Section 26 (2) Practical challenges; trustee role & issues to consider

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The practical challenges faced by a section 26(2) trustee

1. The need to address the situation where funds are for a number of reason left without a board to direct the affairs of the fund imposes a hardship on members –the very members who need to be protected.
2. The Employer in most cases no longer exists – making the establishment a S7A board difficult.
3. Funds have been inactive for many years and complete fund data is scant and it can be challenging to reconstruct.
4. Member records at the Administrator is sparse.
5. Statutory records such as AFS, Valuations, Surplus Apportionment, are not up to date, records held by the Regulator are incomplete.
6. The Funds rules are outdated or inadequate and needs to be amended to ensure compliance and enable next steps to be taken.

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The practical challenges faced by a section 26(2) trustee

7 Historic transfers in terms of section 14 and or the unclaimed benefits often not in line with the Act or the fund rules.

8 Tracing of members is both costly and challenging , the success rate of tracing is well below par.

9 Trustees are not adequately skilled or trained to deal with the issues specific to the section 26(2) managed funds.

10. Trustees are not supported nor are they provided with the appropriate resources (financial & human) to deal with the matters.

11. Term of trustee appointments- the terms are often inadequate given the number of outstanding issues to be addressed.

12. Personal liability and lack of insurance/fidelity cover for section 26(2) trustees.

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Consequential amendments through COFI

Authority can intervene in the management of the Fund

Section 26 (2)

Where a retirement fund does not have a properly constituted Board in terms of section S7A or has no valid exemption granted in terms of section 7B and

- has failed to appoint a S7A Board within a period determined by the Authority or
- for whatever reason, a Board compliant with the Act cannot be constituted.

The Authority can appoint at the cost of the Fund or administrator one or more persons that the Authority deems appropriate to perform the functions of the Board. (*reference that appointments necessary for a quorate Board is removed)*

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Consequential amendments through COFI

Section 26 (2A) New

A person that is appointed under subsection (2) **must** comply with the requirements that may be prescribed in standards. *Some what challenging to comply with ???*

Section 26 (3) expanded

(3) A board must

(a) properly constitute a board in terms of section 7A or obtain an exemption in terms of section 7B,

(b) fulfil all the objects and duties of a board contemplated in the Act and the rules of the retirement fund

(c) Comply with additional duties as determined by the Authority

(d) holds office

- until a Section 7A board is constituted;
- until the Fund is granted an exemption in terms of section 7B, and a Board is properly constituted.

Consequential amendments through COFI

Section 26 (3) expanded

(d) holds office

- in the event that a board cannot be properly constituted, until –
  - the Authority has approved the appointment of a liquidator, or
  - the license of the retirement fund has been cancelled.

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Considerations

1. Bespoke conduct standards or guidelines issued to note the uniqueness of section 26(2) managed funds;

2 Exemptions and or standard operating procedures needs to be considered to assist trustees bring very old and historic funds to a close. Section 281 of the FSR Act read with Section 2(5) of PFA:

FSR Act 281. Exemptions

(1) The responsible authority (FSCA) for a financial sector law (PFA) may, in writing and with the concurrence of the other financial sector regulator, exempt any person or class of persons from a specified provision of the financial sector law, unless it considers that granting the exemption:-

(a) will be contrary to <u>the public interest</u>; or
(b) may prejudice the achievement of the objects of a financial sector law.

Considerations

PFA section 2(5)

(5)
(a) The registrar may, where practicalities impede the strict application of a specific provision of this Act, exempt any fund from, or in respect of, such provision on conditions determined by the registrar.

[Para. (a) substituted by s. 2 of Act 45/2013 w.e.f. 28 February 2014]

a) Any exemption in terms of paragraph (a) may apply to funds generally or be limited in its application to a particular fund or kind of fund, which may, for the purposes of this subsection, be defined in relation to either a category or type of fund or in any other manner.

b) The registrar may, subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), at any time by notice on the official web site withdraw, wholly or in part and on any ground which he or she deems sufficient, any exemption granted under paragraph (a).

Considerations

3. Innovative options – *Out of the Box* thinking to be considered when tracing of members;
4. Regular engagement with the FSCA and trustees (formal and informal) to be established and maintained.
5. Administrators to make use of "economies of scale" and approach insurers to provide fidelity cover for section 26(2) appointed trustees and for section 26(2) managed funds. Its should be consider part of the cost of appointment.

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QUESTIONS ????

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THANK YOU

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