

## Promulgation of Twin Peaks legislation: Financial Sector Regulation Act, 2017

The Financial Sector Regulation Act No. 9 of 2017 (the “Act”) was promulgated on 22 August 2017. This Act makes the “Twin Peaks” structure, law. The purpose of the Act is to achieve a stable financial system and a regulatory and supervisory framework that promotes key principles and objectives. A list of financial sector laws is set out in the Act and includes the Pension Funds Act, Banks Act and Financial Advisory and Intermediary Services Act.

### A. Reminder on the basic “Twin Peaks” structure

#### 1. Financial Sector Conduct Authority (“FSCA”):

The FSCA replaces the Financial Services Board (“FSB”). It is a regulatory body within the ambit of the Financial Intelligence Centre. The FSCA regulates and supervises the conduct of financial institutions. The objectives of the FSCA include:

- Promoting the fair treatment of financial customers by financial institutions
- Providing financial customers and potential financial customers with financial education programs
- Promoting financial literacy.

The head of the FSCA will be known as the Commissioner and there will be between 2 and 4 deputy Commissioners appointed. They will form the Executive Committee of the FSCA and are responsible for the management and administration of the FSCA.

#### 2. Prudential Authority (“PA”):

The PA is a regulatory body within the administration of the South African Reserve Bank (“SARB”). Some of the objectives of the PA include:

- ▶ Promoting and enhancing the safety and soundness of financial institutions which provide financial products and securities services
- ▶ Protecting financial customers against the risk that they may fail to meet their obligations; and
- ▶ Assisting in maintaining financial stability.

The FSCA and PA must co-operate with and assist other regulators such as the Council for Medical Schemes, Competition Commission and the National Credit Regulator (“NCR”) on matters of mutual interest, as the Act requires.

Each financial sector regulator may establish an administrative action committee to make recommendations to their regulator. The Act sets out the procedure to be followed in issuing any new regulatory instruments, including publication and consultation processes. Furthermore, there are extensive topics that instruments may deal with, as set out in the Act.

### B. Further important regulatory organs

#### 1. Financial Services Tribunal (the “Tribunal”)

- ▶ The Tribunal replaces the FSB Appeal Board and reconsiders decisions made by a regulator, the Ombud Council, a statutory Ombud or a licensed financial services provider
- ▶ The Tribunal’s order can be made an order of court, with the same effect as a civil judgment

- ▶ Any party that is unhappy with a Tribunal’s decision may take the matter to the High Court
- ▶ When a decision is required to be reconsidered, the Minister of Finance will appoint the Tribunal members, which will include 2 retired judges and 2 financial services experts
- ▶ The Act sets out the timeframes and procedures to be followed to refer a decision to the Tribunal, including the right to receive reasons for any decision made by a decision-maker.

## 2. Ombud Council (the “Council”)

- ▶ The Council will ensure that financial customers have access to affordable, effective, independent and fair dispute resolution processes for complaints against financial institutions, about their products or services
- ▶ The Council has similar powers as a regulator, but specifically in relation to ombud schemes
- ▶ The Council will perform various functions including recognising industry ombud schemes, promoting co-operation between ombuds, resolving jurisdictional overlap between ombuds, setting rules for ombud schemes and monitoring the performance of ombuds
- ▶ The Council will be managed by the Ombud Board. The head of the Council will be the Chief Ombud, who will be responsible for the management of the Council. A meeting of all ombuds must be convened by the Chief Ombud at least 4 times a year
- ▶ The Council can issue directives, go to court, debar persons, issue administrative penalties, request information and perform inspections and investigations
- ▶ The Council will establish a call centre to assist customers in formulating complaints and identify the appropriate ombud scheme for complaints.

## 3. Financial System Council of Regulators (“FSCR”)

- ▶ The Act establishes the FSCR to co-operate and collaborate, and where appropriate decide on the consistency of action between the financial sector regulators (such as the PA, FSCA, FIC and NCR) and the SARB
- ▶ The FSCR must collaborate with financial sector regulators, when performing their functions in terms of financial sector laws, the NCR and the Financial Intelligence Centre Act.

## 4. Further new authorities and committees

- ▶ The Financial Stability Oversight Committee: supports the SARB to ensure financial stability. It is made up of representatives from the SARB, Government and other regulators
- ▶ The Financial Sector Contingency Forum: assists the Financial Stability Oversight Committee to identify and mitigate systemic risks
- ▶ Financial Sector Inter-Ministerial Council: facilitates co-operation between cabinet ministers who are responsible for financial sector legislation.

