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CORPORATE AND COMMERCIAL ALERT

IN THIS ISSUE

DO FOREIGN FINANCIAL SERVICES PROVIDERS NEED TO REGISTER AS EXTERNAL COMPANIES?

The Financial Services Board sent a letter dated 6 September 2017 to its registered foreign financial services providers advising them that it had come to the attention of the FSB that certain foreign FSPs conducting financial services related business in South Africa are not registered as external companies in the country. According to the FSB, this registration is required in terms of s23 of the Companies Act, No 71 of 2008.

DO FOREIGN FINANCIAL SERVICES PROVIDERS NEED TO REGISTER AS EXTERNAL COMPANIES?

We recommend that foreign FSPs rendering financial services in South Africa voluntarily apply to the South African Companies and Intellectual Property Commission (CIPC) to be registered as external companies if they have not already done so.

Key requirements for a foreign company to consider before making the application to the CIPC are its registered address in South Africa and a local representative resident in South Africa.

The Financial Services Board (FSB) sent a letter dated 6 September 2017 to its registered foreign financial services providers (FSPs) advising them that it had come to the attention of the FSB that certain foreign FSPs conducting financial services related business in South Africa (also referred to as the Republic below in quoted legislation) are not registered as external companies in the country. According to the FSB, this registration is required in terms of s23 of the Companies Act, No 71 of 2008 (Companies Act).

The letter goes on to state that the FSB requires these foreign FSPs to confirm (by no later than 30 September 2017) whether or not they are compliant with s23 of the Companies Act. If not, the foreign FSPs must confirm that they have applied for registration as external companies or to provide reasons why they do not intend to register as external companies and reasons as to why they are of the view that they have complied with all applicable laws.

The Companies Act defines an external company as a "foreign company that is carrying on business, or non-profit activities, as the case may be, within the Republic, subject to s23(2)". Section 23(2) further explains that:

A foreign company must be regarded as "conducting business, or non-profit activities, as the case may be, within the Republic" if that foreign company:

- (a) is a party to one or more employment contracts within the Republic; or
- (b) subject to subsection (2A), is engaging in a course of conduct, or has engaged in a course or pattern of activities within the Republic over a period of at least six months,

such as would lead a person to reasonably conclude that the company intended to continually engage in business or non-profit activities within the Republic.

The Registrar of the FSB is of the view that:

The rendering of financial services (advice and/or intermediary services) by an FSP that is an external company constitutes or qualifies as "conducting business activities" as contemplated in s23 of the Companies Act. Further, given the indefinite nature of the authorisation granted to the FSP read with s11 of the FAIS Act, it is clear that the FSP intends to continually engage in business within the Republic.

Without commenting on the correctness of the view of the FSB Registrar, we recommend that foreign FSPs rendering financial services in South Africa voluntarily apply to the South African Companies and Intellectual Property Commission (CIPC) to be registered as external companies if they have not already done so.

Key requirements for a foreign company to consider before making the application to the CIPC are its registered address in South Africa and a local representative

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If the company fails to comply within the prescribed period, the CIPC may issue a notice requiring the company to cease carrying on its business of activities within South Africa.



resident in South Africa. In a 2012 practice note, the CIPC confirmed that an external company's chosen address should not be one chosen only for its convenience. The registered address must be the address from which the external company conducts its administrative business and can accept service of legal documents and process. That being said, the process for foreign companies to register as external companies in South Africa is not a complex or particularly lengthy one.

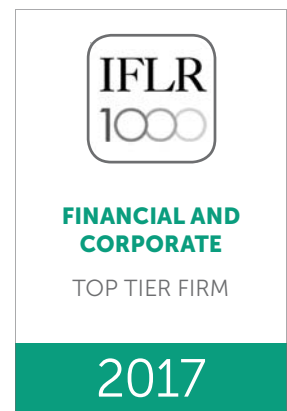
It is important to note that in instances of non-compliance with s23, the CIPC may send a compliance notice to a company that has not registered as an external company, calling for it to comply within 20 business days with the provisions of s23. If the company fails to comply within the prescribed period, the CIPC may issue a notice requiring the company to cease carrying on its business of activities within South Africa. Continuation of business activities by a company that has been

barred from doing so, may result in such company being prosecuted for an offence or being liable to pay an administrative penalty (not greater than 10% of the company's annual turnover).

Once foreign FSPs have successfully registered as external companies, they will need to ensure that they continue to comply with all laws affecting companies in South Africa including the Companies Act and the South African common law.

Cliffe Dekker Hofmeyr regularly assists foreign companies with registration as external companies. We also advise clients and foreign FSPs on continuing compliance with all laws affecting companies in South Africa including the Companies Act and the common law.

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