1. Updated draft amendments to regulation 28 of the Pension Funds Act

The Minister of Finance in February 2021 published draft amendments to regulation 28, which were aimed at making it easier for retirement funds to invest in infrastructure. The Minister has on 29 October 2021 published updated draft amendments.

The most important differences between the new draft and the previous draft are as follows.

A definition of “crypto-asset” is introduced, and it is stipulated that “*a fund may not invest in crypto-assets directly or indirectly*”.

The definition of “infrastructure” is broader. “Infrastructure” was defined in the previous draft as having “*the meaning assigned to it in section 1 of the Infrastructure Development Act*”, which limited it to installations, structures and facilities which are part of the national infrastructure plan. The “national infrastructure plan” is a plan adopted by the Presidential Infrastructure Coordinating Commission for the development of public infrastructure.

In the updated draft “infrastructure” is defined as “*any asset class that entails physical assets constructed for the provision of social and economic utilities or benefit for the public*”, which is much broader than the previous definition.

It was stipulated in the previous draft that the overall investment in infrastructure may not exceed 45% in respect of domestic exposure and an additional 10% in respect of the rest of Africa. In the updated draft the investment in infrastructure, including in the rest of Africa, is limited to 45%. The 10% in respect of the rest of Africa has accordingly fallen away, and is now included in the 45% limit. South African government instruments and government guaranteed instruments are not included in the 45% limit.

A new Table 2 is inserted in regulation 28, which must be used for reporting investments in infrastructure. Unlike the previous draft, retirement funds will in terms of the new draft only have to report the top 20 holdings in infrastructure investments.

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Comments on the draft amendments had to be submitted to National Treasury by 16 November 2021.

2. Purchase of different types of annuities at retirement

The South African Revenue Service (SARS) has published Binding General Ruling 58 ("the ruling") on the purchase of different types of annuities at retirement. SARS General Notes 18 and 18A previously set out the requirements in respect of annuities purchased on the retirement of a member of a retirement fund. General Notes 18 and 18A were withdrawn on 26 February 2021, which created uncertainty with regard to the requirements applicable to such annuities. The purpose of the ruling is to resolve this uncertainty.

The ruling confirms that the rules of retirement funds may provide for:

- the retirement fund paying the annuity directly;
- purchasing the annuity in the name of the retirement fund;
- purchasing the annuity in the name of a retiring member; and
- any combination of the above methods.

The ruling further confirms that multiple annuities of each of the above annuity types may be provided for in the rules of the fund.
It is further confirmed that an annuity provided on retirement may not be transferred, assigned, reduced, hypothecated or attached by creditors and must be compulsory, non-commutable, payable for and based on the lifetime of the retiring member.

The ruling applies from 26 February 2021, being the date of the withdrawal of General Notes 18 and 18A.

3. Implementation of paragraph 2B of the Fourth Schedule to the Income Tax Act

Paragraph 2B of the Fourth Schedule to the Income Tax Act, which comes into operation on 1 March 2022, currently stipulates that if a taxpayer receives remuneration from more than one source (including a pension from a retirement fund or insurer), the tax rebates applicable to the taxpayer are not to be taken into account by the retirement fund or insurer when calculating the taxes to be withheld on the pension. The Taxation Laws Amendment Bill, 2021 proposes that paragraph 2B be amended so that the tax rebates should still be taken into account in the aforesaid circumstances. The retirement fund or insurer paying the pension should instead apply the fixed tax rate as directed by the South African Revenue Service (SARS) in determining the tax to be withheld.

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SARS has sent a letter to all stakeholders, in which they set out how paragraph 2B will be implemented from 1 March 2022. In essence, SARS will determine the effective rate of tax in respect of the combined employment and/or pension sources of income of a taxpayer, with reference to the latest data available to SARS, and provide that rate to retirement fund administrators for purposes of withholding Pay-As-You-Earn (PAYE). This will in practice entail the following:

- Prior to 1 March 2022, SARS will, where it deems necessary, provide retirement fund administrators with the PAYE withholding percentage for each of the pensioners on its payroll that qualify.

- Retirement fund administrators will then be required to use the rate provided by SARS in respect of pensions paid from 1 March 2022.

