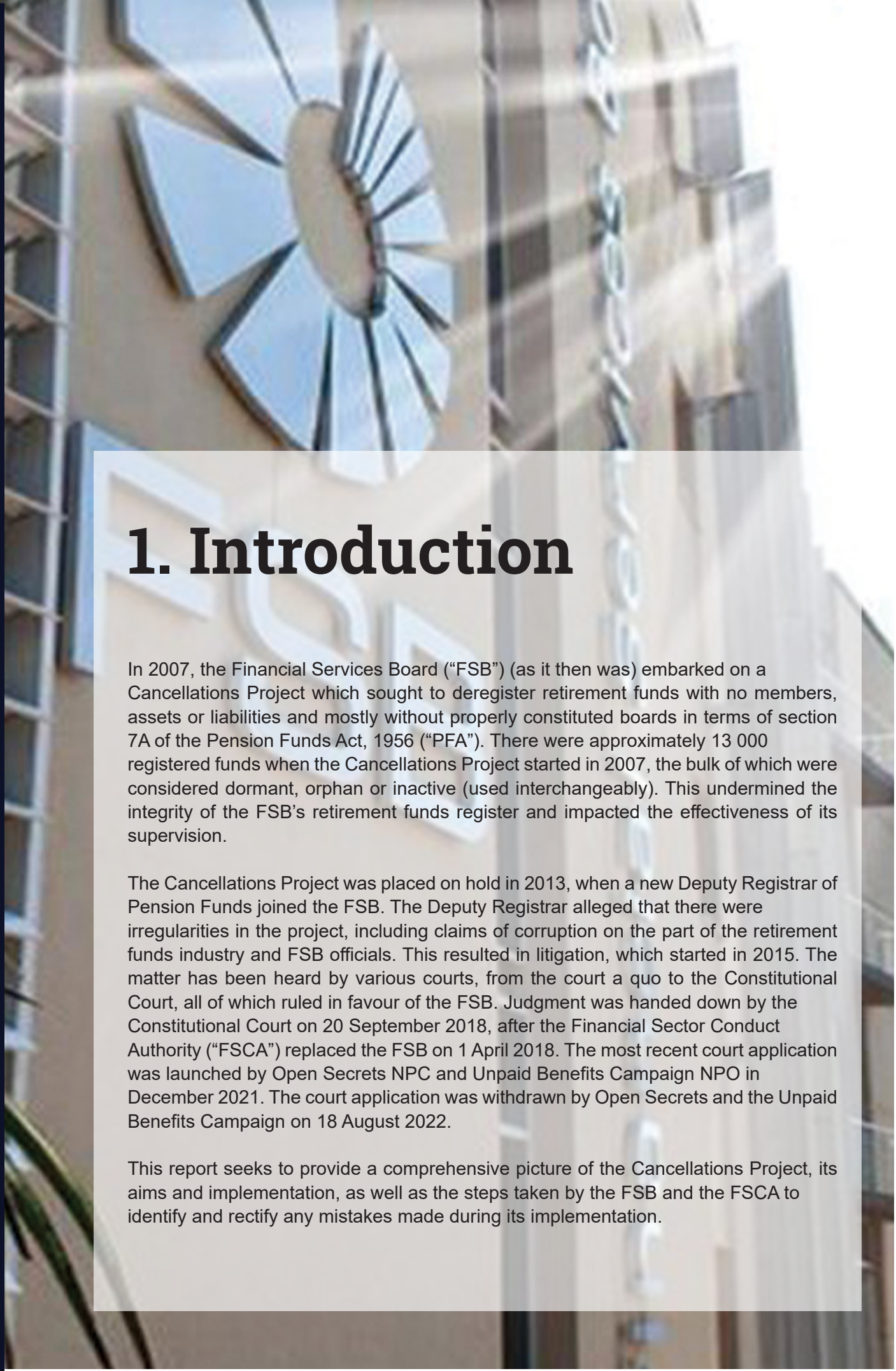
Report on the Deregistration of Inactive Retirement Funds 2023

FSCA

Financial Sector
Conduct Authority



1. Introduction

In 2007, the Financial Services Board ("FSB") (as it then was) embarked on a Cancellations Project which sought to deregister retirement funds with no members, assets or liabilities and mostly without properly constituted boards in terms of section 7A of the Pension Funds Act, 1956 ("PFA"). There were approximately 13 000 registered funds when the Cancellations Project started in 2007, the bulk of which were considered dormant, orphan or inactive (used interchangeably). This undermined the integrity of the FSB's retirement funds register and impacted the effectiveness of its supervision.

The Cancellations Project was placed on hold in 2013, when a new Deputy Registrar of Pension Funds joined the FSB. The Deputy Registrar alleged that there were irregularities in the project, including claims of corruption on the part of the retirement funds industry and FSB officials. This resulted in litigation, which started in 2015. The matter has been heard by various courts, from the court a quo to the Constitutional Court, all of which ruled in favour of the FSB. Judgment was handed down by the Constitutional Court on 20 September 2018, after the Financial Sector Conduct Authority ("FSCA") replaced the FSB on 1 April 2018. The most recent court application was launched by Open Secrets NPC and Unpaid Benefits Campaign NPO in December 2021. The court application was withdrawn by Open Secrets and the Unpaid Benefits Campaign on 18 August 2022.

This report seeks to provide a comprehensive picture of the Cancellations Project, its aims and implementation, as well as the steps taken by the FSB and the FSCA to identify and rectify any mistakes made during its implementation.

