

Legal Report July 2020

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Newsletter of Sanlam Corporate: Legal

1. FSCA Conduct Standard 4 of 2020 (RF): Minimum skills and training requirements for trustees of retirement funds

On 10 July 2020 the FSCA published a Conduct Standard prescribing the minimum skills and training requirements for trustees, as well as a statement supporting the Conduct Standard, a consultation report and also FSCA Communication 42 of 2020 (RF).

In terms of the Conduct Standard, attaining certification of the Trustee Training Toolkit (which is an online facility provided by the FSCA on the website www.trusteetoolkit.co.za) will serve as the minimum skills and training requirement for trustees.

A trustee must, within 6 months of appointment, complete the Trustee Training Toolkit –

- tutorials, case studies and formative (initial) assessments; and
- summative (final) assessment.

The final assessment must be done under the supervision of the principal officer or chairperson of the board, who must ensure that it is completed without assistance. In instances where it is impractical for the principal officer or chairperson to supervise a trustee, the trustee may complete the Trustee Training Toolkit final assessment without supervision, on condition that he/she must complete a declaration stating that he/she completed the final assessment without assistance. Such declaration must be provided to the FSCA on request.

Trustees who attained certification will be required to complete additional modules as and when these are added to the Toolkit by the FSCA, following the same process as set out above.

The Conduct Standard became effective on the date of publication thereof and the effective date is therefore 10 July 2020. Trustees appointed before the effective date must attain the certification within 6 months thereof, i.e. by 9 January 2021.

A trustee who has already attained the certification of the Toolkit before the effective date, is not required to complete the certification again, provided that he/she must complete a declaration stating that he/she completed the Toolkit without assistance.

A trustee who has attained the certification of the Toolkit, and is subsequently appointed to the board of a fund, is not required to complete the certification again.

2. FSCA Communication 41 of 2020 (RF): Default Regulations: Non-compliance with regulations 38(1)(b)(ii) and 38(1)(e)(i)

The purpose of the Communication is to remind boards of pension/provident funds of their fiduciary duties and responsibilities towards the members of the fund and to ensure that funds comply with the provisions of the so-called “default regulations”, and in particular regulations 38(1)(b)(ii) and 38(1)(e)(i) in terms of the Pension Funds Act which relate to paid-up membership certificates. The FSCA has received many reports by auditors of funds to the effect that funds are contravening the provisions of these regulations.

Regulation 38(1)(b)(ii) requires the following in respect of a member who leaves service before retirement:

“When members leave the service of a participating employer before retirement, such members must be presented with a paid-up membership certificate within two (2) calendar months of the fund becoming aware that the member has left the service of the participating employer”.

Regulation 38(1)(e)(i) requires the following in respect of a new member:

“The rules of funds to which a member belongs as a condition of employment must make provision to accept any amount or amounts transferred, to the fund from another fund for the benefit of a member or members, provided that such transfers comprise a defined contribution benefit component, and such fund must within four (4) months of a member joining the fund, request, in a manner which may be prescribed, a list of all paid-up membership certificates in respect of any retirement savings of that member.”

The intention is that the member's new fund must facilitate the transfer of any paid-up benefits of the new member in other funds to the new fund if the member elects to do so.

The FSCA reminded funds that failure to ensure compliance with the provisions of the regulations may lead to the FSCA imposing an administrative penalty.

3. FSCA Communication 45 of 2020 (RF): Expiration of term of office of trustees and COVID-19

The FSCA stated that they have received many requests for extension of trustees' terms of office. The majority of these requests are made because of the impact of the Covid-19 pandemic and the current national lockdown regulations, which make member elections of trustees challenging.

The FSCA confirmed that the Pension Funds Act does not prescribe terms of office for boards of trustees – instead, such term is prescribed in terms of the rules of a fund. Therefore the FSCA is not empowered to extend the terms of office of trustees.

The FSCA said that, given the challenges posed by Covid-19, boards of funds should, where their terms of office have expired and they are unable to constitute a proper board or fill a vacancy within

90 days following the date on which the vacancy arose (as prescribed in FSB Notice 3 of 2016), apply to the FSCA in terms of section 26(2) of the Pension Funds Act to appoint trustees to make up the full complement or quorum of the board. Such application must be made via the FSCA's online platform.

4. FSCA Information Request 3 of 2020 (RF): Request for information relating to participating employers which are subject to sectoral determinations

The FSCA requires information from retirement funds and administrators, relating to participating employers (under umbrella funds) which subscribe to and are governed by sectoral determinations as contemplated in the Basic Conditions of Employment Act. These employers must by virtue of the fact that they are trading in a particular industry, participate in a sectoral fund (unless they have obtained an exemption). These sectoral funds are sometimes referred to as bargaining council retirement funds.

The FSCA requires the following information in respect of the employers referred to above:

- Historic information that is requested on a once off basis, and that must be provided by not later than 30 September 2020, to ensure that the FSCA has up to date and accurate information on these participating employers under umbrella funds. This includes, among others, whether the employer has been exempted from having to participate in a sectoral fund. Annexure A to the Information Request must be completed.
- Information that must be provided on an ongoing basis in future upon application to amend the rules of a fund in order to register a participating employer in an umbrella fund. Annexure B to the Information Request must be completed.
- Information that must be provided on an ongoing basis in future upon application for a rule amendment to effect a change of name of a participating employer. Annexure C to the Information Request must be completed.

A failure to provide the information is an offence and subject to a fine not exceeding R1000 for each day during which the offence continues.

5. Draft guidelines for registration of information officers in terms of POPIA

The Information Regulator published draft guidelines on the registration of information officers. The draft guidelines are informed by section 55(2) of the Protection of Personal Information Act (“POPIA”) which requires that a “responsible party” registers its information officer with the Information Regulator before taking up his/her respective duties in terms of POPIA. In terms of POPIA “responsible party” means “*a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information*”.

The duties of an information officer are set out as follows in section 55(1) of POPIA (the term “body” includes a public body or a private body and therefore also includes a retirement fund):

“(1) An information officer’s responsibilities include—

(a) the encouragement of compliance, by the body, with the conditions for the lawful processing of personal information;

(b) dealing with requests made to the body pursuant to this Act;

(c) working with the Regulator in relation to investigations conducted pursuant to Chapter 6 in relation to the body;

(d) otherwise ensuring compliance by the body with the provisions of this Act; and

(e) as may be prescribed.”

The purpose of the proposed guidelines is to provide guidance and procedures for the following:

- registration of information officers with the Information Regulator;
- updating the details of information officers;
- designation of deputy information officers;
- delegation of duties and responsibilities of the information officers to the deputy information officers.

The Information Regulator has invited comments on the draft guidelines by 16 August 2020. Sanlam will provide comments via industry bodies.

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