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## FSCA CONDUCT STANDARD – REQUIREMENTS RELATING TO PAYMENT OF CONTRIBUTIONS

*In case you missed it...*

3. [March 2022: FSCA Draft Strategy for Transformation](#)
2. [February 2022: Budget summary 2022/23 Tax Year](#)
1. [January 2022: Recent Papers issued by National Treasury](#)

### 1. BACKGROUND

1.1 The Pension Funds Act (“the Act”) imposes the following duties on the employer:

- To pay contributions to the fund no later than 7 days after the end of the month for which such a contribution is payable.
- To submit contribution schedules relating to the contributions required in terms of the rules of the fund to the fund no later than 15 days after the end of the month for which such a contribution is payable so that the fund can allocate the contributions for the benefit of the fund members.

A defaulting employer is liable to pay late payment interest on contributions not paid timeously. However, the enforcement of these provisions has always been problematic. In 2001, the Act was amended to expand Section 13A to require the appointment of a monitoring person who would be responsible for monitoring compliance with the provisions of the section and for reporting to the Financial Sector Conduct Authority (“FSCA”). Regulation 33 was also implemented, which specified the details of the minimum information required in the contribution schedules and set out the reporting requirements.

1.2 In 2020, the FSCA issued a draft Conduct Standard entitled *Requirements relating to Payment of Contributions*. The Conduct Standard will completely replace Regulation 33. The industry was invited to comment on the draft Conduct Standard and the final version has now been submitted to Parliament.

This means that the Conduct Standard will become legislation soon.

1.3 This publication focuses on the reasons for replacing Regulation 33 with the Conduct Standard and the major changes.

### 2. MOTIVATION FOR THE CONDUCT STANDARD

2.1 The FSCA thinks there is a need to standardise the manner and format of reporting by Principal Officers, monitoring persons and boards. Therefore, the reporting requirements have been expanded and certain reports must be made in a format prescribed by the FSCA.

2.2 The FSCA are concerned regarding certain undesirable practices and/or outcomes, where the board of a fund outsources its responsibility to recover outstanding contributions from an employer to an attorney or third party. Issues identified include the following:

- In many instances attorneys delayed paying the funds recovered from the employer over to the fund and instead paid the amounts into their own trust accounts where they earned interest, thereby benefiting the attorney rather than the members of the fund;
- The fund itself caused delay by failing to provide the attorney with clear instructions regarding the action the attorney needed to take to deal with an employer who refused to pay outstanding contributions;
- Sometimes the fees charged by the attorney were exorbitant and/or there was an actual conflict of interest when the recovery function was outsourced to an attorney.

### 3. THE EMPLOYER’S DUTIES – SIGNIFICANT CHANGES

3.1 In terms of the Conduct Standard, before an employer begins to participate in the fund, the fund is required to notify the employer of the employer’s duties, obligations, and liability under section 13A of the Act



and the Conduct Standard. This must be done in a prescribed format (Annexure A to the Conduct Standard).

3.2 It is now a requirement that the initial and subsequent contribution schedules contain the income tax number and contact details of each fund member in respect of whom contributions are being paid. Previously, the only personal information relating to the member that had to be reflected on the schedules was the member's name, date of birth, date of membership and identity number. The following contact details are now required:

- Contact number, including cell phone number if available,
- Email address;
- Postal address;
- Residential address

#### Comment:

*These details will now be made available to insurers who operate large commercial umbrella funds. There is some risk that they may be used to contact members for marketing purposes.*

3.3 Complaints to the Office of the Pension Funds Adjudicator indicate that employers do not register all their employees with funds despite deducting contributions from their salaries. The Conduct Standard requires that when a schedule is provided by the employer to the fund, the employer must, at the same time, declare that all employees eligible to be members of the fund are accurately reflected in the minimum information that has been provided to the fund.

## 4. REPORTING REQUIREMENTS

### 4.1 Report one:

The person responsible for receiving contributions at the employer or the insurer must report to the monitoring person or the principal officer if either:

- a) any of the matters previously reported were not resolved;
- b) the contribution schedule data was not transmitted as required;
- c) the payment of contributions and the data in the contributions schedules cannot be reconciled with each other,

except if the discrepancy is less than 2,5% of the total contribution payable for the relevant period ("the allowable discrepancy"); or

- d) any contributions have not been received as required by the Act except for the allowable discrepancy.

