1. Information Circular 2/2017: Cancellation of registration of a fund and termination of participation of a participating employer in an umbrella fund

This long-awaited Circular was issued on 6 July 2017 and provides clarity on the requirements for the cancellation of the registration of a fund in terms of section 27(1) of the Pension Funds Act and for the termination of participation of an employer in an umbrella fund.

The pre-requisites for a fund, or participation of an employer in an umbrella fund to have ceased to exist are that the fund (or "sub-fund" in the latter case) no longer has any assets liabilities or members, or any pending litigation against it.

1.1 Cancellation of registration of a fund

Application for cancellation of registration of a fund must be made by the board, the administrator or the employer. The application must be accompanied by the information as set out in Annexure A to the Circular. A fund may cease to exist as a result of any one of the following:

- **Section 14:** Where an approved section 14 transfer has been effected, leaving the transferor fund without any assets, liabilities and members;
- **Exemption from section 28:** Where a fund has been exempted from all the provisions of section 28 and the person responsible for the winding-up of the fund has complied with all the requirements and conditions of the exemption;
- **Exit of the last member:** Where a fund ceases to exist due to members receiving their benefits from the fund and the fund has no remaining assets, liabilities and members, or any pending litigation against it;
- **A fund was registered but never commenced business as a fund:** This situation will only be recognised in circumstances not amounting to fraud.

1.2 Termination of the participation of an employer in an umbrella fund

The board of the umbrella fund must inform the Registrar of the termination of the participation of an employer within 60 days and, where applicable, submit a rule amendment to the special rules of the fund which records the termination of that employer's participation in the fund. The application to the Registrar must be accompanied by the information as set out in Annexure B to the Circular.

This newsletter provides information of a general nature and does not constitute advice in respect of a particular client

A participating employer's participation in an umbrella fund may terminate as a result of any one of the following:

- **Section 14:** Where an approved section 14 transfer has been effected, leaving the transferor fund without any assets, liabilities and members in respect of the participating employer;

- **Exemption from section 28:** Where a fund has been exempted from all the provisions of section 28 in respect of the liquidation of a sub-fund, and the person responsible for the winding-up has complied with all the requirements and conditions;

- **Exit of the last member:** Where the participation of an employer terminates due to members receiving their benefits from the fund, and the fund has no remaining assets, liabilities and members in respect of that participating employer;

- **Special rules being registered for an employer that never commenced participation in the fund:** Where the Registrar and the fund agree that the special rules should not have been registered as the employer never commenced participation in the fund.

1.3 Publication of a notice of intention to cancel the registration

The Registrar will publish a notice of the intention to cancel the registration of the fund in accordance with the requirements of the Promotion of Access to Administrative Justice Act and on the Financial Services Board website for a period of 30 days.

During this period any person aggrieved by the intended cancellation of registration may submit an objection to the proposed cancellation, which the Registrar will consider and thereafter make a decision as to whether to proceed with the cancellation of the fund's registration.

1.4 Submission of applications

Applications already submitted to the Registrar will continue to be processed. However, where there is a need for additional information to satisfy the Registrar that the fund has ceased to exist or that an employer has ceased participation in an umbrella fund, this must be provided.
All future applications should comply with the requirements set out in the Circular. Applications must be submitted electronically to the Registrar on the Retirement Funds On-line System.

2. Information Circular 3/2017: Appointment of trustees by the Registrar in terms of section 26(2)

Section 26(2) of the Pension Funds Act empowers the Registrar to establish a functional board in circumstances where, for whatever reason, a fund does not or no longer has a properly constituted board. As such, a section 26(2) trustee will have to comply with section 7D of the Act, the fund's rules, common law duties and those duties imposed by the Registrar based on the circumstances of the fund. In the Circular fifteen examples of duties are provided for clarity. These include, among others:

- Constituting a board in terms of the rules of the fund;
- Management of the fund;
- Ensuring compliance with applicable laws;
- Submitting rule amendments to the Registrar for approval;

This newsletter provides information of a general nature and does not constitute advice in respect of a particular client

- The approval and submission of outstanding annual financial statements and actuarial valuations;
- Collection of outstanding contributions;
- Paying benefits;
- If a valid board cannot be established, apply to the Registrar for the approval of a liquidator or the cancellation of the fund, as the case may be.

