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Study Guide

THE PROCESS OF DEBARMENT: ONLINE CPD COURSE 2020 /2021



June 2020

Course summary

The Financial Sector Conduct Authority has published a guidance notice 1 of 2019 to provide guidance on the application of section 14 of the FAIS act particular with the regard to the rational applied and the processed to be following when effecting debarments.

This course considers this guidance note as well as the statutory stipulations regarding debarment.

Time allotted for course

The course consists of 1 topic with an assessment that needs to be completed. The time allotted for each aspect is as follows:

Topic number	Title	Word count	Level	Time allotted
Topic 1	The process of debarment	7 177	Intermediate	60 minutes
	Assessment			

Total time	1.0
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Assessment and certification

After completion of the workshop the learner must complete an electronic assessment on the learning management system.

- **Form of assessment:** Multiple Choice Questions
- **Number of questions:** 8 questions
- **Duration:** 25 minutes
- **Competency mark:** 60%

Upon obtaining a competency mark of 60% the learning will receive a certificate of completion. The learner will be afforded an opportunity to re-do the workshop should a competency mark not be attained.

Course accreditation

CPD Category: Online program

COB Category: All Classes of Business

Financial planning component: Ethics & Practice Standards

Advice component: Ethics, Standards & Compliance

Accreditation validity: 1 September 2020 to 31 August 2021

CPD Points allocated: 1.0 hours | points on completion and pass of assessment

FPI approval number: FPI20080230

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Ordering information

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TOPIC 1 THE PROCESS OF DEBARMENT

LEARNING OUTCOMES

After studying the topic, the learner should be able to-

- Understand the obligation of the FSP to debar a representative or key individual.
- Understand the meaning of debarment.
- Understand in which time frame debarment must be affected by the FSP.
- Outline the process that must be followed by an FSP when debarring a representative.
- Describe debarment by Financial Sector Conduct Authority (FSCA).
- Describe what needs to be done when a person cannot be located.
- Outline the stipulations regarding the conduct of a person during the debarment process.
- Describe the recourse measures for a debarred person.
- Understand the role of the Financial Sector Conduct Authority (FSCA) upon receipt of a notification of debarment.
- Describe the process for the reappointment of a debarred representative.

1.1 Introduction

The requirement and duty imposed by the Financial Advisory and Intermediary Services (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.

Debarments in terms of section 14(1) of the Financial Advisory and Intermediary Services (FAIS) Act is a regulatory tool aimed at ensuring that only persons who comply with the provisions of the Financial Advisory and Intermediary Services (FAIS) Act and satisfy the fit and proper requirements are allowed to render financial services.

A debarment decision by a Financial Services Provider (FSP) constitutes the exercise of a statutory power and amounts to administrative action.

However, many Financial Services Providers (FSPs) have failed to follow the procedures set out in section 14(3) of the Financial Advisory and Intermediary Services (FAIS) Act which was substituted with the Financial Sector Regulations (FSR) Act with effect from 1 April 2018.

This text considers the stipulations regarding debarment of representatives and key individuals in terms of the Financial Sector Regulations Act, FAIS notices and guidance notices that has been issued in this regard and decision of the Financial Services Tribunal handed down since inception of Section 230 of the Financial Sector Regulation Act.

1.2 Obligation on Financial Services Provider (FSP) to debar

Debarment is a regulatory instrument intended to rid the industry of incompetent and dishonest representatives.

The following are grounds for debarment:

- The person does not meet (or no longer meets) the fit and proper requirements.
- The person has contravened or failed to comply with any provisions of the Financial Advisory and Intermediary Services (FAIS) Act in a material manner.
- The person conspired with, aided, abetted, induced, incited or procured another person to contravene the Financial Advisory and Intermediary Services (FAIS) Act in a material way.¹

A Financial Services Provider (FSP) may only exercise the powers to debar in respect of a natural representative, juristic representative or a key individual of the Financial Services Provider (FSP).

Debarment should not be used to satisfy a Financial Services Provider (FSP)'s contractual or other grievances against a representative, unrelated to fit and proper requirements or adherence to the Financial Advisory and Intermediary Services (FAIS) Act.

