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Legal update 11 / 2011

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Consumer Protection Act – Exemption for the Pension Funds Industry

The Consumer Protection Act, 2008 (“the Act”) was previously discussed in Legal Updates 9/2009, 9/2010, 2/2011 and 8/2011. In these updates a summary of the Act was provided as well the applicability of certain sections to Momentum (“the Administrator” approved in terms of Section 13B of the Pension Funds Act, 1956) and the FundsAtWork Umbrella Pension and Provident Funds (“the Funds”).

Notice 533 issued in Government Gazette 34400 dated 27 June 2011 provides that the Pension Funds industry regulated under the Pensions Funds Act has been exempted from certain provisions of the Act from 1 April 2011 to 30 September 2012. This means that the Administrator and the Funds now have until 30 September 2012 to ensure that they comply with all the provisions of the Act.

Sections of the Act that are exempted

The exemption for the industry applies to 64 sections of the Act. The exempted sections are listed in Annexure A.

In this document we only deal with those sections that impact significantly on the Administrator and the Funds.

Right to information in plain and understandable language (Section 22)

Regarding retirement funds, there are already various sections in the Pension Funds Act and Pension Fund (PF) Circulars that make provision for the above requirement. Section 7D(c) of the Pension Funds Act says that trustees are required to ensure that adequate and appropriate information is communicated to members and beneficiaries. This relates to suitable information which places the members and beneficiaries in a position to make an informed decision. PF Circulars 86 and 90 provide guidelines to funds regarding the minimum information to be disclosed.

We must ensure that all communication intended for our clients is drafted in plain and understandable language. This section provides that *“an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort”*. It is not clear whether this means that the consumer’s home language must be used. If this is indeed the intention, it could have expensive consequences for the Funds whose rules and member communication may have to be translated into several languages.

Section 93 of the Act provides that the National Consumer Commission may develop and promote the voluntary use of codes of practice for the use of plain language in documents. Hopefully such codes of practice will provide some clarity. Regulation 41 to the Act provides that the official languages to be used by the Commission in any documents are English and Zulu.

Disclosure of price of goods or services (Section 23)

The Administrator already complies with this section as fees and expenses are disclosed in the tender document in compliance with the Financial Advisory and Intermediary Services (“FAIS”) Act. Further costs are also reflected in benefit statements to members.

Sales records (Section 26)

This section provides that a supplier of goods and services must provide a written record of each transaction to the consumer to whom any goods or services are supplied. It lists different kinds of information that must be provided, for example the date on which the transaction took place, the name or description of the goods or services supplied and the total price of the transaction including any applicable taxes.

When a new scheme is installed, the employer receives copies of the General Rules of the Fund and the Special Rules and policy documents applicable to that employer. Members are provided with member guides and benefit statements. The information that needs to be provided under Section 26(3) of the Act is reflected in one or more of these documents.

When there are changes to benefits, a copy of the revised Special Rules and / or policies are forwarded to the employer for their records. Such changes are however not communicated to members and members may only become aware of the changes when they receive their next benefit statements or when they claim a benefit. This process is currently being reviewed by the Administrator. It has been recommended that a letter detailing the changes is sent to the employer for distribution to members.

Unfair, unreasonable or unjust contract terms (Section 48)

The rules of the Fund and policies of insurance make up the agreements between the member, the employer and the Fund.

The rules must be in line with the requirements as set out in Regulation 30 to the Pension Funds Act for it to be registered by the Registrar of Pension Funds. The Funds’ Rules have been registered and approved by the necessary authorities.

The policies of insurance are also in line with industry standards.

Regulation 44 to the Act sets out the contract terms that are considered to be unfair and unreasonable and rules and policies of insurance must be carefully tested against this.

Notice required for certain terms and conditions (Section 49)

This section may apply if we look at the notice period for claims as set out in the policy documents. Although the policy requires the policyholder (which is the employer) to notify the insurer (Momentum) of any claims within a specified time period, it is ultimately the member who suffers if a claim is rejected due to a late submission.

