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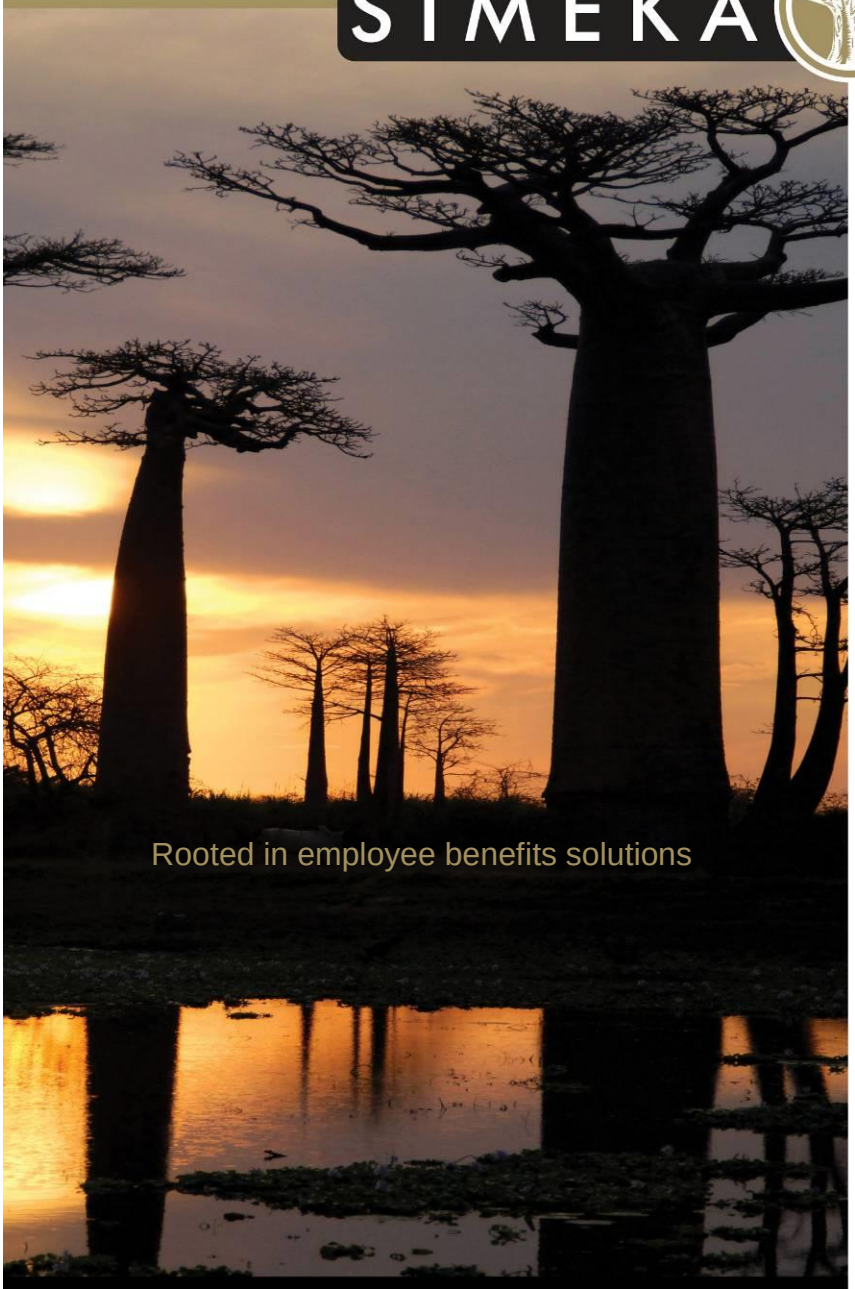

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Retirement Fund Update

October 2013

An authorised financial services provider

EDITOR:
Kobus Hanekom
Head: Strategy, Governance and Compliance
Tel: +27 21 912 3311
Email: kobus@simekaconsult.co.za

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1 The Financial Services Board (FSB): Legislation and Circulars

1.1 Directive PF No. 7: Revised financial statements

In this directive (issued on 3 May 2013 and published in the Government Gazette on 10 May 2013) the Registrar advised that it intends to publish new prescribed annual financial statements during May 2013. The revised format had not been published as at date of publication. In the directive, funds are requested to use the revised format.

To ensure that all 2013 statements are in the revised electronic format, the Registrar granted an extension to funds with financial year-ends at the end of January, February, March or April 2013. These funds have until 30 November 2013 to submit their financial statements.