2. Overview of the Cancellations Project

2.1 Reasons for the initiation of the Cancellations Project

In the 1990's, thousands of occupational retirement funds were converted from defined benefit arrangements to defined contribution schemes. In the 2000's, there was another dramatic shift from single-employer or stand-alone retirement funds to umbrella funds. As a result of these changes, thousands of these original stand-alone funds became orphan funds without properly constituted boards in terms of section 7A of the PFA. Some of these orphan funds were shell funds while others had assets and/or liabilities.

The FSB was not aware of the full extent of this issue until the amendments to the PFA in 2004 and 2005, which required all retirement funds to submit annual financial statements to the FSB. In 2005, the FSB noted that only 7 684 of the 13 735 registered retirement funds submitted annual financial statements and only 4 384 of the 13 132 registered funds submitted financial statements in 2006. The FSB picked up a few discrepancies in these annual financial statements and noted thatnumerous retirement funds were seemingly no longer active. The FSB subsequently undertook a verification exercise to identify the active retirement funds. This verification exercise indicated that only 4 057 of approximately 10 132 registered funds were active funds at the time.

The FSB decided that it would be prudent to clean up its records with the aim to reflect a more accurate number of active registered funds. This is how the Cancellations Project came into existence. The purpose of this Cancellations Project was to identify inactive funds that no longer had any members, assets or liabilities and to cancel their registration.

The dormant funds were cancelled in terms of the provisions in section 27(1) of the PFA, which provides as follows:

"(1) The registrar shall cancel the registration of a fund -

(a) on proof to his satisfaction that the fund has ceased to exist; or

(b) if the registrar and the fund are agreed that the fund was registered by mistake in circumstances not amounting to fraud:

Provided that in the circumstances stated in paragraph (b), the registrar may suspend the registration in lieu of cancelling it, if he is satisfied that by so doing the fund will be furnished with an opportunity of rectifying the said mistake to the satisfaction of the registrar, the latter shall thereupon reinstate the said registration, as from the date of suspension but if the mistake is not rectified within a period specified by the registrar he shall cancel the registration of the fund."

A fund ceases to exist when it no longer has any members, assets or liabilities. The requirements for cancellation are thus two-fold. The first is that the Registrar should be subjectively satisfied that the fund has ceased to exist. The second is that his/her conclusion should be one that a reasonable Registrar of Pension Funds could reach.

There are two other important features in section 27(1) of the PFA. The first is that the Registrar may take the initiative to cancel the registration of a fund (the fund itself need not apply for its own cancellation) and the second is that the Registrar may act on evidence of any kind derived from any source (the evidence on which he/she bases his/her decision need not emanate from the fund itself). These two features are perfectly sensible because dormant funds that have ceased to exist would normally not have anybody to act or speak on their behalf.

2.2 The Cancellations Project

An orphan fund is ordinarily a fund that does not have a board of trustees to act or speak on its behalf. There is usually nobody to apply for cancellation on its behalf or collect and provide the necessary evidence to prove that the fund ceased to exist. The Registrar sought to address this problem by appointing authorised representatives to act on behalf of orphan funds or by appointing section 26(2) trustees to manage orphan funds.

Of the 6 757 registered retirement funds that were cancelled, 999 funds were cancelled through the authorised representatives' process. These authorised representatives were usually officers of the former administrators of the orphan funds and were appointed by the Registrar to act on behalf of these orphan funds. The authorised representatives investigated orphan funds, applied for deregistration if they found that these funds no longer had any members, assets or liabilities and collected and provided proof that the funds ceased to exist to the Registrar. At the time, the PFA provided for the Registrar to cancel the registration of a fund without any application for its deregistration and regardless of the source of the evidence that proves that the fund has ceased to exist in terms of section 27(1). An amendment to the PFA in 2007 introduced a new section 26(2) which reads as follows:

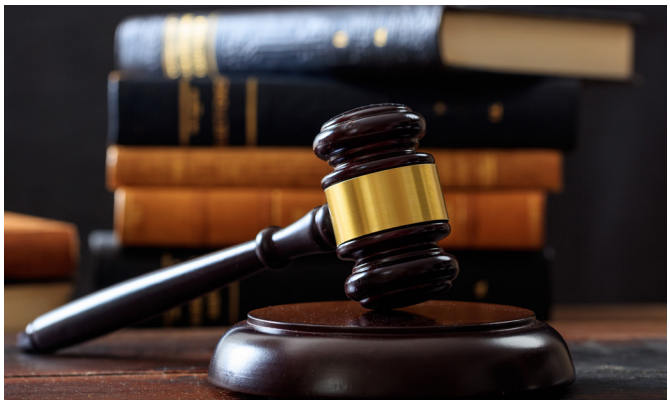
"Where a fund has no properly constituted board contemplated in section 7A and has failed to constitute a board after 90 days written notice by the registrar, or where a fund cannot constitute a board properly or where a board fails to comply with any requirements prescribed by the registrar in terms of section 7A(3), the registrar may, notwithstanding the rules of the fund, at the cost of the fund-

(a) appoint so many persons as may be appropriate to the board of the fund or appoint so many persons as may be necessary to make up the full complement or quorum of the board; and

(b) assign to such board such specific duties as the registrar deems expedient."

