Dashboard

Legal Updates

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A legal and regulatory update for retirement funds

1 Two-pot system update

The date for implementation of the two-pot system remains 1 March 2024. Many funds and service providers are telling Treasury that they need to see the final legislation before they will be able to start with the implementation of the two-pot system. It is likely that the next draft of the legislation that will effect the two-pot system will only be seen in June 2023 (for comment) and that the Bill will be published in July 2023. This does not leave enough time for implementation. Treasury has stated that persons must raise their concerns during the parliamentary process.

Treasury is still consulting on, and making decisions, about the following:

- How the two-pot system will apply to members of provident funds who were 55 or older on 1 March 2021 (and are still in the same provident fund).
- The seeding debate: which is, whether to permit transfer of some of what has already been built up by a member in a fund before 1 March 2024 into the member's savings pot and allow the member access to it whilst they are still in employment. 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 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.)
- Proposals related to defined benefit funds.
- Legacy (old) Retirement Annuity Funds will be given the option to apply to the Financial Sector Conduct Authority (FSCA) individually for exemption from the two-pot system.
- Amendments to the Pension Funds Act to allow for the two-pot system, including deductions like divorce and housing loans. These amendments will be made with the Conduct of Financial Institutions Bill.

Access to the retirement pot on retrenchment of a member by an employer will only be considered in phase two of the implementation of the two-pot system and will not form part of the initial phase.

Once the legislation (Revenue Laws Amendment Bill) for the two-pot system has been finalised, NMG will be able to provide finalised communication and training to our clients. Legislation is, unfortunately, only likely to be finalised in June/ July 2023.

2 Conduct of Financial Institutions Bill (COFI) - update

Treasury is urgently finalising certain aspects of this legislation. COFI is likely to be sent to Parliament by Treasury towards the middle to end of this year. There is a drive by Treasury to prioritise the enactment of this legislation. An impact assessment will be published with COFI.

3 The FSCA's regulatory plan

The FSCA is busy with a routine update of its regulation plan, which they will publish once finalised for the year. This will give the industry a better idea of what the FSCA is working on and its timelines.

4 The Omni Conduct of Business Return (Omni CBR)

The Omni CBR involves new quarterly returns to the FSCA by funds and their service providers (among other types of financial institutions) across a number of broad reporting themes. It will be the main supervisory tool of the FSCA once it is implemented.

The FSCA is busy working through the comments it has received on the Return. The FSCA intends to issue questions to the industry to allow it to gauge the financial impact of the Return on financial institutions. The FSCA will issue an updated version of the Return. At this point it will be important for funds to understand and comment on the draft as funds are very different to the other types of financial institutions. The FSCA has stated that funds and their service providers will be given a reasonable time to implement the changes that need to be made to allow for the required reporting.

5 The Financial Action Task Force (FATF) and the grey listing

Implementation of the FATF recommendations is a priority for the FSCA. These recommendations involve:
(a) The substantial increase of resources at the FSCA to deal with anti-money laundering (AML) and counter-terrorism financing (CTF). This could affect levies payable by financial institutions going forward as the FSCA recruits more people in its FICA supervision department. In addition, it will result in more inspections and meetings; and
(b) The imposition of sanctions in relation to AML and CTF. The FSCA is revising its enforcement methodology and sanctions and will communicate further with the industry on this issue.
The FSCA has said it will focus more on groups in relation to AML and CTF inspections. These inspections will be done jointly by the FSCA and PA.

6 Cyber-resilience

The FSCA has stated that cyber-resilience of financial institutions is a priority for it. On 14 December 2022, a revised draft of the Joint Standard on Cybersecurity and Cyber Resilience Requirements Standard was published for a second round of public consultation. Comments are now being considered and the Standard will be revised if necessary. The Standard will then be tabled in Parliament this year.

7 Update on the Conduct Standard about contributions

Uncertainty on date of calculation of penalty interest

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. This interest is calculated from the first day following the expiration of the period contributions were payable for until the fund receives the contributions - at the prime rate plus 2%.

There is confusion as to whether “the first day following the expiration of the period contributions were payable for” refers to the 1st day of the month or the 8th of the month. The FSCA has stated that it is deciding on a final view on this, and we await this view.

Reporting by the FSCA

When the FSCA receives reports of non-compliance from funds in relation to contributions, it will do its own reporting to the South African Revenue Services (SARS) as well as the Companies and Intellectual Properties Commission (CIPC). The FSCA is working with SARS on a Memorandum of Understanding as well as working with CIPC.

