Sanlam

Legal Report February 2022

Insurance | Financial Planning | Retirement | Investments | Wealth

Newsletter of Sanlam Corporate: Legal

1. Draft Conduct Standard on the payment of retirement fund contributions

The Financial Sector Conduct Authority (FSCA) on 15 February 2022 advised that a draft Conduct Standard on the payment of retirement fund contributions, together with supporting documentation, was submitted to Parliament on 8 December 2021. This is required in terms of section 103(1) of the Financial Sector Regulation Act, which requires that, before it is issued, any regulatory instrument must be submitted to Parliament for a period of at least 30 days while Parliament is in session. The final Conduct Standard will therefore probably be issued shortly.

The requirements relating to the payment of retirement fund contributions are currently contained in regulation 33 of the regulations under the Pension Funds Act ("the Act"). 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 regard to payment of contributions by an employer, in terms of section 13A of the Act;
- 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, section 13A of the Act 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 of the Act;
- set out the format in which a fund must request an employer to notify it of the identity of every director who is regularly involved in the management of the employer's financial affairs;
- prescribe the manner and format of reporting by principal officers of retirement funds, or any other authorised persons as referred to in section 13A(6) of the Act, to the board of a fund regarding compliance with, or non-compliance with, the provisions of section 13A of the Act 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, section 13A of the Act by an employer; and
- 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.

The Conduct Standard also requires that "*any material contravention of or material failure to comply with sections 13A(2)(b) or 13A(3)(a) of the Act that continues for a period of 90 days,* *must be reported in sufficient detail by the board to the South African Police Service, in the format determined by the Authority, within 14 days after the expiration of the 90 day period*". In response to comments that the Police does not have the capacity to deal with such complaints, the FSCA said the following:

"*Although the FSCA acknowledges that there have been practical and capacity challenges, such should not serve as basis for not having this as a requirement. This requirement is still important, even if it just serves as a mechanism to deter undesirable behaviour whilst the practicalities are being addressed. It might also be noted that the FSCA is in the process of liaising with the SAPS to see to what extent the process can be improved.*"

With regard to the implementation date of the Conduct Standard, the following is said in the Statement supporting the Conduct Standard:

"*The implementation date of the Conduct Standard is 6 months after publication, or a later date determined by the Authority. If implementation becomes a widespread problem across the industry as a whole because the 6-month period is insufficient, the FSCA would therefore be able to extend the implementation period to a later date.*"

2. 2022 National Budget

The Minister of Finance delivered his Budget Speech on 23 February 2022. The following proposals and information provided in either the Budget Speech or the Budget Review are of interest to the employee benefits industry:

<u>Investment in infrastructure</u>

Draft amendments to regulation 28 of the Pension Funds Act were published during 2021, which are aimed at enabling greater infrastructure investment by retirement funds and improving data reporting on such investments by funds. The amendments have been through two rounds of public consultations and will be gazetted into law by March 2022.

<u>Foreign investment limit</u>

The limit for foreign investment by retirement funds is currently 30% in respect of offshore assets, and an additional 10% in respect of investments in the rest of Africa. The limit for offshore assets will be increased to 35%, with the 10% in respect of the rest of Africa remaining unchanged.

<u>Early access to retirement savings</u>

National Treasury in December 2021 issued a discussion paper on allowing members early access to their retirement savings in terms of a so-called two pot system. The paper proposes in brief that members are given access to one third of all their future contributions (the access pot), while the balance must be preserved until retirement (the retirement pot).

Public comments on the tax treatment of contributions to the two pots are currently being reviewed in preparation for public workshops. This will be followed by legislative amendments, which will be published for comment in the middle of the year.

The Minister further said that part of the proposal includes the possibility of short-term access, which would be dependent on the approval by the trustees of each fund. It is not entirely clear what the Minister meant by this. If he however meant that the granting of access will be subject to the discretion of the trustees, this would place a severe burden on trustees, who already have a very considerable workload.

