



Financial Sector
Conduct Authority

Directive 8, Whistleblowing & Enforcement Actions

RFSD Workshop – Guidance for Trustees

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Topics to be covered

1. Directive 8
2. Whistleblowing (Protected Disclosures)
3. Enforcement Actions (FSR Act)





Directive 8

Overview

- **Prohibition on Acceptance of Gratification** - issued on 8 March 2018.
- Prescribes **conditions** to combat and prevent **corruption** and **corrupt activities** in the retirement fund industry.
- Defines **gratification** and specifies the types of gratification which are **automatically prohibited**.
- Places a **reporting obligation** on role players in retirement funds.





Directive 8

General Principle

Officials of and services providers to retirement funds should not be involved in any conduct constituting corruption or corrupt activities. Any such involvement will have a bearing on such persons' fitness and propriety to hold office and/or provide a service.



Directive 8

Who does it apply to?

- **Board member;**
- Principal Officer;
- Deputy Principal Officer;
- Employee of a Retirement Fund;
- Any other Officer of a Retirement Fund;
- Auditor;
- Valuator;
- Administrator (and its Employees); and
- Service Provider or Potential Future Service Provider.



Directive 8

What constitutes corruption and corrupt activities?

- **Corruption** - defined in section 3 of **Prevention and Combating of Corrupt Activities Act, 2004 (PRECCAA)** as amended from time to time.
 - Unduly influencing someone to act in a certain way – abuse of power – to achieve an unjust outcome.
- **Corrupt Activities** - listed in Part 2 of Chapter 2 of PRECCAA as amended from time to time.
 - includes bribery, fraud, anti-competitive behaviour, extortion, etc.



Directive 8

What is gratification?

- Defined in Directive 8 and **modified from PRECCAA** to be applicable to the retirement funds;
- Examples of gratification:
 - Money, whether cash or otherwise;
 - Gifts;
 - Property or interest in property (moveable or immoveable);
 - Office or employment;
 - Residential or holiday accommodation; and
 - Valuable consideration or benefit of any kind.
- Excludes remuneration paid by a sponsor of a retirement fund to a board member appointed by the sponsor.



Directive 8

Gratification that is automatically prohibited

- Any gratification which **objectively** viewed, creates a **conflict of interest**;
 - **Token gift/s** that exceed the annual limit set by the board in terms of a fund's gift policy but shall not be more than **R500.00 per annum in aggregate from any one service provider**;
 - Any gratification relating to local or international **due diligences** including, but not limited to, **subsistence, travel** and **accommodation**;
 - Any gratification relating to local or international **entertainment** or **sporting events** including, but not limited to, **subsistence, travel** and **accommodation**; and
 - **Conferencing costs** or **board of fund expenses**.
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Directive 8

Reporting Requirements

Directive PF No. 8

Breach or attempted breach must be immediately reported to FSCA – **Information Circular No. 1 of 2018**

Prevention and Combating of Corrupt Activities Act (PRECCAA)

Offences involving **R100,000.00** or more must be reported to the **Directorate for Priority Crime Investigation** (also report to FSCA)

Pension Funds Act, 24 of 1956:

Section 7A(4)(b) – Board Members, Section 8(6)(b) – Principal Officer, Section 9(4)(c) – Auditor,
Section 9A(2) – Valuator and Section 13B(10) - Administrator





Directive 8

Guidance Notice No. 2 of 2018

- **Practical guidance** on the interpretation and implementation of Directive 8 and to **address enquiries** received by the FSCA. This **does not replace Directive 8** and where there is any practical inconsistency between the guidance notice and Directive 8, **preference must be given to the provisions of Directive 8**.
 - As far as is reasonably possible, **a retirement fund should bear its own expenses** unless circumstances dictate otherwise and **objectively viewed no conflict of interest** is created. **Substance will take precedence over form** in all such cases.
 - If **uncertainty** on whether a particular practice is compliant with the provisions of Directive 8 then **such a practice should preferably be avoided**.
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Directive 8

Practical Example - Scenario 1:

XYZ Administrators (Pty) Ltd (“XYZ”) are the benefit administrators of ABC Provident Fund (“the fund”) for almost a decade.