- SARS will provide the PAYE withholding rates by way of an electronic file.

- Where a PAYE withholding rate has not been provided by SARS in respect of a particular pensioner, retirement fund administrators must continue to apply the normal PAYE withholding rates.

- Where SARS provides a PAYE withholding rate, it will be by way of an annual directive. Where a pensioner's circumstances change during the year (for example other employment income ceases, or death and so on), the retirement fund administrator may apply the normal PAYE withholding rate, as opposed to the withholding rate provide by SARS, with effect from the month in which it becomes aware of the change in circumstances.

- Notwithstanding the PAYE withholding rate provided by SARS, a pensioner may at any time request his or her retirement fund administrator to withhold PAYE at a rate higher than the rate provided by SARS.

- Notwithstanding the PAYE withholding rate provided by SARS, a pensioner may request his or her retirement fund administrator to withhold PAYE at a rate that is equal to the PAYE withholding rate under the normal PAYE withholding tables. In such a case, the retirement fund administrator is required to inform the pensioner of the possibility that the PAYE withholding rate may be insufficient to cover the tax liability of the taxpayer on assessment.

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4. Taxation Laws Amendment Bill, 2021

The Draft Taxation Laws Amendment Bill, 2021 was published for comment earlier in the year. After taking into account the comments received, the final Taxation Laws Amendment Bill, 2021 ("the Bill") has now been introduced in Parliament. The Bill must now be passed by Parliament, thereafter it will be signed into law. The amendments affecting retirement funds are as follows.

Allowing retiring members to choose a combination of annuities

A retiring member is allowed to choose a combination of annuities (including a combination of methods of paying the annuity) or a combination of types of annuities. A member can in other words choose a combination of an in-fund annuity, an annuity purchased from an insurer in the name of the fund and an annuity purchased from an insurer in the name of the member. This is also confirmed in Binding General Ruling 58, which is discussed in point 2 of this report.

There is no limitation on the number of annuities that may be chosen. Where more than one annuity is chosen, the amount utilised to purchase or provide each annuity must however exceed R165 000.

Applying tax on retirement fund interest when a member ceases to be a tax resident

The Draft Taxation Laws Amendment Bill proposed that when a member ceases to be a South African tax resident, and withdraws his/her benefit prior to retirement or death, the member will be deemed to have withdrawn from the fund on the day before he/she ceased to be a South African tax resident. There were many concerns about this proposal, and National Treasury has accordingly withdrawn the amendments in this regard. National Treasury has indicated that further amendments will be considered in the next legislative cycle in order to address the complexities raised.

Transfers by preservation fund members who are 55 years or older

In terms of paragraph 2(1)(c) of the Second Schedule to the Income Tax Act any amount transferred for the benefit of a member on or after normal retirement age forms part of the member's gross income. Paragraph 6A of the Second Schedule makes provision for a deduction in respect of such a transfer, but only in the event of a transfer from a pension or provident fund to a preservation fund or a retirement annuity fund. It is proposed in the Bill that paragraph 6A be amended, with effect from 1 March 2022, to also make provision for a tax-free transfer from a preservation fund to another preservation fund or retirement annuity fund.

Clarifying the calculation of the fringe benefit in relation to employer contributions to a retirement fund that provides self-insured risk benefits

It is proposed that self-insured risk benefits under a retirement fund be classified as a defined contribution component for fringe benefit purposes. This will ensure that retirement funds that provide both defined contribution component retirement benefits and self-insured risk benefits can

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account for the fringe benefit in respect of employer contributions based on the actual contribution. As a result, the value of the risk premiums under self-insured risk benefits will be determined based on the cost to the employer (i.e. the actual contribution made by the employer).

Paragraph 2B of the Fourth Schedule to the Income Tax Act

Paragraph 2B, which comes into operation on 1 March 2022, currently stipulates that if a taxpayer receives remuneration from more than one source (including a pension from a retirement fund or insurer), the tax rebates applicable to the taxpayer are not to be taken into account by the retirement fund or insurer when calculating the taxes to be withheld on the pension. It is proposed that paragraph 2B be amended so that the tax rebates should still be taken into account in the aforesaid circumstances. The retirement fund or insurer paying the pension should instead apply the fixed tax rate as directed by the South African Revenue Service (SARS) in determining the tax to be withheld.