Governance of umbrella funds

National Treasury in December 2021 issued a discussion paper entitled *Governance of Umbrella Funds,* which seeks to improve the governance of retirement funds, and particularly commercial umbrella funds. The paper inter alia proposes that members of a commercial umbrella fund should elect at least 50
per cent of the members of the board of trustees. Work will continue in this regard during 2022.

Transfer of total interest in a retirement annuity fund

If a member of a retirement annuity fund wants to transfer to another retirement annuity fund, the member must transfer his/her total interest in the retirement annuity fund. If a member has more than one contract in the fund, he/she can accordingly not choose to only transfer one of his/her contracts. It is proposed that the Income Tax Act be amended so as to allow retirement annuity fund members to transfer only one, or only some, of their contracts in the fund, subject to certain conditions to ensure that the current minimum thresholds are not contravened.

Protection of vested rights when transferring to a public sector fund

The so-called T-day amendments, which make provision for compulsory annuitisation, came into effect on 1 March 2021. The amendments make provision for the protection of vested rights, in other words benefits that are not subject to annuitisation. Vested rights may also be transferred into another retirement fund without forfeiting their vested rights protection.

It has come to Government's attention that the current provisions have the effect that vested rights would be forfeited if transfer is made into a public sector fund. To address this anomaly, Government proposes amending the definitions of "pension fund" and "provident fund" in the Income Tax Act to ensure that vested rights remain protected upon transfer to a public sector fund.

The applicability of T-day to public sector funds

It is stated in the Budget Review that the T-day amendments (referred to under the previous heading) also apply to public sector pension funds that operate like provident funds. Paragraph (eA) of the definition of "gross income" in the Income Tax Act does however not mention public sector funds that operate like provident funds. Government proposes that paragraph (eA) be clarified to ensure that gross income includes all public sector funds.

Although National Treasury has now formally confirmed that the intention is that the T-day amendments also apply to public sector pension funds that operate like provident funds, the South African Revenue Service (SARS) is of the opinion that this intention is not reflected in the Income Tax Act. It is not yet known whether the proposed amendment will cause SARS to change their opinion in this regard.

Retirement of a provident fund member on grounds other than ill health

Paragraph 4(3) of the Second Schedule to the Income Tax Act currently stipulates that if a member of a provident fund who is younger than 55 retires for reasons other than ill health, any lump sum received shall be taxed as a withdrawal benefit rather than a retirement benefit. This does not apply to members of pension or retirement annuity funds. Paragraph 4(3) will be repealed so that there is no longer any distinction between provident funds and other retirement funds in this regard.

Tax-neutral transfers from a pension to a provident fund

Before 1 March 2021 transfers from a pension fund to a provident fund or provident preservation fund were taxable. From 1 March 2021, in accordance with paragraph 6(1)(a) of the Second Schedule to the Income Tax Act, such transfers are no longer taxable. Contrary to the intention, such transfers are however only tax-neutral in respect of contributions made to a pension fund after 1 March 2021. An amendment will be made so that such transfers will also be tax-neutral in respect of contributions to a pension fund before 1 March 2021.

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

The Draft Taxation Laws Amendment Bill last year 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. Consultation on the proposal however showed that multiple tax treaties need to be revised before the proposal can be implemented. It is stated in the Budget Review that Government intends to initiate the necessary negotiations in this regard this year.

Conduct of Financial Institutions Bill

National Treasury has revised the Conduct of Financial Institutions Bill based on feedback from stakeholders. It is stated in the Budget Review that the Bill is expected to be tabled in Parliament in early 2022. National Treasury recently indicated that they hoped to table the Bill by April.

Transformation

The Financial Sector Conduct Authority (FSCA) will publish its transformation strategy in February 2022, outlining its approach to promoting financial sector transformation within the existing policy framework, including the Financial Sector Regulation Act, and under the future Conduct of Financial Institutions Bill. It will set out how the FSCA intends to effect key proposals in the Bill. The strategy will be published for public comment and consultations will be held with stakeholders.

The subcommittees of the Financial Sector Transformation Council have further been reviewing the transformation targets in the Financial Sector Code. They are expected to conclude their review and submit the revised targets to the Council for approval this year. The Department of Trade, Industry and Competition will publish the revised targets for public comment.

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