Observation: *We have however been informed by the FSB that audits in respect of January – May 2013 year-end financials that have commenced prior to the issue of Directive 7, will be accepted in the current prescribed format. The FSB system has been adjusted to accommodate both the old and new format for January 2013 to May 2013 year-ends. The new format has been published on the FSB's website.*

1.2 Exemption of investment administrators from section 13B of the Pension Funds Act

Section 13B of the Pension Funds Act, 1956 provides that all investment administrators must apply for and obtain approval from the Registrar of Pension Funds ('Registrar') and must comply with the conditions imposed by the Registrar from time to time. In Circular 5 of 2013 the Registrar of Pension Funds noted the following:

1. Investment administrators are already regulated by the Financial Advisory and Intermediary Services Act, 2002 ('FAIS').
2. Section 45(1) of FAIS makes it clear that the legislature never intended for providers of a category of financial services to be subject to regulation, in terms of more than one piece of legislation.
3. FAIS is "the more appropriate statute" in terms of which investment administrators should be regulated and supervised.

It has been proposed in the Financial Services Law General Amendment Bill (which is currently before Parliament) that the reference to investment administrators be removed from section 13B(1). As a result of the above, the Registrar has exempted investment administrators from the provisions of section 13B(1), effective immediately.

Observation*: These requirements will not have any direct impact on retirement funds, other than the need to confirm that its asset managers are properly licenced in terms of the FAIS Act.*

1.3 Progress on Financial Services Laws General Amendment Bill (Omnibus Bill)

The above-mentioned Bill will amend the Pension Funds Act in a number of ways as previously discussed. Progress has however been very slow.

Observation: *Public hearings were concluded on 24 April 2013. After the Standing Committee on Finance (SCOF) received National Treasury's response to the public hearings recently, certain changes to the Bill were agreed upon. Further deliberation on the Bill will be held in Parliament within the near future.*

1.4 PFA determination in Affirm Marketing v IF Umbrella Pension and Provident Fund

In this determination the adjudicator held four trustees liable in their personal capacity for around R20 million on account of the maladministration of the IF Umbrella Pension and Provident Funds.

It would appear that the trustees terminated the services of the administrator and requested a firm of auditors to reconstruct the member records. The trustees instituted action against the administrator in order to recover the losses but came up short. They were only able to secure a settlement payment of R1 million from the administrator. In the interim the reconstruction process ran up an account of R20 million. The trustees recovered the costs on a pro rata basis from the members, who questioned the deduction. The adjudicator concluded that the rules did not authorise such an expense and held the four trustees personally liable for the amount.

Observation*: This is the second case in which the Pension Funds Adjudicator has held trustees liable in their personal capacities for losses suffered by a fund. Claims of this nature are typically covered by the Professional Indemnity Insurance secured by the fund and should therefore protect the trustees against errors and omissions of this nature. To add insult to injury, however, it appears that the trustees allowed the fund insurance to lapse.*

It is essential that when a trustee resolution is recorded going forward, it states clearly which trustees voted in favour, who voted against and who abstained. This will assist trustees to protect themselves from personal liability in respect of decisions they did not support. This notion is developed further by the proposed new section 7F contained in the Financial Services Laws General Amendment Bill, 2012 which provides as follows -

> "**Liability of board member**
> **7F.** (1) In any proceedings against a board member in terms of this Act, other than for wilful misconduct or wilful breach of trust, the court may relieve the board member from any liability, either wholly or partly, on terms that the court considers just, if it appears to the court that—
> *(a)* the board member has acted independently, honestly and reasonably; or
> *(b)* having regard to all the circumstances of the case, including those connected with the appointment of the board member, it would be fair to excuse the board member."

The reason for the inclusion of the new section, according to the explanatory memorandum, is to provide that a board member, who acted independently, honestly, and reasonably, in accordance with the board member's fiduciary duties, may potentially be relieved from joint and several liability by a court. This underscores that where board members do not act in accordance with their duties, they will be jointly and severally liable for the actions of the board.

2 Retirement Reform

Two discussion papers were published during 2013. The first was a paper entitled "Retirement reform proposals for further consultation" published on 27 February with the 2013 Budget. Many of the tax proposals are contained in the draft *Taxation Laws Amendment Bill 2013*, discussed below.

The second, entitled "Charges in South African retirement funds" (perhaps better known as the "Cost paper"), was published on 11 July 2013 for comment by 30 September 2013. The stated goal of this paper was not to propose any particular approach. It was intended to facilitate engagement with retirement funds, service providers and other stakeholders, as well as to promote public consultations on how the charges of retirement funds can be reduced during the accumulation phase. Following this, National Treasury envisaged that firmer policy proposals will be developed, leading to draft legislation, which will enter the parliamentary process in late 2014.

***Comment**: We discussed the key themes and proposals in a newsflash on 17 September 2013.*

3 Draft Taxation Laws Amendment Bill 2013

T-Day was at first proposed to be 1 March 2015 but indications are that it may possibly be postponed to 1 March 2016. From this date the new tax deductions for individual taxpayers will become effective.

