

# FAIS NEWSLETTER



Financial Services Board

07/10/2015

Volume 18

## FSB E-MAIL SUBSCRIPTION

It's time to explore opportunities!

The FSB has introduced a new functionality on the enhanced FSB website (launched 11 May 2015). This is an important service that will assist financial advisors and compliance officers in keeping up to date with legislative and industry news.

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- Receiving notification of amendments to legislation
- Receiving notification of any new FAIS notices published on the FSB website

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## Disclaimer

*The FAIS Newsletter must not be construed as a substitution of the FAIS Act and subordinate legislation. The newsletter is aimed at addressing specified areas and provides a quick reference to the reader. It does not take away the obligations that are imposed on FSPs, key individuals, representatives, compliance officers or any person involved in the rendering of financial services to acquaint himself or herself with the provisions of the FAIS Act.*

# EXEMPTION FROM AUDITED FINANCIAL STATEMENTS

## (FAIS Notice 82 of 2015)

On 21 July 2015, the Registrar published a general exemption granting eligible FSPs and eligible FSPs limited by product exemption from the requirement to submit audited financial statements as contemplated in section 19(2)(a) of the FAIS Act subject to certain criteria and conditions. This Exemption repeals Board Notice 193 of 2011.

The exemption was published by FAIS Notice 82 of 2015 and a link to the exemption notice was sent via e-mail to all authorised FSPs and Compliance Officers on 22 July 2015. A copy of the exemption notice can be downloaded on the FSB website.

The exemption is only applicable to eligible FSPs and eligible FSPs limited by product.

The exemption notice defines an **eligible FSP** as an authorised FSP who:

- is licensed as a Category I FSP only; and
- doesn't receive or hold client funds and / or premiums and / or assets

An **eligible FSP limited by product** is defined as an FSP who:

- is licensed as a Category I FSP only;
- is authorised in respect of Long Term Insurance A and / or Friendly society benefits **only** (subcategory 1.1 and / or 1.19 **only**); and
- receives or holds client funds and / or premiums and / or assets in respect of their authorisation for Long Term Insurance A and / or Friendly society benefits

The exemption is in respect of the 2015 financial year end onwards i.e. it does not apply to financial statements for previous financial years.

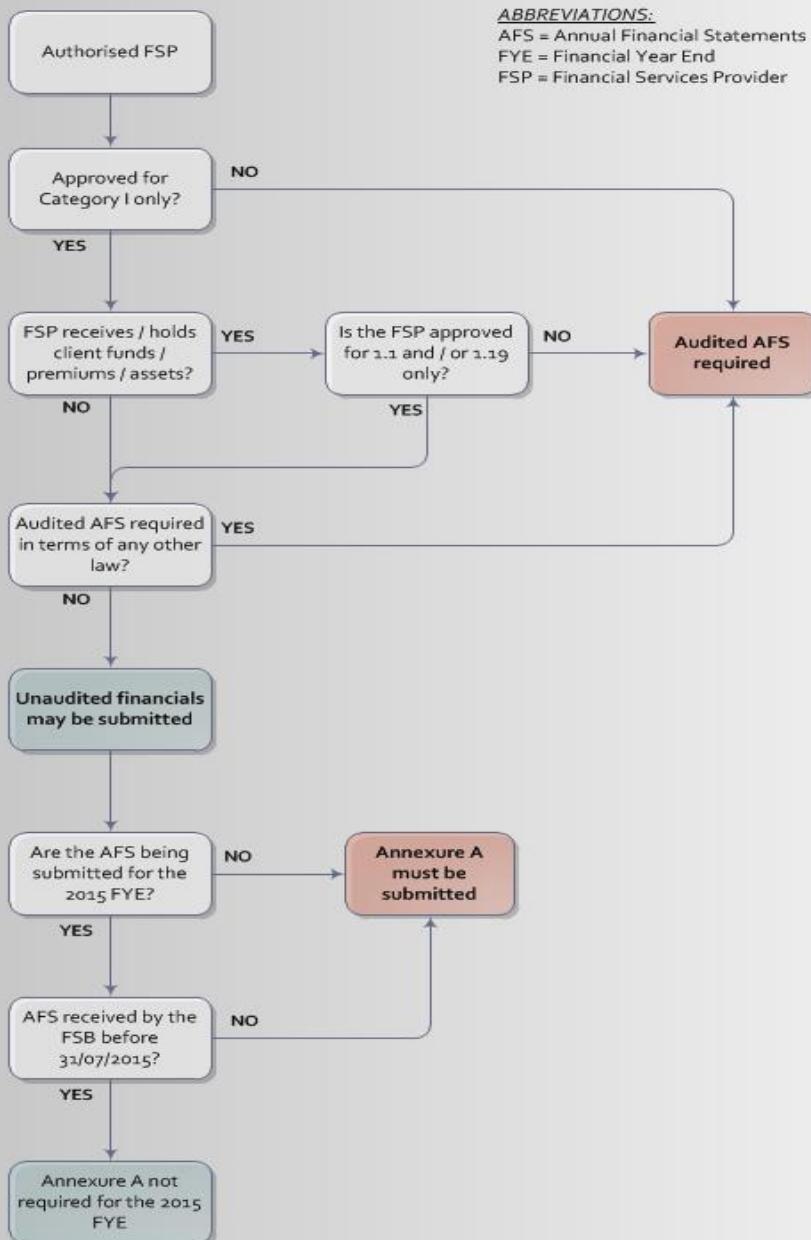
Where an FSP wishes to make use of the exemption they need to ensure that they submit Annexure A (which was published together with the exemption notice) together with their annual financial statements each year. Where an eligible FSP or an eligible FSP limited by product fails to submit Annexure A they will be required to submit audited financial statements.

The only exception to the requirement to submit Annexure A was in respect of those FSPs who had already submitted their 2015 financial statements to the FSB on or before 31/07/2015. A decision was taken by the Registrar that it would have been impractical to request that all the eligible FSPs and FSPs eligible by product that had already complied with section 19 of the FAIS Act (by submitting on time) to now submit Annexure A. These specific eligible FSPs and eligible FSPs limited by product will however need to ensure that Annexure A is submitted together with their 2016 annual financial statements.

**Important:** In terms of the exemption, an eligible FSP limited by product must ensure that their financial statements are prepared by an accounting officer.

The diagram on page 3 below summarises the key elements of the exemption.

## EXEMPTION FROM AUDITED FINANCIAL STATEMENTS



## THE CENTRAL REPRESENTATIVE REGISTER & REPRESENTATIVES APPOINTED UNDER SUPERVISION

Board Notice 104 of 2008 sets out the requirements for representatives working under supervision. Board Notice 104 defines services under supervision as *“financial services rendered by a representative who does not meet the prescribed experience, qualification and / or regulatory examination requirements and which services are rendered under the guidance, instruction and supervision of a supervisor in terms of the provisions of an exemption by the Registrar under Section 44 of the Act.”*

FSPs who appoint representatives who are working under supervision are required to indicate on the central representative register that such representatives are working under supervision.

