

FSCA COMMUNICATION 47 OF 2020 (RF)

DIRECTIVE PF NO. 8 OF 2018: PROHIBITION ON THE ACCEPTANCE OF GRATIFICATION: THE ROLE AND INDEPENDENCE OF PRINCIPAL OFFICERS

1. PURPOSE

The purpose of this Communication is to provide further clarification to the industry and stakeholders on the position of the Financial Sector Conduct Authority (“the Authority”) in respect of conflicts of interest relating to principal officers of retirement funds appointed as such whilst also being in the employ of service providers, and to extend the period for compliance with Directive PF No. 8 of 2018 (“Directive 8”) in this regard.

2. BACKGROUND

- 2.1 Directive 8 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. “(G)ratification” 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...*” This aspect was further clarified in paragraph 3.8.4 of Guidance Notice 2 of 2018 published on 27 June 2018.
- 2.2 The simultaneous employment of the principal officer by a service provider is impermissible and is also undesirable.
- 2.3 The legal validity of Directive 8 has been called into question by a few entities and individuals, insofar as it accords fiduciary duties to principal officers, and in that it precludes principal officers from being in the employ of sponsors and/or service providers to funds.
- 2.4 The Authority has subsequently obtained independent legal guidance and advice from senior counsel regarding the legality of Directive 8, including but not limited to whether principal officers owe fiduciary duties to the funds they serve and whether they may be remunerated by the service providers to the funds.

3. THE AUTHORITY’S POSITION

- 3.1 The Authority has always taken the view that a principal officer owes a fiduciary duty to a fund to act in its best interest.

- 3.2 The Authority has further taken the view that a principal officer of a fund may not simultaneously be in the employ of a service provider to the fund as this constitutes a conflict of interest.
- 3.3 These views find expression and legal force in Directive 8.
- 3.4 The advice provided by senior counsel confirmed the Authority's views and the legal validity of Directive 8.

4. REGULARISING NON-COMPLIANCE

- 4.1 In Communication 7 of 2019 (PFA) ("Communication"), issued on 12 December 2019, the Authority indicated that an Enforceable Undertaking (in terms of section 151 of the Financial Sector Regulation Act, 2017) would be appropriate in matters where there is a high level of co-operation and would be consistent with previous actions taken by the Authority in dealing with issues of a similar nature. It further provided that funds and relevant parties would be afforded a period of 6 (six) months (from the date of the Communication) within which to regularise the appointment of an independent principal officer subject to the conclusion of an Enforceable Undertaking.
- 4.2 In order to afford all funds the opportunity to regularise the appointment of an independent principal officer, the Authority hereby grants funds and relevant parties an extension until 28 February 2021 within which to regularise the appointment of an independent principal officer, subject to the conclusion of an Enforceable Undertaking in this regard. In instances where there is no co-operation, or no agreement can be reached, the Authority will be obliged to take the necessary regulatory action.
- 4.3 Funds and principal officers that are aware that they are or might be in breach of Directive 8 must approach the Authority as soon as possible if they have not yet been approached.

5. CONTACT

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