

Legal Report October 2021

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Newsletter of Sanlam Corporate: Legal

1. FSCA Information Request for information related to profiles of licensed financial institutions

The Financial Sector Conduct Authority (FSCA) has issued FSCA Information Request 2 of 2021, in which certain information is requested from all licensed financial institutions. Licensed financial institutions include retirement funds, retirement fund administrators and insurers.

The purpose of the Information Request is as follows:

- ④ to obtain verified information for licensed financial institutions;
- ④ to ensure that the information held by the FSCA on financial institutions is up to date, accurate and complete;
- ④ to identify and rectify any discrepancies on database records of the FSCA.

It is stated in the information request that licensed financial institutions must log on to the relevant FSCA E-portal using credentials issued to them by the FSCA and verify and/or update their information, including the following, where applicable:

- ④ contact details;
- ④ relevant persons, including directors and shareholders;
- ④ management, including retirement fund trustees;
- ④ compliance officer(s), responsible persons and/or principal officers; and
- ④ accounting officer(s) and/or information in respect of the audit partners.

Guidance notes are available on the E-portal to provide guidance with regard to uploading the above information. It appears from the guidance note with regard to retirement funds that all information must be provided by the fund's principal officer. In the case of umbrella funds, certain information must also be provided about all the participating employers under the fund, whereunder the registered and postal address of the employer and the name and contact details of the employer's contact person.

The verification and/or updating of information must be completed on or before 15 December 2021. Financial institutions are reminded that failure to provide the relevant information by 15 December 2021 constitutes an offence.

2. National Treasury paper on sustainable investing

National Treasury has published a technical paper on sustainable investing (“the paper”). The paper is an update of a previous paper published on 15 May 2020. It is stated that *“it is not a policy paper though may inform other policy and lead to various forms of guidance notes or regulation in the future”*.

The main theme of the paper appears from the following remark in the media statement accompanying the paper:

“Where previously financial institutions would only focus on the return on investment of projects, the focus on sustainable finance encourages them to also be cognisant of how their investment decisions impact the environment.”

The paper aims to define sustainable finance for all parts of the South African financial sector, including retirement funds and insurance, and makes certain recommendations. The proposed definition of “sustainable finance” inter alia includes the following:

“Sustainable finance contributes to the delivery of the sustainable development goals, a just transition to a low carbon and climate resilient economy and financial stability.”

The paper makes the following recommendations with regard to retirement funds:

- ④ Regulators should issue guidance or regulatory instruments on sustainable finance.
- ④ All investment decisions should consider environmental and social factors, as well as climate risk, which will necessitate appropriate training of boards, trustees, actuaries and investment managers.
- ④ Guidance should be developed or adopted for the monitoring of compliance to the sustainable finance framework as envisaged in the paper.
- ④ Requirements for annual financial statements and other reports should be amended to ensure the disclosure, monitoring and reporting of responsible investments.
- ④ There should be a technical workgroup, including analysts and academics, to determine or adopt guidelines for regulation 28 implementation, including making it easier to invest in sustainable finance investment vehicles or projects, green investments, monitoring and disclosure frameworks, and implementation of the FSCA guidance notice on sustainable investments published in 2019.
- ④ Retirement funds and asset managers must develop and disclose environmental and social risk management policy frameworks and governance systems in line with the recommendations in the above-mentioned guidance notice.
- ④ Climate risk management capability must be included in the fit and proper requirements for trustees, directors and executives.
- ④ The FSCA must work with National Treasury in developing the strategic framework contemplated in the paper and specifically work on the harmonisation of requirements relating to sustainable investments across the financial sector.

3. Pension Funds Adjudicator determinations with regard to arrear contributions

The Pension Funds Adjudicator (“the Adjudicator”) has published OPFA Communication 1 of 2021 on its website with regard to orders relating to arrear contributions. The Adjudicator’s current practice in complaints about arrear contributions is to order the fund to inform the

employer of the amount of the outstanding contributions, whereafter the employer must pay the outstanding amount. Such orders are not always given effect to, in which event the complainant has to make an application to court to compel compliance with the order.

To solve the above problem, the Adjudicator will as from 1 December 2021 no longer order the fund to inform the employer of the amount of the outstanding contributions. The order will instead specifically mention the amount to be paid by the employer. This will enable the fund or the member to obtain a warrant of execution against the employer if the employer fails to comply with the order.

So as to enable the Adjudicator to make an order as set out above, the fund must provide the Adjudicator with the following information:

- ④ the periods for which the employer is in arrears;
- ④ a reconstruction of the member's contribution schedules, based on the information in the fund's possession, for the periods for which the employer is in arrears;
- ④ a computation of the arrear contributions owed by the employer, based on the above-mentioned reconstructed schedules;
- ④ the value of the member's fund credit in the fund to date;
- ④ a calculation of the benefit due if all contributions were up to date.

4. Prior authorisation in terms of POPIA

The Information Regulator held a webinar on 27 October 2021 regarding the prior authorisation that is required for processing personal information in the instances set out in sections 57 and 58 of the Protection of Personal Information Act (POPIA). All references to sections in what follows are to sections of POPIA.

The Information Regulator confirmed that there are currently four categories of processing for which prior authorisation must be obtained:

1. Processing any unique identifiers (e.g. ID number, policy number) of data subjects for a purpose other than the one for which the identifier was specifically intended at collection, and with the aim of linking the information together with information processed by other responsible parties;
2. Processing information on criminal behaviour or on unlawful or objectionable conduct on behalf of third parties;
3. Processing information for the purposes of credit reporting;
4. Transferring special personal information (as referred to in section 26) or the personal information of children (as referred to in section 34) to a third party in a foreign country that does not provide an adequate level of protection for the processing of personal information as referred to in section 72.

The Information Regulator provided some examples and guidance and made a few comments that are worth taking note of, including:

- ④ In the context of categories 1 and 4 above, a responsible party cannot rely on, for example, the fact that the data subject has consented to such processing as justification why prior authorisation is not required. If the processing falls within the ambit of section 57, application for prior authorisation must be made. The Information Regulator will

consider all eight conditions for lawful processing (including consent) during its assessment of the application.

- ④ In the context of category 2 above, the responsible party must ensure that the person it has appointed to do such processing on its behalf has obtained the required prior authorisation from the Information Regulator.
- ④ In relation to category 4 above, the Information Regulator has not yet conducted an assessment to determine which countries provide an adequate level of protection for the processing of personal information. Currently, the onus is on the responsible party to conduct such assessment.
- ④ The Guidance Note on Application for Prior Authorisation is in the process of being reviewed.

Where an application for prior authorisation has been submitted, section 58(2) of POPIA prohibits the responsible party from carrying out the processing until the Information Regulator has completed its investigation or until it has received notice that a more detailed investigation will not be conducted. The commencement of section 58(2) was postponed to 1 February 2022 and the Information Regulator indicated during the webinar that it will not be postponed again. Responsible parties therefore need to ensure that if prior authorisation is required, their applications are submitted timeously (before the end of November 2021) since the Information Regulator may take up to 3 months to conclude its assessment and, where applicable, detailed investigation.

The presentations made during the webinar will be made available on the Information Regulator's website.

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