

The principal officer of a retirement fund must be independent

The Financial Sector Conduct Authority (“FSCA”) issued Communication 7 of 2019 in December 2019 to inform the retirement fund industry of its approach to address the current practice of principal officers of funds simultaneously being employed by the fund’s sponsor or any of the fund’s service providers.

What is the approach adopted by the FSCA?

The FSCA is of the view that the principal officer of a fund owes a fiduciary duty to the fund and should therefore avoid conflicts of interest in much the same way as expected from a board member in terms of the Pension Funds Act. This view was confirmed in Directive 8 (issued by the FSCA in March 2018) which provides that principal officers are not permitted to accept any *gratification* which objectively viewed creates a conflict of interest with their fiduciary duty towards the fund in which they serve. Gratification is defined in Directive 8 as including “*any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity...*”. The Communication provides that as such, the simultaneous employment of the principal officer by a service provider is impermissible and is also undesirable as the principal officer’s ability to comply with his or her duty to report on the activities of such service provider is likely to be impaired by virtue of his or her employment relationship with the service provider. To ensure a principal officer’s independence, such person should therefore not be in receipt of any type of prohibited gratification.

What action will be taken by the FSCA to enforce their approach?

Although a communication document issued by the FSCA does not have any legal standing, the approach set out by the FSCA in this Communication is based on the provisions of Directive 8 and a directive issued by the FSCA is legally binding. It could therefore be argued that this Communication has legal standing and that funds and their principal officers are legally bound to adhere to its provisions. There is however uncertainty and difference of opinion in the industry in this regard.

Funds (and their principal officers) that have been identified by the FSCA as being in breach of the relevant provisions of Directive 8, will have to enter into an Enforceable Undertaking with the FSCA. This Enforceable Undertaking will set-out what actions the fund will take to bring it into compliance with regards to the appointment of its principal officer within a period of 6 months. An Enforceable Undertaking is a written undertaking given by a fund or person to the FSCA about their future conduct with regards to a certain issue - if the undertaking is accepted by the FSCA, it becomes an Enforceable Undertaking which is published on the FSCA’s website.

What is the approach adopted by the FundsAtWork Umbrella Funds?

The approach adopted by the FundsAtWork Umbrella Funds since 2007 is in line with the view of the FSCA in that the principal officer of the FundsAtWork Umbrella Funds is not an employee of the sponsor and is remunerated directly by the FundsAtWork Umbrella Funds.

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