

**REPORT TO MEMBERS OF THE PENSION LAWYERS
ASSOCIATION ON THE MEETING OF THE INSTITUTE OF
RETIREMENT FUNDS (IRF) LEGAL AND TECHNICAL
COMMITTEE HELD ON 21 & 22 JULY 2010**

This note contains an update on various issues, both tax and regulatory. These issues are being discussed with the industry and the authorities and the IRF legal and technical committee is actively taking part in those discussions.

1. Adjudicator Scorecard

The new Pension Funds Adjudicator, Mr Charles Pillai, has confirmed that he will not be implementing the score card. The Committee raised with the FSB the need to define the PFA Conciliation process with the possibility of guidelines being issued. The FSB is to set up a work group in this regard and invite representatives from the Adjudicator's office to attend.

2. Amendments to the Pension Funds Act and Regulations

The FSB confirmed that Regulations are unlikely to be finalised this year and another draft will be circulated for comment.

3. Unclaimed Benefits

In the last note, it was reported that the IRF will approach SARS with the intention of reaching agreement that bulk Recognition of Transfer forms (per fund) may be done for transfers of unclaimed benefits to an Unclaimed Benefit Fund.

The IRF has now received a letter dated 23 August 2010 from SARS regarding the request that SARS allow a window period to submit bulk ROT's. SARS has confirmed that it has agreed to this request as a once off concession relating to unclaimed benefits only. The transfers must be completed and submitted prior to 31 August 2011 and the normal procedure for an application for a tax

directive in respect of each member must be followed prior to submitting the bulk ROT.

4. Consumer Protection Legislation

The FSB confirmed its understanding that retirement funds fall within in the Consumer Protection Act. Most of its provisions were intended to be effective on 25 October 2010. An exemption of one year applies to long and short term insurers, but this does not include retirement funds. The effective date has now been deferred in terms of a Government Gazette Notice until 31 March 2011. A proposal was made that guidelines be circulated to IRF members to assist them in understanding how funds are going to be impacted by this legislation and to provide assistance in regard to what needs to be done and/or what should be done in terms of this legislation. The effective date of this Act was imminent but has now been extended.

A working group has been set up and the FSB has been requested to assist with this.

5. Administrators: 13B requirements

The IRF queried two issues with the FSB, namely the capital adequacy requirement and the notification requirement (if an administrator merges with another administrator). As regards the capital adequacy requirement, the FSB conceded that this was an onerous requirement and it is looking into finding a viable alternative. The FSB advised that it is considering relaxing this requirement, but that it would be maintained in some form. The FSB confirmed that audit reports for administrators have to be finalised first before another draft is issued regarding section 13B regulations and conditions.

The notification requirement was not responded to by the FSB at this meeting.

The FSB has undertaken to conduct an impact study and circulate this.

6. National retirement funding reform process

The FSB advised that the Minister of Social Development has promised a new paper before mid-2011.

7. Curator fees

The IRF raised with the FSB the fees to be charged if a “responsible person” is appointed who an individual, in other words, not an administrator. Questions were also raised in regard to the shortened “liquidation” process in terms of Directive 4, which is intended for funds under R6 million.

The FSB requested that the IRF list all issues regarding fees and the shortened process and that this be submitted to the FSB for consideration.

8. Member Communication

The review of PF Circulars 86 and 90 is still underway and an IRF work group has been set up to liaise with the FSB in this regard.

9. Preservation Fund fees

The FSB advised that it is waiting to see what is contained in draft legislation regarding the issue of preservation funds not having contributions and fees having to be deducted from members’ credits.

10. Using fund bank accounts as a conduit for risk premiums

The work group is still to meet with the FSB, SARS and National Treasury.

11. Draft note on service level commitment

The FSB confirmed that this has been finalised, it is awaiting signature and will be issued shortly.

12. Valuation exemptions

The IRF raised with the FSB the question of section 14 transfers involving valuation exempt funds and the effective date of the transfer as there is no guidance in the legislation and inconsistent application in practice.

The FSB advised that they do not have an answer to this issue currently, but that the intention is to submit a formal response before the next IRF L & T Committee meeting.

13. King III Report

The FSB advised that the work group that has been established to consider this will be considering the impact of King III with reference to the differences between large and small funds and it is currently also reviewing the link between King III and PF Circular 130. It is intended that PF130 will be updated to align with King III

14. FSB requirements for umbrella funds

The FSB has circulated a draft notice in which the definition of an umbrella fund is contained. The FSB advised that Regulation 30 is to be replaced and the definition of umbrella fund will be included in this.

The draft definition introduces some significant changes from the current umbrella fund arrangements. Up until now, subsidiaries of a participating employer were typically included, but associated employers were distinguished. The definition envisages that each employer participating in the umbrella fund will not include any of its subsidiaries or associated companies. The definition also distinguishes between a type A and a type B umbrella fund in regard to which there are special rules relating to each participating employer (type A) and where there is only a primary set of rules applicable to all participating employers (type B). There is also a significant change in the proposed definition regarding the separation of assets of participating employers.

15. The BN68/2010

The FSB advised that this board notice is going to be done away with and that an Information Circular is to be issued in which the six (6) sets of financial statements previously provided for will now be reduced to three (3). With effect from 1 January 2013 the audit exemption will also be withdrawn. The only distinction will be between small funds and large funds and financial statements will be aligned on this basis. The cash basis for accounting will be done away with. The FSB advised that audit exemptions may still be applied for but that they will not be automatic as in the past.