As a token of XYZ’s appreciation for its ongoing business with the fund, they offer the board members two tickets each to an upcoming music concert in Johannesburg. The value of each ticket is R200,00.

The board members accept the tickets as the fund’s gift policy has an annual limit of R750,00 per service provider.

Is there a breach of Directive 8 in the above scenario?



Directive 8

Answer - Scenario 1:

Yes, there is breach of Directive 8.

- i. The concerts tickets are gratification that is automatically prohibited in terms of **section 4.1(d)** of Directive 8 as it constitutes an entertainment event, regardless of the amount.
- ii. The fund's gift policy is also contravention of **section 4.1(b)** of Directive 8 as it allows for an annual limit of more than R500.00.
- iii. Also refer to **section 3.4** of Guidance Notice 2 of 2018.





Directive 8

Practical Example - Scenario 2:

XYZ Investments (Pty) Ltd (“XYZ”) is an investment manager of ABC Pension Fund (“the fund”).

XYZ invited the investment sub-committee members of the fund to inspect properties that the fund has invested in Ghana as part of a due diligence exercise.

In order to save the fund and its members costs, XYZ paid for the accommodation and airfare for the due diligence trip.

Is there a breach of Directive 8 in the above scenario?





Directive 8

Answer - Scenario 2 :

Yes, there is breach of Directive 8.

- i. The payment of the travel and accommodation costs of the due diligence trip by a service provider is automatically prohibited in terms of **section 4.1(c)** of Directive 8.
- ii. Also refer to **section 3.6** of Guidance Notice 2 of 2018.





Directive 8

Practical Example - Scenario 3:

Mr Soap is the principal officer of the ABC Retirement Fund (“the fund”).

The fund is owed R13 million in arrear contributions and Mr Soap has intimate knowledge of the administration of the fund and the Pension Funds Act. Mr Soap is also a director of XYZ Attorneys Incorporated (“XYZ”), who were recently appointed to the fund in order to assist with the recovery of arrear contributions. The lawyer handling the fund’s account is Mr Shampoo, Mr Soap’s partner.

Within 3 months of their appointment, XYZ assisted the fund with the recovering almost R3 million of arrear contributions.

Is there a breach of Directive 8 in the above scenario?



Directive 8

Answer - Scenario 3:

Yes, there is breach of Directive 8.

- i. Mr Soap's directorship in XYZ constitutes gratification which objectively viewed creates a conflict of interest, in contravention of **section 4.1(a)** of Directive 8.
- ii. Also refer to **section 3.8.4** of Guidance Notice 2 of 2018.

NOTE: The board of the fund also failed to avoid a conflict of interest, **which could have reasonably been avoided**, by appointing XYZ as service providers to the fund, in contravention of **section 7C(2)(c)** of the Pension Funds Act.





Whistleblowing

Section 7A(4)(b) of PFA

- Section 7C of the Pension Funds Act, 1956 (“the PFA”) provides that the object of a board shall be to **direct, control and oversee the operations of a fund** in accordance with the applicable laws and the rules of the fund. In pursuing its object, the board shall *inter alia*:
 - **ensure that the interest of members are protected at all times;**
 - **act with due care, diligence and good faith; and**
 - **act independently.**
 - Section 7A(4)(b) of the PFA places a **responsibility on a board member** to inform the FSCA in writing on becoming aware of **any material matter relating to the affairs of the fund** which, in the opinion of the board member, may seriously **prejudice the financial viability** of the fund or its **members.**
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Whistleblowing

Section 9B of the PFA (Protected Disclosures)

- The FSCA must provide for **process for the submission of disclosures** by a board member, principal officer, deputy principal officer, valuator or other officer or employee of a fund or an administrator, which ensures **appropriate confidentiality** and provides appropriate **measures for the protection of disclosures**;
- A disclosure made a by a board member to the FSCA in terms of section 9B constitutes a **protected disclosure**;
- Such board member **may not suffer** any occupational or other detriment;
- Section 9B(3)(b) provides **remedies** for a board member who suffered detriment for submission of a protected disclosure to the FSCA.