Section 26(2) trustees must perform the duties determined in their appointment letters, which may be supplemented or altered at the discretion of the Registrar.

3. Information Circular 4/2017: Conditions for the temporary exemption from section 14 transfer periods

The Pension Funds Act requires that a transfer in terms of section 14(1) of the Act must be completed within 60 days from the date on which the Registrar issued the certificate of approval. Similarly, a transfer in terms of section 14(8) of the Act must be implemented within 180 days of the effective date of the transfer.

Changes to the Income Tax Act with effect from 1 March 2017 resulted in funds being required to obtain a tax directive in respect of all members involved in a section 14 transfer. Funds are experiencing practical problems in complying with the prescribed timelines for those transfers that were already in progress when the changes were introduced or those transfers that were already approved but not yet paid to the receiving fund.

The following measures have been introduced by the Registrar to assist with the above:

- For transfer applications submitted after 6 July 2017 (the date of publication of the Circular), funds must make sure that they have all the necessary member information to allow them to apply for a tax directive before including the member in the scheme of transfer. This has to be certified by the fund in the transfer application.

- For section 14(1) transfers that were approved on or after 1 January 2017 but were unpaid as at 1 March 2017, the Registrar has granted an exemption from complying with the 60 day period, provided that the transfer is effected by 31 August 2017 and fund return is added to the final transfer amounts.

- For section 14(8) transfers that have effective dates from 1 September 2016 onwards but were unpaid as at 1 March 2017, the Registrar has granted an exemption from the 180 day requirement, provided that the assets and liabilities are transferred by 31 August 2017 and fund return is added to the final transfer amounts.

If the Registrar has not yet approved a transfer that has been submitted for approval on or before 6 July 2017, funds must assess whether they have all the details required to apply for a tax directive for the members involved. Funds will have to submit revised or amended applications in those cases where they would not be able to transfer the members. A revised application should be uploaded under the previous FSB case number or sent to: section14@fsb.co.za. If the application is approved before the revised application is received or considered, the amendment process must be followed.

This newsletter provides information of a general nature and does not constitute advice in respect of a particular client

The Registrar will consider applications for withdrawal or amendment of an approved scheme of transfer if submitted by 31 August 2017. In terms of section 14(6)(c) the Registrar may withdraw or amend a section 14 approval certificate if he is satisfied that, as a result of amendments to legislation, the implementation of a section 14 scheme would prejudice members.

4. Notice 1 of 2017: Exemption in respect of debt instruments issued or guaranteed by a South African bank

The Registrar of Pension Funds on 21 July 2017 published a Notice exempting retirement funds from items 2.1(c)(i), (ii) and (iii) of Table 1 of Regulation 28 under the Pension Funds Act, with effect from this date.

Regulation 28 provides that a fund may only hold assets and categories of assets referred to in Table 1 and that a fund must comply with the limits set out in the regulation. Items 2.1(c)(i), (ii) and (iii) of Table 1 determine that funds may invest in debt instruments issued or guaranteed by a listed South African bank against its balance sheet, subject to limits based on the market capitalisation of the bank (issuer).

The Notice states that in practice the controlling company of the South African bank is the listed entity and not the South African bank. An exemption was therefore required to regularise the application of the aforesaid limits. Funds are exempted from the limits on condition that -

- its controlling company is listed; and
- the aforesaid limits are applied taking into account the market capitalisation of the controlling company.

5. Proposed amendments to the regulations under the Long-term Insurance Act

In December 2016, National Treasury (NT) with the support of the Financial Services Board ("FSB") published for comment proposed amendments to the Regulations made under the Long-term Insurance Act, 1998 ("LTIA") to give effect to a number of conduct of business reforms, Based on the comments received, the FSB made revisions to the draft amendments of the Regulations that will inform the FSB's submission to NT. Comments are invited by 4 August 2017. Among others the revisions entail the following:

5.1 Remuneration

5.1.1 Binder fees

The draft Regulations proposed binder fee caps for non-mandated intermediaries ("NMI") authorised to render "advice" as defined in the Financial Advisory and Intermediary Services Act ("NMI advisers") or their associates.