A Financial Services Provider (FSP) can terminate an agreement with a representative without debarring him/her. It is important that the employment contract/mandate include the reasons for possible debarment and the possible consequence of debarment for the status of employment or the mandate.

The Financial Advisory and Intermediary Services (FAIS) Act makes provision for debarment of a representative and key individual by either a Financial Services Provider (FSP) that authorised the representative to act on their behalf or by the Financial Sector Conduct Authority (FSCA).

1.3 The meaning of debarment

A debarment order prohibits the natural person, for the period specified in the debarment order, from the following:

- Providing, or being involved in the provision of financial services, generally or in circumstances specified in the order.
- Acting as a key individual of a Financial Services Provider (FSP).
- Providing specified services to a financial institution, whether under outsourcing arrangements or otherwise.

A natural person who is subject to a debarment order may not engage in conduct that, directly or indirectly, contravenes the debarment order.

1.4 Effective date of debarment

A debarment order in respect of a natural person takes effect from the date on which it is served on the person or if the order specifies a later date, the later date

A Financial Services Provider (FSP) that becomes aware that a debarment order has been made in respect of a natural person employed or engaged by the financial institution must take all reasonable steps to ensure that the debarment order is given effect to.

The Financial Sector Conduct Authority (FSCA) that made a debarment order may, by order and on application by the debarred natural person reduce the period of the debarment order or revoke the debarment order.

The Financial Sector Conduct Authority (FSCA) must publish each debarment order, and each order to revoke or reduce the period of debarment.

1.5 Debarment by the Financial Services Provider (FSP)

An Financial Services Provider (FSP) must ensure than any representative who no longer complies with the fit and proper requirements or contravened or failed to comply with any of the provisions of the Financial Advisory and Intermediary Services (FAIS) Act in a material manner is prohibited from rendering any financial service by debarring such a representative.

Debarment means that the authority to act as a representative will be withdrawn and that no other Financial Services Provider (FSP) will be able to authorise the representative to act on their behalf until such a time that the re-appointment of the representative has been approved by the Financial Sector Conduct Authority (FSCA).

If the Financial Services Provider (FSP) does not debar a representative when circumstances so call for, the Financial Services Provider (FSP) will be subject to regulatory action, and the Financial Sector Conduct Authority (FSCA) will handle the debarment process of the representative.

If a Financial Services Provider (FSP) had no mandate or contractual relationship with a representative at the time, it cannot affect a valid debarment.

1.5.1 Timing of debarment

Prior to the amendment of section 14 of the Financial Advisory and Intermediary Services (FAIS) Act, the Financial Advisory and Intermediary Services (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 Financial Services Provider (FSP).

Clarity in this regard has now been provided in sections 14(1)(b) and 14(5) of the Financial Advisory and Intermediary Services (FAIS) Act, which provide that an Financial Services Provider (FSP) retains the obligation to debar a person who no longer is a representative of that Financial Services Provider (FSP), provided that the following requirements are adhered to:

- **Requirement 1:** Reason for a debarment must have occurred and become known to the Financial Services Provider (FSP) while the person was still a representative of the Financial Services Provider (FSP)
- **Requirement 2:** Debarment must commence no longer than six months from the date that the person ceased to be a representative of the Financial Services Provider (FSP).

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 Financial Services Provider (FSP), the Financial Services Provider (FSP) may not debar the representative and must refer the matter to the Financial Sector Conduct Authority (FSCA).

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 Financial Services Provider (FSP), the Financial Services Provider (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 Financial Services Provider (FSP). Under such circumstances it is, however, required that the Financial Services Provider (FSP) should take all reasonable steps to commence debarment proceedings within six months from the date on which the person had ceased to be a representative.

Although the debarment proceedings must commence within six months, it is not necessarily implied that the said proceedings must be completed within six months. Having said this, as the decision amounts to administrative action, such action is subject to the specific requirements of section 14 of the Financial Advisory and Intermediary Services (FAIS) Act as well as the overarching requirements of the Promotion of Administrative Justice Act (PAJA). In terms of PAJA, a failure to take a decision also constitutes administrative action. This is echoed in section 218(g) of the Financial Sector Regulations Act in that the failure to take a decision within a reasonable period may become the subject of an application for reconsideration to the Financial Services Tribunal in terms of section 230 of the Financial Sector Regulations Act.

