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Financial Service



REGULATORY UPDATE

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Transformation of financial sector regulation

- **Recently published for comment:**
 - Financial sector regulation bill;
 - Market conduct policy paper;
 - Retail distribution review.
- **Planning for internal reorientation and new styles of regulation and supervision**
 - Regulation and supervision to be function-based rather than sector based;
 - Greater consistency in licensing and supervision standards and methods. Current FSB-wide projects include
 - Disclosure standards
 - Complaints management standards



Contributions & Investments

- **Contributions**

- Working with SAPS & NPA on ways to ensure consistent and effective prosecutions for non-payment of contributions. Hoping that central contact points for funds will be established.

- **Investments**

- Securities lending notice to be amended to address problems relating to the provision of collateral and securities transfer tax;
- Notice on investments in derivatives to be published shortly;
- Notice on investments in hedge funds to be delayed pending issue of regulatory instruments to which hedge funds will be subject
- Notice on investments in private equity funds to be revised once FAIS dept has issued new regulatory instruments for these funds



Governance

- **Notice on filling of vacancies on board**
- **Notice on appointment of deputy PO**
- **Prescribed requirements**
 - Training and other requirements;
 - NB to recognise that, while certain minimum standards of knowledge required of all board members, it is also important that each board includes people with a variety of skills, knowledge and attributes e.g.
 - Financial, investment, legal knowledge & expertise;
 - Knowledge and understanding of members needs.



Umbrella funds

- **Different types of umbrella funds**
 - Important to appreciate that there may be different risks, and so needs for different regulatory and supervision methods associated with different types of umbrella funds such as-
 - Employer group umbrella funds
 - Union funds
 - Sectoral funds
 - Bargaining council funds
 - Trades and occupations funds
 - Municipal funds
 - Commercial umbrella funds
 - Some are 'Type A' funds with special rules for employees of each employer;
 - Others are 'Type B' funds with the same rules for all members.



Umbrella funds

- **Commencement, termination and re-commencement of employer participation**
 - Draft guidance circular published for comment
 - No provision in the PFA for the ‘cancellation’ of an employer’s participation. But the regulator needs to know which employers are participating in which funds.



Umbrella funds

- **Commencement of participation**
 - Type A fund – on approval of special rules
 - Type B fund –
 - rule amendment may not be required;
 - either way, registrar will require funds to inform us



Umbrella funds

- **Termination of employer participation**
 - **If rules require partial liquidation**
 - Liquidator must be appointed to prepare liquidation and distribution accounts subject to section 28 and Directive 6;
 - Fund may only be exempted from compliance subject to conditions in Directive 6 – don't think you can lobby your way to an exemption;
 - At conclusion of partial liquidation, application must be made for approval of rule amendment to delete special rules, or other rules providing for the employer's participation, if applicable.
 - **If rules do not require partial liquidation**
 - Assets and liabilities may be disposed of by means not requiring the registrar's supervision – this is of some concern and we will be considering whether this is desirable



Umbrella funds

- **Exemptions in terms of section 7B of the PFA**
 - Conditions for exemption –
 - Number of ‘independent’ board members;
 - Definition of ‘independent’
 - Direct and indirect elections.
- **Umbrellas within umbrellas**
 - No problem, provided that individual employers remain on the hook for unpaid contributions, funding shortfalls.
- **Immunisation of fully funded ‘pods’ against underfunded ‘pods’**
 - May require amendment to statute.



Administrators

- **Concerns**
 - Business model
 - unsustainable if based on ‘captured’ clients;
 - particularly if it results in under-resourcing in human resources and technology capacities;
 - Inadequate application of ‘treating customers fairly’ principles;
 - Need to replace “one-size fits all” approval conditions with conditions designed to address risks associated with specific business models of administrators and the funds they administer;



Administrators

- **Plans**
 - To provide guidance on embedding of ‘treating customers fairly’ principles in conduct of administration business;
 - New conditions for approval to conduct fund administration business taking into account-
 - demonstrable capacity and experience;
 - nature of funds to be administered and sectors in which they operate.



Transfers

- **Problems in the interpretation and application of section 14**
 - Uncertainty as to which transfers require prior approval in terms of section 14(1) and when a tax directive must be obtained.
 - Discussing these matter with SARS.
- **Directive 6**
 - Working on replacement directive.



Unclaimed benefits

- **Transfers of unclaimed benefits**
 - About to publish draft notice of intention to withdraw exemption granted in Directive 6;
- **Results of thematic review of conduct of business by unclaimed benefit funds**
 - Boards too passive – we need more effective measures to trace and pay beneficiaries.
- **Regulation 35(4) and reports on statutory actuarial valuations**
 - Are bound by regulation 35(4) unless and until it is withdrawn.



Liquidations

- **Concerns about current performance;**
- **Work on the replacement for Directive 4;**
 - will be addressing issues such as the independence of the liquidator, remuneration of the liquidator and means by which liquidator may be required to communicate with creditors including members;
- **Need an amendment to the PFA** to allow replacement of deceased liquidators without going to court.



