

Legal Report May 2020

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Newsletter of Sanlam Corporate: Legal

1. Draft Conduct Standard on requirements related to payment of pension fund contributions

In FSCA Communication 28 of 2020 (RF) the FSCA informed stakeholders that on 29 May 2020 it published the above-mentioned draft Conduct Standard and supporting documents for public comment by 31 July 2020. All of these relate to the general regulatory requirements regarding payment of retirement fund contributions, which are currently contained in section 13A and Regulation 33 of the Pension Funds Act. The draft Conduct Standard is intended to replace Regulation 33.

The following documents have been published:

- Notice regarding the publication of a draft Conduct Standard on requirements related to the payment of pension fund contributions (the draft Conduct Standard is contained in a schedule to the Notice)
- Annexure A (Notice to participating employer of its duties)
- Annexure B (Reporting contravention(s) to FSCA)
- Annexure C (Affidavit by monitoring person or principal officer, reporting contravention(s) to SA Police Service)
- Statement supporting the draft Conduct Standard
- Comments Template

Rationale for Conduct Standard

In the Statement supporting the draft Conduct Standard the FSCA states that, in supervising compliance with Regulation 33, it has identified:

- a need to standardise the manner and format of reporting by principal officers and/or authorised persons, and boards of funds, insofar as it relates to various matters falling within the ambit of section 13A and Regulation 33;
- undesirable practices and/or outcomes where the board of a fund outsources its responsibility to recover outstanding contributions from an employer to an attorney or third party. Issues identified include the following:
 - In many instances attorneys make use of their trust accounts and would therefore earn interest on the amounts they recovered from an employer on behalf of a fund while the amounts recovered are in the possession of the attorney. Often the funds so recovered are not paid over to the fund in a timeous manner.

- Various instances were identified where a fund did not provide any instructions to the attorney regarding what action the attorney should take when dealing with employers that refuse to pay outstanding contributions.
- In some instances, actual or potential conflicts of interests and/or exorbitant fee arrangements exist where the recovery function is outsourced to an attorney;
- potential drafting improvements that can clarify various of the requirements contained in Regulation 33.

The FSCA therefore believes that the requirements contained in Regulation 33 should be revised and, since these requirements are largely aimed at the fair treatment of members, it would be practical to replace Regulation 33 with a Conduct Standard.

Summary of the draft Conduct Standard

The draft Conduct Standard is intended to replace Regulation 33 (with necessary drafting improvements) by providing for the following matters that are currently provided for in Regulation 33:

- The minimum information to be furnished to a fund by an employer with regards to payments of contributions made by an employer in terms of section 13A;
- Notification and reporting obligations on the board of a fund, principal officer or other authorised person where there is a contravention of or non-compliance with sections 13A(2)(b) [minimum information to be provided by employer] or 13A(3)(a) [when and how contributions must be paid] by an employer; and
- the rate of interest payable on arrear contributions.

In addition, the draft Conduct Standard also proposes to:

- set a standard format in which a fund must inform a participating employer of its duties and obligations under section 13A within 30 days of the commencement of the employer's participation in the fund and annually thereafter (the format is contained in annexure A to the draft Conduct Standard);
- set out the format in which a request by a fund to an employer to be informed of the persons personally liable for payment of contributions, as contemplated in section 13A(8), must be made (the format is also contained in annexure A to the draft Conduct Standard);
- prescribe the manner and format of reporting by principal officers or any other authorised persons to the board of a fund regarding compliance with, or non-compliance with, the provisions of sections 13A(2)(b) and 13A(3)(a) by an employer;
- impose standard notification and reporting obligations on the board of a fund where there is a contravention of or non-compliance with sections 13A(2)(b) or 13A(3)(a) by an employer (annexures B and C to the draft Conduct Standard contain the format for reporting contraventions to the FSCA and SA Police Service respectively);
- set requirements for a board of a fund, and participating employers, when the board of a fund outsources the collection of outstanding contributions to attorneys.

Implementation

According to the Statement in Support of the draft Conduct Standard it is envisaged that the majority of the draft Conduct Standard will not have any significant impact on industry stakeholders as most of the requirements have been law for an extended period through Regulation 33. The FSCA states that is expected that the implementation of standardised reporting formats will only have a minor operational impact on funds, principal officers and/or

authorised persons, and boards of funds, and the FSCA believes that a 90 day transitional period would be sufficient for implementation of the reporting formats.

Sanlam will provide comments on the draft Conduct Standard via industry bodies.