Where a representative's relationship with a Financial Services Provider (FSP) is terminated and the circumstances of the first requirement are present, it is incumbent upon the Financial Services Provider (FSP) to commence with debarment proceedings within 6 months. A Financial Services Provider (FSP) may not abdicate this and the Financial Sector Conduct Authority (FSCA) may require of Financial Services Providers (FSPs) to show what steps had been taken to timeously commence debarment proceedings.

Failure to comply with the obligation under section 14 of the Financial Advisory and Intermediary Services (FAIS) Act may lead to regulatory action against the Financial Services Provider (FSP).

1.5.2 The debarment procedure

Section 14(3) of the Financial Advisory and Intermediary Services (FAIS) Act sets out the requirements with which a Financial Services Provider (FSP) must comply when debarring a person. These requirements must be contained in a Financial Services Provider (FSP)'s policies and procedures governing its debarment process.

(I) Step 1: Give adequate notice to the person

The Financial Services Provider (FSP) must inform the representative of the intention to debar and the grounds, therefore.

The notice should state the following:

- The Financial Services Provider (FSP)'s intention to debar the person.
- The grounds and reasons for the debarment. Grounds refer to the factors stated in Paragraph 1.2 and reasons mean the facts that inform these factors.
- Any terms attached to the debarment, including, in relation to unconcluded business, any measures stipulated for the protection of the interests of clients.

The Financial Services Provider (FSP) should, through the notice, provide the person with a copy of its written policies and procedures governing the debarment process.

The Financial Services Provider (FSP) should further, through the notice, give the person a reasonable opportunity to make a submission in response to such a notice. 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 by the Financial Sector Conduct Authority (FSCA) that representatives approach the Financial Sector Conduct Authority (FSCA), after the debarment, to request the documentation and reasons for the debarment by the Financial Services Provider (FSP) from the Financial Sector Conduct Authority (FSCA). In this regard, the Financial Sector Conduct Authority (FSCA) urges the Financial Services Provider (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.

(II) Step 2: Consider representations

The Financial Services Provider (FSP) must consider together with all available facts and information, any response received from the person that the Financial Services Provider (FSP) intends to debar and where applicable have regard to information regarding the conduct of the person that is furnished by the Financial Sector Conduct Authority (FSCA), the Ombud or any other interested person.

(III) Step 3: Take a decision

The key individual must take a decision whether or not to debar the person and immediately notify the person in writing of the Financial Services Provider (FSP)'s decision; the persons' rights in terms of section 228 of the Financial Sector Regulations Act to request reasons for the decision and have the decision reconsidered by the Financial Sector Tribunal.

1.5.3 Oral hearing not required

Section 14 of the Financial Advisory and Intermediary Services (FAIS) Act does not require that an oral hearing be held.

The debarment process may form part of employment related disciplinary proceedings which may be embarked upon by the employer against a representative.

Should an Financial Services Provider (FSP) conduct a disciplinary hearing with a representative, it is advisable for the Financial Services Provider (FSP) to combine its policy and procedures governing the debarment process with the Financial Services Provider (FSP)'s policies and procedures in respect of disciplinary hearings.

In the event that this is not done, a Financial Services Provider (FSP) cannot summarily debar a person based on the outcome of a disciplinary hearing without following the required steps.

1.5.4 Abuse

A debarment should only be effected in circumstances where there are relevant grounds for debarment and should not be used by Financial Services Providers (FSPs) to satisfy contractual or other grievances.

Financial Services Providers (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.

To guard against abuse, a debarment of a person should only be effected by a person duly authorised by the Financial Services Provider (FSP) to do so. Such a person should preferably be a key individual of or hold the rank of senior management in the Financial Services Provider (FSP).

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

1.5.5 Rationality

As stated above, a debarment decision by a Financial Services Provider (FSP) constitutes the exercise of administrative action. Such action is subject to the specific requirements of section 14 of the Financial Advisory and Intermediary Services (FAIS) Act as well as the overarching requirements of PAJA.

