



Legislative Updates

Consumer Protection Act ("CPA")

The Consumer Protection Act ('CPA') became fully effective on 31 March 2011 and is likely to have a major impact on retirement funds. The CPA affects all transactions between funds, their members and their service providers. Funds and service providers are required to adapt their procedures and processes to take into account consumer protection principles.

To date it seems that exemption to be excluded from compliance with the CPA has not been applied for by the Registrar and therefore the CPA applies to retirement funds. The provisions of the Pension Funds Act would need to be amended to be brought in line with the CPA. At the moment, the industry is awaiting clarity from the Registrar on this matter.

The CPA currently applies to funds both in their capacity as 'consumers' and as 'suppliers'. Entities with assets or turnover in excess of R2 million have been excluded from the definition of consumer, so most retirement funds will fall into category of 'suppliers' as opposed to 'consumers'.

The CPA's Impact on Retirement Funds

Some important issues that Funds should ensure compliance with, are set out below:

- **Contracts:** all transactions between a fund on the one hand and service providers/members on the other hand, constitute a contract. The CPA requires that a consumer (fund members) must understand what they are purchasing and costs. Contracts must comply with a number of requirements.
- **Plain language:** fund rules; standard member documents and fund communication must be clear; easy to understand and must be in a language/level that takes into account the membership's education level. This will prove challenging, particularly in relation to Fund rules. Whether this means that fund documentation must be provided in the members' home languages, is not clear at this point in time.
- **Disclosure requirements:** any limitation of the supplier's (fund's) liability or risk; any indemnity required of the consumer (member) and any acknowledgement of fact by a consumer (member) must be in plain language and must be drawn to attention the consumer (member) in a conspicuous format
- **The plain language and disclosure requirements** extend to member benefit statements, section 14 transfers and member investment choices switches. A written record of all of these transactions must be provided to consumers (members) including specific details prescribed in the CPA

- All documents prepared by the supplier (fund) must be interpreted for the benefit of the consumer (member). This would include fund rules; standard documents such as benefit statements and complaints from members
- **Fund Benefits** cannot be discriminatory unless the discrimination benefits members or justifiable groups of members e.g. disabled members
- **Marketing Material** must not contain misleading information, misrepresentations or unsubstantiated claims. Members have the right to refuse marketing material; to opt out or to block any direct marketing at no cost to themselves. Funds must have clear rules on when members can be contacted
- Suppliers (funds) cannot require that consumers (members) waive any rights, assume any obligations or waive any of the supplier's (fund's) liabilities on terms that are unfair, unreasonable or unjust. This may impact on members' annuity options at retirement, as well as transfers to other funds / unclaimed benefit funds
- The CPA gives consumers (members) **the right to select suppliers**. This provision impacts on any fund limitations regarding annuity choices on retirement and possibly on member investment choices.

Draft regulations to the CPA have been issued, which are not yet effective.

Complaints and Forum Shopping

Consumers (members) may lodge complaints where their rights under the CPA have been infringed / threatened or where prohibited conduct has occurred. These consumer rights may be enforced through a number of forums including the Pension Funds Adjudicator. There is therefore a concern that this provision will result in forum shopping by consumers and members, leading to inconsistent rulings. There is also no requirement for a consumer (member) to exhaust a supplier's (fund's) internal complaint resolution mechanism first.

Penalties for Non-Compliance

Non compliance with an order of the National Consumer Commission or Tribunal may result in:

- Fines payable to the National Revenue Fund
- Compensation to the complaining consumer (member)
- Imprisonment of up to 12 months or as much as 10 years for a breach of confidence

Administrative penalties of up to 10% of a supplier's (fund's) turnover in the previous year or R1 million may be imposed by the National Consumer Tribunal.

This publication does not provide advice. If you have any questions / comments on the above, please contact your consultant.