Naming and shaming

The FSCA has previously said it will name and shame both employers and funds where there are arrear contributions owing to a fund. Recently, it stated that it is finalizing its work to “name and shame” non-compliant employers through its website. The FSCA also stated that where employers are in genuine financial distress they must engage with their funds and the FSCA.

8 FSCA statement on sustainable finance and programme of work

The FSCA issued a document, dated 31 March 2023, containing this statement and programme.

The FSCA points out that individuals, governments, and corporates alike are alive to the need and increasing urgency to support sustainability in public and private operations that contribute to economic growth and development. Sustainability is broadly understood to refer to growth or development “that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

The FSCA refers to sustainability considerations being classed according to the Environment, Social and Governance (ESG) classification. Furthermore, that South Africa’s history of legislated discrimination and the consequences it still has for our unequal society today, has resulted in many legislated and governance requirements that speak to ESG aspects.

As part of the FSCA’s support of a sustainable financial system, it aims to develop an enabling environment for sustainable finance, where the financial system is able to:

- Evaluate product, portfolio and transaction-level environmental and social risk exposures and opportunities, using science-based methodologies and best practice norms, to inform product development, business activities in general and capital allocations.
- Improve transparency by accurate and complete reporting of these risks to a wide stakeholder base, including not only shareholders but also employees, policy makers and impacted communities.
- Effectively and reliably mitigate these risks and
- Ensure that customers receive fair outcomes in the design, marketing and sale of financial products and services that are related to sustainability opportunities.

The FSCA has identified market conduct risks that could affect the efficient operation of a sustainable finance market, that is:

- Lack of standardised terminology,
- Inaccurate and/or misleading information,
- Weak or undeveloped understanding of sustainability concepts,
- Inconsistent, unreliable (or no) disclosure and reporting requirements, and
- Lack of suitable products, services, and markets.

It has also identified several sustainability outcomes that it would seek to achieve in the financial sector from a conduct perspective. For example, among others:

- Making it easier for market players to conduct due diligence, including by accurately assessing risks and opportunities, to make suitable sustainability investments,
- Ensuring that non-prudentially regulated entities take into consideration ESG risks (prudentially regulated entities will be subject to risk management requirements by PA,
- Evaluating and adopting/adapting appropriate international frameworks related to ESG and climate, from a conduct perspective, and
- Addressing risks of greenwashing.

Programme of work

The FSCA has developed a programme of work for sustainable finance, made up of five pillars. While these pillars (and indicative timelines) are outlined in the document, the FSCA states that it intends to produce more detailed outputs in relation to each of the pillars of work.

Pillars

Pillar one: Taxonomy
The FSCA states that a common taxonomy will contribute significantly toward ensuring common terminology and understanding. Work on this pillar will build on outputs already produced through Treasury's Climate Risk Forum.

Pillar two: Disclosure, reporting and assurance
This pillar includes:
- Alignment of corporate disclosure and reporting requirements,
- Financial product disclosure requirements to address green-, social- and impact-washing, and
- Credible and consistent assurance.

Pillar three: Market development
Across different segments of the financial sector, the FSCA will consider the role it may have in driving the development of markets that support sustainable objectives on both the supply and demand side. This includes:
- Work in relation to the possibility of a domestic market to trade tax credits created through the carbon tax, and
- A focus on insurance and the emerging concern in many jurisdictions about the availability and affordability of insurance because of weather-related events and natural catastrophes.

Note: there is also a focus on fintech to support policy formulations relating to sustainability.

Pillar four: Active ownership
Active ownership refers to shareholders using their influence in a company they have invested in to drive the company's strategy and actions in the direction of a more sustainable future.
Pillar five: empowering retail investors and consumers through financial education.

9 Draft Conduct Standard – conditions for living annuities in annuity strategy

Retirement fund boards are required to establish an annuity strategy. The FSCA, in November 2018, published a draft Conduct Standard on the criteria for living annuities forming part of a fund's annuity strategy.

Comments received through the public consultation process have been processed, and a revised version of the Conduct Standard was shared with industry associations that commented on the draft Conduct Standard for "fatal flaw" input before it is finalised for submission to Treasury (to forward onto Parliament). These comments are being processed by the FSCA.

10 Draft Conduct Standard - communication of benefit projections to members of funds

On 8 June 2020, the FSCA published this draft Conduct Standard about communication of benefit projections to members to standardise the provision of minimum information to members and to ensure that benefit projections are communicated to members through the various stages of fund membership.