Whistleblowing

Remedies in terms of Section 9B(3)(b)

Section 9B(3)(b) provides any person referred to in paragraph (a) who suffers **any detriment**, including occupational detriment as defined in the Protected Disclosures Act, may:

- seek the remedies provided for in **section 4 of the Protected Disclosures Act**, where occupational detriment has been suffered;
- approach any **court having jurisdiction** for appropriate relief; or
- pursue any **other process** and seek any **remedy provided for in law**.



Whistleblowing

Section 253 of the FSR Act

- Section 253(1) of the FSR Act provides that **a person** may report to the following to FSCA:
 - **financial difficulties or suspected financial difficulties** in a financial institution;
 - a **contravention or suspected contravention** of a financial sector law in relation to a financial institution;
 - the **involvement or suspected involvement** of a financial institution of **a financial crime**.
- Section 253(2) provides that unless the report was made in **bad faith**, a person who makes the report is not:
 - **criminally liable** for making the report;
 - liable for compensation or **damages** to any person in relation to a loss caused by the report.





Whistleblowing

Information Circular No. 1 of 2018

E-mail: FSB.PDisclosure@fsb.co.za

Post: Financial Sector Conduct Authority
Protected Disclosures
P.O. Box 35655
Menlo Park
PRETORIA
0081

Hand Delivery: Financial Sector Conduct Authority
Protected Disclosures
Riverwalk Office Park, Block B
41 Matroosberg Road
Ashlea Gardens
PRETORIA

- **Anonymous Tip-Offs:** FSCA Website (link on bottom right of webpage)



Enforcement Actions

Chapter 10 of FSR Act

Chapter 10 of the Financial Sector Regulation Act, 2017 (“FSR Act”) provides for the following regulatory remedies:

- Guidance Notices and Interpretation Rulings (Sections 141 and 142)
- Directives by the Prudential Authority (Section 143)
- **Directives by the FSCA (Section 144)**
- **Enforceable Undertakings (Section 151)**
- Court Orders (Section 152)
- **Debarment (Section 153)**
- Leniency Agreements (Section 156)





Enforcement Actions

Directives (Section 144) – Purpose / Aim of a Directive (subsection 3)

A Directive must be aimed at achieving the objective of the FSCA set out in section 57 and to:

- stop **the financial institution** or the **directed person** from contravening applicable financial sector laws, or reducing the risk of such contraventions;
 - ensure that the financial institution or directed person complies with an **Enforceable Undertaking**;
 - stop the financial institution or the directed person from being involved in **financial crime**, and **reducing the risk** that it may be so involved;
 - reduce the **risk that a systemic event** may occur; or
 - **remedy** the effects of a contravention of a financial law or the person's involvement in a financial crime.
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Enforcement Actions

Directives (Section 144) – Directives to a Financial Institution (subsection 1)

The FSCA may issue a written Directive to a financial institution (includes a **retirement fund**) to take action specified if it:

- conducts its business in a way that **poses a material risk** to the efficiency and integrity of financial markets;
- treats its financial customers (members) such that the institution will not be able to comply with its obligations in relation to the **fair treatment of financial customers**;
- provides **financial education** in a manner that is not in accordance with relevant conduct standards; or





Enforcement Actions

Directives (Section 144) – Directives to a Financial Institution (continued)

- or a key person, representative or contractor of the financial institution:
 - contravened or likely to contravene **a financial sector law**;
 - not complied with an **Enforceable Undertaking**;
 - involved or likely to be involved in **financial crime**;
 - causing or **contributing to instability** in the financial system or likely to do so.





Enforcement Actions

Directives (Section 144) – Action to be specified in Directive to Financial Institution (subsection 5)

Actions to be specified in a Directive to a financial institution includes the following:

- to **cease** offering or providing a specific financial product or financial service;
- it **modify** a specific financial product or financial service or the terms on which it is provided;
- **remove a person** from a specified position or function in or in relation to the financial institution;
- **paying** a specified bonus or performance payment; and
- **remedying** the effects of a contravention of a **financial sector law**.





