1. FSCA Communication 11 of 2020 (RF) - Covid-19: Section 13A of the Pension Funds Act and financially distressed employers - submission of urgent rule amendments

The Financial Sector Conduct Authority (FSCA) on 26 March 2020 published the above Communication, which deals with the submission of urgent rule amendments to assist employers who are, as a result of the financial challenges brought about by Covid-19, unable to comply with the payment of contributions in terms of section 13A of the Pension Funds Act.

It is stated in the Communication that notwithstanding the provisions of section 13A, most funds have rules which make provision for temporary absence from work or a break in service and/or postponement of contribution payments and/or reduction of pensionable service (in respect of employees who are working reduced hours). Following formal requests by employers for the suspension or reduction of contributions, the Boards of funds are required to consider such requests and apply the relevant rule/s, given the particular circumstances of the employer.

The FSCA says that, in the event that funds do not have rules as set out above, they should urgently submit the necessary rule amendments to the FSCA, following engagements with the employer to that effect.

The Communication further also states that "*funds must attempt to ensure that full risk benefit premiums continue to be paid in full in respect of the affected employees/members in order to ensure that the fund risk benefits will continue to be provided*".

With regard to the rule amendment process, the Communication states as follows:

- "*To assist with the efficient registration of the rule, such rule amendment should also specify the effective date based on the agreement between the employer and fund. Given the current circumstances, funds will only receive a letter and an unstamped version of the rule amendment from the Conduct Authority. Funds will receive the stamped version of the rule amendment once business resumes as usual.*"
- *Please note that the rule amendments submitted should be limited to the rule amendments delineated above. No other rule amendments are to form part of this rule amendment submission. Such rules are to be submitted to the Conduct Authority as a matter of urgency.*

- *Funds are required to keep a proper record of affected members of the fund, which they will be required to produce upon request by the Conduct Authority.*
- *Funds are required to inform affected members of employers' requests to reduce or suspend contributions, and of proposed rule amendments pursuant thereto within 30 days of receipt of such request/decision."*

2. FSCA Communication 9 of 2020 - impact of COVID-19 on compliance with various regulatory requirements

The FSCA in the above Communication says the following:

"*The Financial Sector Conduct Authority (the Authority) acknowledges the impact of the COVID-19 on South Africa in general and the financial services industry specifically. The Authority is aware of the challenges the regulated entities might face in complying with various regulatory requirements. As a result, the Authority hereby communicates various arrangements in respect of submission of statutory returns and fit and proper related deadlines.*"

The extensions applicable to retirement funds and retirement fund administrators are as follows:

- The submission date of the annual returns for retirement fund administrators is extended with an additional 3 months.
- The submission date of financial statements by retirement funds is extended by 3 months.
- The submission date of valuation reports by retirement funds is extended by 3 months, in line with the extension for financial statements. Valuation reports must be submitted within 6 months from the extended submission date of the financial statements.

The FSCA also states the following in the Communication:

"*Please note that the Authority is concerned with the current situation and open to specific challenges facing the industry, as such the Authority will do its best to accommodate anyone that is experiencing problems in complying with specific regulatory requirements because of the impact of COVID-19.*"

3. Interpretation Ruling on the application of section 37C of the Pension Funds Act

The FSCA has published FSCA Interpretation Ruling 1 of 2020 (RF) (and an accompanying FSCA Communication), which Ruling deals with the applicability of section 37C of the Pension Funds Act to the benefits of paid-up members and deferred retirees, being members who have retired from employment, but who have preserved their retirement benefits in the fund. According to the Interpretation Ruling section 37C applies to paid-up members' benefits, deferred retirees and unclaimed benefits, where no election to withdraw has been made by the member prior to such member's death.

