



Draft FSCA Conduct Standard: contributions to retirement funds - now submitted to Parliament

The Financial Sector Conduct Authority (“**FSCA**”) identified a need to standardise the manner and format of reporting regarding contributions. A draft Conduct Standard entitled “Requirements related to the payment of pension fund contributions” was published by the FSCA in May 2020. The Conduct Standard has now been submitted to Parliament and is nearing finalization. The FSCA can use its enforcement powers to enforce compliance with the Conduct Standard which is law, including, in the FSCA’s view, penalties issued against the employer.

Replace current contribution requirements in Regulation 33

The Conduct Standard will replace Regulation 33¹ of the Pension Funds Act (“**the Act**”) which currently provides for the minimum information requirements submitted by employers with contribution payments as well as other requirements such as reporting processes.

Timing

The Conduct Standard, once finalised, will become effective six months after publication. This is to give employers, funds, and their service providers time to implement the necessary changes. The FSCA has the power to notify later dates by publishing these on its website.

Notification by the fund to the employer of its duties

- (a) A fund must notify every employer before the employer starts participating in the fund, and annually after that, of the employer’s duties, obligations, and liability under section 13A of the Act (which deals with the payment of contributions) and the Conduct Standard. This notification is done in a format to be prescribed by the FSCA.
- (b) Section 13A(9) of the Act requires a fund to ask employer(s) to notify it in writing² of the persons at the employer (as set out in section 13A(8)) who are personally liable for compliance with section 13A and the payment of contributions. This is requested by the fund in a format to be prescribed by the FSCA.

The FSCA states that it has engaged National Treasury to request that Regulation 33 be repealed, on the understanding that it will be replaced by this Conduct Standard. National Treasury has, in principle, agreed to this.

The FSCA defines “writing” to include any communication by any appropriate electronic medium that is accurately and readily reducible to written or printed form; and “written” has a corresponding meaning. The communication must be clear, concise, comprehensive and in a language that is easily understood.

Contribution statements provided by the employer to the fund

The employer must provide the following contribution statements to the fund:

- (a) *Initial contribution statement* means the first contribution statement provided to a fund by an employer after the employer started participating in the fund; and
- (b) *Subsequent contribution statements* mean all contribution statements provided with contributions after the first one.

The information that must be contained in the contribution statements as a minimum

The Conduct Standard prescribes the minimum information that must be provided in both types of contribution statements.

The Act provides that this information must be provided either at the time of paying the contributions or not later than 15 days after the end of the month in respect of which the contributions payment was made.

Initial contribution statement

- (a) the name of the fund;
- (b) the fund registration number;
- (c) the period in respect of which the contribution is payable;
- (d) the name and address of the employer;
- (e) where an employer has multiple pay-points, the pay-point which made the deduction;
- (f) the contact person responsible at the employer or pay-point dealing with enquiries relating to contribution statements and payment of contributions;
- (g) the identity of the person envisaged in section 13A(8) of the Act as requested from the employer by the fund in terms of section 13A(9)(a) of the Act;
- (h) in respect of each member, the following:
 - (i) full name;
 - (ii) date of membership;
 - (iii) date of birth;
 - (iv) South African identity number or passport number;
 - (v) employer pay or industry number;
 - (vi) income tax number;
 - (vii) contact number, including (*where available*) cellular phone number;
 - (viii) e-mail address (*where available*);
 - (ix) postal address;
 - (x) residential address;
 - (xi) annual pensionable emoluments;
 - (xii) percentage and amount of contributions;
 - (xiii) split between member and employer contribution; and
 - (xiv) details of any additional voluntary contributions paid

Subsequent contribution statements

- (a) All the information required for the initial contribution statement except that the employer only needs to give the information in (2)(g) if the identity of this person changes compared to the previous statement;
- (b) the membership number allocated to each member by the fund; and
- (c) an indication of any changes as compared to the contribution statement for the previous period showing any differences in the data, including additions as a result of new members, reductions as a result of membership terminations, adjustments as a result of changes in pensionable emoluments, the payment of additional voluntary contributions, corrections due to error or any other information that may be relevant.

Declaration on all contribution statements

When a statement is provided by the employer to the fund, the employer must, at the same time, declare that all employees eligible to be members of the fund are accurately reflected in the minimum information that has been provided to the fund.



Comment: it is good to see that the FSCA took comments on board and has not included some of the information required in the previous draft, for example, the cost to company information. In addition, for certain information such as e-mail addresses, the FSCA has stated that this can be included where it is available. It is also noteworthy that the above is the minimum information to be provided and the fund could ask for additional information from the employer.

