

1. Bulking payments to former members of deregistered funds

Certain retirement fund administrators previously engaged in a practice called bulking, which entailed that the administrator treated individual retirement fund bank accounts as one account in order to negotiate a higher interest rate. The administrator did however not disclose the additional interest to the relevant retirement funds, resulting in the administrator making so-called secret profits. When this practice came to light, the Financial Sector Conduct Authority's predecessor, the Financial Services Board, during 2007 informed all administrators that it expects them to pay these profits to the affected funds.

The Minister of Finance on 1 March 2009 published a notice in terms of which bulking settlement payments by retirement funds to former members are tax-free. When this notice was issued, some of the affected retirement funds were no longer registered. Fund administrators could therefore not pay the bulking settlement payments to the fund to be distributed to its former members. These bulking settlement payments are currently still held by the respective fund administrators.

The Minister has in view of the above issued a notice making provision for the tax-free payment of bulking settlement payments to former members of deregistered retirement funds, provided that the following requirements are met:

- ⦿ the bulking settlement payments relate to amounts that became due and payable by the administrator to the relevant retirement fund before 1 January 2008; and
- ⦿ such bulking payments have not been allocated due to the fact that the fund has been deregistered; and
- ⦿ the administrator has entered into an agreement with the Financial Sector Conduct Authority to make such bulking settlement payments directly to the former members of the deregistered fund.

It is made clear in the explanatory memorandum and media statement accompanying the notice that this will be the last opportunity for administrators to rectify the situation.

The notice came into operation on 3 May 2023.



2. Calculation of late payment interest by retirement funds

The Financial Sector Conduct Authority (FSCA) has issued FSCA Communication 15 of 2023 (RF), dealing with the calculation of late payment interest on retirement fund contributions.

In terms of section 13A(3)(a)(i) of the Pension Funds Act contributions to a retirement fund must be paid “*not later than seven days after the end of the month for which such a contribution is payable*”.

Section 13A(7) of the Pension Funds Act stipulates that “*interest at the rate as prescribed shall be payable from the first day following the expiration of the period in respect of which such amounts were payable*”.

FSCA Conduct Standard 1 of 2022 (RF) (“the Conduct Standard”), dealing with the requirements related to the payment of retirement fund contributions, came into effect on 19 February 2023. In terms of paragraph 5(1)(a) of the Conduct Standard “*compound interest on late payments or unpaid amounts must be calculated from the first day following the expiration of the period in respect of which such amounts were payable until the date of receipt by the fund*”.

According to the FSCA the combined effect of the above provisions is as follows:

“The wording in paragraph 5(1)(a) of the Conduct Standard read with sections 13A(3)(a)(i) and 13A(7) of the PFA is clear and unambiguous. Section 13A(3)(a)(i) of the PFA requires that contributions must be paid not later than seven days after the end of the month for which such a contribution is payable. It follows, in terms of the wording of paragraph 5(1) of the Conduct Standard and section 13A(7) of the PFA, that LPI must be calculated from the day after the seventh day referred to in section 13A(3)(a)(i) of the PFA.”

In accordance with the FSCA's opinion, as set out in the Conduct Standard, late payment interest must accordingly be calculated from the 8th day of the month following the month in respect of which the contributions were payable.

3. Fiduciary duty of the principal officer of a retirement fund

The general view within the retirement fund industry was previously that the role of the principal officer is administrative in nature, and that the principal officer does not have a fiduciary duty towards the fund. The Financial Sector Conduct Authority (FSCA) however in December 2019 confirmed that they are of the view that a principal officer does have a fiduciary duty towards the fund.

The issue whether a principal officer has a fiduciary duty towards the fund, was now also ruled upon by the Financial Services Tribunal (“the Tribunal”) in the matter of Zibi v Financial Sector Conduct Authority. The Tribunal confirmed that a principal officer does indeed have a fiduciary duty towards the fund, and inter alia said the following:



“Having regard to Circular PF130 it is clear that the Applicant’s duties as the Principal Officer are not limited to the execution of the decisions of the board, but include the duty to act with utmost good faith towards the Fund and in the best interest of all members, to ensure that the board gives full and proper effect to the rules of the Fund and to deal with all matters relating to the Fund and its members in accordance with his fiduciary duties.”

The FSCA in a press release issued on 12 May 2023 welcomes the above ruling, and amongst others says the following:

“The judgement reiterated the role and responsibilities of a Principal Officer and confirms the view of the FSCA that a Principal Officer holds a fiduciary responsibility towards the stakeholders in the fund.”

“This is an important and unprecedented (sic) decision for the retirement fund industry as it upholds the importance of good governance and prudent conduct by trustees and Principal Officers of retirement funds. The FSCA expects both trustees and Principal Officers to comply with their fiduciary duties and to conduct themselves ethically, lawfully, diligently and properly.”

The fiduciary duty of principal officers will receive formal statutory recognition once the Conduct of Financial Institutions Bill is enacted as the Pension Funds Act will be amended to expressly stipulate that *“a principal officer has a fiduciary duty to the retirement fund and its members”*. The principal officer will also, inter alia, have to *“provide the board collectively and board members individually with guidance as to their duties, responsibilities and powers”*.

4. Annual reports in terms of the Promotion of Access to Information Act

The Information Regulator (“the Regulator”) has on 2 May 2023 invited all public and private bodies, which includes retirement funds, to submit their annual reports on access to information requests, received and processed in terms of the Promotion of Access to Information Act, for the 2022-2023 financial year. The deadline for the submission of the reports is 30 June 2023. Although public and private bodies are in terms of the notice from the Regulator, and the accompanying media statement, “invited” to submit the reports, the Regulator has confirmed that the submission of the reports is compulsory, and that all public and private bodies must submit the reports by 30 June 2023.

The reports must be submitted via an online portal on the Regulator’s website.



5. Conduct standard on conditions for investment by retirement funds in derivative instruments

Regulation 28(7) of the Pension Funds Act provides that retirement funds may invest in derivative instruments and empowers the Financial Sector Conduct Authority (FSCA) to prescribe conditions in respect of such investments. Pursuant hereto, the FSCA has on 11 May 2023 published a conduct standard on the conditions for investment by retirement funds in derivative instruments.

The purpose of the conduct standard is to balance the benefits of investing in derivative instruments with the possible risks thereof. The conduct standard sets out overarching principles for the use of derivative instruments by retirement funds. It also sets conditions relating to, inter alia, the following:

- ⦿ permissible uses of derivative instruments;
- ⦿ net derivative positions must at all times be covered by appropriate reference assets, which is defined as the assets from which the value of the derivative instrument is derived;
- ⦿ valuation of derivative instruments;
- ⦿ determining the allowable counterparties for purposes of derivative instruments;
- ⦿ providing guidance on the calculation of exposure to derivative instruments;
- ⦿ setting out the allowable netting provisions for derivative instruments;
- ⦿ determining the conditions in respect of collateral; and
- ⦿ prescribing the conditions for reporting in respect of investments in derivative instruments. The FSCA, in the Statement supporting the conduct standard, in this regard said that it will in due course issue revised Annual Financial Statement notes and updated Regulating Reporting Requirements for public comment.

The conduct standard will come into effect twelve months after the publication thereof, in other words on 10 May 2024.

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