision taken by an FSP must make sense and be justifiable given the information that is available.

3.6.3 FSPs must use the power to debar within the framework of the law, i.e. the empowering provision. When an FSP considers a debarment, it must only take relevant factors into account. Failure to take relevant factors into account or giving consideration to irrelevant factors may render the debarment unlawful.

⁶ Refer to paragraph 3.2 above.

3.7 FSPs' duties after debarment

3.7.1 An FSP must:

- (a) immediately withdraw any authority given to a debarred person to act on behalf of the FSP;⁷
- (b) where applicable, remove the name of the debarred person from the register of representatives;⁸ and
- (c) immediately take steps to ensure that the debarment does not prejudice the interests of clients of the debarred person and that any unconcluded business of the debarred person is properly attended to.⁹

3.7.2 Failure to comply with the aforementioned may result in regulatory action against the FSP.

3.8 Recourse available to debarred persons

3.8.1 A debarment decision by an FSP constitutes administrative action. The debarment decision will accordingly stand until it is set aside or until the debarred person has been re-appointed as contemplated in terms of section 13(1)(b)(ii) of the FAIS Act.

3.8.2 The focus of this part of the Guidance Notice is on a debarred person's recourse to set aside a debarment decision. Before elaborating on this below, it is important to take note of the responsibilities of an FSP that reappoints a debarred person as a representative in term of section 13(1)(b)(ii) of the FAIS Act. A debarred person may only be reappointed by an FSP if the debarred representative complies with the requirements determined by the Authority for the reappointment of a debarred person as a representative (currently Board Notice 82 of 2003). Although the Authority is not empowered to interfere in a reappointment by an FSP of a debarred representative, the Authority will satisfy itself that the process of reappointment was followed correctly. Should the Authority be of the view that a reappointment was not proper or in line with statutory provisions, the Authority may take action under section 9 of the FAIS Act (suspension or withdrawal of licences) and/or section 153 of the FSR Act (debarment) against the reappointing FSP. Similarly, the Authority may initiate new debarment proceedings against an unfit person who has been reappointed.

3.8.3 A person's recourse to set aside a debarment decision in terms of section 14(1) of the FAIS Act will now be discussed.

3.8.4 Administrative law does not allow FSPs and representatives to self-help. This means that they may not decide to ignore or simply undo a debarment decision once it has been taken. Administrative action may be

⁷ Section 14(4)(a) of the FAIS Act.

⁸ Section 14(4)(b) of the FAIS Act.

⁹ Section 14(4)(c) of the FAIS Act.

overturned by a competent court or in terms of such other processes as may be specified in legislation.

- 3.8.5 Debarred persons may exercise their right to make application to a High Court having jurisdiction to review debarment decisions in terms of the provisions of PAJA. However, PAJA requires that before a Court may review administrative action, all internal remedies must be exhausted first. An internal remedy is now afforded to persons aggrieved by a debarment decision.
- 3.8.6 A person who feels aggrieved by a debarment decision in terms of section 14 of the FAIS Act may, in terms of section 230 of the FSR Act, apply to the Tribunal for a reconsideration of the decision.
- 3.8.7 Debarred persons may therefore make application for reconsideration by the Tribunal and should do so before launching review proceedings in a High Court, unless there are exceptional circumstances that may cause the Court to exempt the debarred person from first exhausting the internal remedy.
- 3.8.8 It should be noted that the Tribunal does not have the jurisdiction to consider debarment decisions by FSPs taken prior to 1 April 2018. This is so as section 230 of the FSR Act came into effect on 1 April 2018 and does not apply retrospectively. These decisions stand and a representative's recourse is to approach a competent court or to be re-appointed as a representative.
- 3.8.9 It is important to take note of the powers of the Tribunal should it find fault with debarment decisions. In doing so, a distinction should be drawn between decisions that are bad because an FSP failed to follow the correct process in terms of section 14 of the FAIS Act and those that are bad because of the merits:
- (a) Decisions that are bad because an FSP failed to follow the correct process -¹⁰
 - (i) The Tribunal has found that it cannot set aside and substitute such a decision. Decisions that are bad because of process are to be set aside and remitted back to the FSP for further consideration;
 - (ii) Practically this means that the FSP should go back to follow the correct process.
 - (b) Decisions that are bad because of its merits:
 - (i) In these circumstances, the Tribunal can remit a decision back to an FSP for further consideration or substitute the decision with its own decision.
 - (ii) Whether the Tribunal will remit a decision back or substitute a decision will depend on the facts of each case.
 - (c) The Tribunal's decision to remit a decision back / substitute a decision after setting it aside (whether on the basis of process or

¹⁰ *Thomas vs. AGM Mapsure Risk Management (Pty) Ltd (Case No. FSP5/2018) / Jorum Gokora vs Old Mutual Life Assurance Company (South Africa) Ltd (Case No. FSP6/2018)*

merits), only affects a person's debarment status (i.e. he is no longer debarred). It does not pronounce on the contractual or labour relationship between the parties (e.g. employment relationship).

4. ROLE OF THE AUTHORITY UPON RECEIPT OF A NOTIFICATION OF DEBARMENT

4.1 When a debarment has been effected, the FSP must -

4.1.1 notify the Authority within five (5) days of the debarment;¹¹ and

4.1.2 provide the Authority with the grounds and reasons for the debarment within 15 days of the debarment.¹²

The prescribed Notification of Debarment Form is available on the Authority's web site, www.fsca.co.za.

4.2 The Authority does not review, approve or confirm a debarment of a representative by an FSP. The administrative action is complete once the debarring FSP takes a decision.

4.3 The Authority merely records the fact that a debarment has occurred in the register for debarred representatives which is published on the Authority's web site in terms of section 14(7) of the FAIS Act. Neither the recording of the debarment in the register, nor the publication thereof, translates into an administrative act.¹³

4.4 The Authority is therefore not required to engage with a debarred person in order to afford such person an opportunity to make submissions why the debarment should not be recorded or published.

4.5 The FSP is required to inform the Authority of the reasons for the debarment¹⁴ to enable the Authority to-

4.5.1 consider the possible referral of the representative's actions for criminal investigation or enforcement action as contemplated by section 167 of the FSR Act;

4.5.2 have relevant information as to the debarment when confronted with the reappointment of a debarred representative by another FSP and to assess whether or not there has been compliance with all the requirements for the re-appointment;

4.5.3 satisfy itself that due process was followed by the FSP and that the debarment relates to compliance with provisions of the FAIS Act, in the absence of which (i.e. where any form of dishonesty or *mala fides* on the

¹¹ Section 14(4)(d) of the FAIS Act.

¹² Section 14(4)(e) of the FAIS Act.

¹³ See *Financial Services Board v Barthram and Another* [2015] ZASCA 96; [2015] 3 All SA 665 (SCA) at par 15, *Michelle Hollenbach and the Registrar of Financial Services Providers* (Case No. A9/2016) at par 23 and *Odendaal v ABSA Brokers (Pty) Ltd and another* [2015] JOL 34944 (FB) at par 20).

¹⁴ Section 14(3)(a) of the FAIS Act.

part of the debarring FSP is detected) possible regulatory action against the FSP may follow.

5. WITHDRAWAL OF PREVIOUS GUIDELINE

The Guideline on the debarment process in terms of section 14(1) published on 5 November 2013 is herewith withdrawn with immediate effect.



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