

Retirement Matters 4/2024



The two-pot retirement system update

- **Legislation**

To implement the two-pot retirement system, three pieces of legislation must be finalised.

1. The 2024 Revenue Laws Amendment Act (RLAA)

The Revenue Laws Amendment Act, 12 of 2024 has been promulgated on 4 June 2024. This Act provides legislative amendments to the Income Tax Act.

2. The 2024 Draft Revenue Laws Second Amendment Bill

This Bill addresses further technical corrections to the Income Tax Act, in addition to the RLAA. A second version of the Bill will be published for public comment, and once all issues have been resolved, tabled before Parliament. Fund administrators are in a difficult position as certain provisions of the RLAA and the 2024 Draft Revenue Laws Second Amendment Bill do not align, and it is uncertain whether the draft Bill will be promulgated before 1 September 2024.

3. The 2024 Pension Funds Amendment Bill

The Bill, which proposes amendments to the Pension Funds Act, has been tabled before Parliament, but has not been promulgated yet. The Bill ensures that new definitions to reflect the different components, as set out in the Income Tax Act, are introduced in the Pension Funds Act.

- **Taxation**

- Arrear tax

It has been confirmed by SARS that IT88's (also known as AA88 third party appointment notification) will be issued and arrear tax will be deducted from savings withdrawal benefits from the savings pot. SARS has committed to inform the public about this in their communication campaign.

What is an IT88?

Section 179 of the Taxation Administration Act empowers SARS to issue a collection notice called an AA88 third party appointment notification. This notice essentially instructs a third party to withhold and pay over any amounts due to SARS. The third party can be an employer, a retirement fund or any other person who has 'the management, custody or control of any income, monies or property of the taxpayer' (for instance a bank). This means that if a person does not respond to any of the notices or demands informing them of outstanding tax debts, SARS may appoint a third party who

holds money on their behalf or owes them money, including salary, wages, and other types of remuneration, to pay the outstanding amounts to SARS. Failure by a third-party appointment to act, may lead to that third party being held personally liable for the tax debt and they can also be found guilty of an offence. If convicted, the person is subject to a fine or to imprisonment for not longer than two years.

- Cancellation of tax directives

Once a member has elected to take a savings withdrawal benefit, the administrator of the fund will apply for a tax directive. Such a directive cannot be cancelled. Members will therefore need to understand the tax consequences of a savings withdrawal and be aware that their choice to make a savings withdrawal cannot be reversed.

- **Section 14 transfers**

- New section 14 forms

Draft amendments to Conduct Standard 1 of 2019 (the section 14 Conduct Standard) were published on 8 May 2024. It proposes to remove the section 14 application forms from the section 14 Conduct Standard, to enable the FSCA to determine the manner of submission, content, and format of the section 14 application forms. The intention is to, once the draft amendments to the section 14 Conduct Standard take effect, determine the section 14 application forms separately by notice on the FSCA's website.

The current section 14 application forms do allow for the transfer value in relation to the two-pot retirement system. The forms only allow for a single transfer value, whereas the implementation of the two-pot system will require the transfer value to be differentiated in three parts in the forms. The FSCA issued FSCA Communication 21 of 2024 containing the amended draft forms to be determined in terms of the section 14 Conduct Standard and clarification on the treatment of section 14 transfers during the transition to the two-pot system. Interested parties are invited to provide comments on the new forms by 31 July 2024.

- Clarification on the treatment of section 14 transfers with the implementation of the two-pot system

The issue for clarification is how funds and administrators must treat section 14 transfers over the period of transitioning to the two-pot system in instances where a transfer is still in process on 1 September 2024, and for new transfers as of 1 September 2024. Clarification is required in relation to:

- (a) the seed capital allocation;
- (b) payment of savings withdrawal benefits; and
- (c) allocation of transfer values across the various components.

Any fund that holds member assets as at 1 September 2024 must calculate the seed capital for all members, irrespective of the status of the transfer. The transferor fund will not in all circumstances have to pay savings withdrawal benefits. However, the membership schedules provided to the transferee fund on transfer of the assets must show the value in the transferor fund at 1 September 2024, and the calculation of the seed capital.

When the two-pot system comes into effect on 1 September 2024, there may be instances where a section 14 transfer is not yet finalised. Below are tables of scenarios from the FSCA on how funds and administrators must give effect to the requirements in the two-pot system before the transfer is finalised.

A **retrospective transfer** is a transfer where the number of members and the amounts are known at the effective date of the section 14 application.

