

Legal Report March 2018

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Newsletter of Sanlam Employee Benefits: Legal

1. Directive 8: Prohibition on the Acceptance of Gratification

A Directive on the prohibition on the acceptance of gratifications was issued on 8 March 2018 and became effective on the same date.

General principle

The Directive confirms that the general principle is that a board member, principal officer, deputy principal officer, employee of a retirement fund, auditor, valuator, administrator (or its employees) or service provider to a retirement fund should not be involved in any conduct constituting corruption or corrupt activities (as contemplated in the Prevention and Combating of Corrupt Activities Act, 2004), and any such involvement will have a bearing on such persons' fitness and propriety to hold office and/or to provide a service.

Definition of "gratification"

"Gratification" is defined in the Prevention and Combating of Corrupt Activities Act as including:

- a) *money, whether in cash or otherwise;*
- b) *any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;*
- c) *the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;*
- d) *any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;*

- e) *any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;*
- f) *any forbearance to demand any money or money's worth or valuable thing;*
- g) *any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;*
- h) *any right or privilege;*
- i) *any real or pretended aid, vote, consent, influence or abstention from voting; or*
- j) *any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage."*

The Directive uses the same definition of "gratification" as quoted above but adds that it "excludes remuneration paid by a sponsor of a retirement fund to a board member appointed by the sponsor of the retirement fund."

General offence of corruption

Section 3 of the Prevention and Combating of Corrupt Activities Act describes the general offence of corruption as follows:

"Any person who, directly or indirectly –

- (a) *accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or*
- (b) *gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner -*
 - (i) *that amounts to the –*
 - (aa) *illegal, dishonest, unauthorised, incomplete, or biased; or*
 - (bb) *misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*

- (ii) *that amounts to –*
 - (aa) *the abuse of a position of authority;*
 - (bb) *a breach of trust; or*
 - (cc) *the violation of a legal duty or a set of rules;*
- (iii) *designed to achieve an unjustified result; or*
- (iv) *that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption.”*

Gratification automatically not permitted

The most important new provision contained in the Directive is that the Registrar of Pension Funds has “*directed that the following types of gratification are automatically not permitted to be accepted, agreed or offered to be accepted by a board member, principal officer, deputy principal officer, employee of a retirement fund, valuator, auditor, administrator, employee of an administrator or other officer or service provider to a fund, from any other person connected in whatsoever manner to a service provider of a fund, or from any potential future service providers, in which such principal officer, deputy principal officer, employee of a retirement fund, valuator, auditor, administrator, employee of an administrator or other officer or service provider to a fund or other officer serves:*

- a) *any gratification which objectively viewed, creates a conflict of interest with their fiduciary duty towards the fund;*
- b) *token gift/s that exceed/s the annual limit set by the board in terms of the fund's gift policy, which annual limit shall not be more than R500.00 per annum in aggregate from any one service provider;*
- c) *any gratification relating to local or international due diligences including, but not limited to, subsistence, travel or accommodation;*
- d) *any gratification relating to local or international entertainment or sporting events including, but not limited to, subsistence, travel or accommodation; and*
- e) *conferencing costs or board of fund expenses.”*

Duty to whistle blow

The directive reminds that, in terms of the Pension Funds Act –

- A board member, on becoming aware of any material matter relating to the affairs of the retirement fund, which in his/her opinion, may seriously prejudice the financial viability of the fund or its members, must inform the Registrar thereof in writing.
- A principal officer, deputy principal officer, auditor, valuator or administrator of a retirement fund must, on becoming aware of any matter relating to the affairs of the fund, which in their opinion, may prejudice the fund or its members, inform the Registrar thereof in writing.

In terms of the Directive board members, principal officers, deputy principal officers, employees of a retirement fund, valutors, auditors, administrators, employees of an administrator and service providers to a fund must report or disclose to the Registrar any breach or attempted breach of the Directive immediately upon becoming aware thereof. They may take guidance from Information Circular 1 of 2018 on how to report or make a disclosure to the Registrar.

2. Information Circular 4/2018: Clarification on the effective date of Directive 8

Following queries received in respect of Directive 8, the Registrar advised as follows:

- The Directive is effective from 8 March 2018.
- Commitments which were entered into prior to 8 March 2018 and which are prohibited by the Directive should be withdrawn or declined by the regulated persons or entities, where possible.
- If it is not possible to withdraw or decline such prior-commitments, the regulated persons or entities can honour such prior commitments. The Circular states that this should however not be interpreted as the FSB endorsing the prohibited action, but should be seen within the context of the effective date of the Directive.