It is required of Financial Services Providers (FSPs) exercising the debarment power to act reasonably and rationally. This means that the decision taken by a Financial Services Provider (FSP) must make sense and be justifiable given the information that is available.

Financial Services Providers (FSPs) must use the power to debar within the framework of the law. When a Financial Services Provider (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.

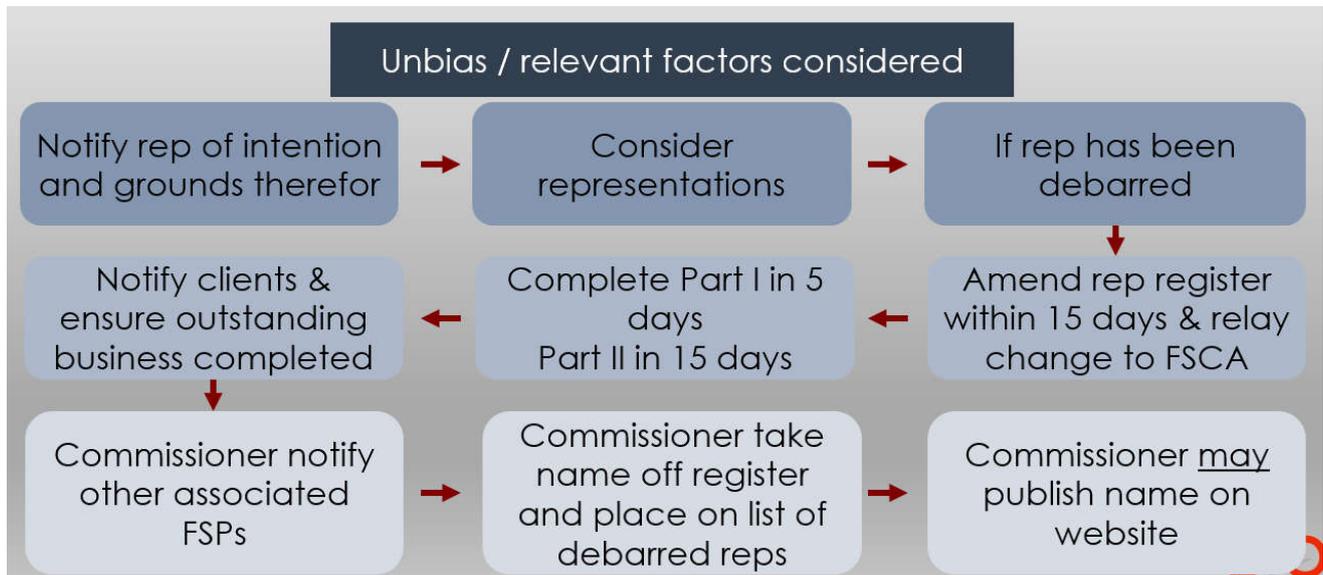
1.5.6 Duties after debarment

After the debarment has been affected the Financial Services Provider (FSP) must adhere to the following:

- Immediately withdraw any authority given to a debarred person to act on behalf of the Financial Services Provider (FSP).
- The Financial Services Provider (FSP) must remove the name of the representative from the register of representatives within 15 days of debarment. The amended register must be submitted to the Financial Sector Conduct Authority within 15 days of date of amendment of register.
- Immediately take steps to ensure that the debarment does not prejudice the interests of clients of the debarred person.
- The Financial Services Provider (FSP) must also inform the clients of the representative of the debarment.
- Ensure that any uncompleted business of the debarred person is properly attended to by transferring the clients to another authorised representative of the Financial Services Provider (FSP).

Failure to comply with the aforementioned may result in regulatory action against the Financial Services Provider (FSP).