### 4.2 Report two:

The Principal Officer or the monitoring person must, within seven days after the receipt of a report one, submit a written report to the board, in respect of every relevant employer, if the employer;

- a) has not provided the contribution statements or has not provided them on time;
- b) if previous non-compliance is still unresolved. ("S13A requirements").

This report two must include details of whether any of the matters previously reported on were not resolved; and any instance where contribution payments and the contribution statement cannot be reconciled with each other, except for the allowable discrepancy (2.5% of the total contribution payable).

### 4.3 Report three

The board must ensure that any material contravention of, or material failure to comply with Section 13A requirements is, within 30 days of the board being informed in writing of the failure by the monitoring person brought, in writing, to the personal attention of each affected member, or if the affected members cannot be identified, to the personal attention of all the members of the fund.

### 4.4 Report four

The board must then report the contravention to the FSCA, in a format to be prescribed by the FSCA. The prescribed format is Annexure B, which is on the FSCA website. The report must include the proposed course of action taken by the fund to remedy the contravention.

#### Note:

*Regulation 33 (4) required the board to ensure the monitoring person must bring the matter to the attention of only the affected members and the board then had to inform the FSCA.*



## 4.5 Report five

Any material contravention of, or material failure to comply with, the Section 13A requirements that continues for a period of 90 days must be reported by the board in writing and in sufficient detail to the South African Police Service ("the SAPS") within 14 days after the expiration of the 90-day period. The report must be made in the prescribed format set out in Annexure C which is in the form of an affidavit and must be certified by a Commissioner of Oaths but apparently is to be made by the Principal Officer or the monitoring person. The form is complex and requires the Principal Officer or monitoring person to state that the directors of the delinquent employer are personally liable for the contravention of Section 13A and to name these individuals in the statement. The FSCA must then be informed this action has been taken.

### Comment:

*Previously in terms of Regulation 33 (5), failure to comply with Section 13A requirements that continued for 90 days had to be reported by the monitoring person to the Attorney General. Presumably this was not an effective remedy. It will be interesting to see whether the SAPS will actually take any action against the directors named in the affidavit.*

## 4.6 Report six

The board of trustees are required to bring a contravention continuing for 90 days or more to the personal attention of the affected members or, where the affected members cannot be identified, all the members of the fund or all the members of the fund in respect of that participating employer, within 14 days after the expiration of the 90-day period.

## 5. INTEREST ON LATE PAYMENT OF CONTRIBUTIONS

5.1 **Calculation of interest** Compound interest on late payments or unpaid amounts must be:

- calculated from the first day of the month in respect of which the contributions became due until the date of receipt by the fund;
- may not exceed the prime rate plus two percent; and
- may not exceed the principal debt due in respect of the unpaid amounts, inclusive of all costs associated with the recovery of the unpaid amounts.

5.2 As is the case with the current Regulation 33 (7) late payment interest is regarded as investment income for the fund and must be payable to the fund by no later than the end of the second month following the month in respect of which the amount is payable, or the amount is transferable.

## 6. IF THE TRUSTEES DECIDE TO OUTSOURCE RECOVERY OF CONTRIBUTIONS

The Conduct Standard introduces the following requirements if the trustees decide to outsource the recovery of contributions:

- the trustees must ensure any conflict of interest is avoided;
- fees paid to an attorney must be reasonable;
- the trustees must enter into an agreement with the collecting attorney which provides at least for the following:

- any amount recovered by an attorney must be paid into the fund's bank account **within 7 days** of the amount being received;
- there must be specific reference on the fee structure;
- specific instruction on the steps the attorney must take if the employer fails to pay the arrear contributions on demand;
- anticipated timelines in respect of collecting all arrear contributions;
- frequency of reporting of the attorney to the fund on the status of payments made by the employer.

This requirement was not in Regulation 33.

### Comment:

*It is apparent that the Conduct Standard shifts several of the functions which were previously the responsibility of the monitoring person onto the board of trustees. Given the expanded reporting requirements, the requirement to draw up an agreement with an attorney who assists with recovery of contributions, and to monitor the activities of the attorney, compliance with the Conduct Standard will be onerous for trustees.*

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