Reporting

Report one: reporting on receipt of contributions and data to the principal officer/ monitoring person

The Act distinguishes between three types of contribution payment methods in section 13A and provides for the periods within which the payment must be received by the fund:

- (a) payments directly into the fund's bank account not later than seven days after the end of the month for which the contribution is payable;
- (b) contributions forwarded to the fund - must be received no later than seven days after the end of that month; or
- (c) in the case of certain exempted, insured funds, contributions paid to an insurer – must be forwarded to the insurers so that the insurer receives the contributions not later than seven days after the end of the month.

The person for (a) above who is responsible for checking the receipt of electronic transfers into the fund's bank account, for (b) above who is responsible for receiving contributions, and for (c) above who is authorised by the insurer to account for contributions received by the fund must:

Report one: report not later than a further fifteen days after the end of the period set out in (a) to (c) above to the principal officer or monitoring person:

- (i) whether any of the matters previously reported were not resolved;
- (ii) if the contribution statements data was not transmitted as required;
- (iii) where the payment of contributions and the data in the contributions statements cannot be reconciled with each other, except if the discrepancy is less than 2,5% of the total contribution payable for the relevant period (“**the allowable discrepancy**³”); and
- (iv) if any contributions have not been received as required by the Act except for the allowable discrepancy.

Report two: principal officer/monitoring person report to the board of the fund

The principal officer of a fund or monitoring person must, within seven days after the receipt of a report one submit a written report to the board, in respect of every relevant employer, if the employer:

- (a) has not provided the contribution statements,
- (b) not provided them on time,
- (c) contributions have not been paid to the correct entity within the required time set out in the Act (see above); or
- (d) if previous non-compliance is still unresolved

(“**S13A requirements**”).

This report two must include details of:

- (a) whether any of the matters previously reported on were not resolved; and
- (b) any instance where contribution payments and the contribution statement cannot be reconciled with each other, except for the allowable discrepancy.

Comment: it would have been useful for the FSCA to introduce a requirement at this point for the fund to make this report to the employer as well to ensure the employer is aware of its failure/ contravention.

Report three and four: reports by the board of the fund

The board must ensure that any material contravention of, or material failure to comply with S13A requirements is, within 30 days of the board being informed in writing of the failure by the monitoring person:

- *Report three:* brought to the attention of each affected member, in an appropriate manner. If the affected members cannot be identified, then the board must bring the contravention/ failure to the attention of all the members of the fund or all the members of the fund in respect of that participating employer; and
- *Report four:* reported to the FSCA, in a format to be prescribed by the FSCA. The report must include the proposed course of action taken by the fund to remedy the contravention/ failure.

Monitoring person means an authorised person referred to in section 13A(6)(b) of the Act – who is a person authorised by the board of the fund to report on section 13A compliance.

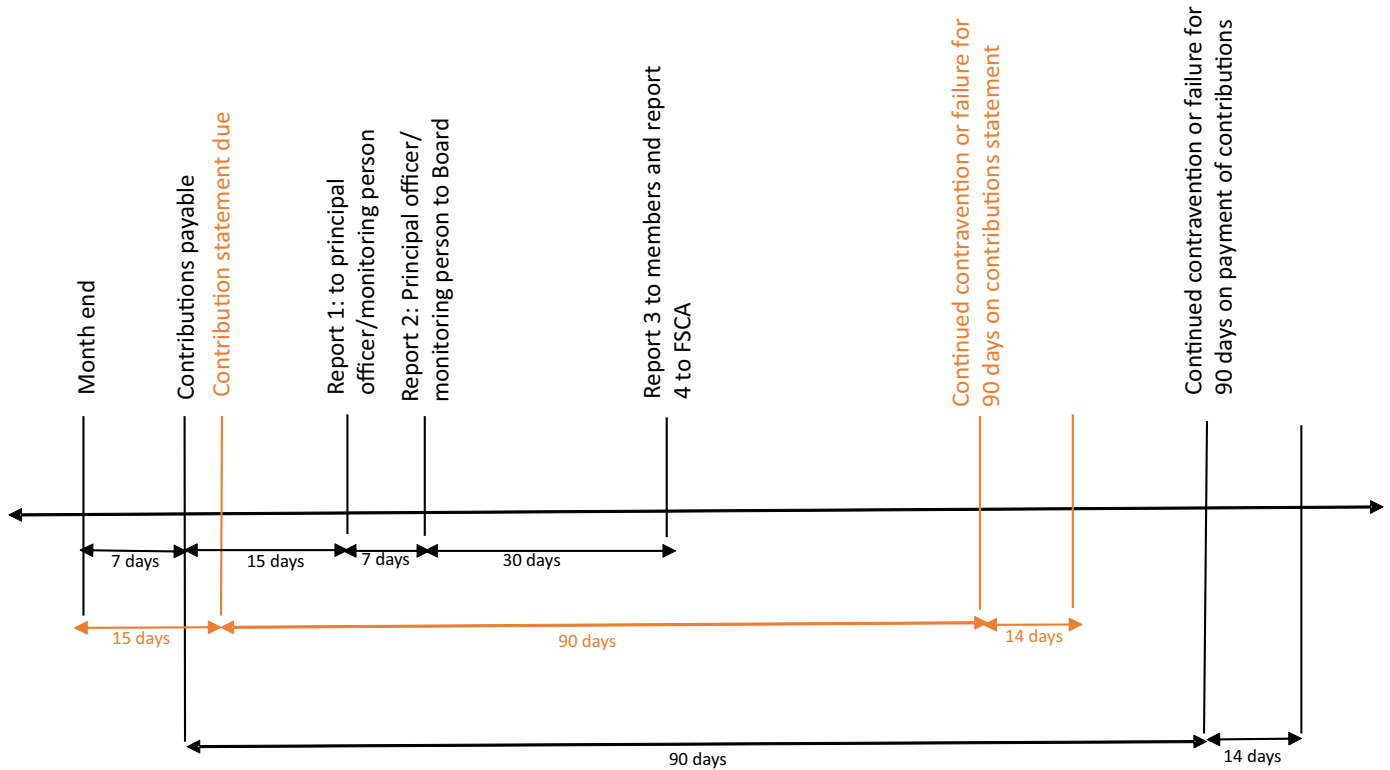
³The principal officer /monitoring person could decide to report all discrepancies if they want to.