2. FSCA Information Request 2 of 2020 (RF): Information on the impact of COVID-19 on contributions for retirement savings

The FSCA, under section 131 of the Financial Sector Regulation Act, published an Information Request requiring all retirement funds to submit certain information as set out in Annexure A to the Information Request.

The FSCA states that it is cognisant of the unprecedented challenges and potential financial distress that the Covid-19 pandemic has presented to employers and employees that are not receiving any income, or only receiving partial income, thereby affecting deductions and/or contributions for retirement savings. The FSCA, as part of its supervisory approach, aims to determine the impact that the Covid-19 pandemic is having on financially distressed employers and employees and the related impact on retirement savings.

All registered funds must complete the survey and submit it via e-mail to the FSCA at contributionrelief@fsc.co.za by not later than 15 June 2020. A failure to provide the specified information by or within the timeframe specified constitutes an offence under section 267 of the FSRA.

The Information Request and Annexure A thereto are available on the FSCA's website (www.fsc.co.za) under Regulatory Frameworks < Notices < Retirement Funds.

3. Compensation for Occupational Injuries and Diseases Act: Maximum amount of earnings on which the assessment of an employer shall be calculated

In terms of section 83 of the Compensation for Occupational Injuries and Diseases Act an employer is assessed by the Director-General according to a tariff of assessment calculated on the basis of such percentage of the annual earnings of its employees as the Director-General, with due regard to the requirements of the compensation fund for the year of assessment, may deem necessary.

In terms of section 83(8) the Minister of Employment and Labour may, on the recommendation of the Director-General, prescribe a maximum amount of earnings on which an assessment of an employer shall be calculated by the Director-General. The Minister has prescribed the amount of R484 200.00 per annum as the maximum amount on which an assessment of an employer shall be calculated with effect from 1 March 2020.

4. Government Notices on living annuities

The two draft Notices regarding living annuities that were reported on in the April Legal Report have been published in the Government Gazette on 1 June 2020 and are effective from such date. The two Notices entail the following:

Government Notice (GN 618) allowing changing of drawdown percentages during June - September 2020

The Notice provides that -

- a) at the election of the annuitant, from 1 June 2020 to 30 September 2020, the amount of the living annuity may be determined to be not less than 0,5 per cent and not greater than 20 per cent of the value of the living annuity assets, irrespective of the anniversary date of the living annuity;
- (b) in addition to the election referred to in paragraph (a) above, a living annuitant may elect a different draw-down percentage at the anniversary date of the living annuity if that anniversary date falls within the period 1 June 2020 to 30 September 2020.

ASISA's understanding of the Notice, which has been confirmed by National Treasury as correct, is as follows:

- "1. There will be a relief period from 1 June 2020 – 30 September 2020.*
- 2. During this period, all living annuitants will be able to change their annuity drawdowns to an amount that is not less than 0.5% and not greater than 20% of the value of the annuity assets.*
- 3. On termination of the relief period, each annuitant's drawdown must revert to the percentage that was in place for that annuitant immediately prior to 1 June 2020, unless paragraph 4 below applies.*
- 4. If, during the relief period, a contract anniversary occurs or a contract commences, and a "relief period" percentage rate has been selected, the annuitant will also be able to select a drawdown rate that will apply on termination of the relief period. This rate must fall within the percentages prescribed by GN 290 of 2009 (2.5% - 17.5% or 5% - 20% for pre- 21 February 2007 annuities where applicable).*
- 5. In all other respects, the provisions of GN 290 of 2009 continue to apply. GN290 is not repealed and continues to be in force, with the exception of the provisions of the new GN 618* which apply only for the period 1 June 2020 – 30 September 2020, after which period they fall away. [*In ASISA's e-mail to National Treasury reference was made to "draft GN..." since it was not yet gazetted at that stage.]*
- 6. In all cases, as provided by GN 290, the drawdown amounts must be calculated based on the value of the assets (net of costs) at inception of the contract or at the last contract anniversary, whichever is the later date."*

It should be noted that many funds providing in-fund living annuities prescribe much lower maxima than that prescribed in terms of the Income Tax Act. Funds providing in-fund living annuities may also have to amend their rules to allow the adjustment of drawdown percentages during the 4 months period even if the anniversary date of a particular living annuity does not fall within this period.

Government Notice (GN 619) increasing the de minimis amount

Previously the full remaining value of the living annuity capital could be paid as a lump sum when the value thereof at any time became less than either R50 000 (if part of the retirement interest was commuted upon retirement) or R75 000 (if there was no previous commutation). In terms of the Notice the said “de minimis amounts” of R50 000/R75 000 have been replaced by a single threshold of R125 000 for the future (i.e. this will apply going forward and not only for the 4 months period).

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