Figure 1.1: The debarment process



1.5.7 Reporting the debarment to the Financial Sector Conduct Authority (FSCA)

The Financial Services Provider (FSP) must inform the Financial Sector Conduct Authority (FSCA) of the debarment within 5 days of date of the debarment by submitting Part I of the Debarment Notification form by either hand delivery or electronic mail notification. The form includes the reasons for debarment²

The Financial Services Provider (FSP) must provide the Financial Sector Conduct Authority (FSCA) with the particulars of debarment within 15 days of date of the debarment by submitting Part II of the Debarment Notification form by either hand delivery or electronic mail notification. The form must provide particulars of reasons for debarment including the following:³

- All documentary evidence and information supporting the grounds/reasons for debarment.
- A copy of the employment contract or mandate between the Financial Services Provider (FSP) and the debarred representative.
- A copy of the transcript/minutes and outcome of the debarment hearing.
- Forensic/investigation report and any other relevant documents.⁴

The Financial Sector Conduct Authority (FSCA) must enter the name of the representative into the database of debarred representatives and take the name off the central register of representatives.

The Financial Sector Conduct Authority (FSCA) may make known any such debarment and the reasons therefor by notice on the official Financial Sector Conduct Authority (FSCA) website or by means of any other appropriate public media.⁵

Fine for late submission of the debarment notification

A maximum fine of up to R1 000 per day per change applies for late submission plus interest

(I) Debarment notification form part 1

1. Particulars of the debarring Financial Services Provider (FSP)	
Financial Services Provider (FSP) Name	
FSP Number	

2. Particulars of the person at the Financial Services Provider (FSP) who effected the debarment	
Full Names	
Surname	
Position at the FSP [Designation]	
Mobile phone number	
Telephone number	
E-mail address	

3. Recent particulars of the debarred representative	
Title	
Full Names	
Surname	
Identity No. / Passport No. / Registration No.	
Physical address	
Postal Address	
Telephone number	
Mobile phone number	
E-mail address	
4. Date on which the representative was debarred	
Debarment date	

5. Grounds of debarment			
Indicate the grounds of the debarment.			
(a)	Non-compliance with Fit and Proper Requirements	Honesty and Integrity	<input type="checkbox"/>
		Competency	<input type="checkbox"/>
		Operational ability	<input type="checkbox"/>
		Financial soundness	<input type="checkbox"/>
(b)	Any other material contravention or non-compliance with provisions of the Act	<input type="checkbox"/>	
	Indicate the non-complied or contravened provision of the Act.		

6. Details of person completing form

Name	
Designation	
Place	
Date	
Signature	

(II) Debarment notification part II

6. Particulars of the debaring FSP and Debarred Representative

FSP Name	
FSP Number	
Initials and Surname of Debarred Representative	
Identity No. / Passport No. / Registration No. of Debarred Representative	

7. Grounds and Reasons

Submit within 15 days from date of debarment, all relevant documentation which formed the grounds and reasons for the debarment, this may include but is not limited to the following:

(a) All documentary evidence and information supporting the grounds/reasons for the debarment.
(b) A copy of the employment contract or mandate between the FSP and the debarred representative.
(c) A copy of transcript / minutes and outcome of debarment hearing.
(d) Forensic/investigation report and any other relevant documents.

8. Details of person completing form

Name	
Designation	
Place	
Date	
Signature	

1.6 Debarment by the Financial Sector Conduct Authority (FSCA)⁶

The Financial Advisory and Intermediary Services (FAIS) Act also make provisions for the debarment of a representative or key individual by the Financial Sector Conduct Authority (FSCA) if the key individual fails to debar a representative when circumstances so call.

Before debarment, the Financial Sector Conduct Authority (FSCA) must inform the person of the following, by way of an intention to debar notice:

- Give a draft of the debarment order to the person and to the Prudential Authority, along with reasons for and other relevant information about the proposed debarment
- Invite the person to make submissions on the matter and give the person a reasonable period to do so. This period must be at least one month.

In deciding whether or not to make a debarment order in respect of a natural person, the responsible authority must take into account at least any submission made by, or on behalf of, the person and any advice from the other prudential authority.

The representative must also be given reasonable opportunity to respond to the notice. It must be ensured that the debarment does not prejudice the interest of clients of the representative and that any uncompleted business of the representative is properly concluded.

The Financial Services Provider (FSP) must within 5 days after being informed by the Financial Sector Conduct Authority (FSCA) of the debarment, indicate the debarment on the register of representatives.

