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1. Two-pot system - latest developments

National Treasury's engagement with stakeholders

National Treasury has been engaging with stakeholders to discuss the proposed two-pot retirement system. Treasury called for and received written comments, briefed Parliament's Standing Committee on Finance (SCoF) and held workshops with stakeholders to discuss their written comments. Oral presentations were made by taxpayers and tax advisors on the 2022 draft Revenue Laws Amendment Bill at hearings held by the SCoF on 13 September 2022.

On 20 September 2022, National Treasury provided SCoF with a Draft Response Document that included the draft Revenue Laws Amendment Bill. The 2022 Draft Response Document contains a summary of draft responses from National Treasury and South African Revenue Service officials to the public comments received during the consultation process.

Legislation is not final and may change

As a result of the Treasury engagements, we have further insight into the choices Treasury must make in relation to the two-pot system, as well as their current thinking. Included below is a summary of the developments in the progression of the two-pot system. However, there are several matters still to be decided by Treasury and we will see further development of the two-pot system before it is finalised.

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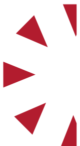
Treasury's responses and proposals

- The implementation date of 1 March 2023 is not feasible and has been changed to 1 March 2024.
- It is mandatory for all funds to apply the two pot system and fund rules must be amended to allow for it, otherwise a fund's tax exempt status would be at risk.
- The seeding debate revolves around whether to allow a member to transfer some of their retirement savings built up in the fund before 1 March 2024 into the member's savings pot and allow the member access to it. Treasury stated that Government is open to allowing once-off seeding, if it does not have adverse implications on liquidity and the costs of such withdrawal is not imposed on members choosing not to withdraw. This requires further consultation with commentators, to take the relevant risks and benefits into account as well as possible trade-offs on vested rights. Treasury could consider allowing phased withdrawals from the savings pot if the savings pot is seeded.
- From 1 March 2024, contributions coming into the fund will be reduced by fees and risk premium costs and then one-third of the remaining contributions must automatically go into the savings pot. The remaining two-thirds of the net contribution will go into the retirement pot. This mandatory contribution into the savings pot means the investment strategy of the fund in relation to the pots is important.
- As retrenchments are involuntary, Treasury has proposed that limited withdrawals be permitted from the retirement pot based on the income of the member. These withdrawals will be subject to certain conditions (i.e. the vested and savings pots have been fully utilized first, before the retirement pot and access to Unemployment Insurance Fund benefits have been exhausted). Treasury proposes that the member will need to prove that they have no other alternative income source. The income-based withdrawals will be provided for a limited period and as a form of annuity, with a maximum amount payable per year.
- More work needs to be done to understand how the two pot system should be applied to defined-benefit funds and public sector funds. Treasury states that a consultative process will be undertaken with relevant defined-benefit funds and stakeholders will need to consider the options available. Protective mechanisms will be explored, including increasing future contributions when a member withdraws funds before retirement.
- The minimum annual withdrawal from the savings pot stays at R2 000, however Treasury has clarified that its intention is for the annual period to be a rolling annual period. In addition, the R2 000 is a gross amount (before any withdrawal fee is applied). If a member leaves the fund and has less than R2 000 in their savings pot, they will still be able to take whatever is in the savings pot in full, even if it is under R2 000.
- A statutory minimum amount will be applied to smaller retirement benefits on retirement (the *de minimis* amount). Retirement benefits below this amount currently do not need to be paid as an annuity and may be taken as a lump sum - this will continue in the two pot system. The statutory minimum amount will be applied to any amounts that would have been required to be annuitized on retirement, if the minimum amount was not applied.
- How section 37D deductions, such as housing loans/guarantees and divorce orders, will work in the two-pot system requires more consideration and amendment of current legislation.
- Treasury's intention appears to be to preserve the accrued rights of older members of funds whose ongoing contributions to a provident fund are still not subject to compulsory annuitisation. They will need to be 55 years or older on 1 March 2021 and a member of the same provident fund they were a member of when compulsory annuitisation became law (1 March 2021). These members may be given a choice of whether to opt into the two pot system, to have ongoing access to a savings pot, or stay out of it, with their current accrued rights, and not have access to an ongoing savings pot. This will need to be clarified by Treasury .



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- Some stakeholders asked Treasury to clarify whether Regulation 28[1] will apply to each pot separately or simply across the whole fund (as it does now) and also to clarify whether the fund could have a different investment strategy for the savings pot and the retirement pot. Treasury's view is that it is not its role to deal with these matters, and that the Financial Sector Conduct Authority (FSCA) can deal with these issues, if it so wishes.

2. Breach notifications to the Information Regulator - prescribed form

What is a breach?

All responsible parties (including retirement funds) are required to notify affected data subjects (e.g. members) and the Information Regulator as soon as there are:

reasonable grounds to believe that an unauthorised party has unlawfully accessed or acquired personal information.[2]

This is often called a security compromise or 'a data breach'.

Who must notify breaches?

The *responsible party* is required by law to notify breaches to affected data subjects and the Information Regulator – not its operators. For example, where an administrator is acting as the fund's operator (e.g. it is paying benefits) and a data breach occurs, the administrator must immediately report this to the fund and the fund must do the required notifications.

Most funds will have a data breach process, for example set out in its Data Protection Policy. Funds should follow this process when managing a breach.

There have already been funds that have notified breaches through to the Information Regulator, as they are required to do by law. The Information Regulator can decide whether to take enforcement action, such as referring the matter to the Enforcement Committee. We are not aware, at date of writing, of a fund that has been referred to the Enforcement Committee upon reporting a breach.

Timing for notification of breaches

The Protection of Personal Information Act requires that breaches must be made "as soon as reasonably possible after the discovery of the compromise"[3]. When deciding on the timing of a notification, the fund may consider law enforcement needs (if any) as well as any measures reasonably necessary to determine the scope of the compromise and to restore the integrity of the fund's information system.

Failure to report timeously is a breach of the Protection of Personal Information Act.

There is a new prescribed form for notifying breaches

On 12 August 2022, the Information Regulator issued:

- a section 22 Security Compromise Notification Form" Guideline; and
- a Security Compromise Notification Form.

It is *mandatory* for the fund to use this form to notify the Information Regulator of a breach. The Guideline provides information about completing the form. The form is available on the Information Regulator's website https://inforegulator.org.za/ under the tab of POPIA forms. It is a fillable PDF form. If you can't fit all the information on the form, you may attach documents to your email. The fund will need to update the Information Regulator on any new information relating to the breach.

[1]Regulation 28 to the Pension Funds Act, 1956 prescribes the maximum percentage of fund assets that may be invested in various asset classes.
[2]Section 22(1) of the Protection of Personal Information Act, 2013
[3]Section 22(2) of the Protection of Personal Information Act, 2013

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Once completed, the form should be emailed to the Information Regulator using the following email address: POPIACompliance@inforegulator.org.za. The Information Regulator will acknowledge the notification and issue a reference number.

The notification requires (among other things) the following information:

- The date of the incident and an explanation for any delay in reporting the incident to the Information Regulator;
- Whether the security compromise is confirmed or alleged;
- The type of incident (for example, loss, damage, destruction or unlawful access or processing of personal information);
- The categories of personal information that are potentially compromised;
- The number of data subjects impacted by the incident;
- the method of communication used to notify any affected data subjects;
- description of the measures that the responsible party intends to take or has taken to address the security
- a declaration by the responsible party that the information is accurate, true and correct.

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