Sanlam

Legal Report March 2022

Newsletter of Sanlam Corporate: Legal

1. Foreign investment limit

The limit for foreign investment by retirement funds previously was 30% in respect of offshore assets, and an additional 10% in respect of investments in the rest of Africa. This has, with effect from 23 February 2022, been amended in terms of Exchange Control Circular No. 10/2022. There is now no longer a separate African allowance, and funds may invest up to 45% of their assets anywhere in the world. The revised foreign investment limit has also been confirmed by the Financial Sector Conduct Authority (FSCA) in FSCA Communication 8 of 2022 (RF).

2. FSCA Strategy for Supporting Financial Sector Transformation

The Financial Sector Conduct Authority (FSCA) on 28 February 2022 published a draft strategy for promoting financial sector transformation for public comment. Feedback received will inform the finalisation and implementation of the strategy.

The strategy aims to:

- outline the FSCA's approach to promoting financial sector transformation within the existing policy framework, including the Financial Sector Regulation Act, and
- outline an approach to promote transformation under the future Conduct of Financial Institutions (COFI) Act framework.

The promulgation of the COFI Act, together with consequential amendments to the Financial Sector Regulation Act, are expected to provide the FSCA with the enabling framework to impose requirements related to transformation on all financial institutions and supervise and enforce these requirements.

Given that the legislative framework that specifically empowers the FSCA to promote transformation is still under development, the FSCA has adopted a two-phase approach to promoting transformation:

- Phase 1 will focus on the role that the FSCA will play within the current legislative framework, i.e. the Financial Sector Regulation Act, the Broad-Based Black Economic Empowerment Act and the Financial Sector Code.

- Phase 2 will focus on the role that the FSCA will play within the COFI Act legislative framework.

Key proposals in the COFI Bill that relate to transformation include:

- promoting transformation is made an explicit function of the FSCA and the FSCA can issue conduct standards in this regard;

- the COFI Bill requires entities to promote transformation in a manner reasonably consistent with their transformation plan, which plan should be aligned to the achievement of tangible targets, informed by the targets in the Financial Sector Code; and

- the FSCA can issue directives in relation to transformation plans and may use its supervisory and enforcement powers to ensure that a financial institution's governance frameworks, including in relation to transformation, are adequate and adhered to.

Transformation plans of financial institutions should demonstrate how the entity will ultimately meet the targets set out in the Financial Sector Code. It is envisaged that all financial institutions with an annual revenue of over R10 million should reflect a Broad-Based Black Economic Empowerment (B-BBEE) Level 4 score or have in place a transformation plan that demonstrates how they will reach this level within five years.

Actions that can be considered where financial institutions fail to meet the targets identified in their transformation plans could include:

- meeting with the board of the institution and engaging on the importance of transformation as a national imperative;
- requesting a remedial plan to address the shortcomings, which can take the form of an enforceable undertaking;
- issuing a directive for non-compliance with an enforceable undertaking; and
- issuing an administrative penalty for non-compliance with COFI Act transformation requirements, an enforceable undertaking or directive.

Comments on the draft strategy can be provided to the FSCA until 29 April 2022.

3. New timeframes for filing of responses to complaints

In OPFA Communication 2 of 2022, the Office of the Pension Funds Adjudicator (OPFA) announced a revision of its timeframes for filing responses to complaints with effect of 1 April 2022. The refer-to-fund (RTF) process provides that a fund has a period of 30 days to reach an amicable solution with a potential complainant before the OPFA may investigate a complaint where the internal dispute resolution referred to in section 30A of the Pension Funds Act has not been followed. Previously, the OPFA afforded a respondent to a complaint a period of 30 days to provide a formal response and if no response has been received, a further period of 14 days was allowed. In order to fulfil its main object of disposing of complaints in a procedurally fair, economical and expeditious manner, the OPFA has revised these timelines. Parties now have to file responses within 20 days if a complaint was not resolved at the RTF stage. Should a response not be received after the 20-day period, a further 10 days will be given to file responses.

The OPFA encourages all boards of retirement funds, Principal Officers, fund administrators and employers to take note of the new timeframe for filing responses and ensure that deadlines for the submission of responses are strictly adhered to.

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