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# FINANCE AND BANKING ALERT

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### DEBARMENT OF DELINQUENT FAIS REPRESENTATIVES

Once signed into law, the Financial Sector Regulation Bill (Twin Peaks Bill) will significantly amend the current s14 of the Financial Advisory and Intermediary Services Act, No 37 of 2002 (FAIS) by providing more clarity on the procedures to be followed when a Financial Services Provider (FSP) intends to debar a representative and by affording a representative additional rights during and after the debarment process.

# DEBARMENT OF DELINQUENT FAIS REPRESENTATIVES

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This article aims to provide a brief outline of what to do when a FSP intends to have a representative debarred in terms of FAIS as well as the proposed amendments to s14 of FAIS which will be brought about by the 21 July 2016 version of the Twin Peaks Bill.

## **Debarment Process**

Section 14(1) of FAIS states that a FSP must ensure that:

- any representative of the FSP who no longer complies with the fit and proper requirements of FAIS; or
- who has contravened or failed to comply with any provision of FAIS in a material manner;
- is prohibited from rendering any new financial service by withdrawing any authority to act on behalf of the FSP and the representative's name, and the names of the key individuals of the representative, will be removed from the register of representatives;
- provided that any such FSP must immediately take steps to ensure that the debarment does not prejudice the interests of the representative's clients, and that any unconcluded business of the representative is properly concluded.

The debarment must relate to non-compliance by the representative with the fit and proper requirements. FAIS permits a FSP to take action against

representatives who are seen to be incompetent or unfit to render financial services.

There are no specific debarment procedures laid down in FAIS, the regulations or any board notice published by the Financial Services Board (FSB). There are only the Registrar's guidelines on the debarment process which were published by the FSB on 5 November 2013. As a result, it is unclear what process needs to be followed by a FSP to have a representative legally and validly debarred.

The FSP does not have a discretion to decide whether to debar a representative as s14(1) makes it compulsory for FSPs to debar a representative when he or she has failed to comply with the fit and proper requirements or has failed to comply with any provision of FAIS in a material manner. Further, the FSP must remove the representative's name from the register of representatives and, within 15 days of the removal, inform the Registrar in writing that it has done so. The FSP must also provide the Registrar with the reasons for the debarment in the format prescribed by the Registrar.

However, where the representative is in the employment of a FSP, the requirements of the Labour Relations Act, No 65 of 1995 (LRA) may be taken into account along with the requirements in FAIS. The FSP, as employer, therefore has to follow the disciplinary hearing process prescribed

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*The decision to debar would constitute "administrative action" in terms of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA) and the representative would have to institute action in court in order to have the decision to debar reviewed.*



by the LRA and the outcome of the disciplinary hearing may be used as a basis for the process under FAIS. However, a guilty outcome under the LRA does not automatically lead to a guilty outcome under FAIS. An independent assessment would have to be conducted to determine if the representative did in fact contravene the fit and proper requirements in FAIS.

The guidelines published by the FSB sets out the procedure to be followed by a FSP when exercising their powers in terms of s14(1):

- Lack of authority and unlawful delegation:
  - The Registrar requires the FSP to show that it has the authority to debar a representative by virtue of an employment contract or mandate agreement which existed at the time of debarment, otherwise the FSP cannot effect a valid debarment.
  - If the reason for the debarment existed but only came to the notice of the FSP at a later date, the process of debarment may still be utilised.
  - The person who authorises the debarment must be the key individual of the FSP or any other person authorised by the FSP.
- Bias:
  - Before effecting a debarment, the FSP must inform the representative of the intention to debar and the grounds thereof and must give the representative an opportunity

to make a submission in response thereto. This could form part of the disciplinary proceedings carried out under the LRA.

- Failure to comply with s14(1) of FAIS:
  - Within 15 days of removal of the representative's name from the register of representatives, the FSP must inform the Registrar in writing and complete the debarment form prescribed by the Registrar. Debarment would not be appropriate before due process has been followed, for example, if the representative has been suspended pending an investigation.
- Rationality, legality and reasonableness:
  - A FSP must ensure that the debarment is rational and reasonable and must only take relevant factors into account when considering debarment. Failure to do so, may render the debarment unlawful. Any action taken by a FSP against a representative must be justifiable given the information that is available to the person making the decision.