16. Unpaid Contributions and the Enforcement Committee

The FSB advised that its position is clear that if an employer actually makes the deductions, but these are not paid over to the fund, the Enforcement Committee will get involved, but not if the employer does not make the deductions at all. The FSB is not prepared to be a debt collecting agency for funds.

17. FSB E-learning

The FSB advised that a new initiative for e-learning for fund trustees has been released and it is intended to be a tool which is made available to all trustees of retirement funds.

18. FSB Levies

The FSB advised that it has excused administrators from levies to date but that from 2011 the levying of and payment of levies will be enforced.

19. Fund investments in trust

The FSB advised that an Information Circular is to be issued in which it will be confirmed that funds are not permitted to invest in a trust or use a trust as a conduit for investments as this does not comply with section 5(2) of the Pension Funds Act, because assets are not held in the name of the fund. The FSB advised that previously this could not be picked up from a fund's annual financial statements because of the fund applying the look through principle. Accordingly, the FSB's position in this regard is to be made clear in the Information Circular.

20. Number of trustees to be provided in rules

The FSB advised that it is going to require that the rules of the fund specify the exact number of trustees on the board because it has become an issue when the FSB conducts compliance visits if only the minimum and maximum number of trustees is stated in a fund's rules. This is too vague to ensure compliance.

SARS ISSUES

21. Living Annuities

Correspondence in this regard with SARS has drawn to an end, the issues concerning annuities have been addressed in the draft Bill and the IRF has requested clarification of wording and the effective date. It was pointed out that if the effective date is not retrospective there will be a period of uncertainty as to how to treat commutations.

The amendment of GN18 is also required as it still refers to certain conditions which are out of date.

It was noted that there might be some elements of the definition of living annuity that requires attention to make sure that the interpretation is clear. The intention is for the continuity of living annuities through generations to occur.

22. Surplus and GN 29

There are two different views on the taxation of future surplus, namely whether it is a taxable as a retirement benefit or a withdrawal benefit. The IRF's position is that it should be taxed a retirement benefit, but SARS's view is that it must be treated as a withdrawal benefit.

The Committee highlighted the inconsistency internally within SARS as this is treated differently in different SARS offices as there has been an example of one SARS office taxing it as a retirement benefit. This SARS was not able to provide any further update in this regard.

23. Divorce and Maintenance

GN33 and GN37 still need to be updated. SARS confirmed its position as per its November 2009 letter. All accruals after 1 March 2009 are taxed in the hands of the non-member spouse except for pre-13 September 2007 divorces, which are not taxed.

The amendments in the draft Bill still need to give effect to the position as contained in the SARS November 2009 letter.

The determination by the Pension Funds Adjudicator which advocated no cash payments to non-member spouses but only transfers to another fund (based on the preservation principle) was raised with SARS. This has not yet been considered by SARS.

GN35 and Unclaimed Benefits

GN35 needs to be updated and re-issued. Operational issues were highlighted such as the interest which is added to an unclaimed benefit and accumulated subsequent to IT33. This needs to be addressed.

24. Preservation funds

All new generation preservation funds rules had to be submitted by the 30 September 2009 to SARS for approval. This has been extended to 30 September 2010.

The various operational issues raised with SARS on preservation funds, including the existing provisions of RF1/98, still needs to be addressed and clarified.

SARS has indicated the withdrawal of RF 1/98.

25. Housing Loans

GN30 is in its final stages. SARS has been issuing IT88's on housing loans although GN14 specifically excludes this. SARS advised that GN14 would be re-circulated as this may not have properly filtered down internally with SARS.

An issue pertaining to the deductions of housing loans in terms of section 37D and taxation where a member's tax affairs are not in order was raised. The problem lies where SARS does not issue a tax directive because the member's tax affairs are not in order and the member either does nothing to sort this out or delays sorting this out. This has been addressed by the IRF making a submission to SARS in which it has been suggested that a flat tax rate be imposed and a similar approach as that adopted in GN35 be applied to this situation. SARS advised that it would consider proposals made in this regard.

26. Tax Guide

SARS advised that the new SARS Tax Guide should be issued by the end of the year.

27. Draft Taxation Laws Amendment Bill

The explanatory memorandum to the Bill differentiates between voluntary and involuntary retrenchment. The Act does not contain this distinction.

It was raised that the R300 000.00 tax relief that is applicable to severance payments may give rise to a conflicting situation when an employer considers it one way and the fund considers it the other way – the one indicating it as a voluntary retrenchment and the other as an involuntary retrenchment.

SARS advised that it is looking into this and will advise the IRF what the official position is as regards the process and the way this is to be reflected in the legislation.

28. Election prior to benefit accruing

The issue concerns whether accrual takes place on the date that the member stipulates when he or she wants to receive the benefit or the date on which the member actually makes the election. This is an interpretation issue.

SARS's view is that when the election is made this constitutes the accrual

It was acknowledged that there are problem cases, for example, when the election is made on 20 February but the member wants the benefit to accrue for tax on 1 March. SARS advised that it will treat these on a case by case basis.

29. Beneficiary funds allowing unapproved schemes

A submission has been made to SARS in this regard as an amendment to the Act is required to allow this.

Should you have any queries relating to this note, please feel free to contact Vanessa Bell via e-mail on vbelle@mortlaw.net.