SARS has sent a letter to all stakeholders, in which they set out how paragraph 2B will be implemented, which letter is discussed in point 3 of this report.

5. Order in respect of pension interest in the case of marriages in community of property

Section 7(7) of the Divorce Act provides that in the determination of the patrimonial benefits to which parties to a divorce are entitled, the pension interest of a member is deemed to be part of his/her assets. Section 7(8) goes further to provide that a court granting a decree of divorce may make an order for a retirement fund to pay a portion of the pension interest of a member to his/her spouse and may further order the fund to make an endorsement in its records to reflect such order. The enabling provision in the Pension Funds Act is section 37D(4)(a)(i)(aa), which provides that a fund may make a deduction from a member's pension interest in the fund mentioned in, or identifiable from, the divorce order.

The Supreme Court of Appeal in 2016 in the case of *Ndaba v Ndaba* held that, in the case of marriages in community of property, the pension interest is automatically included in the division of the joint estate. A common misinterpretation of this judgement is that there is, in the case of marriages in community of property, no need for a fund to be specifically ordered to pay a portion of the member's pension interest to the non-member spouse. In the recent case of *Masike v SALA Pension Fund [2021] JOL 51320 (GJ)*, the Johannesburg Division of the High Court however confirmed that the mere fact that parties are married in community of property, does not in itself enable the relevant fund to pay a portion of the member's pension interest to his/her former spouse.

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The court in *Masike* held that although section 7(7) of the Divorce Act deems the pension interest of a member to be part of his/her assets, and the pension interest thus, in the case of marriages in community of property, automatically forms part of the joint estate, an order in terms of section 7(8) is still required before the fund can make payment to the non-member spouse. In the absence of such an order, the non-member spouse's only option is to claim his/her portion of the pension interest directly from the member.

The *Masike* judgment once again highlights the importance of compliance with the applicable legislative provisions when drafting divorce orders and/or settlement agreements. The fund must be correctly identified, and must be ordered to make payment of a specified percentage, or amount, of the member's pension interest to the non-member spouse. If the order does not meet these requirements, the fund is not able to give effect thereto.

6. Conditions applicable to preservation funds

The conditions with which preservation funds must comply are set out in the definitions of "pension preservation fund" and "provident preservation fund" in the Income Tax Act. Certain additional conditions were until now also laid down in South African Revenue Service Retirement Fund Practice Note RF 1/2012. This practice note has been withdrawn with effect from 15 November 2021. The conditions with which preservation funds must comply, are accordingly now set out fully in the definitions of "pension preservation fund" and "provident preservation fund" in the Income Tax Act.

7. Conditions for investment in hedge funds

The Financial Sector Conduct Authority (FSCA) during October 2020 published a draft conduct standard on the conditions for investment in hedge funds for public comment. The FSCA on 19 November 2021 issued FSCA Communication 20 of 2021 (RF) in which they say that, following comments received on the draft conduct standard, the need and appropriateness thereof was reassessed.

The conclusion, based on the above-mentioned assessment, is that there is no longer a critical need to issue a conduct standard on the conditions for investment in hedge funds. This is so because the issues that the draft conduct standard were aimed at, are already sufficiently addressed in the Pension Funds Act and regulations, or in proposed amendments to the regulations. The draft conduct standard is accordingly withdrawn, and will not be proceeded with.

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8. Early access to retirement savings

The Minister of Finance and National Treasury earlier in the year indicated that discussions are underway on allowing early access to retirement savings. The Minister of Finance in his Medium Term Budget Policy Statement Speech on 11 November 2021 said the following in this regard:

"*On retirement reforms, we are proposing measures to boost household savings by increasing preservation before retirement and to increase flexibility through partial access to retirement funds through a "two-pot" system. In terms of this system, individuals would be able to access contributions to the one pot, while contributions to the other pot would be saved until retirement.*

These measures would require legislative changes and further consultation. Limited withdrawals would also depend on affordability and liquidity of funds. National Treasury will shortly publish a discussion document on the details of this proposal to obtain inputs before further announcements are made in the 2022 Budget."

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

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