

FSCA COMMUNICATION 31 OF 2022 (RF)

Publication of draft Notice proposing an exemption of funds from the conditions in Board Notice 75 of 2009, to qualify for exemption from Section 28 of the Pension Funds Act, for public consultation

1. Purpose

The purpose of this Communication is to inform stakeholders that today the Financial Sector Conduct Authority (the Authority) published for public comment on its website a draft notice proposing to exempt certain funds, in terms section 281(1) of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017) (FSR Act), from having to meet the conditions set out in paragraphs 9.2(a) and 9.2(b) of Board Notice 75 of 2009 (the Board Notice), as published in *Government Gazette* 23238 of 8 June 2009 under section 28(17) of the Pension Funds Act, 1956 (PF Act).

2. Background and applicable legislation

- 2.1 The purpose of section 28(17) of the PF Act and the Board Notice is to provide for a more cost effective and speedy liquidation of small funds. Section 28(17) of the PF Act empowers the Authority to prescribe the circumstances under which a fund may be exempted from the provisions of section 28 and requires the Authority to prescribe the requirements to be complied with for such exemption to be granted.
- 2.2 On 8 June 2009, the then Registrar of Pension Funds issued the Board Notice. The Board Notice sets out requirements in respect of the information that the Authority will require from a fund and/or liquidator in exercising powers and functions under section 28 of the PF Act.
- 2.3 Paragraph 9 of the Board Notice deals with the requirements of an application under section 28(17) for exemption from the provisions of section 28 of the PF Act. It prescribes the format and requirements that funds need to comply with in order to qualify for the exemption. In terms of Paragraph 9.2(a) of the Board Notice, the Authority will only consider applications for exemption from the provisions of section 28 of the PF Act where, on the date that the fund takes a resolution to liquidate or partially liquidate the fund due to withdrawal of a participating employer, the average benefit per member is less than R50 000.
- 2.4 Further to this, in terms of Paragraph 9.2(b) of the Board Notice, the Authority will only consider applications for exemption from the provisions of section 28 of the PF Act where, on the date that the fund takes a resolution to liquidate or partially liquidate the fund due to withdrawal of a participating employer, the fund or the relevant participating employer withdrawing does not have more than 50 members.
- 2.5 In addition, section 281(1) of the FSR Act states that the Authority may, in writing and with the concurrence of the other financial sector regulator – being the Prudential Authority - exempt any person or class of persons from a specified provision of the financial sector law, unless it considers that granting the exemption —

- (a) will be contrary to the public interest; or
- (b) may prejudice the achievement of the objects of a financial sector law.

2.6 Section 281(2) of the Act states that section 281(1) of the Act applies to the granting of exemptions if a financial sector law does not provide a power to grant exemptions. The Board Notice is a financial sector law and does not specifically provide for a power to exempt a fund from a requirement contained in the Board Notice.

3. Rationale informing the proposed exemption

3.1 The Authority has been receiving applications for funds to be exempted from section 28 of the PF ACT, but these funds are not able to comply with some of the conditions contained in Paragraph 9 of the Board Notice. They consequently applied for the same exemption in terms of section 281(1) of the FSR Act.

3.2 The challenge with the current conditions in Paragraph 9 of the Board Notice is that, in certain instances, large income and therefore benefit disparities can result in the average benefit being skewed and overstated. In addition, many small participating employers facing financial distress during economic downturns cannot afford to continue with their employer contributions, resulting in termination of their participation in funds. Under such circumstances, members may be better served by applying for exemption from the full liquidation process. The process to amend section 28 of the PF Act and the Board Notice is underway to ensure members are treated fairly by reducing the red tape in the current liquidation process.

3.3 The benefits and challenges of a full liquidation process versus those of a liquidation exemption are tabulated hereunder.