P-Day is still subject to negotiations with trade unions and other stakeholders. The compulsory preservation measures have therefore not been incorporated in the draft Bill.

3.1 The key changes to be implemented in respect of T-day are:

- Tax harmonisation measures will become effective from T-day and an individual taxpayer will be able to deduct employer and own contributions to a pension fund, provident fund or retirement annuity fund up to 27.5% of 'remuneration' or 'taxable income' (excluding retirement lump sums), whichever is greater.
- Special formulas will be used to calculate the employer contributions to defined-benefit and hybrid retirement funds.
- The total deduction will be subject to a cap of R350 000 per year.

- Contributions in excess of this amount may be rolled over to future years when the rand cap is not reached. Amounts not rolled over can be added to the tax-free lump sum at retirement.
- All employer contributions and premiums payable in respect of group life or disability insurance will be taxed in the hands of the member as a fringe benefit. This is already the position in respect of group life and lump sum disability insurance policies and will now be extended to disability income and severe illness policies. Members will in turn be able to deduct the retirement fund contributions as set out above.

3.2 Provident funds

- Any new contributions made to a provident fund from T-day onward (and growth thereon) will be subject to the same annuitisation rules as pension funds, namely that at least two-thirds of the savings must be used to purchase a pension at retirement.
- To protect historic vested rights.
- Balances in provident funds as at 1 March 2015 (and any subsequent growth thereon) need not be annuitised.
- If a provident fund member is 55 years of age or older as at 1 March 2015, the mandatory annuitisation requirements will not apply to contributions made (nor any growth thereon) if the member remains in the same provident fund until retirement. Indications are that the latter requirement (i.e. same fund) will be relaxed.

3.3 Fund-to-fund transfers

- This protection will apply irrespective of whether the retirement interest remains in the provident fund or whether the retirement interest is transferred to another retirement or preservation fund. Stated differently, a member of a retirement or preservation fund need not annuitise any contributions made to a provident fund prior to 1 March 2015 (together with any growth on those contributions).
- The provident fund must provide the split between the pre-1 March 2015 contributions (and related growth) vis-à-vis the post-1 March 2015 contributions (and related growth) for this split to be recognised by the transferee fund. All other funds inheriting these split accounts must similarly retain this split for record-keeping purposes.
- De minimis exception.
- The current threshold for the de minimis exception (R75 000) will be doubled to R150 000 for all retirement funds. As a result, every member may receive their entire retirement interest in the form of a lump sum, as long as the portion of the member's retirement interest that is subject to mandatory annuitisation (i.e. the two-thirds amount) does not exceed R100 000.
- Free portability between retirement funds e.g. pension funds to provident funds.

- Due to the alignment of the mandatory annuitisation requirements between all retirement and preservation funds, the transfer of retirement savings to provident and provident preservation funds from other funds will henceforth be free from tax in all instances (e.g. pension funds can be transferred to provident funds).

3.4 Alignment of the Tax Treatment of Disability Income (Individual – Based) Policies

- From 1 March 2014 premiums paid by natural persons in respect of life, disability and severe illness policies (including disability income benefits) will no longer be deductible (even if the policies are aimed at income protection). All pay-outs on life, disability and severe illness policies will be tax-free, irrespective of whether the payout takes the form of a lump sum or an annuity.
- Where employers pay such premiums (notably group life and group disability income benefits), they will be deductible for the employer if the premiums are taxed as a fringe benefit in the hands of employees. Employees will be taxed on the premium as no subsequent deductions will be available and as a result the policy pay-outs will be tax-free.
- There will be no transitional period for current policy holders.

***Comment**: In the latest round of report-back hearings of the Standing Committee on Finance (SCOF) on 11 September 2013, National Treasury agreed that the renegotiation of income protection policies will be administratively difficult and could possibly not be achieved in a short period of time. As a result, the implementation of the proposal will probably be delayed by a year to allow an additional period of time for employers and employees to renegotiate their income protection policies.*

4 Protection of Personal Information Bill

The Protection of Personal Information Bill ('POPI') was passed by Parliament on 20 August 2013, but still has to be signed into law by the President. Given that the enactment of POPI is imminent, a brief summary prepared by Jeanri de Souza, legal adviser at Sanlam Employee Benefits of the most important provisions is set out below.

The legislation will apply to both public and private bodies, i.e. including retirement funds, administrators, etc. There will be a transitional period of one year, where after full compliance with the legislation will be required. POPI will seek to protect personal information which is subjected to processing. Personal information is defined as all information relating to an identifiable, living natural person and where applicable, an existing juristic person (who is referred to in POPI as the data subject). This includes information relating to marital status, education, criminal history, fingerprints, personal opinions/views/preferences, email addresses etc. The definition for processing is equally wide and is any operation or activity or any set of operations, whether or not by automatic means, concerning personal information. This includes collection, receipt, recording, organisation, collation, storage, updating and use of the information.