The Financial Sector Conduct Authority (FSCA) may make known any such debarment and the reasons therefor by notice on the official Financial Sector Conduct Authority (FSCA) website or by means of any other appropriate public media.⁷

1.7 Where a person cannot be located

If the Financial Services Provider (FSP) or Financial Sector Conduct Authority (FSCA) after taking all reasonable steps, including through electronic means, cannot locate a person to be given a debarment order, delivering the document or information to the person's last known e-mail or physical business or residential address will be sufficient.⁸

1.8 Conduct of representatives

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

It has come to the attention of the Financial Sector Conduct Authority (FSCA) 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, a Financial Services Provider (FSP) retains its power to debar a person who is no longer a representative of that Financial Services Provider (FSP), provided that the first and second requirement set out Paragraph 1.5.1 are adhered to.

1.9 Recourse measures for debarred representatives

A debarment decision by a Financial Services Provider (FSP) constitutes administrative action. The debarment decision will accordingly stand until it is set aside or until the debarred person has been re-appointed.

Administrative law does not allow Financial Services Providers (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 overturned by a competent court or in terms of such other processes as may be specified in legislation.

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.

A person who feels aggrieved by a debarment decision may, in terms of section 230 of the Financial Sector Regulations Act, apply to the Financial Services Tribunal for a reconsideration of the decision.

Debarred persons may therefore make application for reconsideration by the Financial Services 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.

It should be noted that the Financial Services Tribunal does not have the jurisdiction to consider debarment decisions by Financial Services Providers (FSPs) taken prior to 1 April 2018. This is as section 230 of the Financial Sector Regulations 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.

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 a Financial Services Provider (FSP) failed to follow the correct process in terms of section 14 of the Financial Advisory and Intermediary Services (FAIS) Act and those that are bad because of the merits:

- **Decisions that are bad because a Financial Services Provider (FSP) failed to follow the correct process:** The Financial Services 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 Financial Services Provider (FSP) for further consideration. Practically this means that the Financial Services Provider (FSP) should go back to follow the correct process.
- **Decisions that are bad because of its merits:** In these circumstances, the Financial Services Tribunal can remit a decision back to a Financial Services Provider (FSP) for further consideration or substitute the decision with its own decision. Whether the Tribunal will remit a decision back or substitute a decision will depend on the facts of each case.

The Financial Services Tribunal's decision to remit a decision back / substitute a decision after setting it aside (whether on the basis of process or 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).

1.10 Role of the Financial Sector Conduct Authority (FSCA) upon receipt of a notification of debarment

The Financial Sector Conduct Authority (FSCA) does not review, approve or confirm a debarment of a representative by a Financial Services Provider (FSP). The administrative action is complete once the debarring Financial Services Provider (FSP) takes a decision.

The Financial Sector Conduct Authority (FSCA) merely records the fact that a debarment has occurred in the register for debarred representatives which is published on the Financial Sector Conduct Authority (FSCA)'s web site in terms. Neither the recording of the debarment in the register, nor the publication thereof, translates into an administrative act.

The Financial Sector Conduct Authority (FSCA) 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.

The Financial Services Provider (FSP) is required to inform the Financial Sector Conduct Authority (FSCA) of the reasons for the debarment" to enable the Financial Sector Conduct Authority (FSCA) to-

- Consider the possible referral of the representative's actions for criminal investigation or enforcement action as contemplated by section 167 of the Financial Sector Regulations Act.
- Have relevant information as to the debarment when confronted with the reappointment of a debarred representative by another Financial Services Provider (FSP) and to assess whether or not there has been compliance with all the requirements for the re-appointment.
- Satisfy itself that due process was followed by the Financial Services Provider (FSP) and that the debarment relates to compliance with provisions of the Financial Advisory and Intermediary Services (FAIS) Act, in the absence of which (i.e. where any form of dishonesty or mala fides on the part of the debarring Financial Services Provider (FSP) is detected) possible regulatory action against the Financial Services Provider (FSP) may follow.

1.11 Reappointment of a debarred representative

A debarred person may only be reappointed by a Financial Services Provider (FSP) if the debarred representative complies with the requirements determined by the Financial Sector Conduct Authority (FSCA) for the reappointment of a debarred person as a representative (currently Board Notice 82 of 2003).