A representative who has been debarred by a FSP cannot lodge an appeal to the FSB board of appeal as only decisions taken by the Registrar can be reviewed by the FSB board of appeal. However, the decision to debar would constitute "administrative action" in terms of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA) and the representative would have to institute action in court in order to have the decision to debar reviewed.

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*The new s14 will require a FSP to ensure that the debarment process is lawful, reasonable and procedurally fair.*



## Debarment by the Registrar

Section 14A states that the Registrar may at any time debar a person, including a representative, for a specified period from rendering financial services, if satisfied on the basis of available facts and information that the person:

- (a) does not meet, or no longer meets, the fit and proper requirements; or
- (b) has contravened or failed to comply with any provision of FAIS.

A FSP must within five days after being informed by the Registrar of the debarment of a representative or key individual, remove the names of that representative or key individual from the register of representatives.

## Proposed Amendments to the Debarment Process

The Twin Peaks Bill will bring about significant changes to the current s14 of FAIS. The new s14 will require a FSP to ensure that the debarment process is lawful, reasonable and procedurally fair. Further, prior to debarment, a FSP will be required to give adequate notice in writing to the representative stating the FSP's intention to debar the representative, the grounds and reasons thereof, and any terms or conditions attached to the debarment. A FSP will be required to provide the representative with reasons for the debarment as well as the FSP's written policy and procedure governing the debarment process. This

would mean that all FSPs will now be required to have a document, setting out the policies and procedures for debarment of representatives that is lawful, reasonable and procedurally fair.

The FSP must give the representative a reasonable opportunity to make submissions in response to the written notice. Unlike s152 of the Twin Peaks Bill which affords the representative at least one month to make submissions, the new s14 of FAIS is silent on what would constitute a "reasonable opportunity" to make submissions.

The FSP will now also be required to ensure that the debarment of a representative will not prejudice the interests of the debarred representative's clients and all unconcluded business of the debarred representative will have to be attended to by the FSP. The FSP will be required to notify the Financial Sector Conduct Authority (FSCA) (previously the FSB) within five days of the debarment of a representative and provide the FSCA with the grounds and reasons for the debarment.

If a person is no longer a representative of a FSP but committed an act which would have given rise to debarment at the time the person was a representative of a FSP, then the FSP must still commence the debarment process against the person within three months of becoming aware of the reason for the debarment, even if that person is no longer a representative of the FSP.

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*FSPs will welcome the further clarity provided on the procedures to be followed when a FSP intends to debar a representative under the Twin Peaks Bill's amendments.*



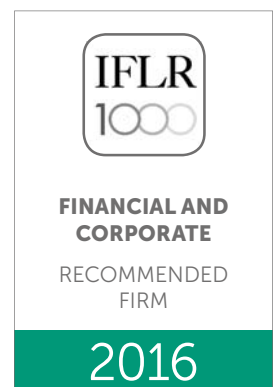
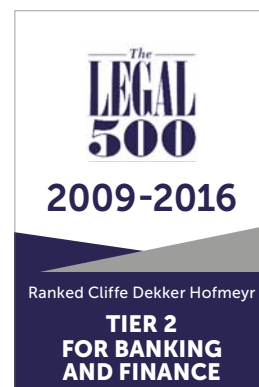
Currently, a representative has no right to appeal the decision to debar a representative. However, the amended s14 of FAIS will now provide for a right of appeal against such debarment. The FSP will be required to notify the person of their right of appeal to the internal appeal mechanism established by the FSCA, and the right to a subsequent review of the decision of the FSCA to the Financial Services Tribunal (Tribunal). The FSP will also be required to provide details of the period within which the internal appeal proceedings to the FSCA, or review proceedings to the Tribunal, must be instituted together with any other formal requirements in respect of the proceedings.

Section 14A dealing with debarment by the Registrar will be repealed by the Twin Peaks Bill, and s152 of the Twin Peaks Bill will deal with debarment by the FSCA. Prior to making a debarment order, the FSCA must give a draft debarment order to the representative setting out the reasons for the debarment and the representative will be given at least one month to make submissions.

#### Conclusion

FSPs will welcome the further clarity provided on the procedures to be followed when a FSP intends to debar a representative under the Twin Peaks Bill's amendments. Representatives will be afforded additional rights during and after the debarment process and this too is a positive change.

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