It has been noted that a number of FSPs who indicated on the central representative register that a representative was appointed under supervision have failed to update the central representative register once the representative has completed their supervision period.

We would urge FSPs to review their representative registers and, where applicable, update the central representative register to reflect that the said representative is no longer working under supervision.

Such updates can either be done by way of the excel spreadsheet which is utilised for representative imports or an request can be submitted to [Faispfc@fsb.co.za](mailto:Faispfc@fsb.co.za).

If an FSP is unsure as to whether their representatives currently still reflect on the central representative register as working under supervision (and their supervision period has been concluded) then they can verify this information on the FSB website using the FSP search functionality. A representative who appears on the central representative register as working under supervision would have an “x” under the services under supervision column for the relevant financial product.

Example from the FSB website of a representative working under supervision:

### Representative ( John Smith ) Products

Category	Sub Category	Category Description	Advice	Intermediary	Services Under Supervision
1	2	Short-Term Insurance : Personal Lines	X		X

If you have any enquiries please contact the FSB call centre - 0800 110 443

## EXTENSION REQUESTS FOR ANNUAL FINANCIAL STATEMENTS

The FAIS Supervision department has seen an increase in the requests for extensions for the late submission of financial statements. The Office of the Registrar would like to remind FSPs that in terms of section 19(2)(b)(iii) of the FAIS Act a FSP must ensure that its audited financial statements must be submitted within 4 months of financial year end.

If a FSP is unable to submit the financial statements within the prescribed period, it can apply for an extension. The request for extension must be submitted at least 15 days before the due date of the financial statements, and the extension cannot exceed 2 months.

As an example, this means the following timelines would apply:

FSP financial year end of	28 February
The financial statements due date	30 June
Application for an extension	No later than 15 June
The FSP cannot ask for an extension for more than	2 months

Although we understand that due to various and valid reasons, FSPs are unable to always meet the above requirements, there is an alarming tendency for certain FSPs to apply for an extension every year.

We are concerned that there could be a lack of planning by FSPs regarding the submission of the financial statements. As a guideline, FSPs are reminded that:

- there is an on-going responsibility to draw up monthly accounting records (section 19(1)(a) of the Act);
- the FSP must make arrangements in advance with their auditor/ accountant to conduct the audit or review and finalise the financial statements within the 4 months after financial year-end;
- FSPs that know they will need additional time to finalise all arrangements (e.g. Board approval of the financial statements) should submit their extension requests within the allowable timeframes;
- FSPs that submit the extension request with a period of less than 15 days before the due date of the statements, will find that their requests are declined, unless there is clear evidence of a major, unexpected event that made it impossible for them to request an extension timeously; and
- the fee for extension requests that were instituted in 2015 is an administrative fee for the cost of processing the request. The payment of the fee is not a guarantee that the request will be granted.

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In terms of FN 81 and 82 of 2015 this also refers to the submission of unaudited financial statements

## **AFRIKAANS EXAMINATIONS TO BE DISCONTINUED**

## BACKGROUND

The level 1 regulatory examinations were available in English when they were rolled out in November 2010. During 2011 an application was made to the Equality Court for the Exam to be made available in Afrikaans.

The FSB proceeded with an in-depth investigation regarding the viability of Afrikaans examinations, and the implications of translating the relevant examinations into different languages. A further development was the publishing of the South African Languages Bill, 2011 which also placed a requirement on the FSB to develop a formal language policy.

Extensive discussions with industry role players such as the FIA followed, and at the time not much statistical information was available to indicate whether Afrikaans examinations would be viable.

Based on the lack of information, consultation with relevant industry role players, the legal guidance obtained by the FSB and the requirements stipulated in the South African Languages Bill, 2011, the FSB made the decision to translate the following level 1 regulatory examinations into Afrikaans:

- a) RE1: Key Individual and Sole Proprietor Examination: Category I, II, IIA, III and IV), and
- b) RE 5: Representative and Sole Proprietor.



In addition to these two examinations, the FSB also undertook to translate the supporting preparation tool for both examinations, i.e. the Regulatory Examination Preparation Guide, and to make available a list of terms which provides the English legal terminology as well as the Afrikaans translation of each term.

Despite this concession by the FSB, the applicants did not withdraw the case against the FSB, and the case was heard in the Equality Court in January 2012. After two days in court, on 25 January 2012, a settlement agreement was signed between the applicants and the FSB which confirmed the undertaking which the FSB had already made to translate the two examinations and the support tool for these exams.

The Afrikaans examinations rolled out on 26 March 2012 to specific examination centres situated nationally, and a clear communication drive by the FSB supported the rollout process and the implementation of these examinations.

## STATUS OF THE AFRIKAANS EXAMINATIONS

Initially there was an uptake of the Afrikaans examinations but since the rollout in 2012, the demand and the pass rate in relation to these examinations have been declining year on year.



As a result, the following factors were considered in order to determine whether the Afrikaans examinations should be discontinued:

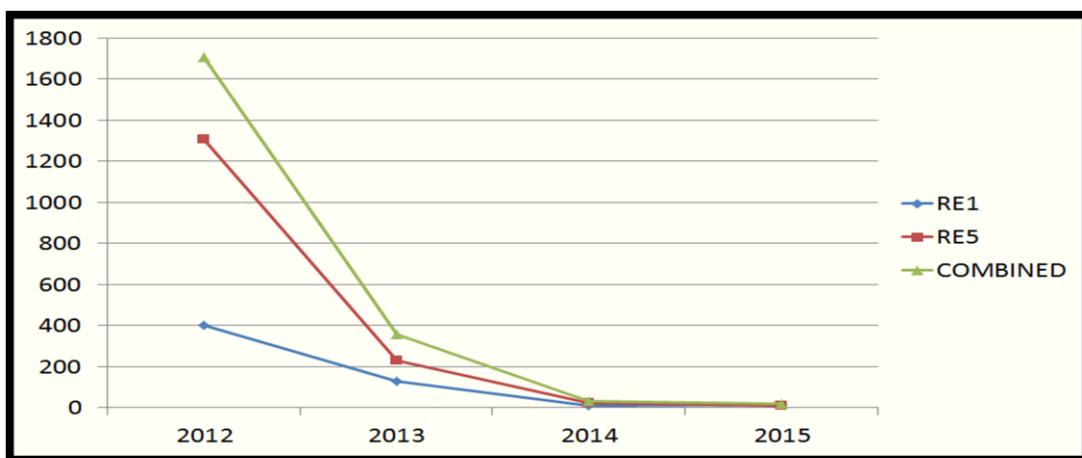
- Usage of the Afrikaans examinations
- Practicality of the Afrikaans examinations
- Expense of maintaining and delivering the Afrikaans examinations
- Regional circumstances