A copy of the policy is sent to the employer and members may not necessarily be given copies. We may therefore need to communicate such notice periods to members and this will be included in the member guide.

Written consumer agreements (Section 50)

All agreements between the Fund and its clients are in writing.

Consumer's rights to demand quality service (Section 54)

A consumer is entitled to performance of the service in a manner and quality that is "generally" expected. Although this is somewhat vague about the service to be expected, trustees of funds are advised to check their service level agreements with service providers such as the administrator to ensure that they are satisfied with the set standards. This section also entitles the consumer (members, pensioners and beneficiaries) to claim a reasonable portion of the price paid for a service if they are dissatisfied with such service.

To avoid such a claim, the Administrator should ensure for example that all turnaround times in the service level agreements are met.

Penalties and fines (Sections 111 and 112)

Consumer rights may be enforced through a number of forums for example the National Consumer Tribunal, Consumer Court, National Consumer Commission or a competent court with jurisdiction.

Non-compliance with an order of the Tribunal or Commission may result in a fine payable to the National Revenue Fund or imprisonment. Separate compensation may be paid to the consumer who complained.

Administrative fines of up to 10% of a supplier's turnover in the preceding year or R1 000 000 may be imposed by the Tribunal.

Sections of the Act not exempted

Most of the sections of the Act that apply to the Administrator and the Funds have been exempted until 30 September 2012. One of the sections which have not been exempted and which requires further discussion is Section 11.

Right to restrict unwanted direct marketing (Section 11)

This section expands on a person's right to privacy and provides that a person can refuse to accept, require another person to discontinue or pre-emptively block any communication for the purposes of direct marketing.

The Act provides for a registry to be established where a person may register a pre-emptive block against any communication that is primarily for the purpose of direct marketing. It requires any person who is involved in direct marketing to be in a position to access the registry and not deliver any communication for the purposes of direct marketing to a person who has made a demand or put a pre-emptive block on the registry.

This section may be relevant to the Administrator where we provide members' information to other business units for marketing purposes. Further, the Administrator must ensure that they have access to this registry.

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Annexure

- S 4: Realisation of consumer rights
- S 8: Protection against discriminatory marketing
- S 14: Expiry and renewal of fixed-term agreements
- S 19: Consumer's rights with respect to delivery of goods or supply of service
- S 21: Unsolicited goods or services
- S 22: Right to information in plain and understandable language
- S 23: Disclosure of price of goods or services
- S 26: Sales records
- S 27: Disclosure by intermediaries
- S 28: Identification of deliverers, installers and others
- S 29: General standards for marketing of goods or services
- S 32: Direct marketing to consumers
- S 38: Referral selling
- S 39: Agreements with persons lacking legal capacity
- S 40: Unconscionable conduct
- S 41: False, misleading or deceptive representations
- S 42: Fraudulent schemes and offers
- S 48: Unfair, unreasonable or unjust contract terms
- S 49: Notice required for certain terms and conditions;
- S 50: Written consumer agreements
- S 51: Prohibited transactions, agreements, terms or conditions
- S 54: Consumer's rights to demand quality service
- S 64: Prepaid services and access to service facilities
- S 65: Supplier to hold and account for consumer's property
- S 68: Protection of consumer rights
- S 69: Enforcement of rights by consumer
- S 70: Alternative dispute resolution
- S 71: Initiating complaint to Commission
- S 72: Investigation by Commission
- S 73: Outcome of investigation
- S 74: Consent orders
- S 75: Referral to Tribunal
- S 76: Powers of court to enforce consumer rights
- S 79: Identification of supplier
- Chapter 3: Protection of Consumer Rights and Consumer's Voice (sections 68 – 78)
- Chapter 6: Enforcement of the Act (sections 99 – 119)