This newsletter provides information of a general nature and does not constitute advice in respect of a particular client

As a result of comments received and research done by the FSB, they revised the proposed binder caps for NMI advisers as follows (references are to sections of the LTIA:

Binder function	**Maximum fee payable**
Enter into, vary or renew a policy (section 49A(1)(a)); Determine the wording of a policy (section 49A(1)(b)); determine premiums under a policy (section 49A(1)(c)); or determine the value of policy benefits under a policy (section 49A(1)(d)); or any combination of the above	5%
Settle claims under a policy (section 48A/49A(1)(e))	4%
TOTAL	**9%**

According to the FSB this proposal is still subject to further technical work, specifically in as far as it relates to functions (a) - (d) referred to above. The FSB's intention is to propose a further split between the (a), and (b) - (d) functions. It is at this stage unclear what exactly this split should be and comments in this regard were invited from the industry.

It is important to note that the above binder caps are the maximum binder fees that may be paid, and does not represent a default fee payable in all circumstances. Binder fees must still be reasonable and commensurate with the actual cost of performing the relevant binder function.

5.1.2 Fees for policy data administration services

The FSB proposed that the definition of "services as intermediary" under the LTIA Regulations should be amended to include "policy data administration services" ("PDAS").In short, PDAS entails the managing, recording and updating of policy and policyholder data on behalf of an insurer. However, for purposes of remuneration, PDAS will be carved out from the normal commission regulations and an additional fee may be paid for PDAS if the relevant operational requirements are met.

No fees may be paid in respect of PDAS to a binder holder who has a binder agreement with the insurer to perform the function contemplated in section 49A(1)(a) of the LTIA, in other words the binder function of entering into, varying or renewing a policy.
Fees paid in respect of PDAS performed by NMI advisers may also create a conflict of interest and for this reason it was proposed that fees paid in respect of PDAS are also capped. A maximum fee of 2% of gross premiums is proposed in the draft Regulations, but this will be aligned to the final fee cap that applies to the "entering into" binder function (i.e. binder function (a)).

This newsletter provides information of a general nature and does not constitute advice in respect of a particular client

5.1.3 General principles for determining remuneration

It was proposed in the previous draft of the draft Regulations that any remuneration payable in terms of the Regulations, in other words commission, binder fees and fees in respect of PDAS, must be reasonable and commensurate with the actual cost of performing the service, function or activity performed. Concerns were raised that this is too vague and could lead to inconsistent application by industry role-players. To address these concerns, and to ensure the consistent application of these principles, the FSB proposes detailed criteria that must be applied when determining whether remuneration is reasonable and commensurate.

To further mitigate the risk of insurers paying an independent intermediary or representative additional fees for a service, function or activity that ostensibly rather falls within the definition of "services as intermediary" or constitutes a binder function or incidental activity, a requirement has been inserted that an insurer must obtain approval from the Registrar before it pays an independent intermediary or a representative any fee for a service which in the opinion of the insurer does not constitute services as intermediary or binder functions. This means that an insurer would have to obtain approval from the Registrar for the payment of an outsourcing fee. The Registrar will only approve the payment of such fee if the Registrar is satisfied that the service for which the fee is being paid does indeed not constitute services as intermediary or binder functions.

5.2 Operational requirements

The draft Regulations provide for operational requirements that apply in respect of both binder functions and PDAS. The operational requirements broadly entail the following:

Frequency of data exchange

In terms of the draft Regulations binder holders and PDAS providers are required to provide the insurer at least every 24 hours with timely, comprehensive and reliable data to ensure that the insurer is able to comply with any regulatory data management requirements. The FSB acknowledges that it might not be practical to comply with the data exchange requirement for funeral and assistance business policies because of the lack of system sophistication in many of the distribution channels distributing these policies. For this reason it is proposed that the 24 hour requirement in respect of funeral and assistance policies be changed to a monthly data exchange requirement. It is, however, proposed that the 24 hours data exchange requirement for all other policies be retained.

"Integration" and "access on demand" requirement

The previous draft of the draft Regulations also required binder holders and PDAS providers to ensure complete integration between the information technology system of the insurer and their system and to also ensure that the insurer has continuous access to accurate, up-to-date, complete and secure policy and policyholder data.