Reports five and six by the board of the fund

Any material contravention of, or material failure to comply with, the S13A requirements that continue for a period of 90 days must be reported by the board in writing:

Report five: in sufficient detail to the South African Police Service, in a format to be prescribed by the FSCA, within 14 days after the expiration of the 90 day period; and

Report six: to affected members or, where the affected members cannot be identified, all the members of the fund or all the members of the fund in respect of that participating employer, within 14 days after the expiration of the 90 day period.



Interest on late payment of contributions

According to the Conduct Standard, interest is payable on late payment of contributions or unpaid contributions, where contributions (or part of contributions) are paid after the prescribed period for payment:

Prescribed period for payment

- (a) payments directly into the fund's bank account not later than seven days after the end of the month for which the contribution is payable;
- (b) contributions forwarded to the fund- must be received no later than seven days after the end of that month; or
- (c) in the case of certain exempted, insured funds, contributions paid to an insurer – must be forwarded to the insurers so that the insurer receives the contributions not later than seven days after the end of the month.



Interest payable

Compound interest on late payments or unpaid amounts:

- (a) must be calculated from the first day of the month in respect of which the contributions became due until the date of receipt by the fund;
- (b) at the prime rate plus two percent;
- (c) may not exceed the principal debt due in respect of the unpaid amounts, inclusive of all costs associated with the recovery of the unpaid amounts.

This interest is investment income for the fund and must be payable to the fund by no later than the end of the second month following the month in respect of which the amount is payable, or the amount is transferable.



Outsourcing by the fund to an attorney of the recovery of contributions

The FSCA states that it has identified the following issues related to boards appointing attorneys to recover late or unpaid contributions:

- attorneys make use of their trust accounts and earn interest on the amounts they recover from an employer on behalf of a fund, whilst the amounts recovered are in the possession of the attorney. Often the recovered funds are not paid over to the fund in a timely manner, potentially with the objective of maximizing interest earned on such funds;
- various instances were identified where a fund does not provide any instructions to the attorney regarding what action the attorney should take when dealing with employers that refuse to pay outstanding contributions. The lack of instruction and clear agreement on processes between the fund and attorney often results in delays in taking appropriate action to address outstanding contributions; and
- actual or potential conflicts of interests and/or exorbitant fee arrangements.

Where a fund's board decides to outsource the recovery of late payment of contributions or unpaid contributions to an attorney, the Conduct Standard requires the below.

(a) the board must have regard to:

- (i) any actual or potential conflict of interest that may exist in the selection and appointment of the collecting attorney; and
- (ii) any board approved policies of the fund relating to conflict of interest and outsourcing;

and ensure that any conflict of interest is avoided.

(b) The board must ensure that fees payable to the attorney for collection of arrear contributions are:

- (i) are reasonable and commensurate to the service provided; and
- (ii) do not impede the delivery of fair outcomes to members and the fund

(c) The board must enter into an agreement with the collecting attorney. The agreement must provide for at least the following:

- (i) a requirement that any amount recovered by an attorney in respect of late payment of contributions or unpaid contributions must be transmitted into the fund's bank account within seven business days of receipt of such amount received;
- (ii) specific reference must be made to the fee structure;
- (iii) specific instructions relating to the steps the attorney must take in the event that the employer fails to pay the arrear contributions on demand;
- (iv) anticipated timelines for recovering all arrear contributions; and
- (v) frequency of reporting by the attorney to the fund on the status of payments made by the employer.

Work to do

During the six month phase-in period, administrators and funds will need to decide which processes, communication, and documentation we need to amend as well as continue to re-evaluate our current systems and policies.