### a) Usage of the Afrikaans examinations

Included below are the totals for each examination, as well as the combined totals. The numbers provided include numbers from March 2012 to September 2015:

YEAR	SOLE PROP / KEY INDIVIDUALS (RE1)				SOLE PROP / REPRESENTATIVE (RE 5)				COMBINED TOTAL			
	WRITTEN	PASSED	FAILED	PASS RATE (%)	WRITTEN	PASSED	FAILED	PASS RATE (%)	WRITTEN	PASSED	FAILED	PASS RATE (%)
2012	399	124	275	32.1	1308	450	858	34.4	1707	574	1133	33.6
2013	127	25	102	19.7	228	69	159	30.3	355	94	261	26.5
2014	9	0	9	0	22	4	18	18.2	31	4	27	12.9
2015	12	1	11	8.3	8	2	6	25	20	3	17	15
<b>TOTAL:</b>	<b>547</b>	<b>150</b>	<b>397</b>	<b>27</b>	<b>1566</b>	<b>525</b>	<b>1041</b>	<b>34</b>	<b>2113</b>	<b>675</b>	<b>1438</b>	<b>32</b>

- The uptake of the RE1 declined significantly from 399 candidates in 2012 to 12 candidates in 2015.
- The same trend is evident in the RE5 where the uptake of the examination declined from 1308 candidates in 2012 to only 8 candidates in 2015.
- The total number of candidates who wrote the Afrikaans examinations accounts for approximately 2% of the total number of affected candidates that were required to write the Level 1 examinations.

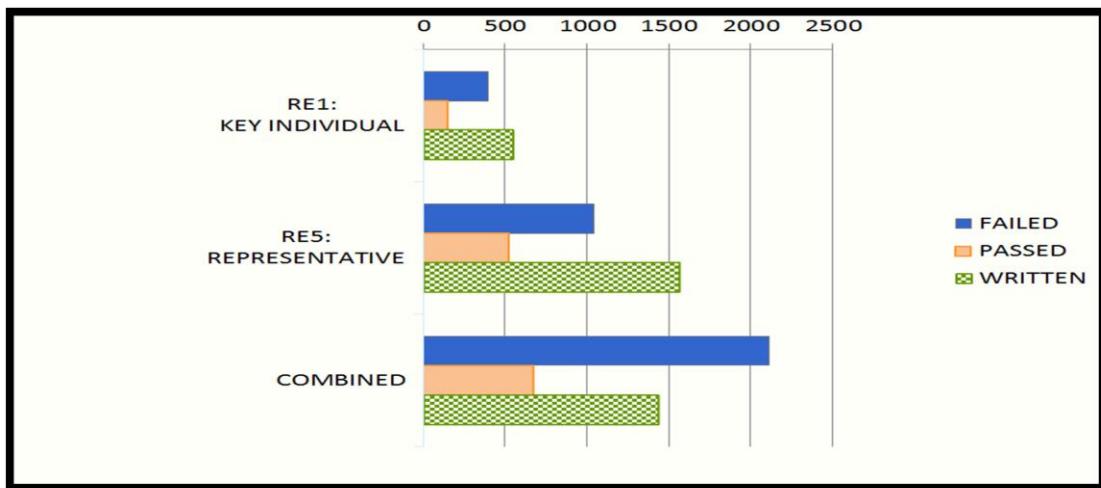


Approximately 93 493 candidates were required to write the level 1 regulatory examinations of which 2 113 wrote in Afrikaans. This equates to 2.26% of the affected candidates.

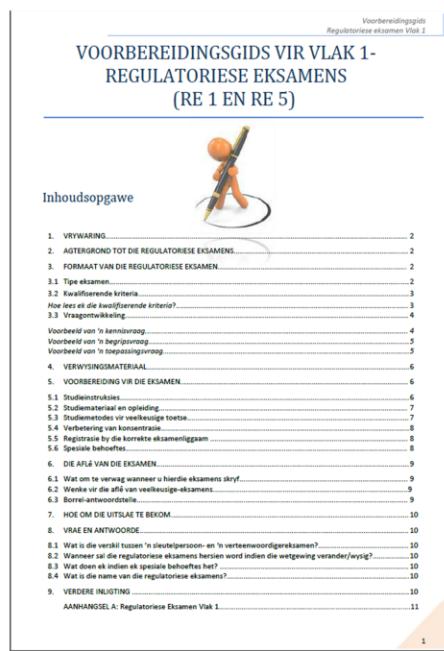
## b) Practicality of the Afrikaans examinations

The Afrikaans examinations are maintained in exactly the same manner as the English examinations – the same resources and quality assurance processes apply to these examinations. Yet, there isn't sufficient demand for the Afrikaans examinations and therefore investing the same amount of resources to maintain these examinations is neither sustainable nor practical.

In comparison to the English version of the Level 1 regulatory examinations, the Afrikaans examinations are also not performing very well. The highest pass rate of 32% and 33% respectively, were achieved in 2012, when the Afrikaans examinations rolled out and the uptake of the examinations was relatively high. The pass rate achieved during 2014 was bleak for both examinations in comparison to the pass rate of the English examinations, which was 95% and 93% respectively as at 28 December 2014.



## c) Expense in maintaining the Afrikaans examinations



The cost associated with the Afrikaans examinations is based on the resources and activities required to develop and maintain the examinations, such as a translation cost, new question quality control, question administration and maintenance, question moderation, paper generation and verification, direct cost per venue, Afrikaans invigilators, maintenance and update of Afrikaans support material, etc.

The total cost directly attributable to the Afrikaans examinations since inception up to July 2015 was R926 575, with a fixed monthly maintenance cost of R13 000 (Incl. VAT).

Considering that only 20 candidates wrote the Afrikaans examinations during 2015, it is clear that the on-going maintenance cost is too high, given the low demand for this examination.

#### d) Regional circumstances

It is recognised that there are specific regional areas within South Africa where the home language of the people is predominantly Afrikaans. However, no clear link between these regional areas and the actual usage of the examinations could be established.

Interesting to note is that candidates, who were unable to pass the Afrikaans examinations, reverted to the English version of the examination where many of them passed.

#### Afrikaans examinations to be discontinued

The demand for the Afrikaans examinations has declined to such an extent that the cost to maintain these examinations cannot be justified. The pass rate for these examinations also indicates that the Afrikaans examinations are not making any significant difference in the success rate of the Afrikaans speaking candidates writing these examinations.

**DISCONTINUED**

As a result the Registrar has taken a decision to discontinue the Afrikaans examinations.

#### Last examination sessions: 2015

The Afrikaans examinations will be discontinued as at 30 November 2015.

Those candidates, who would like a final opportunity to write the regulatory examination in Afrikaans before 30 November 2015, are welcome to book for the examination through the normal procedure with Moonstone.