This elicited a number of comments and clarity on what is meant by the terms "complete integration" and "continuous access". The FSB therefore proposes amendments that essentially split the requirements in two, i.e.:

- "access on demand" requirement - despite the 24 hour data exchange requirements, an insurer must at all times be able to access data held by a binder holder or PDAS provider when it so requests. A requirement has been inserted to give effect to this principle.

This newsletter provides information of a general nature and does not constitute advice in respect of a particular client

- "integration" requirement - The proposed revisions to the draft Regulations include a definition for "integration" which attempts to clarify that the systems of the insurer and the binder holder/PDAS provider must be able to "talk" to each other and exchange of information should not lead to duplication in work.

5.3 Governance, oversight and reporting requirements

The draft Regulations propose much stricter requirements with regard to supervision of binder holders. Amongst other things, it is proposed that an insurer may only enter into a binder agreement if the outsourcing of the binder function will ensure the delivery of improved outcomes for customers, will not result in a duplication of administrative efforts or costs, and will not impede the insurer's ability to manage its conduct of business risks. According to the FSB this is to mitigate the risk of inappropriate outsourcing of binder functions.

In addition, before and after entering into a binder agreement, an insurer will need to demonstrate that it has the ability and resources necessary to ensure effective oversight of the binder holder at all times and that it is satisfied with the binder holder's governance and internal control framework, fitness and propriety and technical and operational ability.

The FSB proposes that insurers must notify the Registrar at least 60 days before entering into any new binder or PDAS agreements.

5.4 Transitional arrangements proposed for binder agreements

i. Agreements and/or policies entered into before 1 January 2017:

    - The requirements on binder fee caps for NMI advisers in respect of binder agreements entered into before 1 January 2017 will become effective 12 months after the amended Regulations become effective ("effective date").
    - All governance requirements will become effective immediately;
    - Operational requirements will become effective within 24 months after the effective date.

ii. Agreements and/or policies entered into between 1 January 2017 and the effective date:

    - The requirements on caps for binder fees on binder agreements entered into within this period will become effective 6 months after the effective date;
    - The governance requirements will become effective immediately;
    - Operational requirements will become effective within 24 months after the effective date.

iii. Agreements and/or policies entered into on or after the effective date:

    - The requirements regarding fee caps and governance will become effective on the effective date for all new agreements. Operational requirements will become effective within 24 months after the effective date.

As PDAS is a "new" service identified in the draft Regulations for which additional remuneration can be received, no transitional provisions will apply to requirements relating to PDAS, and all requirements will become effective on the effective date.

It is our understanding that the implementation date of the final amended Regulations is likely to be 1 January 2018.

This newsletter provides information of a general nature and does not constitute advice in respect of a particular client

6. Draft Taxation Laws Amendment Bill, 2017

The main provisions of the draft Bill affecting retirement funds are the following:

6.1 Postponement of annuitisation requirement for provident funds to 1 March 2019

In 2015, amendments were made to the Income Tax Act regarding the tax treatment of provident funds in order to enhance preservation of retirement benefits during retirement. As a result, provident funds will be treated like pension and retirement annuity funds and will be required to annuitise benefits. This implies that on retirement, members of the provident fund will be permitted to take up to a third of the retirement benefit as lump sum and annuitise at least two thirds. However, this will only be applicable for contributions made to a provident fund after the implementation date. All contributions made before the implementation date, and growth on those contributions, may still be taken as a lump sum on retirement.

The above-mentioned amendments were supposed to come into effect on 1 March 2016 but were postponed by Government for two years until 1 March 2018 in order to provide sufficient time for the Minister of Finance to consult with interested parties, including National Economic Development and Labour Council (NEDLAC), regarding the annuitisation requirements for provident funds after the publication of the comprehensive policy document on social security.

According to the explanatory memorandum to the draft Bill the discussions on the comprehensive paper on social security are still underway in NEDLAC and therefore it is proposed that the provisions relating to the annuitisation requirements for provident funds be postponed for 1 year from 1 March 2018 to 1 March 2019.

6.2. Transferring retirement fund benefits after reaching normal retirement date

In 2014, changes were made in the Income Tax Act to allow individuals to elect when to retire from a fund, and the date on which the lump sum benefit accrued to the individual depended on the date on which the individual elected to retire and not on the date of retirement from employment. As a result, members of retirement funds were allowed to postpone 'retirement' by keeping their benefits within their funds after retirement from employment.