## C. Regulation and enforcement measures

### 1. Licences

- ▶ The Act sets out licensing requirements for financial products and financial services providers
- ▶ If there is no specific financial sector law that provides for such licence, the licence will be issued in terms of the Act
- ▶ Licences in force before the Act, will remain in force.

### 2. Guidance notices, interpretation rulings and directives

- ▶ The Act provides for financial sector regulators (including the PA and the FSCA) to issue guidance notices, directives in certain instances and interpretation rulings, as well as non-binding guidance notices on the application of the financial sector laws
- ▶ Financial sector regulators are authorised to institute legal proceedings to enforce compliance with a financial sector law. They are also authorised to make orders debarring a person for not complying with financial sector laws.

### 3. Information gathering, supervisory on-site inspections and investigations

- ▶ The FSCA can request information or documents from funds and administrators, in writing. This request must be relevant to help the FSCA perform its functions or to assess risks of non-compliance or contraventions of the PFA
- ▶ On-site inspections may take place, after prior notification to the entity
- ▶ The Act sets out conditions relating to an inspection and the FSCA may appoint an investigator to carry out such inspections
- ▶ The FSCA should have a reasonable suspicion that a contravention has occurred or may occur in order to launch an investigation. The Act sets out in detail the powers of investigators to question individuals and require fund documents to be produced
- ▶ An investigator can enter premises with prior consent (but without a warrant, under certain circumstances)
- ▶ The Act sets out conditions under which any search of premises may be conducted. No one may intentionally or negligently interfere with an investigation.

## D. Offences and penalties

- ▶ The Act sets out offences and penalties that may be imposed for contravention of certain provisions in the Act, as well as administrative penalties
- ▶ A penalty cannot be imposed on a person where criminal proceedings against that person, for the same set of facts, has already commenced
- ▶ A court must take into account any penalty that has been imposed for the same set of facts, when setting the sentence of a person convicted of an offence under a financial sector law
- ▶ Except under certain specific circumstances, a person will not be allowed to indemnify or compensate another person for payment made or liability that is incurred by the other person, in respect of a

penalty imposed on the other person. For example, a financial services provider cannot compensate an employee for a penalty imposed on that employee

- ▶ There are various types of penalties depending on the nature of the contravention, eg:
  - Institutions acting without a licence: a fine of up to R15 million or imprisonment of up to 10 years, or both
  - Institutions failing to report, as required under the Act: R5,000 for every day that the offence continues. The Act does not put a cap on this amount
  - Failing to publish or disclose a licence: penalty of R50 000
  - Not meeting the requirements of an inspection or investigation: fines of between R1 -R5 million (depending on the offence) and imprisonment in some cases
  - Non-compliance with an enforcement order: R15 million fine or imprisonment of up to 10 years, or both
- ▶ Fines are furthermore set out for regulators, if they fail to comply with the Act.

## E. Transitional arrangements

- ▶ The PA's power to ensure financial soundness will be delegated to the FSCA in respect of retirement funds, for a 3 year period
- ▶ The FSB's assets, liabilities and staff will be transferred to the FSCA
- ▶ Inspections and investigations currently being undertaken by the FSB will be continued by the FSCA
- ▶ The FSB Appeal Board and Enforcement Committee will cease to exist. However, pending matters will be finalised by the FSB Appeal Board
- ▶ In respect of court cases that are already underway which involve the FSB, the FSCA will be substituted for the FSB
- ▶ The Minister of Finance may issue Regulations, which may also clarify transitional arrangements.

### Appointment of Mr Olano Makhubela as acting Deputy Executive Officer for Retirement Funds

In October 2017, the Minister of Finance appointed a current member of the FSB Board and the National Treasury, Mr Olano Makhubela, to fill the vacant position of Deputy Executive Officer of Retirement Funds (in an acting capacity). Mr Makhubela's primary task is to assist the FSB's executive team to fulfil their mandate, during the transitional period.

## F. Changes to the Pension Funds Act

The introduction of this Act has resulted in changes being required to many other pieces of legislation, including the Pension Funds Act. These include:

- ▶ A fund could be financially unsound, as determined by a prudential standard
- ▶ Housing loans issued by funds will be subject to prudential standards
- ▶ The FSCA may issue a directive to a fund, requiring the rules relating to trustees to be amended, in certain circumstances
- ▶ The Pension Funds Adjudicator will become a statutory ombud.

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