Retrospective Transfers				
Scenario	Status of S14 (1) Application	Seed Capital	Savings Component	Withdrawal from Savings Component
1	Not approved on 1 September 2024	Calculated from transfer value by transferor fund as at 1 September 2024	Established from transfer value by transferor fund at 1 September 2024	Withdrawal is payable by transferor fund
2	Approved before 1 September 2024, and transfer value not yet transferred on 1 September 2024	Calculated from transfer value by transferor fund as at 1 September 2024	Established from transfer value by transferor fund at 1 September 2024	Withdrawal is payable by the transferee fund only
3	Approved after 1 September 2024, and transfer value not yet transferred	Calculated from transfer value by transferor fund as at 1 September 2024	Established from transfer value by transferor fund at 1 September 2024	Withdrawal is payable by the transferee fund only

A **section 14(8) transfer** is a transfer where an application need not be submitted to the FSCA, for instance where both funds are valuation exempt.

Section 14(8) Transfers				
Scenario	Status of S14 (8) Application	Seed Capital	Savings Component	Withdrawal from Savings Component
1	Transfer value is transferred before 1 September 2024	Not calculated for transfer value transferred before 1 September 2024	Not established for transfer value transferred before 1 September 2024	Not applicable
2	Transfer value is not yet transferred on 1 September 2024	Calculated from transfer value by transferor fund at 1 September 2024	Established from transfer value by transferor fund at 1 September 2024	Withdrawal is payable by transferor fund

A **prospective transfer** is a transfer where the number of members and amounts are not known at the date of the section 14 application (also known as a blanket transfer).

Prospective Transfers					
Scenario	Blanket Period	Status of S14 Application	Seed Capital	Savings Component	Withdrawal from Savings Component
1	Full blanket period is before 1 September 2024	Preliminary approval is granted before 1 September 2024	Not calculated for transfer values transferred before 1 September 2024	Not established for transfer values transferred before 1 September 2024	Not applicable
2	First part of the period is before 1 September 2024	Preliminary approval is granted before 1 September 2024	Not calculated for transfer values transferred before 1 September 2024	Not established for transfer values transferred before 1 September 2024	Not applicable
	Second part of the period is after 1 September 2024	Preliminary approval is granted before 1 September 2024	Calculated from transfer value by transferor fund at 1 September 2024	Established from transfer value by transferor fund at 1 September 2024	Withdrawal is payable by transferor fund
3	First part of the period is before 1 September 2024	Preliminary approval is granted after 1 September 2024	Calculated from transfer value by transferor fund at 1 September 2024	Established from transfer value by transferor fund at 1 September 2024	Withdrawal is payable by transferor fund
	Second part of the period is after 1 September 2024	Preliminary approval is granted after 1 September 2024	Calculated from transfer value by transferor fund at 1 September 2024	Established from transfer value by transferor fund at 1 September 2024	Withdrawal is payable by transferor fund

Marriage and divorce

• Divorce Amendment Act

The Divorce Act of 1979 was amended through the Divorce Amendment Act, 1 of 2024 on 14 May 2024. The amendments provide for a definition of a Muslim marriage; the protection and safeguarding of the interests of dependent and minor children of a Muslim marriage; the redistribution of assets on the dissolution of a Muslim marriage and forfeiture of patrimonial benefits of a Muslim marriage. This means that Muslim marriages can be dissolved by a court order, just like any other marriage and that courts may make orders regarding maintenance, custody and access to children from Muslim marriages.

It is important to keep in mind that section 7(8) of the Divorce Act stipulates that the court granting a decree of divorce in respect of a member of a pension fund, may make an order that any part of the pension interest of the member which is due or assigned to the other party to the divorce action concerned, must be paid by that fund to that other party.

The non-member has no automatic right to any part of the member's pension interest against a fund and no payment can be made unless a court has ordered the fund to pay a part of the pension interest to the non-member spouse.

• Marriage Bill

South Africa does not have a harmonised system of marriage. Family law has developed in a fragmented manner by way of the Marriage Act, the Recognition of Customary Marriages Act and the Civil Union Acts. Amendments to the Marriage

Act is contained in the Marriage Bill, which has not been promulgated yet. This Bill was submitted to the National Assembly on 13 December 2023. Once the Bill is enacted, it intends to bring the different types of marriages under the Marriage Act. It will provide for the following:

- recognition of marriages;
- the requirements for monogamous and polygamous marriages;
- designation of marriage officers;
- solemnisation and registration of marriages;
- proprietary consequences and the dissolution of marriages;
- offences and penalties; and
- any matters incidental thereto.

The current marriage statutes still deprive certain cultural and religious communities from concluding legally recognised marriages. This includes Islamic and Hindu marriages, customary marriages concluded in some African communities and marriages of transgender persons.

The new Marriage Act will enable South Africans of different sexual orientation, and religious and cultural persuasions to conclude legal marriages that align to the doctrine of equality as encapsulated in the Constitution.