## ELECTRONIC REPRESENTATIVE REGISTER UPLOADS

A Financial Services Provider (FSP) is required to provide the Registrar's office with a register of their representatives and key individuals. The FSP must, in terms of Condition 3 of its license, inform the Registrar of Financial Services Providers (Registrar) within 15 days after any change to its register of representatives has taken place.

The FSP can either update the register with the details of their representatives by submitting a completed Form 5 or use the electronic notification method. The electronic notification means they will complete an excel spread sheet, which is then sent to [faispfc@fsb.co.za](mailto:faispfc@fsb.co.za) or [reps@fsb.co.za](mailto:reps@fsb.co.za) depending on which email address is linked to the relevant FSP number for direct rep imports.

The excel spread sheet contains different fields which the FSP is required to complete accurately. Any errors in the completion of the spread sheet will in turn result in import error/errors.

It has come to the Registrar's attention there are common difficulties that are experienced by the FSPs. The main errors occur in:

- Column N: Date of Appointment (with current FSP);
- Column Q: Experience per categories (with current FSP); and
- Column S: Qualification code & Year obtained.



In order to correct an error for:

- **Column N:** Date of Appointment (with current FSP), the FSP must ensure that they enter the date on which the representative was appointed by the current FSP, not the Date of First Appointment (DOFA) in the industry.
- **Column Q:** Experience per categories (with current FSP), the format in which this column has to be completed is: category/sub-product/advise/intermediary services/under supervision. The FSP has to ensure that the dates must correspond with the date in column N: Date of Appointment. It is important to only use a semi-colon (;) between the products with no spaces. The date to be entered is the date of appointment at the FSP when the person started giving Advice, Intermediary Services or the date they were appointed Under Supervision. The format of the date entered must be ddmm/yyyy, without / or -.
- **Column S:** Qualification code & Year obtained: the FSP is required to enter the Qualification number as per Board Notice of 76 of 2015 Amendment Notice on the Determination of Qualifying Criteria and Qualifications for Financial Services Providers and the year the qualification was obtained. The qualification number is the first column on the qualification list not column 5 which is the SAQA ID.

It is important to note that it is the responsibility of the person who submitted the spread sheet to correct these errors and to resubmit the spreadsheet after the corrections have been done.

The representative register remains the responsibility of the FSP and the obligation remains on the same FSP to keep the register up to date and to do the reconciliations where necessary.

It is vital for the FSP to ensure that the representative register is maintained on an ongoing basis as changes occur, keeping in mind that they must submit any changes within 15 days

## ***FIT AND PROPER QUALIFICATIONS: UNDERSTANDING THE “CREDIT” REQUIREMENTS***

The “credit” requirements have caused a lot of confusion for many persons in the industry, and the FSB continues to receive requests from industry to provide them with proof / record of credits. The FSB is unable to assist with such a request simply because the FSB does not have access to all of the relevant records, and is also not directly involved in the education and training structures which have been established to support skills development and education within South Africa.

The South African education and training structures consists of many different role players with very specific functions and responsibilities. For the purposes of explaining how qualification related credits are recorded and where these records are kept, one must first have a basic understanding of the main role players involved, as well as the basic processes that are involved to award credits or a qualification to a learner.



In order to provide clarity regarding credit requirements, we will look at the following:

- A. The role players and the process involved in recording credits;
- B. The difference between credits, unit standards, skills programmes and qualifications;
- C. The “FAIS credit” requirements.

### **A. Recording Credits: The Role Players and Process**

Below is a short description of the relevant role players:

#### *i. The South African Qualification Authority (SAQA)*



SAQA is a statutory body regulated in terms of the National Qualification Framework Act No. 67 of 2008. It is made up of 29 members appointed by the Minister of Education in consultation with the Minister of Labour.

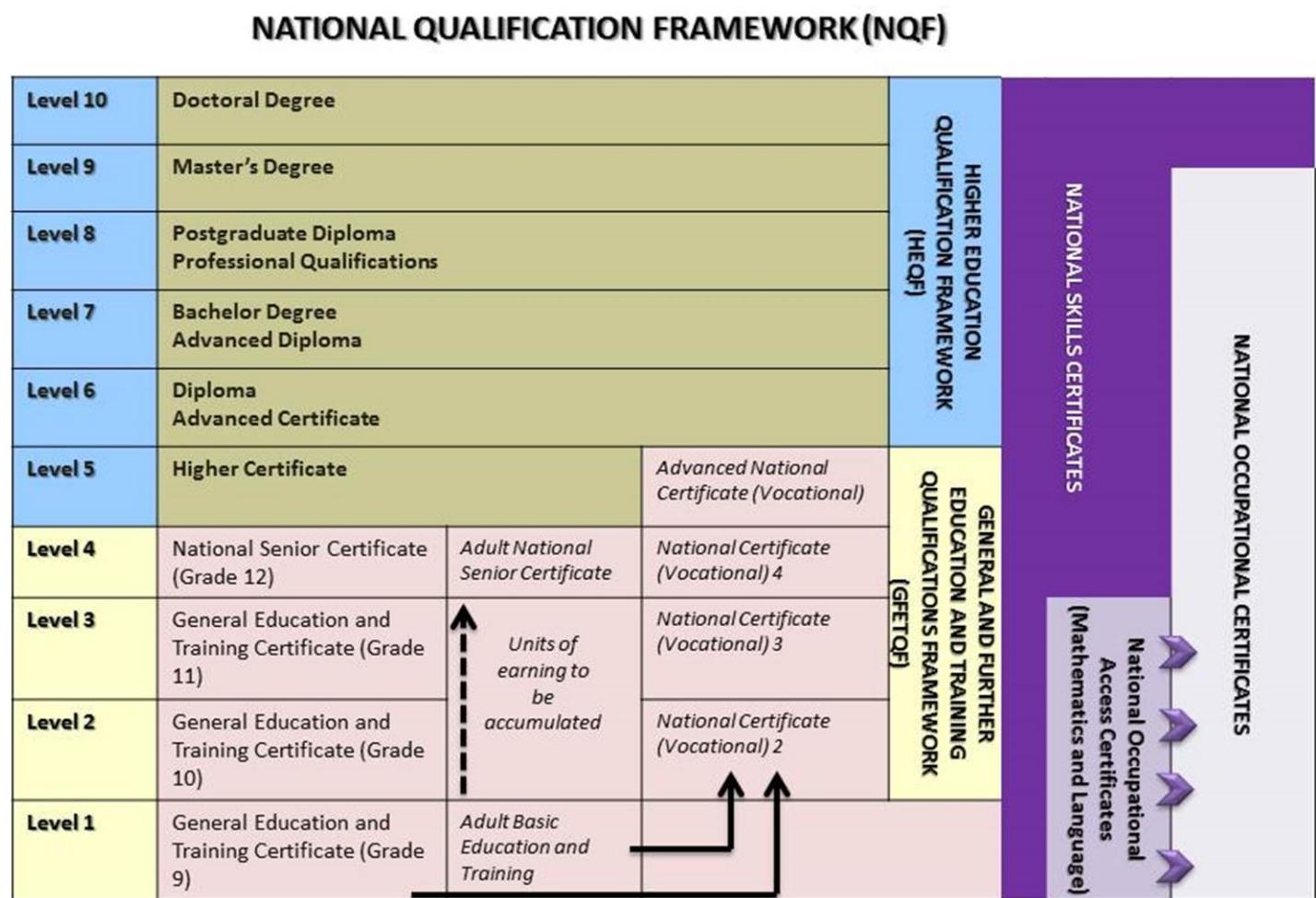
SAQA is mandated by legislation to oversee the development and implementation of the National Qualification Framework (NQF). In order to achieve this objective, SAQA has established specific structures and is responsible for maintaining them. This includes:

- A system for setting nationally recognised and internationally comparable education and training standards and qualifications;
- A national quality assurance system to ensure that education and training is delivered in accordance to set standards;
- An electronic management information system which records all relevant information on the achievement of South African learners, i.e. the National Learner Record Database (NLRD);
- The evaluation of foreign educational qualifications to determine their South African equivalence.

The National Qualifications Framework (NQF) is the system that records levels of learning achievement to ensure that the skills and knowledge that have been learned are recognised throughout the country.

There are eight levels on the NQF. These levels are divided into three bands:

- general education and training
- further education and training
- higher education and training.



## ii. Education and Training Quality Assurance (ETQA)

There are 21 Sector Education and Training Authorities (SETAs) that are formally accredited by SAQA to assist SAQA in achieving its mandate. Provision is made in the Skills Development Act of 1998 for the establishment of these statutory bodies. SAQA accredits all SETAs who in turn accredit Training Providers. The main objective of SETAs is to enable its stakeholders to advance skills in a specific sector in accordance to the government's growth initiatives.

Within each of these SETAs there is a quality assurance body referred to as an Education and Training Authority (ETQA). The primary purpose of the ETQA Unit is to monitor and audit the achievement of standards, and some of the important functions performed by ETQAs include:

- Ensure continuous quality improvement of education and training through the accreditation, monitoring, auditing and moderation of work-based, public and private providers;
- Register assessors and moderators;
- Undertake capacity-building interventions for accredited providers to meet the ETDP SETA, National Skills Development Strategy and the NQF objectives;
- Maintain a learner management system compatible with the National Learner Record Database (NLRD), which is administered by SAQA; and
- Certificate learner achievements.

Insofar credits are concerned, the ETQA must verify the facilitation and assessment processes of an accredited training provider before these credits can be formally awarded to the learner and updated on the SETA learner management system (SMS).



### ***iii. Accredited Training Provider***

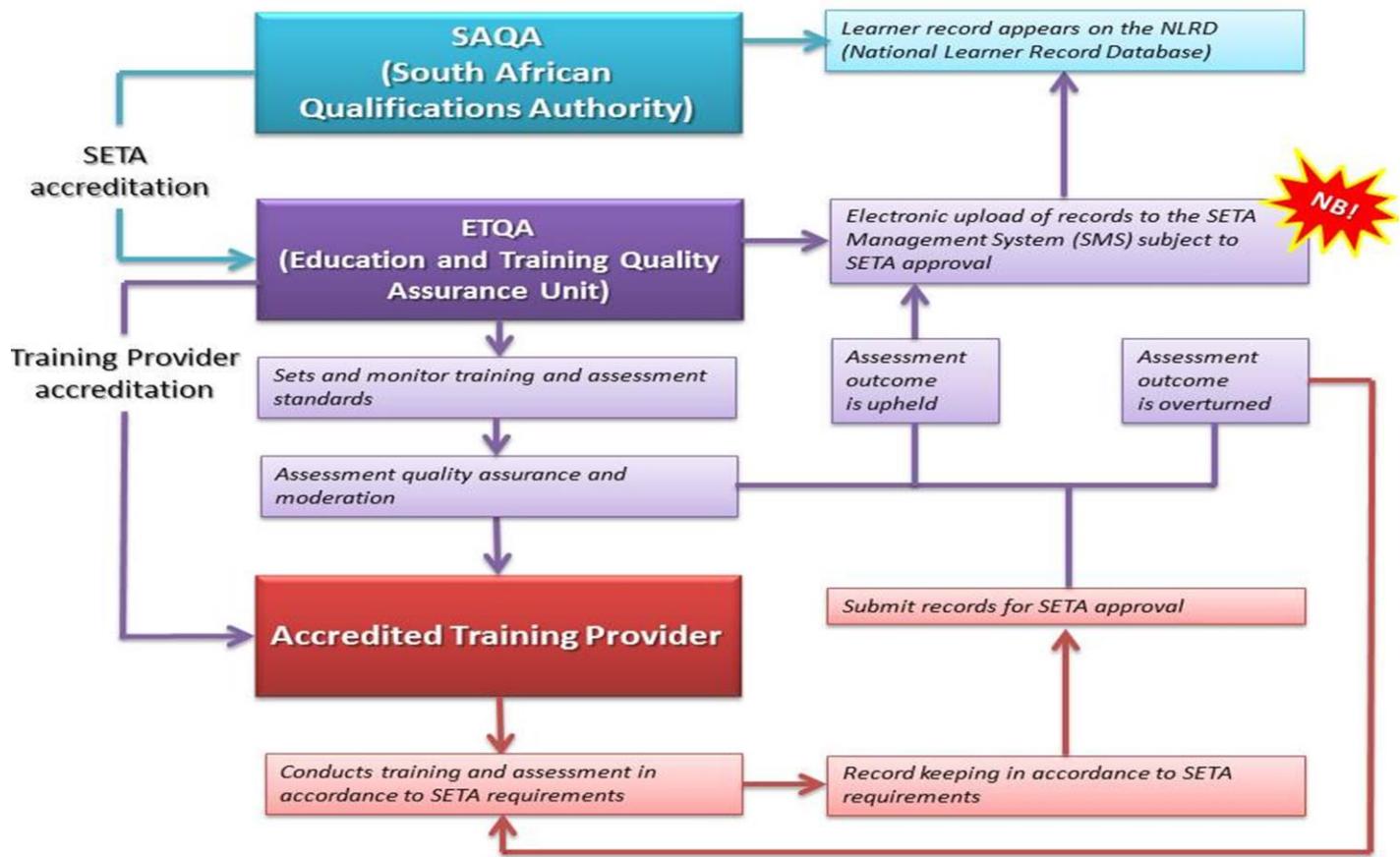


Only accredited Training Providers are able to deliver education and training that leads to nationally registered Unit Standards and Qualifications in accordance to the NQF. Accredited Training Providers are responsible for maintaining all learner records and the submission thereof to the relevant ETQA for quality assurance / moderation when and where required.