Sanlam Corporate: Legal does not agree with the opinion expressed in the Interpretation Ruling to the effect that section 37C applies to paid-up members and deferred retirees. The reasons for our view are as follows. Section 37C applies to "any benefit … payable … upon the death of a member". The benefit of a paid-up member or deferred retiree becomes payable when he/she withdraws from service or retires. When a paid-up member or deferred retiree dies, one is accordingly not dealing with a benefit that became payable upon the death of the member as contemplated in section 37C. The benefit had namely already become payable upon the member's withdrawal from service or retirement, with the result that section 37C is not applicable.

It is stated in the Interpretation Ruling that it is issued "to provide clarity, consistency and certainty in the interpretation and application of section 37C". Sanlam Corporate: Legal is of the opinion that the Interpretation Ruling does not provide such certainty. The only effect of the Interpretation Ruling is namely that the FSCA must in terms of section 142(3) of the Financial Sector Regulation Act interpret section 37C in accordance with the Interpretation Ruling. The Interpretation Ruling is not binding on third parties, and more specifically on the executor of a deceased member's estate. If a fund pays the benefit in respect of a deceased paid-up member or deferred retiree in terms of section 37C, and the executor of the member's estate subsequently claims that the benefit should have been paid to the estate, it would therefore be no defence to say that the fund acted in terms of an FSCA interpretation ruling.

In our view the appropriate remedy for any uncertainty that may exist regarding the applicability of section 37C would be a legislative amendment. The FSCA agrees that section 37C should be amended to clarify this aspect, and in the Communication accompanying the Interpretation Ruling says that "the Authority will engage with the National Treasury to propose relevant amendments to the PF Act". It is accordingly clear that the Interpretation Ruling is intended as an interim arrangement until such time as section 37C has been amended.

The Sanlam Umbrella Funds have however amended their rules quite some time ago to provide that a benefit becomes payable only when a member makes an election regarding payment of the benefit. The rules of the Sanlam Umbrella Funds are therefore aligned with the Interpretation Ruling. All other retirement funds will have to determine whether they should take any action (and, if so, what needs to be done) as a result of the Interpretation Ruling. Funds that require advice should contact their consultant to discuss the way forward in this regard.

4. SARS Interpretation Note 113

The South African Revenue Service (SARS) issued Interpretation Note 113, dealing with the tax treatment of surplus allocations. The Interpretation Note replaces General Note 29 and Addendum A thereto, which previously dealt with this aspect.

The most important points are as follows:

- Any lump sum benefit payable to a former member or retired member of a fund as a result of the approval of a surplus apportionment scheme under section 15B of the Pension Funds Act on or after 1 January 2006, is not included in the member's gross income and is as a result not subject to tax.

- Any section 15B surplus amount allocated to an active member of a fund is used to enhance the member's fund credit and is taxable when he/she becomes entitled to any lump sum benefit or annuity on exit from the fund as a result of retirement, withdrawal or death.

- Any future surplus amounts allocated to an active member of a fund under section 15D(1)(a) or 15E(1)(d) of the Pension Funds Act, may only be used to enhance such a member's share in that fund. These amounts form part of the member's lump sum benefit or annuity payable on exit from the fund because of retirement, withdrawal or death.
- Any future surplus amounts payable on or after 1 March 2009 to former members or pensioners as a lump sum under section 15D(1)(b) or 15E(1)(d) of the Pension Funds Act are regarded as retirement fund lump sum withdrawal benefits, and are subject to the tax table applicable to retirement fund lump sum withdrawal benefits.
- Any future surplus amounts payable on or after 1 March 2009 to the beneficiaries of a member who has died before the distribution of the surplus, are regarded as retirement fund lump sum withdrawal benefits, and are subject to the tax table applicable to retirement fund lump sum withdrawal benefits.