Although the Financial Sector Conduct Authority (FSCA) is not empowered to interfere in a reappointment by a Financial Services Provider (FSP) of a debarred representative, the Financial Sector Conduct Authority (FSCA) will satisfy itself that the process of reappointment was followed correctly.

Should the Financial Sector Conduct Authority (FSCA) be of the view that a reappointment was not proper or in line with statutory provisions, the Financial Sector Conduct Authority (FSCA) may take action under section 9 of the Financial Advisory and Intermediary Services (FAIS) Act (suspension or withdrawal of licenses) and/or section 153 of the Financial Sector Regulations Act (debarment) against the reappointing Financial Services Provider (FSP). Similarly, the Financial Sector Conduct Authority (FSCA) may initiate new debarment proceedings against an unfit person who has been reappointed.

The reappointing Financial Services Provider (FSP), must request the Financial Sector Conduct Authority (FSCA) to remove the debarred representative from the database of debarred representatives. The reappointing Financial Services Provider (FSP) must before making such a request, be satisfied that the representative is a person who is honest and has integrity. The Financial Services Provider (FSP) must do so by submitting satisfactory evidence, affidavits or testimonials to support the proposition.

The reappointing Financial Services Provider (FSP) must be aware of the details of the representative's transgression and be satisfied that the representative will not commit the offence again. The application may still be turned down if the contravention is of such a nature that the profession could not be seen to accommodate the representative.

A debarred representative may be reappointed provided compliance with the following conditions:

- Twelve (12) months have lapsed since debarment date except when debarment resulted from not meeting the fit and proper requirement. In such an event, the representative may reapply as soon as full competence is reached.
- All unconcluded business of the debarred representative must have been properly concluded.
- All complaints or legal proceedings regarding the debarred representative have been properly and lawfully resolved or concluded.
- The debarred representative must have fully complied with any decision, determination or court order issued regarding the matter.
- All fit and proper requirements must be met.⁹

1.12 Key notes

On 1 April 2018, the debarment process under the Financial Advisory and Intermediary Services (FAIS) Act was amended by the Financial Sector Regulations Act 9 of 2017. In terms of section 14(3) of the Financial Advisory and Intermediary Services (FAIS) Act, a Financial Services Provider (FSP) must, before debarring a person, take specific steps. Section 39 of the Financial Advisory and Intermediary Services (FAIS) Act further stipulates that any person aggrieved by a decision of an Financial Services Provider (FSP), including electing to debar a person in terms of section 14, may now also apply for the reconsideration of the decision to the Financial Services Tribunal.

As a result of the right to appeal against a debarment decision, there was a substantial increase in debarment cases referred to the Tribunal since April 2018. These cases highlighted that there was still truly little clarity with regards to the process that needs to be followed as well as the Financial Sector Conduct Authority (FSCA)'s obligations in this regard.

The Financial Sector Conduct Authority (FSCA) has now published Guidance Notice 1 of 2019 to clarify the role of all parties in this process.

The requirement and duty imposed by the Financial Advisory and Intermediary Services (FAIS) Act on Financial Services Providers (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 Financial Services Providers (FSPs) with the statutory power to debar representatives.

Debarments in terms of section 14(1) of the Financial Advisory and Intermediary Services (FAIS) Act is therefore a regulatory tool aimed at ensuring that only persons who comply with the provisions of the Financial Advisory and Intermediary Services (FAIS) Act and satisfy the fit and proper requirements are allowed to render financial services. A debarment decision by a Financial Services Provider (FSP) constitutes the exercise of a statutory power and amounts to administrative action.

1.12.1 Obligation on Financial Services Provider (FSP)

The Guidance Notice once again stresses the obligation on Financial Services Providers (FSPs) to follow due process when they debar a person and describes when and how they should exercise their powers.

