FINANCIAL SERVICES BOARD

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

GUIDELINE ON THE DEBARMENT PROCESS IN TERMS OF SEC 14(1)

Date: 05 November 2013

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1. PURPOSE OF THE GUIDELINE

The purpose of the guideline is to explain the rationale and process to be followed by Financial Services Providers ("providers") when effecting a debarment of representatives as envisaged in s 14(1) of the Financial Advisory and Intermediary Services Act (" the FAIS Act").

2. BACKGROUND

The Registrar receives an inordinate number of notices of debarment from providers in terms of the provisions of s 14(1) of the FAIS Act. There is also a concomitant increase in complaints from representatives about the manner and fairness of their debarments. The reasons provided by representatives include:

2.1 The provider did not notify the person that he/she were to be debarred.

2.2 The debarred person is aggrieved by the debarment as the key individual that effected the debarment had no authority to act on behalf of the FSP.

2.3 The person was debarred for reasons not related to the rendering of financial services.

2.4 The person was debarred after they had left the service of the provider.

A debarment in terms of s 14(1) of the FAIS Act is a regulatory instrument intended to rid the industry of incompetent and dishonest representatives. Debarment should not be used to satisfy a provider's contractual or other grievances against a representative, unrelated to fitness or competency requirements. Such use would be an unfair revenge or retaliation on the representative.

Providers are cautioned against the abuse of their powers under s14(1) of the FAIS Act. A debarment must be effected for the purpose it was intended. It is important that providers understand that they can terminate an agreement with a representative without debarring him/her. Debarment must relate to non-compliance by the representative with the competency and integrity requirements as postulated by s 13(2)(a), read with s 8(1)(a) and (b) of the FAIS Act; or with any applicable code of conduct or law on the conduct of business (s 13(2)(b)).

3. PROCEDURE TO BE FOLLOWED BY AUTHORISED PROVIDERS WHEN EXERCISING THEIR POWERS UNDER SECTION 14(1) OF THE FAIS ACT

i. Lack of authority and unlawful delegation - Section 14(1)

Providers must obey the law and must have authority in law for their decisions. If a provider had no mandate or contractual relationship with a representative at the time when the reason for the debarment occurred, it cannot effect a valid debarment. If, however, the reason for the debarment existed, but only came to the notice of the provider later, the process of debarment may still be embarked upon.

Sometimes a representative, who expects to be debarred, anticipates (and tries to avoid) the debarment by resigning employment or surrendering the mandate. In such event the provider must not delay the debarment if there are justifiable grounds for the debarment. The Registrar requires providers to show that they have authority to debar representatives, either by virtue of an employment contract or mandate agreement which existed at the time the reason for the debarment occurred. The person who authorizes the debarment of the representative must be the key individual of the provider or such other person duly authorized by the provider.

ii. Bias - Section 14(2)

Providers must use their power without bias. "Bias" means that the person making the decision is unfairly slanted towards or in favour of a particular decision. It means too that the person making the decision is not independent and impartial.

The provider must develop systems and procedures to ensure that due process is complied with as soon as possible. Before effecting a debarment the provider must inform the representative of the intention to debar and grounds therefor and must give the representative a reasonable opportunity to make a submission in response thereto. This process may

form part of disciplinary proceedings which may be embarked upon by the employer against a representative.

If the provider might be perceived as biased, it is recommended that an independent person be delegated to chair the enquiry to determine whether there are grounds for debarment. It is important that when effecting a debarment in terms of s 14(1) the provider is exonerated of actual or real bias.

iii. Failure to comply with an empowering provision - Section 14(1)

Providers are empowered in terms of s 14(1) to debar representatives who are no longer fit and proper or have contravened the FAIS Act in a material manner. The provider is required to ensure that the name of the representative is removed from its register and to protect the interests of the clients. Within a period of 15 days after the removal of the name of the representative from its register, the provider must inform the Registrar in writing and complete the prescribed debarment form properly with supporting attachments (if any).

Failure to comply duly and fairly with the provisions of s 14(1) may attract regulatory action against the provider. Providers who do not comply with the law must be able to show good cause why steps should not be taken to enforce compliance on them.

Debarment would not be appropriate before due process has been completed, eg. if the representative has been suspended pending an investigation.

iv. Rationality, legality and reasonableness - Section 14(2)

Providers must use the power to debar within the framework of the law. Debarment must be effected for the purposes that it was designed for and decisions of the providers must be supported by the law. When the provider 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.

The provider must ensure that the debarment is rational and reasonable. This means the action taken by the provider must make sense and be justifiable given the information that is available to the person who makes the decision and takes the action.

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