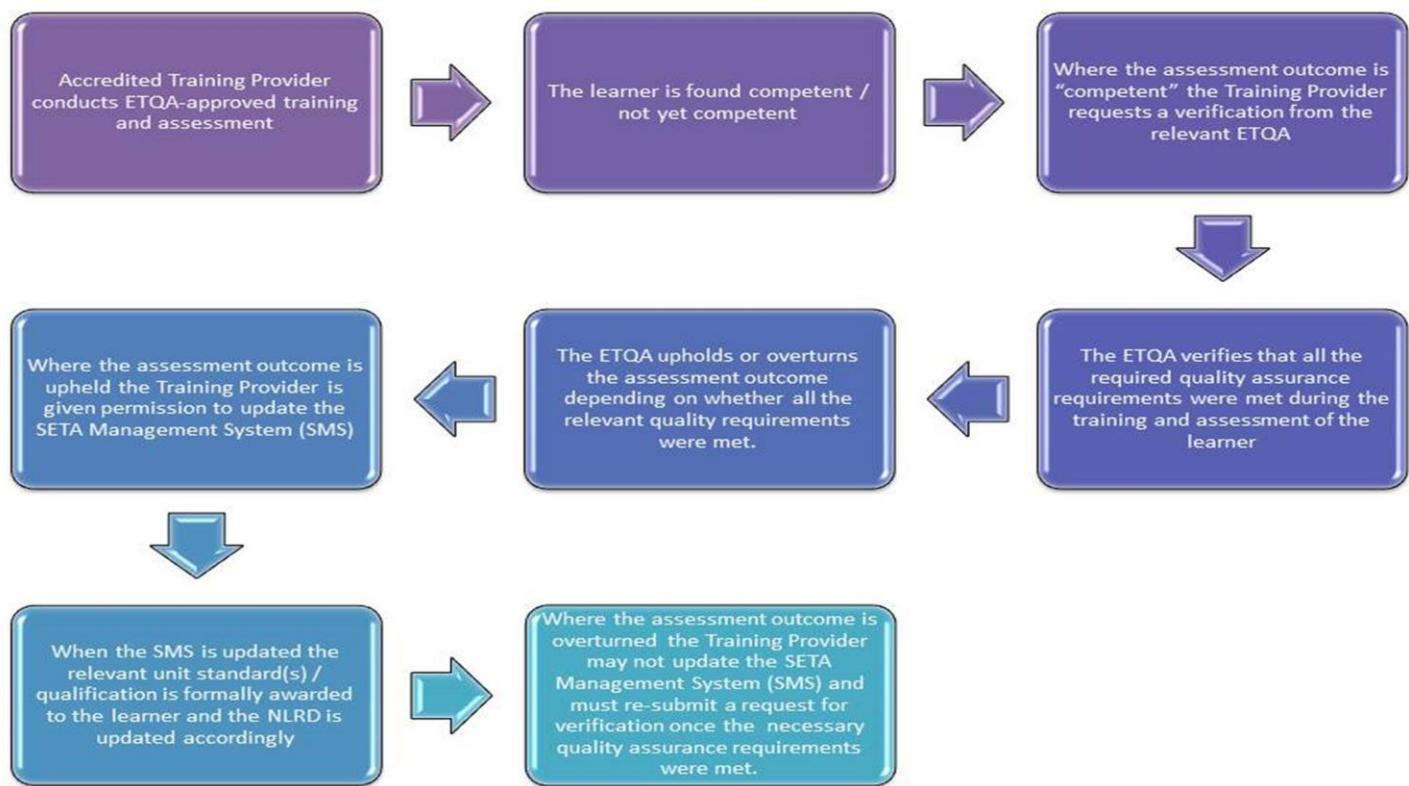
Before any unit standards (credits) or qualifications can be formally awarded to any learner, the relevant ETQA

must first conduct a verification to ensure that all quality standards were in fact met. Only then may the Training Provider record the unit standards (credits) or the qualification achieved by the learner on the database of the SETA (SMS). This record is then also reflected on the NLRD maintained by SAQA.

Only unit standards (credits) / qualifications that reflect on the SMS and NLRD will be deemed as formally awarded to the learner. On page 14 below is a simple illustration of these role players and the basic processes involved, as explained above:



The basic process applicable when credits are awarded is set out below:



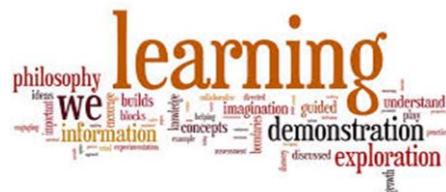
All unit standards and unit standard based skills programmes and qualifications have a specified number of credits depending on the level of complexity and the notional hours of learning involved in achieving the required outcome(s) as stipulated in the unit standard / qualification.

These credits are therefore only formally awarded to a learner once the record of achievement of these credits is recorded on the SETA Management System. Then the relevant certificate of achievement may be awarded to the learner either by the accredited Training Provider, or the ETQA. Therefore, a certificate of attendance will not be sufficient as proof of actually achieving the relevant credits required for FAIS purposes, because there is no evidence that the credits were actually awarded (recorded on the SMS / NLRD).

## **B. Understanding Unit Standards, Credits, Skills Programmes and Qualifications**

### *i. Unit Standards*

A unit standard is:



- Registered on the NQF;
- A statement of desired education and training outcomes and its associated assessment criteria, together with administrative and other information to provide guidance to:
  - **Assessor** as to the evidence that must be gathered during assessment;
  - **Learner** as to the learning outcomes that must be achieved; and
  - **Training Provider** and/or materials designer as to the learning materials or learning experiences to be prepared to assist learners in reaching competence.

## *ii. Credits*

Each unit standard has a credit value. SAQA uses a credit system based on the idea that one credit equals 10 notional hours of learning, motivated in context in each case. ‘Notional hours of learning’ refers to the learning time that it would take an average learner to meet the outcomes defined. It includes concepts such as:

- Contact time;
- Time spent in structured learning in the workplace;
- Individual learning;
- Assessment.

### iii. Skills Programmes

Skills programmes are programmes that comprise of a number of unit standards, however are only part of a full qualification. Skills programmes that are credit bearing can be used as a stepping stone to accumulating credits towards a complete SAQA qualification at a later stage. Skills programmes must be registered.

Many skills programmes have been phased out and have been replaced with short courses or certificate programmes that may also lead to a full qualification such as a Higher Certificate or a Diploma.

iv. **Qualifications**



A qualification is a formal recognition of the learning that has been achieved. Subject to SAQA approval, a qualification can be registered on the NQF at a specific level. A certain number of credits are allocated to the successful completion of a registered qualification.