Prior to the amendment of section 14 of the Financial Advisory and Intermediary Services (FAIS) Act, the Financial Advisory and Intermediary Services (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 Financial Services Provider (FSP). Clarity in this regard has now been provided in sections 14(1)(b) and 14(5) of the Financial Advisory and Intermediary Services (FAIS) Act, which provide that an Financial Services Provider (FSP) retains the obligation to debar a person who no longer is a representative of that Financial Services Provider (FSP), provided that the –

- Reason for a debarment must have occurred and become known to the Financial Services Provider (FSP) while the person was still a representative of the FSP (see Guidance Note where this becomes known after the rep left); and
- Debarment must commence no longer than six (6) months from the date that the person ceased to be a representative of the Financial Services Provider (FSP).

1.12.2 Requirements for debarment

Section 14(3) of the Financial Advisory and Intermediary Services (FAIS) Act sets out the requirements with which a Financial Services Provider (FSP) must comply when debarring a person. These requirements must be contained in an FSP's policies and procedures governing its debarment process.

1.12.3 Conduct of representatives

The purpose of the defined process is to afford a representative an opportunity to make submissions in response to the grounds and reasons that inform a Financial Services Provider (FSP)'s intention to debar him/her. An election by a representative not to make use of this opportunity does not prevent the Financial Services Provider (FSP) from considering the matter and taking a decision concerning the debarment of that person. The Financial Sector Conduct Authority (FSCA) has however noticed 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. A Financial Services Provider (FSP) retains its power to debar a person who is no longer a representative of that Financial Services Provider (FSP), provided that the first and second requirement, set out above, is met.

The Guidance Notice further clarifies that an oral hearing is not required; that Financial Services Providers (FSPs) should not use debarments as a result of other grievances and that Financial Services Providers (FSPs) should in all cases act reasonably and rationally.

1.12.4 Critical steps of debarment

(I) Step 1: Give adequate notice in writing to the person

The notice should state the following:

- The Financial Services Provider's (FSP's) intention to debar the person.
- The grounds and reasons for the debarment.
- 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 Financial Services Provider (FSP) should, through the notice, provide the person with a copy of its written policies and procedures governing the debarment process.

The Financial Services Provider (FSP) should further, through the notice, give the person a reasonable opportunity to make a submission in response.

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 Financial Sector Conduct Authority (FSCA),, after the debarment, to request the documentation and reasons for the debarment by the Financial Services Provider (FSP) from the Authority. In this regard, the Financial Sector Conduct Authority (FSCA), urges the Financial Services Provider (FSP) to also provide a representative with the documentation that informed the decision to debar the representative in order to enable the latter to formulate a proper response. As seen in a number of Tribunal findings, failure to do so could lead to the debarment being set aside.

(II) Step 2: Consider

Consider (together with all available facts and information) any response received from the person that the Financial Services Provider (FSP) intends to debar, and (where applicable) have regard to information regarding the conduct of the person that is furnished by the Financial Sector Conduct Authority (FSCA), the Ombud or any other interested person.

(III) Step 3: Take a decision

Take a decision whether or not to debar the person and immediately notify the person in writing of –

- The Financial Services Provider (FSPs) decision.
- The persons' rights in terms of section 228 of the Financial Sector Regulation (FSR) Act to request reasons for the decision.
- The persons' rights in terms of section 228 of the Financial Sector Regulation (FSR) Act have the decision reconsidered by the Financial Services Tribunal.

1.12.5 Other considerations

It is also important to take note of the following:

- Financial Services Provider (FSP)'s duties after the debarment
- Debarred persons rights
- Powers of the Tribunal should it disagree with debarment decisions
- The Role of the Financial Sector Conduct Authority (FSCA) upon receipt of a debarment notification

¹ Financial Sector Conduct Regulations Act Section 153 (1)

² FSCA FAIS Notice 17 of 2018

³ FSCA FAIS Notice 17 of 2018

⁴ FSCA FAIS Notice 17 of 2018

⁵ Financial Advisory and Intermediary Services ACT, 2002 as amended by section 53 Board Notice 22 of 2008

⁶ The Financial Sector Regulation Act 2017 Section 154

⁷ Financial Advisory and Intermediary Services ACT, 2002 as amended by section 53 Board Notice 22 of 2008

⁸ The Financial Sector Regulation Act 2017 Section 155

⁹ Determination of Requirements for Reappointment of Debarred Representatives, 2003. Section 2