The Registrar also applied section 26(2) of the PFA to appoint trustees to orphan funds. These appointed trustees were also usually officers of the former administrators of the orphan funds. The section 26(2) trustees investigated orphan funds, applied for deregistration if they found that these funds no longer had any members, assets or liabilities and collected and provided proof that the funds ceased to exist to the Registrar. Of the 6 757 registered retirement funds that were cancelled, 3 516 funds were cancelled through this process.

In the course of the Cancellations Project, engagements took place with the retirement funds industry and the Registrar published notices of the intention to cancel the registration of specified funds in the Government Gazette. For the sake of transparency, all interested persons were called upon to object to the proposed cancellations by a specified date.



2.3 The legal framework for cancellation

The legal basis for the Cancellation Project has been attacked on the grounds that the authorised representatives and the section 26(2) trustees did not have the necessary authority to apply for the deregistration of the orphan funds or to gather and produce proof that the funds ceased to exist. However, Section 27(1) allows the Registrar to base his/her decision on any evidence that the funds had ceased to exist, regardless of its source.

Due to the magnitude of the Cancellations Project, some errors and mistakes occurred. When funds mistakenly cancelled were identified, the funds were reinstated. Of the 6 757 funds that were cancelled, only 76 funds had to be reinstated. Of the 76 funds that were reinstated, 39 funds were cancelled after the publication of their intended cancellation in the Government Gazette. These funds remain categorised as "query funds" on the FSCA's system and will be cancelled once their outstanding business has been finalised.

The other 37 reinstated funds were subsequently cancelled following the deregistration applications which were submitted by the representatives of the funds (i.e. their boards, authorised representatives or section 26(2) trustees) to the Registrar. Of these reinstated funds, 32 funds remain categorised as "query funds" on the FSCA's system and will be cancelled once their outstanding business has been finalised. Only 3 of these reinstated funds have been liquidated in terms of section 28 of the PFA and their registrations were cancelled again in terms of section 28(15) of the PFA. The remaining 2 funds have been re-classified as active funds.

3. The reinstatement of funds

The main reasons for the reinstatement of these funds were the following:

3.1. Suspense accounts

There were a few instances during the Cancellations Project where the assets of the cancelled funds were discovered in the suspense accounts of the administrators. In these cases, where appropriate, the funds were reinstated by the Registrar.

3.2. Changes in administrators

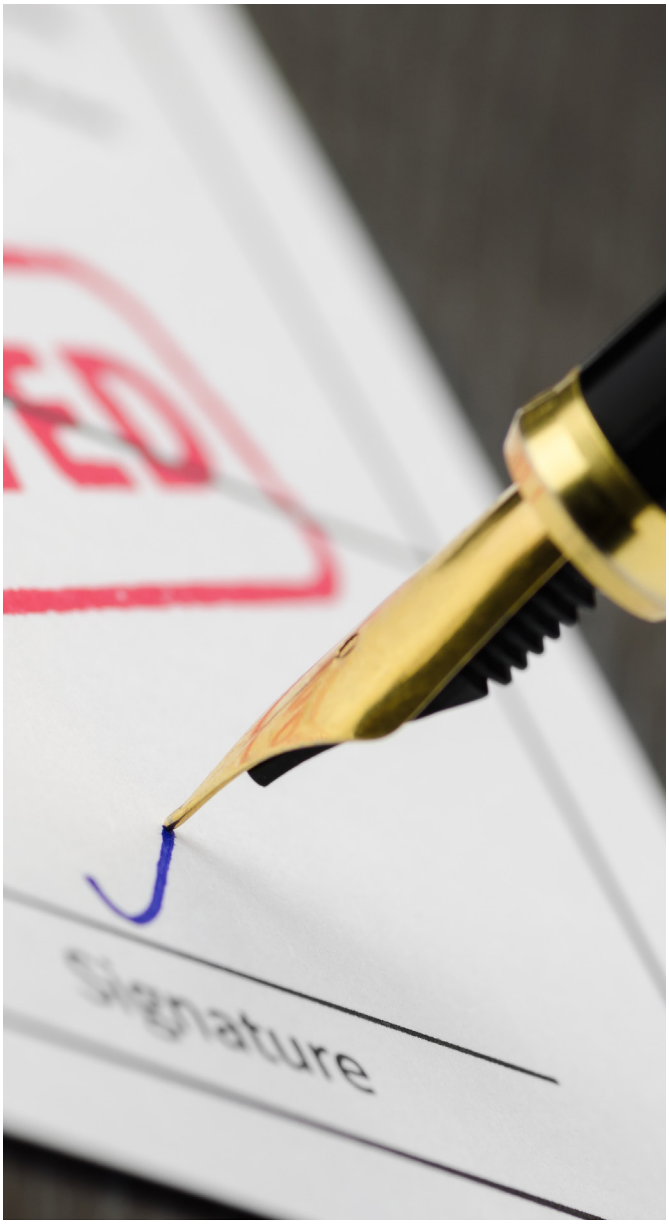
In some instances, changes in the section 13B administrators incorrectly led to the cancellation of the registration of a few funds. Some funds were identified as dormant funds by their old administrators when there had merely been changes in their administrators. It was noted that the reason for this error was that the old administrators did not distinguish between section 14 transfers and section 13B changes in administrators in their records. Upon discovering this error, the new administrators notified the Registrar that the funds were in fact active and the Registrar accordingly reinstated them.

