

# Board Conflicts and FSCA Directive 8

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# Does Directive 8 deal adequately with conflicts or does it create other problems?

- Existing obligations:
  - Must report if of the view that an issue is to the financial prejudice of members/fund
  - Section 34 – Prevention and Combatting of Corrupt Activities Act
- Largely a restatement of the existing law – corrupt activities, reporting obligations
- Deeming of certain gratification as automatic – impact on instances where PO employed by service provider

# Main focus of Directive

- Officers of Fund – trustees and principal officer – although encompasses all providers, the rationale appears to be that proper conduct from POs and trustees will translate into decrease in conflicted situations
- Section 7C – avoid conflicts of interest and act independently
- Appointment of PO employed by service provider contrary to 7C – trustee ought to ensure that PO can act in interests of funds without perception of conflict
- Directive 8 – possibly a clear statement of an existing position which may have been overtaken by practice

# Issues to be considered

- Fund has to appoint the PO directly – employment or contractor
- Additional expense in some instances
- Banking service permissible for payment
- The ambit of automatic gratification is clear in the Directive – gap may arise where contravention exists in respect of a party – compel compliance in respect of regulated entities only – regulated person (PO for instance) may be in breach but FSCA may not be able to act in respect of entities that are not regulated

# COFI – Impact on PO duties

- Fiduciary duty of PO – suggestion that it is implicitly likely to arise in the PFA and at common law having regard to role played by PO
- Amendment of Section 8 – expressly provides that the PO has a fiduciary duty – *Phillips v Fieldstone Africa* 2004 (3) SA 465 (SCA)
- The Supreme Court of Appeal held in Phillips that relationships in which a fiduciary obligation has been imposed are marked by the following three characteristics:
  - “(1) *scope for the exercise of some discretion or power;*
  - (2) *that power or discretion can be used unilaterally so as to affect the beneficiary’s legal or practical interests; and*
  - (3) *a peculiar vulnerability to the exercise of that discretion or power.”* (para 34)

## COFI – Impact on PO duties /Continued

- The principal officer of a pension fund likely to be held to meet these requirements
- Requirement of independence – some clarity is required:
  - Can they be a member of the Fund?
  - An employee of the participating employer?
- It is likely that the independence requirement will be no different to that required from trustees – membership of fund and employment is permissible – unlikely that PO will be held to a higher standard
- Voting – lack thereof – PO has the fiduciary duty but no vote on issues – option is to report to FSCA

# Key persons

- FSR Act includes a PO as a key person
- COFI contemplates:
  - Compliance with fit and proper
  - FSCA may reasonably form the view of non-compliance
  - Take action under COFI, FSR Act or direct the financial institution to make arrangements to address the non-compliance – specified person and must be satisfactory to FSCA
  - Additional education; external resources to support the PO, outsourcing the functions or duties or suspension or removal as key person
- If the institution fails to make arrangements to address non-compliance:
  - Impose additional reporting requirements
  - Vary licencing conditions
  - Suspend or withdraw licence
  - After giving key person an opportunity to be heard – direct that the fund terminate the appointment and replace

# Conclusion

- Directive 8 – likely that it assists the FSCA – automatic gratification prohibited – deeming
- Requirement of independence, without guideline, could result in funds no longer being able to appoint from membership or employer – incurring additional costs
- Enhanced focus on ambit of role
- Insurance – professional PO – ensure adequate insurance cover
- Proper contracts

- Questions

THANK YOU

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