3. Report to South African Reserve Bank

In a letter dated 13 March 2018 the South African Reserve Bank (SARB) reminded institutions to furnish the Financial Surveillance Department of the SARB with a progress report by 31 March 2018 regarding their readiness to submit quarterly asset allocation reports within the new reporting period. In the SARB letter of 24 August 2017 the industry was informed that the period to submit these reports will be reduced from 3 months to 2 months after quarter-end, effective from the September 2018 quarter-end.

4. Proposed amendments to Policyholder Protection Rules

Proposed amendments to the Policyholder Protection Rules (“PPRs”) made under the Long-term Insurance Act, 1998 were published for comment by the Registrar of Long-term insurance.

According to a statement published by the FSB the proposed amendments to the PPRs are necessary to –

- align the PPRs with the Insurance Act, 2017;
- provide for certain conduct of business related requirements that will be repealed from the Long-term Insurance Act through Schedule 1 to the Insurance Act, once the latter Act commences, as these conduct requirements are better placed in subordinate legislation; and
- provide for microinsurance product standards.

The proposed amendments inter alia propose that the use of the term “funeral policy” be prohibited unless the policy benefits are intended to cover the costs associated with a funeral. This is explained as follows in the Statement on the Proposed Amendments:

“The product standards further prohibit the use of the term “funeral policy” or any suggestion to create the impression that policy benefits are intended to cover the costs associated with a funeral or a funeral service, other than for a funeral policy. This prohibition is meant to avoid regulatory arbitrage whereby insurers advertise life risk policies as funeral policies in order to circumvent compliance with the product standards that apply to funeral policies.”

It is expected that the proposed amendments to the PPRs will come into operation on 1 July 2018.

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

The Minister of Finance has published for comment certain proposed amendments to the Regulations under the Long-term Insurance Act.

According to a media statement issued by National Treasury, the draft amendments to the Regulations aim to –

- align the Regulations (specifically terminology) with the Insurance Act, 2017 as enacted on 18 January 2018;

- further strengthen policyholder protection by providing for more robust legislative requirements pertaining to the collection of premiums by intermediaries; and
- amend the binder regulations to provide for certain procurement and transformation requirements.

The Finance Minister stated the following regarding the proposed amendments to the binder regulations:

“The Financial Sector Code (FSC) issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act, (Act No. 53 of 2003) as amended requires insurers to allocate a certain percentage of their total procurement spend to black owned enterprises. However, in practice there are instances where the allocation of insurers’ procurement spend is decided by third parties. This usually happens when an insurer outsources a binder function and the appointment of service providers is incidental to the binder function. The binder holder appoints service providers, which service providers may not be included in the insurers’ panel of service providers, resulting in these appointments not contributing to the insurer meeting its transformation commitments under the FSC.”

To ensure that binder agreements between insurers and binder holders do not undermine an insurers’ ability to meet its commitments under the FSC, the proposed amendments requires binder agreements to provide for mechanisms and measures that will assist the insurer in meeting procurement, enterprise and supplier development targets relating to the transformation in the insurance sector.”

The envisaged effective date of the proposed amendments is 1 July 2018.

6. Draft notice containing proposed conditions for smoothed bonus policies in order to be eligible as a default investment portfolio in terms of the Default Regulations

The Registrar of Pension Funds issued for comment a Draft notice containing proposed conditions for smoothed bonus policies in order to be eligible as a default investment portfolio in terms of the Default Regulations issued in terms of the Pension Funds Act. Among others the policy must follow a formulaic approach to calculate and determine bonus declarations. The cost of any guarantee provided in terms of the policy must be commensurate with the risk and there must be separate disclosure of guarantee charges and other costs relating to the policy. The intention is that the notice will take effect on 1 April 2019.

7. Draft Directive on regulation 28: Sustainability reporting and disclosure requirements

Regulation 28 of the regulations to the Pension Funds Act, 1956 requires all funds to have an investment policy statement and requires that boards of funds consider environmental, social and governance factors before investing in an asset.

The Registrar of Pension Funds published for comment a draft Directive to be issued to prescribe the requirements to ensure compliance with the relevant provisions of Regulation 28. The directive provides guidance in respect of the content of some of the essential aspects of an investment policy statement and the manner in which that content is disclosed by retirement funds.

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