The explanatory memorandum to the draft Bill states the following:

"While members may retain benefits within respective funds, they may no longer make contributions to those funds. The members are thus effectively inactive. In the case of employer funds, the employee may also have left the employ of the company and may wish to sever ties with the employer. The employer would also be left with the burden of having to keep in touch with an inactive member and deal with additional administration.

In order to address these concerns, it is proposed that changes be made in the Act with effect from 1 March 2018 to allow employees to transfer their benefits into a retirement annuity for later consumption. Transfers to preservation funds are not currently included in the proposal as this would create a situation where members of pension funds can transfer their benefits into preservation funds and withdraw all the benefits in a lump sum withdrawal."

This newsletter provides information of a general nature and does not constitute advice in respect of a particular client

6.3 Tax exempt status of pre-March 1998 build-up in public sector funds

The current position is that the tax-free status of pre-March 1998 build-up in public sector funds is retained upon the first transfer from such fund to a private sector fund, but that it is lost upon any subsequent transfer. The explanatory memorandum to the draft Bill states that this outcome results in unfair treatment in respect of the benefits from funds that are merged or consolidated. It is proposed that the Act be amended with effect from 1 March 2018 to allow the tax-free status to be retained when one further transfer to another fund is made.

6.4 Removing the 12-month limitation on joining newly established pension or provident fund

The Income Tax Act provides that if an employer establishes a new pension or provident fund, employees have up to 12 months to make application to join that fund. An employee who fails to make application to join within the 12 month period is not permitted to join that fund. The consequence of the current limit of 12 months may be that employees can opt to be outside of the retirement saving system even though they are currently employed.

In order to encourage employees to contribute towards their retirement and remove practical difficulties, it is proposed that the current limit of 12 months be removed so that employees are allowed to join a new established pension or provident fund at any time, subject to the rules of the fund. The proposed amendment will come into effect on 1 March 2018.

6.5 Deduction in respect of contributions to retirement funds

The deduction for employee contributions to a pension fund were historically included in section 11(k), while deductions for contributions to a retirement annuity fund were included in section 11(n). As part of the wider retirement reform objectives, the tax deductibility of contributions to retirement funds was harmonised across all retirement funds through a replacement of section 11(k) from 1 March 2016, where the same deduction now applies to both employer and employee contributions to pension funds, provident funds and retirement annuity funds.

According to the explanatory memorandum to the draft Bill the replacement of section 11(k) has created technical complications, e.g. it can “create anomalies such as generating an assessed loss from contributions to retirement funds that are above the allowable limit when taxable gains are a part of the higher limit”.

The draft Bill therefore proposes that a new section 11F be inserted in the Income Tax Act with effect from 1 March 2016, effectively replacing section 11(k), and including wording intended to avoid circumstances that can create an assessed loss. The amendment should not affect most members of pension funds and provident funds.

7. Demarcation regulations (medical scheme business vs. insurance business)

The FSB published a “Frequently asked questions” (F&Q) document relating to the Demarcation Regulations issued in terms of the Long-term Insurance Act and the Short-term Insurance Act, which came into effect on 1 April 2017. The Regulations “seek to clearly demarcate the responsibility for supervision of medical schemes and health insurance products, and ensure that health insurance products do not undermine the social solidarity principles inherent in medical schemes, resulting in better protection for consumers.”

This newsletter provides information of a general nature and does not constitute advice in respect of a particular client

The (F&Q) document among others, states the following:

“The demarcation regulations identify the types of contracts that, despite the contracts meeting the definition of business of a medical scheme, are health policies or accident and health policies that are subject to the jurisdiction of the Long-term Insurance Act (LTIA) or the Short-term Insurance Act (STIA) and not the MSA.” (MSA refers to the Medical Schemes Act)

In short, the demarcation regulations stipulate that an insurance policy may not defray expenditure incurred in connection with the rendering of a health service, and may only provide lump sum benefits unrelated to expenditure. A health policy or accident policy must further fall within one of the categories listed in the regulations.

Retirement funds or other clients requiring more information should not hesitate to contact their consultant.

This newsletter provides information of a general nature and does not constitute advice in respect of a particular client