

Legal Report April 2018

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1. New Twin Peaks regulators established

On 29 March 2018 the National Treasury issued a media release advising that on 1 April 2018 South Africa's financial regulatory system will fundamentally change, as two new regulators come into operation - the Prudential Authority (PA) and the Financial Sector Conduct Authority (FSCA). This implements a new Twin Peaks model of financial sector regulation in South Africa. This was effected by the commencement of a number of sections of the Financial Sector Regulation Act, 2017 as from 1 April 2018.

Deputy Governor Kuben Naidoo has been appointed as the CEO of the Prudential Authority. Established within the South African Reserve Bank, the PA will supervise the safety and soundness of all financial institutions.

The FSCA will supervise how financial institutions conduct their business and treat customers. It will be responsible for improving customer protection in the financial sector, and driving better customer outcomes, ensuring that the sector serves South Africans best. It is also responsible for the efficiency and integrity of financial markets. The current Financial Services Board (FSB) closed down on 31 March 2018.

Both the PA and FSCA will publish regulatory strategies within six months of their establishment, setting out in further detail their intended regulatory focus areas and work plans over the next three years.

2. Financial Sector Conduct Authority media release

On 5 April 2018 the Financial Sector Conduct Authority (FSCA) issued a media release confirming that the FSB has officially taken up its new mandate as the FSCA, effective 1 April 2018.

The FSCA's key objectives will be to:

- protect financial customers by promoting their fair treatment by financial institutions, providing financial education programs, and promoting financial literacy;
- enhance and support the efficiency and integrity of financial markets;
- assist in maintaining financial stability;
- support the overall policy objectives of financial inclusion and transformation of the financial sector.

The media release states that the implementation of the FSCA mandate will be by means of gradual changes over the course of the current year, as sections of the Financial Sector Regulation Act come into operation in a phased manner. In the main, financial institutions can expect their interactions with the FSCA to be business as usual in the short term. There are however a few immediate changes as from 1 April, in addition to what has been mentioned above:

- All communications, regulatory actions and decisions will now be in the name of the FSCA;
- The new website of the FSCA www.fsc.co.za is live - but with all the key information that was previously available on the FSB website still accessible;
- A Financial Sector Tribunal has been established, which any entity aggrieved by an FSCA decision can approach for adjudication. The Tribunal replaces the former FSB Appeal Board.

In terms of the Financial Sector Regulation Act a Commissioner and Deputy Commissioners will make up the Executive Committee that will lead the FSCA. As an interim measure, the Minister has determined that a Transitional Management Committee will manage the FSCA until the Commissioner is appointed. The Committee will comprise the members of the former FSB Executive Committee, the Chairperson of the former FSB Board, Mr Abel Sithole, and a National Treasury appointee, Ms Katherine Gibson. The Committee will perform all the functions of the FSCA Executive as described in the Financial Sector Regulation Act, while Mr Sithole will be caretaking as the FSCA Commissioner, until the new Commissioner is appointed.

Note that from 1 April 2018 the references to the Registrar or FSB in the Pension Funds Act have been replaced with "Financial Sector Conduct Authority". In addition, new definitions of Authority, Act, Standards, Register and Tribunal will apply.

3. FSCA communiqué in respect of all applications received in terms of Pension Funds Act

On 20 April 2018 the FSCA advised that, due to the transitional arrangements from the FSB to the FSCA, they are currently unable to finalise applications for rule amendments, registration of retirement funds and licensing of benefit administrators. It is anticipated that the delays as a result of the transitional arrangements will be resolved within five weeks at the latest, by which time it is hoped that most if not all of the backlog would have been addressed.

For genuinely urgent cases and upon request, if the application is compliant, the FSCA will confirm that registration will occur immediately upon the finalisation of the transitional processes.

4. Draft Guidance Note of FSCA with regard to exemptions in terms of Section 7B of the Pension Funds Act

A draft Guidance Note was issued for comment by the FSCA (referred to as the “Authority” in the draft Note) with regard to exemptions in terms of Section 7B of the Pension Funds Act (“Act”) and provides details of the conditions that may be imposed by the Authority in cases where an exemption was granted.

Section 7A(1) of the Act requires that every fund have a board consisting of at least four members, at least 50% of whom the members of the fund shall have the right to elect. Section 7B provides an alternative to the provisions of section 7A in certain defined circumstances. In terms of Section 7B(1)(b) the Authority may on written application of a fund and subject to such conditions as may be determined by the Authority exempt the following types of funds from the requirement that the members of the fund have the right to elect members of the board:

- funds established for the benefit of employees of different employers, which are commonly known as umbrella funds;
- retirement annuity funds;
- beneficiary funds; and
- pension and provident preservation funds as defined in section 1 of the Income Tax Act.