### **C. The FAIS Credit Requirement**

As per Board Notice 106 of 2008, persons falling within the transitional period (i.e. where the date of first appointment is prior to January 2010) must meet specific qualification requirements and these requirements are set out in the definition of “qualification” as well as in Table E which is included in Part 10 of this Board Notice.

What is important to note is that the criteria of what is deemed to be an acceptable appropriate qualification is important, and the following exclusions must be noted:

- Credits that were obtained by completing random unit standards, which have not been registered as a skills programme, cannot be recognised as the unit standards must form part of a registered skills programme;
- Registered skills programmes must consist of core and/or elective unit standards, and where only fundamental unit standards were included in the registered skills programme then these cannot be recognised;
- Modules that were completed which form part of a non-unit standard based qualification cannot be recognised in isolation if the full qualification was not completed.

Credits that are recognised are the ones that are registered skills programme consisting of either one or more unit standards, which when added together can eventually lead to a qualification.

**Note: There are no “FAIS credits”. The credits referred to in the Fit and Proper requirements are credits that have been allocated to SAQA registered unit standards which have been recorded on the relevant SETA learner database and the NLRD.**

In order to check your own record of credits / qualification(s) you need to access either the SMS or the NLRD, and this can be done via the website of the relevant SETA or SAQA. A registration and log-on procedure applies, and once completed the learner will be able to view the complete record of all his/her unit standard / qualification achievements.

To access the NLRD that is maintained by SAQA you need to go to the SAQA website: [www.saq.org.za](http://www.saq.org.za)  
To access the Insurance Education and Training Authority (INSETA) SMS you must go to the INSETA website: [www.inseta.org.za](http://www.inseta.org.za)

To access the Banking Education and Training Authority (BANKSETA) SMS you must go to the INSETA website: [www.bankseta.org.za](http://www.bankseta.org.za)

It is important to note that the FSB does not keep these records, and would therefore not be able to provide you with updated information regarding the credits, unit standards, skills programmes or qualifications which you have completed.

## **COMING SOON: NEW FIT AND PROPER REQUIREMENTS**

The Registrar intends to publish an updated version of the Determination of Fit and Proper Requirements for Financial Services Providers (the Determination) for public comment before the end of 2015.

The Determination sets out the fit and proper criteria applicable to the different categories of financial services providers, their key individuals and representatives within each of those categories (regulated persons).

In terms of the Financial Advisory and Intermediary Services Act, 2002 (the Act), regulated persons must be competent, honest, have integrity and operational ability and be of sound financial standing. This requirement provides the necessary assurance that a regulated person is willing and able to fulfill its obligations under the Act. It also underpins the requirement that a regulated person must render financial services, honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.



To ensure that the assurances referred to above remains substantive and relevant it is necessary to increase the minimum requirements in certain instances. However, this will be done in a manner and to the extent that is suitable and proportionate to the nature, scale, range and complexity of the specific financial services related activities while also giving industry enough lead time to comply with the increased requirements.

## BUSINESS RESCUE AND THE FAIS ACT

As many people will know, Chapter 6 of the new Companies Act, 2008, introduced business rescue proceedings to South African companies.

The following definitions in the Companies Act are important in understanding what business rescue actually is:

**“Business rescue”** means *proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-*

- (i) *the temporary supervision of the company, and of the management of its affairs, business and property;*
- (ii) *a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and*
- (iii) *the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company;*

**“financially distressed”**, in reference to a particular company at any particular time, means that-

- (i) *it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or*

[Subpara. (i) substituted by s. 81 of Act 3/2011]

- (ii) *it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;”*

To put it very simply, business rescue is proceedings aimed to assist with the recovery of a company that is:

- Unable to pay its debts in the next 6 months; or
- Who will most likely become insolvent in the next 6 months.

What people are not always aware of is that the Financial Advisory and Intermediary Services Act (FAIS Act) also has provisions relating to business rescue. The FAIS Act was amended in 2014 by the insertion of Section 38A which specifically relates to business rescue.

In terms of the provisions of this section of the FAIS Act the Registrar must approve the following relating to business rescue:

- The resolution to begin business rescue proceedings;
- The appointment of the business rescue practitioner;
- The adoption of the business rescue plan; and
- The exercise of a power by the business rescue practitioner under the Companies Act.

It is also important to note that:

- If an affected person (other than the Registrar) applies to a court for an order relating to business rescue of an FSP, then the application may not be heard unless the notice of motion, all accompanying affidavits and all other documents filed have been lodged with the Registrar. The Registrar will then decide whether to join or oppose the application.
- As from the date on which the business rescue practitioner is appointed, the business rescue practitioner of the FSP may not conduct any new business unless the practitioner has been granted permission to do so by a court.

Companies wishing to initiate business rescue proceedings must ensure that they also comply with the provisions of the FAIS Act.

## WHEN AN FSP SNEEZES THE ENTIRE INDUSTRY CATCHES THE COLD: THE UNINTENDED CONSEQUENCES OF A FAILURE TO DEBAR A REPRESENTATIVE BY AN FSP.

By Adv. Matome Thulare

In my last article titled “to debar or not to debar”, I alluded to the great difficulty often faced by FSPs when confronted with a determination whether to debar a representative under section 14(1) of the FAIS Act or not. At issue in such situations it is not so much whether there is evidence of wrongdoing against the representative as it is about whether proper processes have been complied with. In most instances, the FSPs are in possession of clients’ statements and forensic reports which supports the allegations of misconduct against the representative. In such cases it should follow that the FSP must conduct an enquiry to determine whether a debarment is appropriate. It is not a foregone conclusion that every instance of misconduct justifies a debarment. Each case must be treated on its merits.

The focus of this article is on a matter that has caught the attention of the registrar lately. It is by all account a serious matter from a regulatory perspective and FSPs are urged to pay particular attention to it. The registrar has observed a few cases that point to what may be described a dereliction of duty by FSPs in the exercise of the statutory-imposed power to debar representatives under section 14(1). It cannot be overemphasised enough that the entire FAIS regulatory framework operates on the basis that FSPs will take responsibility for the actions of their representatives. Put differently, a FSP is enjoined to ensure that only persons who are fit and proper are allowed to have contact with clients. The nature of the duty imposed under section 14(1) is mandatory and must be fulfilled by the decision-maker or the FSP.

Now imagine a scenario where an FSP neglects to debar a representative when it should have, and had, the opportunity to do so. This is not an instance where a representative absconded or resigned from the FSP mid-way through a disciplinary enquiry process. In the cases under consideration the FSPs became aware of the issue of misconduct against the representatives during the existence of the mandates.

In each instance, for various reasons, the FSP could say whether the representatives were debarred or not. As it would become clearer later, the consequences were not foreseen by either of the implicated FSPs.

