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Employment Law ALERT

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Proposed repeal of Regulation 33: Tightening the grip on employers who fail to make contributions to an employees' pension fund

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To ensure compliance with section 13A of the PFA, the principal officer of the fund, or any other person duly authorised by the board of trustees, is required to report the non-payment of contributions by an employer.

The non-payment of pension fund contributions has been a long-standing issue, which the Financial Sector Conduct Authority (FSCA) has attempted to address over the years through various initiatives, the latest being the proposed repeal of regulation 33 made in terms of section 36 of the PFA (Regulation 33). Once repealed, Regulation 33 is to be replaced by Conduct Standard 1 of 22: Requirements Related to the Payment of Pension Fund Contributions, issued under the Financial Sector Regulation Act, 2017 (Conduct Standard).

On 29 May 2020, the FSCA published a draft notice proposing the repeal of Regulation 33, for public comment, which was to be replaced by the Conduct Standard and on 19 August 2022. The FSCA issued a discussion paper on issues regarding the non-payment of pension fund contributions by employer and how the Conduct Standard seeks to address this. In the paper, the FSCA identified various shortcomings in respect of Regulation 33; the main objective of the Conduct Standard is to implement the necessary improvements to address these shortcomings.

On 22 November 2022, National Treasury published a notice inviting the public to submit comments on the proposed repeal within seven days from date of publication of the notice.



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Shortcoming of Regulation 33

The purpose of Regulation 33 is to support the implementation of section 13A of the PFA and set requirements relating to the payment of contributions by employers to pension funds.

The FSCA has been monitoring the implementation of Regulation 33 and has identified that there is a need to standardise the manner and format of reporting by principal officers and authorised persons, and boards of funds, insofar as it relates to various matters falling within the ambit of section 13A of the PFA and Regulation 33. It further identified that boards of trustees outsource their responsibility to recover outstanding contributions from an employer to an attorney or third party, which practice the FSCA has found to be undesirable. This is because, it has found that

in many instances, attorneys make use of their trust accounts and would therefore earn interest on the amounts they recovered from an employer on behalf of a fund, whilst the amounts recovered are in the possession of the attorney. Often the funds so recovered are not paid over to the fund in a timely manner, potentially with the objective of maximising interest earned on such funds. There were various instances identified where a fund has not provided any instructions to the attorney regarding what action the attorney should take when dealing with employers that refuse to pay outstanding contributions. The lack of instruction and clear agreement on processes between the fund and attorney often results in delays in taking appropriate action to address outstanding contributions. In some instances, actual or potential conflicts

of interests and/or exorbitant fee arrangements exist where the recovery function is outsourced to an attorney.

Conduct Standard proposed amendments

The Conduct Standard is intended to replace Regulation 33 by providing for the following changes that are not adequately addressed and dealt with in Regulation 33:

- the minimum information to be furnished to a fund by an employer, with regards to payments of contributions made by an employer in terms of section 13A of the PFA;
- set a standard format in which a fund must inform a participating employer of its duties and obligations under section 13A of the PFA;



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- set out the format in which a request by a fund to an employer, as referred to in section 13A(9) of the PFA, must be made;
- prescribe the manner and format of reporting and notification by principal officers of pension funds or any other authorised persons and boards of a fund as referred to in section 13A(6) of the Act to the board of a fund regarding compliance with, or non-compliance with, the provisions of sections 13A(2)(b) and 13A(3)(a) of the PFA by an employer;
- set requirements for a board a fund, and participating employers, when the board of a fund outsources the collection of outstanding contributions to attorneys; and
- the rate of interest payable on arrear contributions.

The Conduct Standard is set to take effect on 20 February 2023, and will likely play an important role in safeguarding the financial interest of members whose employers fail to comply with their statutory obligations and in particular the non-payment of their pension fund contributions.

**Imraan Mahomed and
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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