The draft Guidance Note among others includes the following requirements:

- Previously the exemptions referred to above were granted for a limited period, not exceeding three years. However, some practical problems were encountered where some funds failed to renew their exemption timeously. The Authority concluded that exemptions granted upon written application by a fund will no longer be time bound or subject to a specific period. Such indefinite exemption envisaged will not be automatic. Funds that currently have exemption must apply for exemption with indefinite duration. The Authority may call for such further information as it considers necessary, having regard to the particular circumstances of the fund.
- At least 50% of the members of the board of a fund must be independent board members. If a fund cannot adhere to this requirement, it must provide reasons and any timelines, which the Authority will consider.
- Bargaining council, sectoral determination, trade union and municipal funds which provide for alternative forms of member representation other than direct member elections in their rules may apply for a specific condition that the Authority not impose, or relax the said requirement, subject to adherence to the member representation provisions in the registered rules. These rules must also provide for the manner in which non-unionised members or members of minority unions, for example, will be accommodated.
- Every independent board member appointed to the board must have the relevant experience or expertise required for the effective fulfilment of their duties, which the fund must demonstrate it has considered before making any appointment, and
 - should be free from any relationships that could, in the opinion of a reasonable and informed outside party, be considered as something that would affect their objectivity;
 - must never have been expelled from any professional body of which he or she was a member or which was entitled to exercise disciplinary powers over him or her;
 - must never have been convicted of an offence involving dishonesty or violence; and
 - the fund must demonstrate that the independent board members will be able to provide sufficient time, expertise and resources to the fund at a reasonable cost to the fund, and will continue to do so for so long as the person remains on the board.
- The board must take remedial action if an independent board member is not, or is no longer, able to comply with the requirements for independence.
- If the board utilises sub-committees, similar criteria apply to the composition of the members of each sub-committee and the requirement for independence of those sub-committee members.
- If an independent board member ceases to comply with any of the conditions specified above, his or her appointment to the board of the fund must automatically and immediately terminate;

- An independent board member must report any irregularities and concerns to the Authority and he or she shall not be held liable or to be victimized as a result of the reporting;
- The rules of the fund must provide for a quorum of at least four board members, including the independent trustees, and that no decision of the board will be binding on it unless that decision was supported by no fewer than:-
 - 50% of the members of the board, of which no fewer than 70% are independent board members; and
 - if a decision is taken by round-robin resolution, it is ratified by the board at its next meeting.
- Depending on the size of an umbrella fund, the Authority will consider it necessary that management committees at employer, sector or regional level be established, so that there is sufficient transparency and participation in the decision-making process of funds;
- The board must adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interest of the fund over time, which must be combined with a timeous, regular and relevant communication strategy for the fund and its members.
- The Authority may add, delete, vary or in any other manner change or amend the conditions attached to exemptions and it may also withdraw an exemption.
- Before funds apply for a section 7B(1)(b) exemption they should ensure that they are able to comply with the above-mentioned conditions, failing which the Authority may not grant the application.

Furnishing of information by an umbrella fund

Upon receipt of an exemption, the fund must, within 30 (thirty) ordinary days of the appointment of an independent board member(s), furnish to the Authority in writing:

- the full names, identity number and contact details of the board member;
- the board member's full employment history;
- the name and contact details of an employee, official or other representative of that employer who would be willing to confirm in writing and, on request, under oath, the information given by the fund in relation to the board member;
- Details of any other positions of trust occupied by the board member within a period of 10 years prior to the date with effect from which he or she was appointed to the board;
- the name and contact details of an employee, official or other representative of the organisation who would be willing to confirm in writing and, on request, under oath, the information given by the fund in relation to the board member.

If, after considering the information provided on the independent board member and any other relevant information, the Authority informs the fund that it is not satisfied that the independent board member is a fit and proper person to occupy a position of trust in relation to the fund, the sponsor must procure the immediate termination of the board member's appointment.

The board must declare at each year-end its adherence to the principles of Good Governance, Code of Conduct and Code of Ethics issued as a guide to the boards by the Authority from time to time.

The Authority will take appropriate regulatory action in the event of any failure by the fund and its board to adhere to any of the provisions stipulated in the proposed Guidance Note.

5. Draft Guide on the calculation of the tax payable on lump sum benefits

A draft Guide on the calculation of the tax payable on lump sum benefits (Issue 3) is available on the SARS website. The document can be accessed by entering the words "Draft Guide on the calculation of the tax payable on lump sum benefits" in the "search" box on www.sars.gov.za.

6. Determinations in terms of the Financial Sector Regulation Act regarding medical schemes

The Minister of Finance has -

- (a) in terms of the Financial Sector Regulation Act 2017 ("Act"), determined that until 31 March 2021, the functions of the Prudential Authority in relation to medical schemes and the associated powers and duties of the Prudential Authority in terms of the Act must be exercised by the Council for Medical Schemes instead of the Prudential Authority, but with the concurrence of the Prudential Authority; and
- (b) in terms of the Act, determined that until 31 March 2021, the functions of the Financial Sector Conduct Authority in relation to medical schemes and the associated powers and duties of the Financial Sector Conduct Authority in terms of the Act must be exercised by the Council for Medical Schemes instead of the Financial Sector Conduct Authority, but with the concurrence of the Financial Sector Conduct Authority.

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