Orphan funds

- **Draft circular**
 - Have just published a draft circular for comment within 30 days.
- **Terminology:**
 - **Dormant fund** – had assets and/or liabilities when abandoned by its board;
 - **Shell fund** – did not have assets and/or liabilities when abandoned by its board;



Future approach

- **Shell fund**

- Does not need a board.
- Interested party can ask registrar to cancel registration in terms of section 27 on the basis that it has “ceased to exist”.
- Registrar will require higher standard of proof of this – in particular regarding manner in which its assets and liabilities were disposed of in the past:
 - Financial statements or other documentary evidence of manner in which assets and liabilities were disposed of;
 - Affidavits by 2 people, at least 1 of whom must be a member of profession, stating that each has taken all reasonable steps to identify and locate fund’s assets and liabilities and has found none;
 - This information not inconsistent with that in registrar’s records;
 - No objections following publication of notice of intended cancellation of registration in both Government Gazette & newspaper circulated in appropriate region;



Future approach

- **Dormant fund**

- Needs a “directing mind and will”:
 - If board can be established, it must be established;
 - Independent section 26(2) trustee may be appointed to do this;
 - If members, they must be given “the right elect”;
 - If no members, rules may be amended if necessary to give sponsor the right to appoint all members of the board;
 - If board cannot be established, curator must be appointed.
 - Bulk curatorships may be applied for to minimise costs – curator may be recommended for appointment as curator with funds with significant asset values on condition that he or she also agrees to work for free as curator for funds with assets below minimum value;
 - Curator’s role will be same as that of board.



Future approach

- **Dormant fund**
 - Roles of section 26(2) trustees
 - To procure establishment of properly constituted board;
 - To minimise risks and protection of members in the interim:
 - Renew insurance policies;
 - All benefits to continue to be paid.
 - Not to take steps that may affect rights of members and other stakeholders to a material degree. So cannot take decisions to
 - Amend rules affecting benefits;
 - Transfer fund's assets and/or liabilities;
 - Make material changes to terms of appointment of service providers etc;
 - Appoint liquidator.



Future approach

- **Dormant fund**
 - **Qualifications for recommendation for appointment by court**
 - Appropriate knowledge, skills and experience;
 - Independent of major providers of products and services to the fund;
 - **Roles of curator or board**
 - To perform functions of a properly constituted board including submissions of statutory returns, concluding agreements with product and service providers and supervising the latter, recovering assets, paying claims, applying for approval of rule amendments, disposing of assets and liabilities in terms of the rules, appointing liquidator, if required or appropriate or apply for exemption '*if practicalities impede the strict application of a specific provision*' of the PFA;
 - Compliance with this condition requires more than merely lower costs and greater convenience for the curator or board;



Orphan funds

- **Dormant fund**
 - **Transfers to unclaimed benefit funds**
 - Exemption from compliance with section 14(1) to be withdrawn;
 - Approval in terms of section 14(1) will not be granted unless
 - rules allow the transfer;
 - the registrar is satisfied on the basis of affidavits furnished by the fund that
 - all reasonable steps have been taken to trace and pay intended beneficiaries;
 - the board / curator has properly exercised his or her discretion in choosing the unclaimed benefit fund,
- amongst other things.



Orphan funds – looking back

- Registrar has formed the view that some steps taken by fund administrators, “authorised representatives”, section 26(2) trustees and the registrar’s office may not have been authorised by law.
- Before September 2007 – registrar did not have the power to appoint authorised representatives;
- From 2007 – Feb 2014 – registrar may not have had the power to appoint trustees to boards of dormant funds for purposes other than the establishment of properly constituted boards;
- Although section 26 amended in February 2014, the amendment may not have been sufficient to authorise such appointments.



Orphan funds – looking back

- **Review of sample of cancellations to identify possible risks of material prejudice**
 - In fulfilment of his constitutional duties, the registrar is reviewing the governance, closure and cancellations of registrations of shell and dormant funds at the requests of ‘authorised representatives’ and/or section 26(2) trustees or administrators from 2007 – 2013 with a view to determining whether any material prejudice may have resulted.
 - This review is now only of a sample of cancellations spread across time, identities of fund administrators and specific circumstances.
 - Only if this sampling exercise indicates that a more comprehensive review would be appropriate will one be undertaken.
 - Even then, this will not mean that the cancellations of registration of each of the funds will be set aside on application to court. The registrar will only apply for orders setting aside cancellations if material potential risk has been identified.



Orphan funds – looking back

- **How material prejudice may have resulted from unauthorised actions**
 - Failure to take all reasonable steps to procure establishment of properly constituted boards with greater personal interest in protection of fund members and greater ability to trace beneficiaries of unclaimed benefits;
 - *Some administrator employees stated in writing that they had when they had not – and registrar relied on those misrepresentations*
 - Failure of ‘authorised representative’ or section 26(2) to take all reasonable steps to identify and recover fund assets eg
 - Arrear contributions
 - Proceeds payable to fund in terms of insurance policies;
 - Demutualisation proceeds and ‘secret profit’ refunds;
 - Options and other non-material assets;



Orphan funds – looking back

- **How material prejudice may have resulted from unauthorised actions**
 - Failure by appointee to exercise independent discretion and to fulfil fiduciary and other duties required to be fulfilled by a board when concluding agreements with providers of products and services, supervising them, apportioning surpluses, tracing and paying beneficiaries, choosing unclaimed benefit funds for unclaimed benefits that cannot be paid;
 - Theft of fund assets.
- **If potential material prejudice identified, steps to be taken to remedy or mitigate**
 - Application by person responsible or by registrar to court or FSB appeal board to set aside registrar's decision to cancel the fund's registration and other decisions as applicable;
 - Establishment of board or appointment of curator.



Questions?