3.3. Surplus discovered after cancellation.

In some instances, a surplus was detected after the assets and liabilities of a dormant fund had been transferred to the transferee fund and the registration of the dormant fund had been cancelled. The registration, therefore, of the dormant fund had to be reinstated to enable a surplus apportionment scheme to be approved by the FSB in compliance with section 15B of the PFA. In other instances, a surplus was only detected after the last member of a dormant fund had been paid out and the fund's registration had been cancelled. This would normally have happened where a reserve account was not allocated to the dormant fund but was a separate reserve account kept by the section 13B administrator instead.

3.4. FSB Appeal Board Reinstatements

The FSB Appeal Board ruled that the registration of 4 cancelled funds had to be reinstated following appeals seeking their reinstatement. The underlying rationale for seeking reinstatement was either to obtain a refund of assets to the fund from an administrator as a result of bulking (i.e. the Alexander Forbes bulking matter), or the section 13B administrator had identified the fund as having outstanding business. In these cases, information came to light following the cancellation of the fund, that there were in fact remaining assets which were due to the members of the funds. The reinstatement of the funds was required to enable administrators to finalise the distribution of such assets which were due to members.



4. Independent Investigations into the Cancellations Project

The FSB initiated 3 independent investigations into the Cancellations Project, namely the O'Regan investigation, the KPMG investigation and the Mort Investigation, to review the cancellations process, identify any mistakes or wrongdoing and to make recommendations to rectify any findings.

4.1. The O' Regan Investigation

The Board of the FSB resolved on 17 September 2014 to appoint Justice O'Regan to investigate allegations of irregularities in the Cancellations project.

After receiving extensive submissions from the Deputy Registrar of Pension Funds, the previous Head of Retirement Funds Division and the Registrar, Justice O'Regan provided her final report to the Board on 21 November 2014.

Justice O'Regan's findings in summary were:

• She noted, but did not express any view on, the debate between the parties about the legality of the cancellations. She recognised that the important question was not whether the registration of funds had been lawfully cancelled, but whether anybody had suffered material financial prejudice as a result of their cancellation. She accordingly recommended, at paragraph 25 of her report, that the FSB appoint a firm of auditors to investigate, "whether it is likely that material financial prejudice may have been suffered by any fund or any person with an interest in any fund as a result of the acts and/or omissions of the Registrar or any 'authorised representative' or 'section 26(2) trustee' in respect of the disposal of the fund's assets and/or liabilities before its registration was cancelled or the determination by the Registrar whether the fund had assets and/or liabilities when deciding to cancel its registration in terms of section 27".

• Justice O'Regan further reported, at para 24(f), that no evidence had been placed before her of any improper, dishonest or corrupt conduct. She added that the question whether there had been any improper, dishonest or corrupt conduct would be more fully investigated in the audit process she recommended.

4.2. The KPMG Investigation

The Board of the FSB appointed KPMG on 18 December 2014 to undertake the investigation recommended by Justice O'Regan into the cancelled retirement funds to determine whether there was a likelihood of material financial prejudice to the members of the funds.

KPMG undertook an investigation into a sample 542 funds from a population of 4 651 funds. It later reduced the sample to 510 funds and made a find ing in respect of 500 of the 510 sampled funds. KPMG used computer analysis to calculate the statistical possibility of prejudice and in its modelling and determination of parameters, excluded expert inputs. As a result, it scoped the potential prejudice very widely. While Justice O'Regan had recommended an investigation of the "likelihood of material financial prejudice" KPMG reported on "the likeliness of potential prejudice".

The Board of the FSB raised its concerns over the determination of the risk factors used by KPMG. The following two examples highlight the concerns raised over the risk factors determined by KPMG:

• Firstly, when Liberty Group Limited ("Liberty") applied for the cancellation of the registration of orphan funds, it certified that the funds had no members, assets or liabilities and added that it would take full responsibility for the payment of any claims that might arise against the funds within three years after their cancellation. This provided a certain level of assurance that Liberty was confident enough to assume liability for these funds and meant that any prejudice suffered by members would be the responsibility of Liberty.

• Secondly, the FSB had prescribed certain forms (Forms F and F1) for cancellation applications which were introduced through Directive 6 of 28 December 2011. Form F was a certificate by the board of a fund which confirmed that the fund no longer had any members, assets or liabilities and had resolved to deregister. Form F1 was a certificate by the valuator, principal officer or auditor of a fund which confirmed that the fund no longer had any members, assets or liabilities. These forms provided an extra layer of assurance because they were invariably signed by the board of the fund as well as a professional such as a chartered accountant, actuary or lawyer.

KPMG questioned Liberty's undertakings and stated in its report that, "It is peculiar that this statement is included in the cancellation letters as it creates the impression that, although Liberty is certifying that the fund has no assets or liabilities there are indications that they are not entirely certain of this position". KPMG further questioned the Registrar's reliance on certificates and stated in its report that, "This particular approach and applied mechanism (of relying on certificates F and F1) meant that the requirement that the Registrar should be in a position to objectively determine that a fund had 'ceased to exist' could not be satisfied". KPMG was of the view that the Registrar could not "objectively determine" that a fund had ceased to exist if the Registrar relied on assurances given to him by others, regardless of how credible and reliable they might be.

The KPMG summary stated that, in respect of 500 funds, there was a Total Indicative Financial Prejudice (TIFP) in aggregate of approximately R2.5 billion. KPMG emphasised that a further investigation would have to be done to determine the "actual prejudice" suffered. When the Board of the FSB expressed its dissatisfaction with KPMG's investigation and report, KMPG suggested that its report be referred to Justice O'Regan for consideration.