In one instance, the FSP discovered information pointing to acceptance of “kick-backs” by a representative from a contracted service provider of the FSP. The FSP had in its possession banks statements that the representative had unwittingly left in the public area at the office. The FSP suspended the representative on the 25 April 2013 and on the 26 April 2013 the representative resigned with immediate effect. The FSP accepted the resignation and “submitted” the information to the FSB under section 14A. The dates in this case are important to note because this matter pre-dates the Guidelines, which the registrar issued on the 5 November 2013. The FSP explained that it had acted on the basis that it had no authority over the representative who had resigned and therefore they could not continue with the debarment enquiry. The FSB Guidelines have since clarified that the FSP is required to debar a representative under section 14(1) if the wrongdoing occurred during the existence of the mandate, despite the subsequent resignation.

I pause here to explain that the resignation is a voluntary act that does not require the consensus of the FSPs to take effect. However, the FSP can refuse a resignation with immediate effect if the contract of employment stipulated that a mandatory notice period must be served. The FSP is simply upholding the terms of the contract in refusing to allow the employee to leave without the service of notice.

The FSP in “submitting” the information to the registrar under section 14A committed a grave mistake. The FSP inadvertently typed the wrong

e-mail address with the words “debartment” instead of debarment and the e-mail could not be delivered. Remarkably, the FSP wrote to the FSB in August 2015 enquiring whether the debarment was completed. A period of 2 years had elapsed before the FSP picked up on its “error” and in the meantime it had been business as usual for the representative. In another similar instance, the FSP could not find any record as to whether it had debarred a representative under section 14(1) or not, and there was a lot of obfuscation about the reasons for its non-compliance. The FSP only submitted information to the registrar under section 14A a year and half after the fact. The FSP claimed to have debarred the representative under section 14(1) and yet its records could not support its claims. It was then left to the registrar to consider a section 14A.

Regrettably, the representatives in both cases were able to secure employment with other “innocent” FSPs. The word “innocent” is used loosely in this context but denotes that the FSPs could have done more in the form of due diligence than to simply check whether the prospective employee appeared on the FSB list of debarred representatives. In both instances, the registrar has engaged the affected FSPs to ascertain the reasons for non-compliance and it is fair to say that there were lapses in their control procedures which have since been remedied.

The nub of the issue is that when an FSP fails to discharge its duties under section 14(1) not only is that FSP in breach of the law but it also puts other FSPs at risk. The public interest is severely undermined when persons who are unfit to render financial services are unleashed on the unsuspecting public. In both cases referred to above, the “unfit” representatives were able to return to the industry to render financial services to clients. This was possible because they had willfully withheld adverse information about their past history to the ‘innocent’ FSPs.

If there are any lessons to be learnt from this is that firstly, FSPs must ensure that they employ and maintain efficient resources and systems to achieve compliance with the law at all times. Secondly, the industry as a whole must be vigilant when it comes to employment practises to ensure that unfit and incompetent persons are not allowed to enter, or remain in, the industry.



## CONTACT DETAILS

### FSB Call Centre:

Are you aware that the Financial Services Board has a Call Centre / Contact Centre that is dedicated to resolving all your queries? The following toll free numbers may be used to contact the FSB Call Centre:

- 0800110443
- 0800202087

### Website :

All the important information applicable to financial services business is posted on our website. You are encouraged to frequently visit our website for latest information and updates. Our website address is [www.fsb.co.za](http://www.fsb.co.za).

On the FSB homepage select “FAIS” from the drop down list of departments.

PURPOSE	
<a href="mailto:Faisinfo@fsb.co.za">Faisinfo@fsb.co.za</a>	General FAIS related enquiries.
<a href="mailto:Faispfc@fsb.co.za">Faispfc@fsb.co.za</a>	Submission of profile change requests specifically relating to FSPs.
<a href="mailto:Reps@fsb.co.za">Reps@fsb.co.za</a>	Submission of the excel rep import spread sheet. This e-mail address should <b>only</b> be used where the person submitting the excel spreadsheet is registered to submit on behalf of the FSP.  Where the person is not registered to submit an excel spreadsheet on behalf of the FSP then the request should be sent to the <a href="mailto:faispfc@fsb.co.za">faispfc@fsb.co.za</a> inbox.
<a href="mailto:Fais.Lapse@fsb.co.za">Fais.Lapse@fsb.co.za</a>	Submission of any requests to lapse licenses and enquiries relating to lapse requests that have been submitted.
<a href="mailto:Fais.Licensecopies@fsb.co.za">Fais.Licensecopies@fsb.co.za</a>	Requests for duplicate copies of FAIS licenses and annexures. Please ensure that proof of payment accompanies the request for a duplicate license copy.
<a href="mailto:Fais.Newlicense@fsb.co.za">Fais.Newlicense@fsb.co.za</a>	E-mail submissions of new license applications for FSPs.
<a href="mailto:Fais.COapprovals@fsb.co.za">Fais.COapprovals@fsb.co.za</a>	E-mail submissions for application for phase 1 approval of compliance officers.
<a href="mailto:Fais.Mandates@fsb.co.za">Fais.Mandates@fsb.co.za</a>	Submission of specimen mandates for approval.

E-MAIL INBOX	PURPOSE
<u>Fais.Exams@fsb.co.za</u>	All queries relating to the regulatory examinations e.g. queries related to duplicate certificates, how to register for exams, authentication etc.
<u>Fais.Qualifications@fsb.co.za</u>	Queries relating to qualifications e.g. credits, recognition of qualifications.
<u>Fitandproper@fsb.co.za</u>	Queries relating to the Fit and Proper Requirements e.g. new entrants wanting to know what competency requirements they have to meet.
<u>Fais.Compliance@fsb.co.za</u>	Submission of documents and queries in response to an intention to suspend or suspension letter sent to an FSP.
<u>Faisfins2@fsb.co.za</u>	Extension requests for the submission of annual financial statements.
<u>Faisfins3@fsb.co.za</u>	Extension requests for the submission of annual financial statements.
<u>Faiscomp1@fsb.co.za</u>	Queries on compliance reports and queries related to the FAIS online reporting system.
<u>FaisComplaints@fsb.co.za</u>	Submission of FAIS related complaints against key individuals, representatives and FSPs.
<u>Debarment@fsb.co.za</u>	Submission of debarment notifications relating to representatives.
<u>Fais.Exemptions@fsb.co.za</u>	Submission of exemption applications for exemptions specific to a person or FSP.
<u>Fais.Examexemptions@fsb.co.za</u>	Submission of excel spread sheets to register for the regulatory examination exemptions that published under Board Notice 102 of 2012.
<u>Fais.conditions@fsb.co.za</u>	Submission of proof that conditions associated with exemptions that were granted have been complied with.
<u>Fais.Dofa@fsb.co.za</u>	Submission of DOFA related enquiries and requests for DOFA reports.