5. FSCA Annual Report

The FSCA issued its annual report for the period 1 April 2018 to 31 March 2019. Some of the points which are of interest to the retirement fund industry, are quoted here below:

- "*Penalties have been issued for the late or non-existent submission of annual financial statements. Funds that default, along with their service providers, will be named and shamed from 2019 onwards.*"
- "*The consolidation of retirement funds into fewer and well-run funds, as part of government's retirement reforms, is encouraged to achieve enhanced economies of scale and supervision. This consolidation can also accommodate large stand-alone funds to continue if they can demonstrate efficiencies, good governance, conduct and value to members. Research will be undertaken to assess and recommend an efficient size for registering or running funds, with the aim of supporting consolidation.*"
- "*The (retirement fund supervision) division will be requesting all retirement funds to submit cash flow statements monthly (supported by bank statements) and for all annual financial returns to be audited, irrespective of the size of the fund. The current reporting system which provides for an eighteen (18) month lag or delay in submitting financial returns is also being reviewed with the aim of shortening the lag to three (3) or four (4) months after the end of the financial or calendar year.*"
- "*As part of implementing and enforcing the new Default Regulations, a new and regular focus will be placed on the analysis of fund costs and their investment performance.*"
- "*The elevation of the governance circular PF Circular 130 into a standard remains one of the priorities of the division.*"
- "*Even though the division is not averse to trustees being remunerated by a fund if its rules allow, there is a need to provide guidance on the nature and extent of such remuneration. Excessive remuneration paid by funds, including also to principal officers, can negatively affect fund returns and members' final benefits.*"

6. FSCA RF Notice 5 of 2020 - Exemption of Large Funds from certain prescribed formats for preparing financial statements

The FSCA in terms of FSCA RF Notice 5 of 2020 exempted funds with total assets exceeding R50 million from using certain prescribed auditor's report formats when preparing financial statements, on the condition that such funds use the illustrative auditor's reports approved by the Independent Regulatory Board for Auditors (IRBA). The exemption applies to the preparation of financial statements in respect of financial year ends beginning after 1 March 2018.

7. FSCA Communication 7 of 2020 (RF) - submission of historically outstanding actuarial valuation reports and annual financial statements

It is stated in the above Communication that the FSCA has identified that there are a number of pension funds that have no remaining members, with historical outstanding actuarial valuation report submissions and outstanding annual financial statement submissions. The Communication sets out a process which may be followed by such funds in order to achieve compliance with regulatory requirements.

The Communication provides that a fund may combine outstanding actuarial valuation reports and outstanding annual financial statements for a number of reporting periods into a single report, subject to the fund meeting certain conditions.

Any fund which intends to apply the consolidated process referred to in the Communication is required to approach the FSCA before 30 June 2020, in order to commit to an action plan in this regard. In such cases, the FSCA will consider waiving penalties relating to outstanding actuarial valuation report submissions.

All submissions of consolidated valuation reports and financial statements must be made prior to 30 April 2021. No consolidated submissions in terms of the Communication will be accepted after that date.

8. Survey on sustainable finance practices in retirement funds

In a letter dated 25 February 2020 addressed to retirement fund trustees and principal officers the FSCA requested funds to, by 31 March 2020, complete a survey on sustainable finance practices. The deadline for submission of the survey has recently been extended to 31 May 2020.

The FSCA also released an FAQ document, in which they, in response to queries received, inter alia state the following:

- "*This survey is <u>not</u> linked to prescribed assets. The motivation is driven by rapidly evolving global trends towards green and sustainable finance and ensuring that South Africa can leverage these opportunities while reinforcing financial stability through good ESG practices*."

- "*The aim of this survey is to capture the current practices as well as obstacles related to sustainable finance among South African retirement funds. This will support important activities in the next year to address these barriers and drive the creation of investment opportunities in response to retirement fund aspirations.*"

9. FSCA Communication 8 of 2020 - extension of dates for comments on Retail Distribution Review (RDR) Discussion Documents

The FSCA during December 2019 published certain Retail Distribution Review (RDR) documents on its website. Two of these documents are still open for comment, being the Adviser Categorisation Discussion Document and the Second Investments Related matters Discussion Document, with feedback due by 31 March 2020.

The FSCA has in view of the impact of COVID-19 extended the submission date for comments on the above-mentioned documents to 15 May 2020.

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