	Full Liquidation Process	Liquidation Exemption Process
1.	<ul style="list-style-type: none"> • Members have the right to inspect the preliminary liquidation & distribution (L&D) accounts and lodge a complaint with the liquidator, which complaint must be investigated. • A single complaint, however, can delay the entire liquidation process if the matter goes to the Financial Service Tribunal (FST) and / or court. 	<ul style="list-style-type: none"> • Members have the right to lodge a complaint with their fund and then the Office of the Pension Funds Adjudicator (OPFA), if dissatisfied with the withdrawal benefit to be paid <i>in lieu</i> of a liquidation benefit. • A complaint lodged with the OPFA in terms of section 30A will not ordinarily prevent other members from being paid their withdrawal benefits in the fund.
2.	<ul style="list-style-type: none"> • On average the liquidation process in terms of section 28 of the PF Act is a more time-consuming process to allow for 30 days for the advertising and inspection of the L&D accounts and a further 14 days for investigation of complaints. It allows for all stakeholders to be considered in the winding down process. 	<ul style="list-style-type: none"> • The termination of a fund in terms of section 27 of the PF Act, where small participating employers who can no longer afford to contribute to the fund or where members have lost their jobs, is quicker than a full liquidation process, insofar as it relates to paying out withdrawal benefits quickly. • The registered rules of the fund protect each member's minimum benefit.
3.	<ul style="list-style-type: none"> • The costs associated with a liquidation tends to be higher than the termination fees contained in the administration agreement. 	<ul style="list-style-type: none"> • The termination fees tend to be lower than liquidation fees, which are prescribed in the Board Notice.

	Currently there is no regulatory cap on the liquidator's fees, although the Authority supervises the liquidation process through section 28A of the PF Act and Board Notice 75 of 2009.	
4.	<ul style="list-style-type: none"> A liquidation benefit is subject to tax laws as set by SARS. A tax directive is sought before any payments are made. 	<ul style="list-style-type: none"> A withdrawal benefit is also subject to tax laws as set by SARS. A tax directive is also sought before any payments are made.
5.	<ul style="list-style-type: none"> The fund or participating employer in the fund will be cancelled through section 28 of the PF Act and after the final L&D accounts have been approved by the Authority. 	<ul style="list-style-type: none"> The fund or participating employer in the fund will be terminated through section 27 of the PF Act, where the Authority is satisfied that there are no assets, liabilities and members remaining.

3.4 As a result, the Authority is intending to exempt funds, under section 281(1) of the FSR Act, from the requirements of paragraphs 9.2(a) and 9.2(b) of the Board Notice, to enable an efficient process, on the following conditions:

- (a) That on the date that the fund takes a resolution to liquidate or partially liquidate the fund due to withdrawal of a participating employer, the fund or the relevant participating employer does not have more than 100 members; and
- (b) that all remaining requirements and conditions in the Board Notice, and specifically paragraphs 9.2(c), 9.2(d) and 9.3, are complied with.

3.5 Should a fund wish to apply for an exemption in terms of section 28 of the PF Act, they will still be required to submit their application in the format set out in Form D of the Board Notice, together with their request for the liquidation exemption to be considered in light of the exemption of funds from the conditions in the Board Notice. As part of the exemption application, the fund will be required to confirm compliance with the remaining subparagraphs of paragraph 9 and show that the fund does not have more than 100 members, or the members allocated to a relevant participating employer withdrawing does not exceed 100 members.

3.6 The Authority will consider such section 28(17) exemption applications on an individual case basis depending on the circumstances of each fund or participating employer in the fund; for example, whether there are arrear contributions or unclaimed benefits, or whether a full section 28 liquidation is in the best interest of members.

3.7 The proposed exemption will in the view of the Authority be in the public interest and continue to give effect to the objects of section 28(17) of the PF Act and the Board Notice.

4. Invitation to comment on the draft Notice

4.1 In the above context, the Authority publishes for public consultation a draft Notice proposing the Exemption of funds from the conditions in the Board Notice, to qualify for an exemption from section 28 of the PF Act.

4.2 The draft Notice and comments template are available on the Authority's website at www.fsca.co.za.

4.3 Interested parties are invited to submit comments on the draft amendment using the Comments Template published with the draft Notice, in Word format, on or before **14 December 2022** to FSCA.RFDstandards@fsca.co.za.

4. Enquiries

For further information regarding this Communication please contact the Regulatory Framework Department of the FSCA by emailing Roslynne van Wyk at roslynne.vanwyk@fsc.co.za.



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