

Our reference: FSCA001/LAW/18

15 May 2019

**TO:** **OLANO MAKHUBELA**  
Divisional Executive of Retirement Funds Supervision, FSCA  
Per Email: [Olano.Makhubela@fsc.co.za](mailto:Olano.Makhubela@fsc.co.za)

**CC:** **ABEL SITHOLE**  
Commissioner of the Financial Sector Conduct Authority  
Per Email: [Abel.Sithole@gepf.co.za](mailto:Abel.Sithole@gepf.co.za)

**CC:** **KATHERINE GIBSON**  
Member of FSCA Transitional Management Committee  
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**CC:** **RADESH MAHARAJ**  
Senior Legal Manager, Retirement Funds, FSCA  
Per Email: [Radesh.Maharaj@fsc.co.za](mailto:Radesh.Maharaj@fsc.co.za)

Dear Olano Makhubela,

## **RE: Enforcement of PFA Information Circular No. 1 of 2019**

1. Open Secrets is a non-profit organisation dedicated to investigating and pursuing accountability for economic crimes and related human rights violations. We write this letter to you as the Divisional Executive of Retirement Funds Supervision at the FSCA. This letter is in response to PFA Information Circular No. 1 OF 2019 (“**the Circular**”; see Annexure A), issued on 4 March 2019 by the Financial Sector Conduct Authority (“**the FSCA**”). You shared the Circular with Open Secrets via email on 15 March 2019.
2. Between 2007 and 2013 the Financial Services Board (“**the FSB**”, now the FSCA) undertook the ‘Cancellations Project’ to deregister ‘dormant’ pension funds (“**the Cancellations Project**”). The Circular is an attempt to correct mistakes made during the this period. While 6757 pension funds had their registrations cancelled on the basis that the funds no longer had any assets, liabilities or members, it is common cause that the process was beset by irregularities and that significant number of funds were cancelled

when they still had assets, liabilities, and members. This meant that beneficiaries to whom these cancelled funds were liable, many from vulnerable groups, were left unable to claim their pensions.

3. The Circular requires funds and administrators to implement appropriate processes in order to establish whether there are remaining assets, liabilities or members in the cancelled funds, and put in place mechanisms to ensure the necessary reporting to the FSCA. It further requires that funds and administrators approach a competent court to set aside the cancellation of any funds incorrectly deregistered before 1 April 2018.
4. In addition to the above, once a fund or administrator becomes aware of an incorrectly deregistered fund (before 1 April 2018), it must:
  - 4.1. Inform the FSCA;
  - 4.2. Disclose all relevant information and full particularity of the error and provide an explanation for why the error occurred; and
  - 4.3. Make application to a competent Court with jurisdiction in order for the cancellation of the registration of the fund to be reviewed and set aside, and that these applications be launched without delay and be served on the FSCA.
5. The Financial Sector Regulation Act<sup>1</sup> (“**the FSR Act**”) of 2018 established the FSCA with the objective of, amongst others, protecting financial customers by promoting their fair treatment by financial markets.<sup>2</sup> It has the express mandate to regulate and supervise the conduct of the financial institutions in accordance with financial sector laws.<sup>3</sup> This mandate makes it clear that the FSCA has the duty to regulate the cancellation and reinstatement of pension funds in a manner that protects the interests of pension-fund beneficiaries and the integrity of the financial sector.
6. We would like to also emphasise that the FSCA is a regulatory body that acts in the public interest, the public nature of the Circular’s requirements, and the enormous impact that pension funds and their regulation have on the public, especially considering the vulnerability of the group of people affected (pensioners and their dependents).

<sup>1</sup> Financial Sector Regulation Act 9 of 2017.

<sup>2</sup> Section 57(1) & (2) FSR Act.

<sup>3</sup> Section 58(1)(a) FSR Act.

7. Open Secrets welcomes the FSCA's attempt to rectify the errors inherent in the Cancellation Project by issuing the Circular. However, we would like clarity on some aspects of the Circular, in particular:

7.1. The Circular says that when an administrator becomes *aware* that the cancellation (prior to 1 April 2018) was in error, it must inform the FSCA, disclose relevant information, and apply to a competent court for reinstatement.<sup>4</sup>

7.1.1. How does the FSCA, as regulator, intend to ensure that administrators become aware of these errors?

7.1.2. Will there be independent investigations, and if so, will there be guidance on what qualifies as 'independent'?

7.2. The Circular talks about the funds and administrators needing to have in place "appropriate procedures" to establish whether a fund was erroneously cancelled.<sup>5</sup> It does not however say what an appropriate procedure is. In order to ensure a standard and uniformity, kindly provide clarity on what an appropriate procedure is.

7.3. The Circular requires funds and administrators to do "necessary reporting"<sup>6</sup>:

7.3.1. What specifically needs to be reported on?

7.3.2. What is the frequency of the reporting?

7.3.3. To whom is this reporting and are the reports to be made public?

8. The above concerns are highlighted in how fund administrators are dealing with funds cancelled during the Cancellation Project period. Open Secrets wrote to Alexander Forbes, Liberty, Momentum (MMI), Sanlam and Old Mutual on 19 March 2019 to inform them of the Circular and ask about its implementation. Their responses are attached hereto as Annexures B, C, D, E, and F respectively.

9. The above fund administrators' responses give rise to additional questions:

<sup>4</sup> Section 2(1) of the Circular.

<sup>5</sup> Section 2(6) of the Circular.

<sup>6</sup> Section 2(6) of the Circular.

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- 9.1. There should be clarity on the processes they need to undertake to ensure uniformity in how the Circular is implemented. Has the FSCA provided this clarification to fund administrators, and if so, where can the public access this information?
- 9.2. Will these reports be accessible to the public, who has an interest in a transparent and accountable process due to the considerable public importance of this issue?
- 9.3. What practical steps is the FSCA taking in order to enforce the Circular?
- 9.4. What timeframes are involved in the implementation of the Circular?
10. In addition to the above, Open Secrets would also like to know:
- 10.1. Is the FSCA reviewing fees earned by the fund administrators from incorrectly cancelled funds?
- 10.2. What criteria and procedures is the FSCA using to appoint trustees of erroneously cancelled funds that are reinstated as a result of compliance with the Circular?
11. Kindly provide us with a substantive written response to the above by **29 May 2019**.

Please acknowledge receipt of this letter.

Yours sincerely,



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Michael Marchant

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Open Secrets

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