Enforcement Actions

Directives (Section 144) – Directives to a Directed Person (subsection 2)

The FSCA may issue a written Directive to a key person, a representative or a contractor of a financial institution (in this section a directed person) requiring action if the financial institution or directed person has:

- contravened or is likely to contravene a **financial sector law**;
- not complied with an **Enforceable Undertaking**;
- is involved or is likely to be involved in **financial crime**; or
- caused or contributed to **instability in the financial system** or is likely to do so.





Enforcement Actions

Directives (Section 144) – Action to be specified in Directive to a Directed Person (subsection 7)

Actions to be specified in a Directive to a Directed Person must be aimed at:

- **achieving the objective** of the FSCA; and
- ensuring that the directed person **performs its function** in compliance with the applicable financial sector laws.



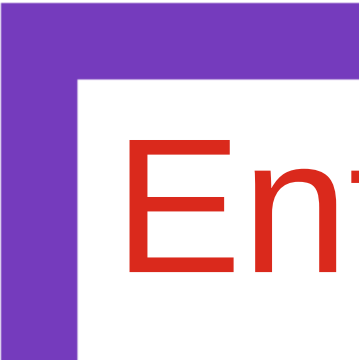


Enforcement Actions

Directives (Section 144) – Consultation Requirements in terms of Section 146(1) & (2)

- Before issuing a Directive the FSCA must:
 - Give the financial institution or directed person **draft of the directive** and a **statement of reasons** including **relevant facts** and **circumstances**; and
 - invite the financial institution or directed person to make **submissions** on the matter and **specified reasonable period** to do so.





Enforcement Actions

Enforceable Undertakings (Section 151)

- **A person** may give a written undertaking to the FSCA concerning that **person's future conduct** in relation to a matter regulated by a financial sector law, and that undertaking, upon its acceptance by the FSCA, becomes enforceable by the FSCA.
 - The Enforceable Undertaking has to be **agreed** upon with the person involved.
 - The person undertakes to implement a specific action or actions within **specified period**.
 - Does not have to be as **result of a contravention**, although it normally will be.
 - Viewed as a softer approach to regulation which is appropriate where there is a **high level of cooperation**.
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Enforcement Actions

Enforceable Undertakings (Section 151) – Continued

- Demonstrates a person's **willingness** to comply with the law.
- Also a means of avoiding unnecessary **legal costs**.
- Important is the fact that each Enforceable Undertaking accepted by the FSCA **must be published**; and
- Failure to comply with the Enforceable Undertaking may *inter alia* be referred to the **Financial Services Tribunal**.



Enforcement Actions

Debarment (Section 153)

- The FSCA may make a **debarment order** in respect of a **natural person** if the person has:
 - **contravened a financial sector law** in a material way; or
 - has contravened in a material way an **Enforceable Undertaking**;
 - **attempted, or conspired with, aided, abetted, induced, incited or procured** another person to contravene a financial sector law in a material way;
 - contravened in a material way a law of a **foreign country** that **corresponds** to a financial sector law.



Enforcement Actions

Debarment (Section 153) - Continued

- A natural person who is subject to a debarment order may not engage in conduct that, **directly or indirectly**, contravenes the debarment order.
- A **licensed financial institution** that becomes aware that a debarment order has been made in respect of a natural person employed or engaged by the financial institution **must take all reasonable steps** to ensure that the debarment order is given effect to.



Enforcement Actions

Debarment (Section 153) - Continued

A debarment order **prohibits the natural person**, for the **period specified** in the debarment order, from:

- providing, or being involved in the provision of, specified financial products or financial services, **generally or in circumstances specified in the order**;
- acting as a **key person** of a financial institution; or
- **providing specified services** to a financial institution, **whether under outsourcing arrangements or otherwise**.





Enforcement Actions

Debarment (Section 153) - Continued

- Governing body means in relation to a financial institution, a person or body of persons - whether elected or not, that manages, controls, formulates the policy and strategy of the financial institution, directs its affairs or has the authority to exercise the powers and perform the functions of the financial institution, and includes – **the board of a pension fund referred to in section 7A of the PFA.**
- The FSR Act empowers the FSCA to debar a board member if found to have contravened the financial sector law or an Enforceable Undertaking in a material way.



THANK YOU
QUESTIONS?