4.2.1. Justice O'Regan's response to the KPMG Report

On 21 November 2015, the Board of the FSB requested Justice O'Regan "to review the final KPMG report together with the issues that the Board has raised and to give the Board guidance". Justice O'Regan responded by email on 1 December 2015 and stated the following: "I think it would be wise for you to approach senior counsel to do this work for you. Pensions are not my area of expertise and I think it would be valuable for someone who is familiar with pensions law" to undertake this review. This advice led the Board of the FSB to engage the services of Mr Jonathan Mort ("Mr Mort") on 20

January 2016. Mr Mort is an experienced attorney and a pension funds specialist and was assisted by Mr Jeremy Andrew ("Mr Andrew"), an experienced pension funds actuary.

4.3. The Mort Investigation and its findings

The Board of the FSB requested Mr Mort and Mr Andrew to review the KPMG Report in terms of section 2(1) of the Inspection of Financial Institutions Act, 1998, as recommended by Justice O'Regan, and to report on how to take the matter forward. Mr Mort and Mr Andrew rendered their assessment report dated 25 April 2016, to the Board of the FSB on 1 June 2016.

Mr Mort and Mr Andrew were critical of the KPMG Report, as the test applied by KPMG appeared to have been "a mere possibility rather than a reasonable probability'. They further reasoned that KPMG incorrectly concluded that there was a likelihood of material financial prejudice as a result of the deregistration of the funds between January 2007 and September 2013. Mr Mort and Mr Andrew were then tasked to review the assessment and determine "whether any member, beneficiary or dependant (of the cancelled pension funds) was likely to have suffered material prejudice in consequence of the deregistration". Mr Mort's responsibilities/mandate included: investigating the history of deregistered funds; inspecting any retirement fund or insurer to which assets of a deregistered fund had been transferred; inspecting the administrators of deregistered funds; and inspecting whether deregistered funds carried on the business of a retirement fund after deregistration. He was also requested to conduct a review of the KPMG Report to determine whether there was a likelihood of (actual) prejudice suffered by members.

Mr Mort's inspection specifically focused on the 453 audited funds mentioned in the KMPG Report. Mr Mort produced two inspection reports dated 7 June 2016 and 12 February 2018 which flowed from his investigations as inspector. In conducting his inspection, Mr Mort had access to the FSB's records and the records of the administrators of the funds. On the basis of his inspections, Mr Mort confirmed that no financial prejudice could be identified with respect to R1 832 183 413 (72,9%) of the total TIFP contained in the KPMG Report.

Mr Mort had found no evidence of any material financial p rejudice h aving b een s uffered by any member, beneficiary o r c reditor o f t he inspected funds. He also found no evidence of corruption, although this was not required in terms of his mandate. The reports concluded that there was no indication that any section 26 trustee or authorised representative in the employment of an administrator had acted in a way that conferred an improper advantage or benefit o n t heir employer, and that it was not apparent that any member, beneficiary or creditor of the funds had been exposed to any material financial prejudice. The reports identified certain areas of concern but concluded that there were ongoing efforts by administrators to trace the beneficiaries of unclaimed benefits.

It should be noted that Liberty launched an application in the High Court under case number 81725117 to review and set aside the Registrar's decisions to cancel the registrations of 25 funds. This was done prior to the hearing of the former Deputy Registrar of Pension Funds' appeal by the Constitutional Court on 13 February 2018. Liberty's application for reinstatement of the affected funds was heard on 14 March 2018 and the Court issued an order reinstating the affected funds on the same day. Another point worth noting is that the Registrar requested Mr Mort to conduct further inspections on Liberty and MMI Holdings Limited ("MMI"). The focus of these inspections was on the remaining or legacy assets retained by them as insurers of the underwritten insurance policies of some funds. These inspections found that Liberty legacy assets were identified as totalling some R430 million in respect of 263 funds. After Liberty identified the legacy assets, it set about recovering from its records as much of the history relating to the legacy assets to ascertain whether anyone enjoyed any rights in relation to these legacy assets.

Legacy assets of cancelled funds were identified and formed part of Liberty's internal investigation which was aimed at formulating applications to court for the reinstatement of the registrations of these cancelled funds. Other entities identified e ither did not require reinstatement or further information was required to determine whether the entity was a fund, a deregistered fund or another type of entity. In some instances, the legacy asset was due or belonged to Liberty or had a zero value.

Mr Mort's MMI investigation focused on residual assets held by MMI as an insurer which were

described in the report as due to funds, deregistered funds and other entities. These assets have not been or cannot be paid to them as it was not clear whether there was a benefit liability associated with the assets.

Mr Mort's inspection indicated that MMI was holding assets totalling some R1.2 million in respect of 10 deregistered funds of which 2 had their registration reinstated. It was not clear whether those assets were held in respect of amounts due to creditors, unclaimed benefits or a benefit liability. Mr Mort reported that, other than the 10 legacy funds in respect of which MMI had provided information concerning legacy assets, he was not in a position to provide assurance that there were no other assets held by MMI falling into the category of legacy assets due to another entity or person.

4.3.1. The recommendations by Mr Mort with regards to Liberty's Legacy Assets

Mr Mort recommended that funds with properly constituted boards of trustees be notified of the legacy assets as soon as possible, and if it turned out the legacy asset belongs to Liberty, the board of that fund must agree and be satisfied with the work undertaken by Liberty in that regard.