The purpose of the Marriage Bill is to rationalise the marriage laws pertaining to the various types of marriages, it is for the recognition of marriages entered into by spouses regardless of the religious, cultural, sex, gender, sexual orientation, or any other belief.

In the retirement funds landscape, the Bill may bring about consequences for divorces, death benefits, and maintenance orders.

Joint Standard 2 of 2024 – Cybersecurity and Cyber Resilience Requirements

The final Joint Standard on Cybersecurity and Cyber Resilience was published by the FSCA on 17 May 2024. It sets out the minimum requirements for sound practices and processes of cyber security and cyber resilience for various financial institutions, including retirement funds and retirement fund administrators.

Cyber risk is broadly defined as the risk of loss, disruption or damage to a fund or its members because of the failure of its information technology systems and processes. Cyber risk includes risks to information, assets as well as internal risk (from fund officers and staff of service providers) and external risk (hacking).

The Joint Standard will commence on 1 June 2025. Notwithstanding the fact that the Joint Standard will likely take effect after 12 months, the FSCA urges the industry to prepare for its implementation.

International Pension & Employee Benefits Lawyer Association (IPEBLA) Conference

The 19th Biannual IPEBLA Conference, *Adapting to change: Ensuring retirement security in a dynamic and uncertain world*, was held in June 2024. There are shared concerns across the globe in respect of the retirement funds industry, including coverage/auto-enrolment, access to retirement savings when in financial distress, lost participants (unclaimed benefits), and financial literacy. Equally there are also similar priorities across jurisdictions in respect of legislative developments to address climate change and sustainable finance, privacy and data protection and cybersecurity. The South African Regulatory framework,

including the adoption of the Twin Peaks model, as well as the various initiatives and priorities of our financial regulators and policymakers aligns with what is taking place in other countries.

The challenge in respect of coverage and retirement savings is a concern across several jurisdictions, who already have auto-enrolment in place and with some jurisdictions introducing auto-enrolment legislation for the first time. In South Africa, National Treasury has indicated that policy research and engagement will continue about auto-enrolment and mandatory enrolment in retirement funds, to address the challenge on how to expand the participation and coverage in retirement savings. These proposals build on National Treasury's December 2021 paper entitled *Encouraging South African Households to Save More for Retirement*.

The cost-of-living crisis is being experienced globally and several jurisdictions are considering access to retirement savings when in financial distress, including the United Kingdom and United States. In South Africa, with the introduction of the Two-pot Retirement System, this system is meant to support long-term retirement savings while offering flexibility to help fund members in financial distress. With the introduction of the 'savings withdrawal benefit', fund members in times of financial difficulty will be allowed access to the savings component before retirement.

Lost participants (unclaimed benefits) are also receiving focus, as is seen with the establishment of the Retirement Savings Lost and Found database in the US. The key challenge is maintaining up to date contact details of former fund members. The concerns and challenges with unclaimed benefits in the South African retirement funds industry has been ongoing for several years and the FSCA's Unclaimed Benefits search engine has been in place since 2017. The most recent update is the FSCA's Response Document to the *2022 Discussion Paper on a Framework for Unclaimed Financial Assets in South Africa*, which includes prioritising the tracing of members of high impact retirement fund and product providers, as well as support for the establishment of a central unclaimed retirement benefit fund.

Q&A

What are the implications should a member of the board of management not complete the FSCA Trustee Toolkit?

The completion of the Trustee Toolkit is a requirement in section 7A(3) of the Pension Funds Act. FSCA Communication 25 of 2023 states: *The importance of trustee training and trustees having appropriate levels of skills are recognised and codified in S7A(3) of the Act which provides that board members elected or appointed to a fund must attain such levels of skills and training as may be prescribed by the FSCA, within six months from the date of their appointment. Board members are, in turn, required to retain the prescribed levels of skills and training throughout their term of appointment. To this end, the FSCA issued FSCA Conduct Standard 4 of 2020 on 10 July 2020, which prescribed minimum skills and training requirements for board members of retirement funds. In terms of paragraph 3(6) of Conduct Standard 4 of 2020, the FSCA may add more modules to the TTK, the completion of which is mandatory for all board members.*

Non-compliance is therefore a contravention of the Pension Funds Act. At the launch of the second phase of the new toolkit on 28 March 2024, the FSCA emphasised that completion of the toolkit by all board members is the responsibility of the entire board. The FSCA will take regulatory action for non-compliance through various instruments for instance they will consider removal of board members, imposing of administrative penalties for failure to complete and enforceable undertakings. It is the duty of the fund's principal officer to report non-compliance to the FSCA.