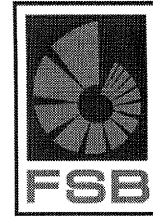


FINANCIAL SERVICES BOARD

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INFORMATION CIRCULAR PF NO. 1 OF 2016

PENSION FUNDS ACT, 1956 COMPLIANCE AND ENFORCEMENT OF SECTION 13A

1. Introduction

- 1.1 Compliance and enforcement of the provisions of section 13A of the Pension Funds Act, 1956 ('PFA') is important as the non-payment or short-payment of contributions can adversely affect the quantum of the benefits payable to members in defined contribution funds in terms of the rules of the fund and may in addition have an adverse impact on the financial soundness of a fund.
- 1.2 Funds and their boards of management must further note that in addition to the provisions relating to board members' fitness and propriety to continue to hold office in section 26(4) of the PFA, section 37(1) of the PFA provides that any person who contravenes or fails to comply with the provisions of section 13A is guilty of a criminal offence and may be liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment.

2. Compliance with section 13A(6)

- 2.1 Section 13A(6) of the PFA reads as follows:

- (6)(a) *For the purpose of monitoring and ensuring compliance with this section, the principal officer of the fund or any authorized person shall, at the times and in the manner and format prescribed, submit reports to the categories of persons, to be specified in that notice, who have an interest in such compliance.*
- (b) *In applying paragraph (a), 'authorized person' means any person who has been authorized by the relevant board to perform the function contemplated in that paragraph and of whom the registrar has been advised in writing."*

Subsection (a) of this section establishes the position and functions of an 'authorized person'. Subsection (b) further determines that funds must inform the registrar in writing of the identity of the 'authorized person' if they intend having one. This subsection makes it clear that if the registrar is not advised of the identity of the 'authorized person' in terms of sub-section (b), the principal officer will by default fulfil these functions.

- 2.2 It is evident from the records of the registrar that a number of funds have failed to inform the registrar of the relevant details of the "authorised person" despite the fact that a fund must do so in terms of section 13A(6)(b) if that person/s is to be properly recognised as an authorised person. Funds are requested to immediately inform the registrar in writing of the identity and details of the authorised person if there is one.

3. Compliance with sections 13A(8) and (9)

- 3.1 One of the frequent findings contained in on-site visit reports on funds recently visited in terms of section 25 of the PFA, is that there are funds which are still non-compliant with the duty imposed on them in terms of section 13A(9)(a) to request a participating employer to inform the fund of the relevant person at the participating employer that will be held personally liable for compliance with the provisions of section 13A.
- 3.2 Section 13A of the PFA was amended in the Financial Services Laws General Amendment Act, 2013 ('FSLGAA'), which amongst others added sub-sections 13A(8), (9) and (10) to provide greater deterrence to non-compliance and greater protection to members-

"(8) For the purposes of this section, the following persons shall be personally liable for compliance with this section and for the payment of any contributions referred to in subsection (1):

- (a) If an employer is a company, every director who is regularly involved in the management of the company's overall financial affairs;*
- (b) If an employer is a close corporation registered under the Close Corporations Act, 1984 (Act 69 of 1984), every member who controls or is regularly involved in the management of the close corporation's overall financial affairs; and*
- (c) In respect of any other employer of any legal status or description that has not already been referred to in paragraphs (a) and (b), every person in accordance with those directions or instructions the governing body or structure of the employer acts or who controls or who is regularly involved in the management of the employer's overall financial affairs.*

- (9) (a) A fund to which the provisions of subsection (8) apply, must request the employer in writing to notify it of the identity of any such person so personally liable in terms of subsection (8).*
- (b) In the event that an employer fails to comply with the requirements of this provision, all the directors (in respect of a company), all the members regularly involved in the management of the closed corporation (in respect of a closed corporation), or all the persons comprising the governing body of the employer, as the case may be, shall be personally liable in terms of subsection (8)."*

- 3.3 Section 13A(8) of the PFA was introduced to enable a fund to identify and hold certain persons who are in control of or regularly involved in the management of the employer's overall financial affairs, accountable and possibly personally liable for any non-compliance with section 13A and for the non-payment or short payment of pension fund contributions.
- 3.4 Section 13A(9) of the PFA requires that a fund **must** request the employer in writing to notify it of the identity of any such person so personally liable in terms of subsection 13A(8). The identified person/s may incur both civil and criminal liability.
- 3.4.1 Funds that have not yet complied with section 13A(9)(a) of the PFA must immediately write to the employer/s participating in their funds in terms of section 13A(9)(a) to request notification of the identity of the persons who will be held personally liable for compliance with section 13A and place such employers on terms to respond to the request within a reasonable period specified in the correspondence.
- 3.4.2 In the event of the participating employer failing to respond to the request, then the provisions of section 13A(9)(b) apply i.e. all the directors (in respect of a company), all the members regularly involved in the management of the closed corporation (in respect of a closed corporation), or all the persons comprising the governing body of the employer, as the case may be, shall be personally liable in terms of subsection (8). This provision should be specifically included in the correspondence to the employer so that the employer is alerted of the consequences of not providing the requested information to the fund.
- 3.4.3 Funds must retain proof of sending and delivery of the letter written in terms of section 13A(9)(a) of the PFA to their participating employers, as the registrar may call upon them to furnish such proof.
- 3.4.4 A specimen letter of such a proposed letter to be addressed to a participating employer as per the requirements of section 13A(9)(a) of the PFA is attached hereto as **Annexure A**. Funds may modify the letter as they wish to suit their particular circumstances provided that it satisfy the provisions of the PFA.

Yours sincerely



DUBE TSHIDI
REGISTRAR OF PENSION FUNDS

ABC Employer

Date: _____

Dear Sir or Madam,

Request for information in terms of section 13A(9)(a) of the Pension Funds Act, 1956

In terms of section 13A(9)(a) of the Pension Funds Act, 1956 ("the Act"), the _____ ("the fund") is required to request that you notify the fund in writing of the identity of the person or persons liable in terms of section 13A(8) of the PFA for compliance with section 13A and for the payment of contributions to the fund. In this regard, we draw your attention to the provisions of section 13A(8) and 13A(9) of the Act which provides:

- "(8) For the purposes of this section, the following persons shall be personally liable for compliance with this section and for the payment of any contributions referred to in subsection (1):*
- (a) If an employer is a company, every director who is regularly involved in the management of the company's overall financial affairs;*
 - (b) If an employer is a close corporation registered under the Close Corporations Act, 1984 (Act No. 69 of 1984), every member who controls or is regularly involved in the management of the close corporation's overall financial affairs; and*
 - (c) In respect of any other employer of any legal status or description that has not already been referred to in paragraphs (a) and (b), every person in accordance with whose directions or instructions the governing body or structure of the employer acts or who controls or who is regularly involved in the management of the employer's overall financial affairs.*
- (9) (a) A fund to which the provisions of subsection (8) apply, must request the employer in writing to notify it of the identity of any such person so personally liable in terms of subsection (8).*
- (b) In the event that an employer fails to comply with the requirements of this provision, all the directors (in respect of a company), all the members regularly involved in the management of the closed corporation (in respect of a closed corporation), or all the persons comprising the governing body of the employer, as the case may be, shall be personally liable in terms of subsection (8).*
- (our emphasis)*

You are therefore requested to provide the relevant information within ____ days from the date of this correspondence, failing which the provisions of section 13A(9)(b) will apply.

Yours faithfully

XYZ Pension Fund