

Legal Report September 2021

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Newsletter of Sanlam Corporate: Legal

1. Green Paper on Comprehensive Social Security and Retirement Reform

The Green Paper on Comprehensive Social Security and Retirement Reform (“the Green Paper”), which was discussed in the August 2021 Legal Report, was withdrawn on 31 August 2021. In a media statement issued by the Department of Social Development on 1 September 2021, it is stated that the Green Paper was withdrawn to provide better clarity on some of the matters contained in the Paper. The following is said in this regard:

“Since its publication, there has been widespread commentary on the key recommendations entailed in the Green Paper. Some of the technical aspects of the proposals were not well understood and many have misrepresented the proposals, particularly on the National Social Security Fund. It has become apparent that some of these areas need further clarification to avoid any further confusion.”

The media statement further states that the Department expects to release the Green Paper again as soon as the above issues have been addressed.

2. Joint Standard on Outsourcing by Insurers

The Prudential Authority (PA) and the Financial Sector Conduct Authority (FSCA) have issued a draft Joint Standard on Outsourcing by Insurers for public comment. The Joint Standard will replace Prudential Standard GOI 5, which currently regulates outsourcing by insurers.

As Prudential Standard GOI 5 was issued by the PA, the outsourcing by insurers currently falls within the regulatory scope of the PA. This results in a gap from a conduct of business perspective as the PA is only responsible for the prudential supervision of insurers, with the conduct supervision of insurers falling under the FSCA.

There in view of the above is a need to expand the current outsourcing regulatory framework beyond Prudential Standard GOI 5, in order to provide an appropriate and comprehensive regulatory framework governing outsourcing by insurers from both a prudential and conduct perspective. The Joint Standard is therefore intended to harmonise the outsourcing requirements for the insurance sector, and enhance oversight by the PA and the FSCA.

According to the statement accompanying the draft Joint Standard, the Joint Standard is intended to address the following:

- set out minimum requirements for the outsourcing of material functions;
- set out the concept of “materiality” in the business of the insurer;
- set out the conditions that determine when an outsourcing arrangement requires prior regulatory notification;
- set out matters that an insurer must consider prior to an outsourcing decision and legal provisions that must be included in any outsourcing contract;
- set out requirements for the management and review of outsourcing arrangements;
- require insurers to have a board-approved policy and related procedures for assessing the risks involved with outsourcing; and
- repeal and replace Prudential Standard GOI 5.

The requirements as set out in the Draft Joint Standard are substantially similar to those currently contained in Prudential Standard GOI 5. There are however a few important changes, whereunder the following:

- i. An insurer must, in order to identify and manage all risks that may be introduced by an outsourcing arrangement, undertake an appropriate due diligence for every activity or function to be outsourced, prior to entering into an outsourcing arrangement.
- ii. When terminating an outsourcing arrangement, an insurer must assess the potential impact, consequences and risks of the proposed termination to policyholders and the insurer’s business, and report to its board of directors where a potentially adverse consequence or risk has been identified.
- iii. The notice of termination of an outsourcing arrangement which is required to be submitted to the PA and the FSCA, must inter alia:
 - include proof that the insurer’s board of directors approved the termination;
 - explain whether there are any outstanding issues that could have a potential impact on the service to policyholders and how these issues will be managed to ensure policyholders are not adversely affected; and
 - highlight any outstanding fees and how such fees will be paid.

The following transitional provisions will apply:

- an insurer must comply with the Joint Standard within 6 months from the commencement date, during which period it must continue to comply with Prudential Standard GOI 5;

- any outsourcing arrangement entered into prior to the commencement date must comply with the Joint Standard within one year from the commencement date.

The Draft Joint Standard is open for comment until 26 October 2021.

3. Regulations in terms of the Promotion of Access to Information Act

The Minister of Justice and Correctional Services has issued new regulations in terms of the Promotion of Access to Information Act (“PAIA”). Some of the changes applicable to private bodies, including retirement funds, are the following:

- The Human Rights Commission has compiled a guide in each of the official languages containing information required by a person who wishes to exercise any right contemplated in PAIA. The information officer of a private body must have a copy of the guide, in at least two of the official languages, at his or her registered head office, for public inspection during normal office hours. The information officer must further make available, upon the written request of any person, the number of copies of the guide in the official languages as requested.
- The Head of a private body may compile and keep a description of the categories of records that are voluntarily disclosed, or automatically available without a requester having to request access thereto. If such a description is compiled and kept, it must be updated as soon as practically possible after any amendment to the description occurs. The description must further be made available to the Information Regulator, on the website of the private body and for inspection, at the registered head office of the private body, during normal office hours.
- The information officer must, if a request for access to a record is made orally as a result of illiteracy or disability, complete the prescribed request form on behalf of the requester.
- A person whose request for information has been refused, may from 30 June 2021 submit a complaint to the Information Regulator. The regulations set out the procedure applicable to such complaints. It is inter alia stipulated that the information officer must respond to the complaint within 20 working days after receipt of the complaint from the Information Regulator.

4. Manual in terms of the Promotion of Access to Information Act

In terms of section 51 of the Promotion of Access to Information Act (“PAIA”) all private bodies (including retirement funds) must prepare a PAIA manual, containing among others the following information:

- address and contact details of the head of the body;
- a notice regarding the categories of records of the body which are available without a person having to request access in terms of PAIA;

- a description of the records of the body which are available in accordance with any other legislation;
- sufficient detail to facilitate a request for access to records;
- a description of the subjects on which the body holds records and the categories of records held on each subject.

Section 51 of PAIA has further been amended with effect from 30 June 2021 to stipulate that the PAIA manual must also include provisions relating to the processing of personal information in terms of the Protection of Personal Information Act.

In order to simplify the compilation process of PAIA manuals, the Information Regulator has, as a guide, published PAIA manual templates on its website.

5. Exemption from the default regulations for retirement funds which applied for cancellation of registration

The Financial Sector Conduct Authority (FSCA) has published FSCA RF Notice No. 16 of 2021, in terms of which a general exemption from the so-called default regulations is granted to retirement funds that have applied for cancellation of registration on or before 28 February 2019. This exemption applies from 1 March 2021 to 28 February 2023, and is subject to the conditions as set out here below.

The exemption applies only to retirement funds which:

- do not have any members, assets, liabilities and any litigation pending;
- have applied for cancellation of registration in terms of section 27(1) of the Pension Funds Act, in accordance with the format set out in Information Circular PF No. 2 of 2017 and the FSCA has received the application on or before 28 February 2019; and
- will have their registration cancelled by 1 March 2023.

The exemption does not apply to retirement funds that are contemplating submitting an application for cancellation of registration, but have not done so on or before 28 February 2019.

6. Data breach at the Department of Justice and Constitutional Development

The Department of Justice and Constitutional Development published a media statement on 9 September 2021 confirming that there was a breach of its IT systems on 6 September 2021. On 22 September 2021 the Information Regulator issued a notice in terms of section 22 of the Protection of Personal Information Act. This is required where there are reasonable grounds to believe that the personal information of a data subject has been accessed or acquired by an unauthorised person.

It appears from the above notice that the extent of the breach has not yet been determined, but that at least 1 200 files were accessed, which files may include personal information such as names, addresses, ID numbers, bank details and salary information. Until such time as the extent of the breach is determined, it would be prudent to take even greater care than currently when reviewing and verifying correspondence, documents and banking details received from the Department of Justice and Constitutional Development.

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