He also recommended that section 26(2) trustees be appointed to deal with the legacy assets in orphan funds and that deregistered funds with legacy assets attributable to them be reinstated as soon as possible.

In respect of legacy assets payable to Liberty, the FSB decided that even if there is a board of a fund that authorises such payment, the FSB's approval should also be obtained. In respect of those legacy assets where it may not be possible to establish an associated liability or the beneficiaries cannot be traced or it cannot be ascertained that Liberty is entitled to such assets, the assets should be dealt with as suggested by Liberty, namely that the assets will be used for a general charitable purpose, as agreed with the FSB.

4.3.2. The recommendations by Mr Mort with regards to MMI Legacy Assets

Mr Mort recommended that the inspection of MMI must continue with the assistance of an expert in benefit administration platforms who should be able to review MMI's administration platform in order to establish whether it had further assets that may be due to another fund, insurer, former member, beneficiary or creditor. The expert should also be able to assess the governance and controls around the previous administration platform migrations of MMI and its predecessors. The balance of the legacy assets should be reinstated or MMI should be required to take steps towards reinstating the funds to which the legacy assets belong.

4.3.3. Findings by Mr Mort regarding the Consolidated Report dated 25 June 2018

It is important to note that there was no material financial prejudice suffered by any member, beneficiary or dependant of 181 funds out of the total of 453 audited funds representing R1,7 billion or 70% of the TIFP recorded in the KPMG report. While no material financial prejudice was suffered, there were certain areas of concern that were identified which, inter alia, related to: the incorrect or unreliable financial statements of a number of funds immediately prior to their cancellations; the lack of important fund documentation such as underwritten policies; the failure by the boards of funds to properly follow up in respect of the receipt of assets following a transfer of assets (business) from a transferor fund; and data issues where administrators acquired the business of other administrators.

Mr Mort noted that in respect of every fund that was erroneously deregistered, the fault appeared to lie with the administrator which requested the deregistration based on incorrect information that the fund had no assets, liabilities or members. He concluded, however, that no prejudice was suffered because the assets remained intact and the administrators had taken steps to reinstate the funds concerned. He highlighted that a very small percentage of the total deregistered funds were

erroneously deregistered and that the Registrar was notified and proceeded to either reinstate the funds or monitored the progress in having them reinstated. Mr Mort concluded that there was no need to further investigate the deregistered funds.

4.3.4. Findings by Mr Mort with regards to the Unclaimed Benefits

KPMG had expressed the view that the greatest risk of the Cancellations Project was in respect of unclaimed benefits held by a fund prior to deregistration. Mr Mort's inspection covered 426 funds of the funds listed in the KPMG Report, and he found that there was no indication of any corrupt activity in relation to the unclaimed benefits in the funds investigated. He was satisfied, despite some areas of concern, that there were generally ongoing efforts to trace the beneficiaries of unclaimed benefits even though deregistration of those funds were imminent or inevitable.

The transfer of unclaimed benefits to unclaimed benefit funds or other entities and the payment of those benefits by the fund or administrator all relate to accrued benefits and as such the issue is one of tracing beneficiaries rather than the reinstatement of cancelled funds from where such unclaimed benefits may have originated.

5. Steps taken by the FSCA

5.1. Judgment by the Constitutional Court

The outcome of the Constitutional Court judgment (referred to as the Hunter judgment) in 2018 was that the Court was satisfied with the steps taken by the FSB and the Registrar in respect of investigating the issues that arose from the Cancellations Project and that the regulator was "intent on getting to the bottom of the problem" (paragraph 43 of the judgment).

The Constitutional Court further stated that it was satisfied that where mistakes had been unearthed, steps had been taken to correct or address those matters (paragraph 43 of the judgment). The Constitutional Court held that the FSB "has not only recognised and discharged its duty to investigate whatever is worthy of an investigation, but administrators have also embarked upon the responsible exercise of ensuring that the interests of the admittedly vulnerable pensioners are not compromised" (paragraph 44 of the judgment).

It is instructive that the Constitutional Court, having been satisfied with the adequacy of the investigations undertaken by the FSB, went on to say that "public sector functionaries too deserve the space to carry out their duties free from outside interference that virtually amounts to unintended micromanagement" (paragraph 45 of the judgment).

Against the background of the investigations already undertaken, the Court stated that "these kinds of investigations must at some stage come to an end" (paragraph 47 of the judgment). The majority judgment of the Constitutional Court dismissed the appeal (paragraph 61 of the judgment) and found that no further investigations of the Cancellations Project were necessary.

5.2 Addressing the errors and mistakes

Following the submission of Mr Mort's report, the FSCA held a workshop with him to discuss his findings and recommendations on 9 November

2018. The purpose of the workshop was to fully appreciate and understand the steps that would have to be taken with regards to past cancellations where errors may be uncovered and pending cancellation applications.Following this workshop, the Retirement Funds Supervision Division of the FSCA commenced with the coordination of various aspects relating to what became a Special Ad-Hoc Project. Some aspects of the Special Ad-Hoc Project had already commenced under the direction of the Registrar of the FSB prior to the FSR Act becoming law and the FSB widening its mandate to be a Conduct Regulator as the FSCA, and prior to the hearing of the appeal by the Constitutional Court.