Comments received through the public consultation process have been processed, and the Conduct Standard underwent refinement. The FSCA will finalise the Conduct Standard and share it with commentators who submitted comments on the Conduct Standard during the consultation process for "fatal flaw" input only. Thereafter, it will be finalised for submission to Treasury (and then Parliament).

11 Draft Conduct Standard – conditions for investment in derivative instruments for funds

On 8 June 2020, the FSCA published this draft Conduct Standard for comment. The Conduct Standard sets overarching principles for the uses of derivative instruments by funds.

The Parliamentary period for comment has elapsed and the Standard will be made final within the next two months.

12 Draft Conduct Standard - conditions for securities lending for pension funds

Pension funds may engage in securities lending and that enables the FSCA to prescribe conditions for such securities lending. According to the FSCA, fund assets represent a significant portion of investable assets of financial institutions and such assets form a large base of the securities lending in the financial industry. In addition, securities lending enables a fund to earn additional income to the benefit of the fund and its members. Thus, to balance the benefit with the possible risks associated with securities lending, the FSCA will prescribe conditions by providing for general principles and requirements pertaining to service providers, agents, counterparties, lending limits and collateral etc. The draft Conduct Standard issued on 7 October 2020, seeks to prescribe these requirements.

However, due to the broader regulatory developments in respect of Securities Financing Transactions this Conduct Standard has been pended until further notice.

13 Draft Prudential Standard – financial statements and regulatory reporting requirements for retirement funds

This Prudential Standard was published for public consultation on 9 November 2022 and brings important new financial statement and audit requirements for retirement funds. This will lead to substantial changes in the financial reporting and audit requirements of funds. In addition, the proposals include that the financial statements of all pension funds will be required to be audited, irrespective of the asset size of a fund.

The draft of the revised format and requirements resulted in extensive commentary. The comment period closed on 18 January 2023 and submissions are currently being considered by the FSCA. The Prudential Standard will be revised if necessary.

14 Draft Prudential Standard - Regulation 28 reporting requirements for funds

The FSCA published the draft Prudential Standard for public consultation on 4 November 2022. The current Regulation 28 quarterly reporting requirements for pension funds is to be brought into line with the recent amendments to Regulation 28, including the requirement to report on infrastructure investments.

The timing to revise reporting is tight for retirement funds, and their service providers, including to implement the processes and system changes required to produce accurate and complete quarterly reporting. Thus, the first quarterly report due in 2023 will be given an extended time for submission (that is, submission on or before 30 September 2023).

The FSCA is currently considering comments from the industry. The next version will be a final version to send to Treasury to table in Parliament. No further consultation will be done by the FSCA. The FSCA has stated that if the Prudential Standard is not finalised in time for the reporting at the end of September 2023, that the FSCA will issue a request for information (which is mandatory) to ensure it receives the specified information.

The FSCA recently stated that it will be revising the draft format such that Table 2 (Infrastructure) and Table 3 (ESG) will be *removed* from the quarterly Regulation 28 report (as revised) and will be required only *annually* instead. This is because the infrastructure and ESG information is unlikely to change on a quarterly basis. The FSCA is not yet sure how it will require the annual report from funds, that is, in which document.

In addition, the FSCA stated that the broader definition of infrastructure recently included in Regulation 28 to the Pension Funds Act could lead to possible inconsistent classification of infrastructure assets. Thus, the FSCA is considering issuing an Interpretation Notice / Guidance Notice.

15 Development of a Joint Standard – corporate governance and culture

This Joint Standard is in the process of being developed by the FSCA and the Prudential Authority (PA). It will apply to retirement funds as well as their service providers (in addition to other financial institutions). A Joint Governance Work Group (JGWG) consisting of various representatives from the FSCA and PA has been established to develop the governance framework. The FSCA expects that the draft Joint Standard will be published for public consultation during the latter half of 2023.

16 Draft Conduct standard on the conditions applicable to fund administrators

Initially, the FSCA made a decision to pend this Standard because of the work it is doing around transitioning to COFI. However, recently it has said that it has urgent reasons for wanting to proceed with a watered-down version of this Standard. Watered-down in the sense that it will remove issues that could misalign with COFI. There is unlikely to be any further consultation by the FSCA on the Standard, except that it may be issued to industry bodies for a final “fatal flaw” check.

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