SARS RF 1/2011: Conditions for Preservation Funds

Retirement Fund (RF) Notes issued by the SARS are binding on all funds, unlike General Notes (GN). On 1 March 2011 SARS issued RF 1/2011 which replaces RF1/98. RF 1/ 2011 has a retrospective effective date to 30 September 2010. This Note sets out additional conditions for pension preservation and in summary provides that:

Retirement Fund (RF) Notes issued by the SARS are binding on all funds, unlike General Notes (GN).

- Members who exit a pension fund before retirement can now take part of their pre-retirement withdrawal benefit in cash from their pension fund and transfer the balance to a pension preservation fund. They will also be allowed to take one cash withdrawal from that pension preservation fund, before retirement
- Benefits from a pension fund or a pension preservation fund cannot be split between a number of different pension preservation funds, when transferred. Benefits can now only be transferred to one pension preservation fund or one pension preservation fund plus one retirement annuity fund
- Transfers from preservation funds to retirement annuity funds are allowed. These transfers will not be treated as members' one cash withdrawal
- The rules of all pension preservation funds must be amended before 31 October 2011 to allow for the provisions of this Note, or their tax approval will be removed.

FSB Board Notice 61: Valuation Exemptions

On 25 March 2011, the FSB issued Board Notice 61 of 2011, dealing with valuation exemptions. The Board Notice applies to all valuation exemption applications submitted on or after 1 April 2011 and replaces Regulation 2 of the Pension Funds Act. The Pension Funds Act provides that all funds are required to appoint a valuator and submit a valuation to the Registrar every three years. In terms of the previous Regulation 2 to the Act, funds that met certain criteria were able to apply to be exempted from submitting a valuation every three years and from having a valuator. Such exemption applications were required to be submitted every three years.

New Valuation Exemption Requirements

The Board Notice stipulates that the application for valuation exemption is now to be made once (ie at the next application due after 1 April 2011) and will thereafter remain in force indefinitely. Under Regulation 2, only the valuator was required to submit a certificate to the Registrar. In terms of the Board Notice, the Valuator, the Trustees and the principal officer are required to sign the application for exemption.

The Board Notice sets out new criteria which may prevent funds from obtaining valuation exemption. Funds that have any of the following will not be exempt from valuation:

- A contingency reserve account which could ever have a negative balance, other than a processing error reserve account
- An investment reserve account
- Funds which have not complied with 15B of the Act (ie have not submitted a surplus scheme or a nil return to the Registrar) cannot be valuation exempt
- Unless the fund was previously exempt from valuation, the statutory valuation following the valuation at its surplus apportionment date has not been accepted by the Registrar.

In order to qualify for valuation exemption, the Board Notice provides that the fund's valuator must certify that the fund meets the following conditions:

- All members of the fund other than pensioners, are entitled to a defined contribution benefit
- There are no liabilities of the fund that exceed the value of the members' individual investment accounts or if there are, the excess is fully insured with registered insurers
- There are no pensions paid from the fund and that at retirement, pensions are fully secured through annuity policies purchased from a registered insurer
- All reserve accounts are provided for in the rules of the fund
- The value of the assets equal or exceed the value of the liabilities at individual member level and at fund level
- The fund's assets are appropriate, taking into consideration the liabilities of the fund (ie, the benefits payable)
- The method used to allocate returns to member's individual accounts is based on sound principles.

Reminder for Employers: Fringe Benefit Tax to Be Levied on Employer Policies

The Taxation Laws Amendment Act, 2010 provides that employer owned, unapproved Group Life Assurance (GLA); dread disease; income replacement (PHI) and key man policy premiums are all to be added to employees' taxable income and taxed as fringe benefits. The effective date of the above changes is 1 January 2011. However, the amendments apply for each employer from the start of the employer's new financial year commencing on or after 1 January 2011.

Approved vs Unapproved Group Life Assurance (GLA) Policies

Approved GLA policies are owned by the Fund and premiums paid by the employer are taxed in the same way as employer contributions paid to the Fund. Benefits payable under approved policies are taxed in the hands of Fund beneficiaries.

Unapproved GLA policies are employer owned. Premiums paid by the employer must be added to employees' taxable income and taxed as fringe benefits. Proceeds from unapproved GLA policies are tax free.