5.3 The Special Ad-Hoc Project

There are three distinct focus areas of the Special Ad-Hoc Project which can be summarised as follows:

• The treatment of funds whose registrations were still to be terminated following the halting of the Cancellations Project by the Deputy Registrar of Pension Funds in September 2013 (terminating funds);

• The treatment of funds that were erroneously cancelled during the Cancellations Project (historic cancellations); and

• The treatment of unclaimed benefits and efforts by funds to trace unclaimed beneficiaries of unclaimed benefits (unclaimed benefits).

5.3.1 Requirements for the deregistration of funds going forward

The FSB commenced with a project to identify improved ways to address the gathering of information before a fund may be cancelled, to strengthen the requirements and to specify relevant criteria that would provide “proof to the satisfaction” of the Registrar that those funds had ceased to exist as contemplated by section 27(1)(a) of the PFA. The research undertaken resulted in the formulation of Information Circular PF No. 2 of 2017 and provided guidance on the requirements for the cancellation of the registration of a fund, as well as the termination of the participation of a participating employer in an umbrella fund.

The 2017 Circular specified the information to be submitted together with an application for the cancellation of the registration of a fund. It also set out that the Registrar would, prior to any cancellation or termination of the participation of an employer in an umbrella fund, publish a notice of the intended cancellation or termination, affording persons who may so wish to object to the intended cancellation or termination an opportunity to do so within a period of 30 days. The publication of the 2017 Circular was important because the halting of the Cancellations Project in 2013 resulted in an impasse and significant cost implications for administrators who had employed dedicated teams to work on the preparation of applications for terminating funds.

Following the issuance of the 2017 Circular, the registrations of a number of funds were cancelled in line with the guidance provided in the circular. The project was halted again due to a view held that some verification that a fund had ceased to exist should be provided by auditors or independent third parties. Despite this not being a statutory requirement in section 27 of the PFA, the FSB was open to exploring the possibility of appropriate verification and included it as a general proposition in paragraph 1(2)(c) of the 2019 Circular. The 2019 Circular stated that for terminating funds, the administrators and funds had to confirm that “an external auditor has verified and confirmed that the fund to be cancelled does not have assets, liabilities, members or a board and attach proof thereof”.

However, it was soon realised that further engagement with the retirement funds industry, specifically the administrators, was necessary regarding the proof to be provided to the satisfaction of the FSCA. It was also realised that it may be prudent to engage the auditing profession to agree on some format for the confirmations to be provided. The FSCA then undertook extensive engagements with the industry about the nature and extent of the provision of further information for the FSCA to satisfy itself that a fund had ceased to exist. During June 2019, the project team established a working group with representatives of the auditing profession to decide on the format of the documents required to give effect to the provisions of the 2019 Circular. It was envisaged that an Agreed Upon Procedure (AUP) would be formulated in this regard to ensure

uniformity. Despite the restrictions of the Covid-19 lockdown, the project team continued with its work and prepared and consulted on a draft AUP with the auditing profession and the retirement funds industry. A further industry workshop was held in September 2020 to agree on a procedure for auditors to provide confirmations that a fund had ceased to exist.

The industry and auditing profession consultations were extensive and, at times difficult, as any agreed enhanced process for the cancellation of the registration of a fund would have cost implications for administrators who, by virtue of terminating funds not having any assets, would have to carry the cost burden. Towards the end of 2020, an agreement was reached and on 26 November 2020, the FSCA issued Information Request 5 of 2020. It captured the AUP and required a Factual Findings Report to be provided to the FSCA with any application for cancellation of a terminating fund. The 2020 Information Request was formulated in terms of the provisions of section 131 of the FSR Act, giving it a statutory underpin, with consequences for any failures to provide the Factual Finding Report in terms of the provisions of section 267(1) of the FSR Act.

It must be noted that prior to the issue of the 2020 Information Request on 26 November 2020, the FSCA applied the requirements set in both the 2017 and 2019 Circulars, which were guidance notices that were not enforceable. However, every application was considered on its own merits and, where necessary, further information was requested as anticipated in paragraph 1(5) of the 2019 Circular. Having reached agreement on the submission of the Factual Findings Reports with the auditing profession and following the issue of the 2020 Information Request, the submission and consideration of the reports have been applied with effect from 1 January 2021.

The Special Ad-Hoc Project also entailed that, when application was made for the cancellation of registration of a terminating fund that is an orphan fund, i.e. one without a board, the administrator would also make application for the appointment of an interim board in terms of section 26(2) of the PFA. The administrator in the application was required to nominate a minimum of two persons, one being an employer representative and the other nominee being a member representative or former member of the fund. If only one of these was available, the FSCA would request the fund to nominate an independent trustee to act alongside the employer or member representative.

The FSCA does not accept employees of the administrator as nominees or appointees, save for umbrella funds, where a section 7B exemption should be renewed. However, even in those instances, it is required that an independent trustee be nominated. Where the employer is no longer in existence and there are no members left in the fund, or where any remaining members are unwilling to serve as trustees, the administrator would be required to nominate two independent trustees. Where the fund has assets to pay for the independent trustees' remuneration, the fund bears the costs. Where the fund has no assets and cannot afford this expense, the administrator is required to fund the independent trustee's remuneration.