POPI sets out the following conditions for lawful processing:

1. Accountability

   The body that determines the purpose of and means for processing personal information is referred to as the responsible party. The responsible party must ensure that conditions are complied with at the time when the purpose and means of processing is determined, and during the processing itself.

2. Processing limitation

   Processing must be lawful, be done in a reasonable manner (that does not infringe the privacy of the data subject) and must not be excessive (regarding the purpose of the processing).

   Processing may only take place with the consent of the data subject, unless it:

   - is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is a party
   - complies with an obligation placed on the responsible party by law
   - protects a legitimate interest of the data subject
   - is necessary for the proper performance of a public duty by a public body
   - is necessary for pursing the legitimate interests of the responsible party or of a third party to whom the information is supplied.

   Personal information must be collected from the data subject, subject to certain exceptions (such as where the data subject has provided consent or the information is in the public domain).

3. Purpose specification

   Personal information must be collected for a specific, explicitly defined and lawful purpose which is related to a function or activity of the responsible party.

   Records of personal information must not be retained any longer than is necessary for achieving the purpose for which it was collected or subsequently processed, subject to certain exceptions (for example it is required or authorised by law or the data subject has consented).

   In certain instances a restriction must be placed on the processing of personal information, (e.g. if the data subject contests the accuracy of the information).

4. Further processing limitation

   Further processing of personal information must be in accordance or compatible with the purpose for which it was collected (taking into account, amongst others, the nature of the information, the consequences for the data subject and the manner in which the information was collected.

5. Information quality

A responsible party must take reasonably practicable steps to ensure that the personal information is complete, accurate, not misleading and updated where necessary (regarding the purpose for which the personal information is collected or further processed).

6. Openness

A responsible party must maintain documentation of all processing operations under its responsibility.

If personal information is collected, the responsible party must (subject to a few exceptions) take reasonably practicable steps to ensure that the data subject is aware of the information being collected, the source, the name and address of the responsible party, the purpose of the collection, the rights of the data subject etc.

7. Security safeguards

The responsible party must ensure the security and confidentiality of the personal information by taking appropriate, reasonable, technical and organisational measures to prevent its loss, damage, unauthorised destruction, unlawful access and unlawful processing.

Reasonable measures must be taken to identify all foreseeable internal and external risks, establish and maintain appropriate safeguards against these risks, regularly verify that the safeguards are effectively implemented and ensure they are continually updated in response to new risks or deficiencies in previously implemented safeguards.

The responsible party must have due regard to generally accepted information security practices and procedures which may apply generally or which may be required in terms of specific industry or professional rules and regulations.

If a responsible party appoints an operator (defined as a person who processes personal information for a responsible party in terms of a contract or mandate, without coming under the direct authority of that party), the responsible party must ensure that certain security safeguards are in place. For example, a written contract must be entered into between the responsible party and the operator to ensure that the operator establishes and maintains the prescribed security measures.

Where there are reasonable grounds to believe that the personal information of a data subject has been accessed or acquired by any unauthorised person, the responsible party must notify the Information Regulator and the data subject (unless it is determined that the notification will impede a criminal investigation) as soon as possible.

8. Data subject participation

   A data subject (who has provided proof of identity) has the right to request a responsible party to confirm whether or not it holds personal information about the data subject (free of charge).

   The data subject also has the right, upon payment of prescribed fee, to request from a responsible party the record or a description of the personal information held, as well as the identity of third parties who have access to the information. This must be provided within a reasonable time and in a reasonable manner and format which is generally understandable.

   A data subject may request a responsible party to correct or delete personal information that is inaccurate, irrelevant, excessive, out of date, incomplete, misleading or obtained unlawfully. The data subject may also request a responsible party to destroy or delete a record of personal information that the responsible part is no longer authorised to retain. On receipt of such a request, a responsible party must correct the information, destroy or delete the information, provide the data subject with credible evidence in support of the information or, where agreement cannot be reached, take such steps as are reasonable in the circumstances to attach to the information an indication that a correction of the information has been requested, but has not been made. In the event that a responsible party took the steps above and it resulted in a change to the information and such changed information impacts on decisions that have been or will be taken in respect of the data subject, the responsible party must inform each person, body, responsible party to whom the personal information has been disclosed of those steps.

In addition to the above conditions of processing, POPI will also deal with the processing of special personal information (such as religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life), the personal information of a child and the cross-border flow of information. It will also give rise to a new regulatory body (Information Regulator) which will (amongst other things) issue codes of conduct, monitor and enforce compliance with POPI (by means of issuing enforcement and infringement notices and fines) and handle complaints.

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