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**UPDATE ON INDUSTRY ISSUES – FSCA REQUESTS
TO ATTEND TRUSTEE BOARD MEETINGS
AND
STATUS OF CONDUCT STANDARD ON PAYMENT OF
CONTRIBUTIONS**

In case you missed it...

6. [July 2022: Revised Regulation 28 of the Pension Funds Act - Finalised](#)
5. [May 2022: Case Law – Decisions affecting Retirement Funds](#)
4. [April 2022: FSCA Conduct Standard](#)
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. FSCA REQUESTS TO ATTEND TRUSTEE BOARD MEETINGS

Several retirement funds have recently received requests from the Financial Sector Conduct Authority (“FSCA”) to attend meetings of boards of trustees and their sub-committees. At present, it seems the FSCA are focusing on the top 100 funds but since they are currently expanding and up-skilling their staff, these requests may be extended to other free-standing and umbrella funds. In this publication we examine the effect of allowing the FSCA to attend meetings, the legality of their request to do so, POPIA considerations and also the consequences if the trustees refuse to allow the FSCA to attend.

1.1 Effect on Fund governance of FSCA presence at board meetings.

The duties imposed on boards of trustees in terms of current legislation and regulation are onerous. It is important that trustees are allowed to discuss and debate issues relevant to the well-being of fund members in an atmosphere of confidentiality and trust. Individual trustees should feel free to put forward their views on a particular matter without constraint and without being inhibited by the presence of an external party. Trustees are likely to be reluctant to participate in free debate in the presence of

the regulator, who in effect ‘police’ the retirement fund industry and have the power to remove a particular trustee from office. The FSCA have also indicated that they will write a report on the proceedings. It is possible that more of the business of the fund will be conducted via informal discussions among the trustees, outside of formal meetings, and by way of round robin resolution.

Having the FSCA attend trustee meetings is therefore likely to have a negative impact on fund governance.

1.2 Have the FSCA a legal right to attend board meetings?

The FSCA have very wide powers under the Financial Sector Regulation Act (“the FSR Act”) and the Pension Funds Act (“PF Act”). However, they exercise a public power and the exercise of any such power must comply with the Constitution. The FSCA are therefore constrained by the principle of legality and should not act (“ultra vires”) i.e. outside the powers conferred upon them by legislation. The FSR Act and the Financial Institutions (Protection of Funds) Act do not expressly empower the FSCA to attend trustee meetings. However, there are sections of Chapter 9 of the FSR Act which allow the FSCA to interact with retirement funds for the purposes of:

- *Information gathering. Section 131 (1) (a) and (2) (a) of the FSR Act allow the FSCA to request specified information or a particular document relevant to assisting the FSCA to perform its functions.*
- *Supervisory On-site Inspections. Section 132 (2) of the FSR Act allows the FSCA to conduct an investigation on the business premises of a financial institution. However, this can only be done for a specific purpose set out in the FSR Act – for example, to determine the extent of risk due to a contravention of a financial sector law or to check compliance with a directive or an enforceable undertaking.*



Moreover, the activities of the FSCA in the course of an inspection are restricted in terms of Section 132 (4) and these activities do not include the right to attend, observe and report on board meetings of the trustees.

- *Investigations. The FSCA have the right to conduct an investigation if the FSCA reasonably suspects that the Fund may have contravened a financial sector law or reasonably believes that an investigation is necessary to achieve the objects referred to in the FSR Act relating to bilateral or multilateral co-operation agreements. Again, there has to be a specific reason for an investigation and this does not include a general right to attend board meetings.*

It appears that none of the abovementioned sections of the FSR Act specifically empower the FSCA to attend trustee meetings and therefore there is no legal basis for this request.

1.3 POPIA concerns

The attendance of an observer from the FSCA at board meetings is a concern from the perspective of a retirement fund's obligation to comply with POPIA.

Much of the material discussed at board meetings, particularly at meetings held by the trustees to discuss death benefit claims, is of a sensitive and highly confidential nature.

The trustees may have the consent of the members and the beneficiaries to process such information in order for them to fulfil their fiduciary duties. However, the fund may not have consent to share personal information with an observer from the FSCA. The FSCA have stated that they intend to issue a report on the meeting – the retirement fund would have no control over the distribution of such a report and of the confidential information that could be contained in it.

1.4 What happens if the Fund says no to a request to attend trustee meetings from the FSCA?

A senior pension lawyer who acts as a trustee on several retirement fund boards has noted that in his experience, the consequence of a fund refusing to allow the FSCA to attend meetings was that the FSCA then promptly announced their intention to launch a full-scale inspection of the fund in terms of Section 132 of the FSR Act. It is possible to regard the FSCA's motivation in launching such an inspection as punitive, since it inevitably necessitated many hours of additional work in preparation.

Notwithstanding the above, it is preferable for retirement funds to maintain a cordial and co-operative relationship with the FSCA rather than to adopt a confrontational approach. If a fund has a particular problem, it may be useful for the fund to meet with the FSCA and discuss the issue with them. The FSCA can often be very helpful when presented with a specific problem and may offer a solution which will assist the fund in resolving the issue.

2. CONDUCT STANDARD ON PAYMENT OF PENSION FUND CONTRIBUTIONS (CONDUCT STANDARD 1 OF 2022)

Conduct Standard 1 of 2022 – Requirements Related to the Payment of Pension Fund Contributions (“the Conduct Standard”) was published on 19 August 2022. This means that it has been passed by Parliament. However, it is not yet effective. Paragraph 7 of the Conduct Standard says that it will become effective within 6 months of publication or “on a later date determined by the Authority by notice on its website”.

Since the Conduct Standard is intended to entirely replace Regulation 33 of the PF Act, it is critical that the repeal of Regulation 33, to be given effect to by National Treasury, coincides with the effective date of the Conduct Standard. The FSCA and National Treasury will work together to ensure the two processes are aligned.

It is therefore likely that the Conduct Standard will come into effect in February or March 2023 and by then funds will need to have their systems ready to provide the FSCA with the data required in the document. It is important to note that the information listed in the Conduct Standard has to be provided to the FSCA on a monthly basis. The document refers to the “initial” contribution statement but paragraph 3 (3) (a) of the Conduct Standard makes it clear that the same information has to be provided in subsequent contribution statements. For further information, please refer to Seshego Insights [Edition 9 of 2020](#) which discusses the draft Conduct Standard.

Should you have any questions regarding the above, please contact your consultant to assist you. The information in this document belongs to Seshego and may not be copied, distributed or modified without the express written permission of Seshego.