The appointment letters of these section 26(2) trustees make provision for a wide range of duties, including the duty to attend to the termination of the fund in terms of either section 27 or section 28 of the PFA. The FSCA requires these section 26(2) trustees to submit reports within 30 days after their appointment, and thereafter bi-annually, on the progress made in regularising the affairs of the fund, inclusive of setting timelines on when specific tasks need to be completed. This has proven effective in the monitoring and supervision of funds with these interim section 26(2) boards of trustees. By reviewing these feedback reports, the FSCA is in a better position to understand challenges that these boards face and to provide guidance where necessary.

The Divisional Executive for Retirement Funds Supervision approves and signs all section 26(2) appointment and relief letters to ensure accountability and quality control. This also ensures that there is segregation of duties. Section 26(2) trustees of terminating funds are appointed for an initial period of 24 months. The period may be extended upon application, with sufficient motivation as to why an extension is necessary.

The FSCA's Retirement Fund Conduct Supervision Department, as part of the special project, liaises with administrators and section 26(2) trustees on a quarterly basis. The purpose of these engagements is to provide a platform where section 26(2) trustees and administrators may voice difficulties encountered in bringing funds closer to cancellation, and where possible, the FSCA also provides guidance on particular issues. This project is

ongoing and will continue for the foreseeable future, given the inherent and unique complexity of issues besetting terminating funds.

The Agreed Upon Procedure (AUP) and the Factual Findings Report are now required to be submitted to the FSCA as part of the application to deregister a fund as of 2021.The segregation of duties internally has been implemented since 2019/20 and requires every application to deregister a fund to be first analysed by an analyst, checked by a manager and the Head of Department, and finally signed off by the Divisional Executive. Further, certain checks and balances are built into the process, with various departments being consulted to ensure that there are no outstanding levies, the financials are in order and accurately reflect the position of the terminating fund, and that regular reports are being received from the interim trustees. This is in addition to the previous step of publishing the names of the terminating funds for any public objection.

The FSCA intends to regularly publish a list of all the cancelled and reinstated funds and participating employers to enhance transparency.

5.3.2 Treatment of erroneously cancelled funds

During the Cancellations Project, some 76 funds that were erroneously cancelled were reinstated by the Registrar, as the view was held that the Registrar was empowered to reinstate those funds. However, the FSB was subsequently advised that those reinstatements could not be undertaken by the Registrar. Some interested parties lodged appeals to the Appeal Board (as it then was) of the FSB against the cancellation decisions concerned, which were set aside, resulting in the reinstatement of some funds.

However, in May 2015, the Appeal Board held in the matter of Cyclone Matibe Makola v The Registrar of Financial Services Providers (Case Number 78/2013) that it does not have inherent jurisdiction and can therefore not ignore the statutory time within which an appeal must be lodged or condone the late noting of an appeal.

As a result, where an appeal to the Appeal Board was not available, the only remedy for reversing an erroneous decision to cancel the registration of a fund was an application to court to review and set aside the administrative action of cancelling the registration of that fund. This is what Liberty did when it launched the first reinstatement application during November 2017.

Section 95 of the FSR Act empowers the FSCA to revoke decisions taken under certain circmstances. In other words, it provided a statutory exemption to the functus officio rule (i.e. no longer having official authority). Prior to the launch of the first reinstatement application, Liberty engaged the FSB and, inter alia, expressed the view that the reinstatement of the affected funds may be undertaken by the Registrar. The application papers recorded the Registrar's position as conveyed to Liberty at the time, namely that he no longer has official authority and could not reinstate the registration of the cancelled funds.

Liberty proceeded with the court application. In paragraphs 71 and 72 of the first reinstatement application the following was stated:

• The Applicant has approached the Registrar in order to have the erroneous cancellation of registrations of the Affected Funds set aside. The Applicant was advised that on a proper interpretation of section 27 and section 28 of the Act, the Registrar is not functus officio and has the power to revoke his decisions to cancel the registration of each of the Affected Funds in light of the respective circumstances of each of those retirement funds.

• The Registrar was advised that he was functus officio and was accordingly of the view that he could not revoke his decisions to cancel the registration of each of the Affected Funds despite the respective circumstances of each of those retirement funds.

• Counsel for the FSB in the Hunter matter in the Constitutional Court devoted a portion of their heads of argument to the issue of the reinstatement of erroneously cancelled funds. Counsel argued before the Constitutional Court, like Liberty, that where the Registrar mistakenly deregisters a fund, he is not functus officio and that his correction of the error is the proper and effective way to address any prejudice.

In view of the position adopted by Counsel for the FSB concerning the reinstatement of funds, Liberty's lawyers again approached the FSB and enquired whether or not the Registrar would reinstate cancelled funds in line with the argument

advanced before the Constitutional Court, as it would obviate the need for Liberty to launch further applications to court to reinstate the registrations of cancelled funds.

At that time the Constitutional Court's judgment in the Hunter matter was still awaited and it was considered prudent to await the judgment to the extent that it may (or may not) deal with the functus officio rule. In the meantime, another significant development was the advent of the so-called "twin peaks" model of regulation when the FSR Act came into effect on 1 April 2018.

The FSR Act introduced, in section 95, a general power for the FSCA to revoke decisions, i.e. a statutory exception to the functus officio rule. The section provides as follows:

(1) "A financial sector regulator may, by notice to a person in relation to whom the regulator made a decision in terms of a financial sector law (or, if more than one such person, all of them), revoke the decision if: -

(a) the decision was made as a result of fraud or illegality;

(b) the information on which the decision was made was inaccurate or incomplete and the financial sector regulator would not havemade the decision if it had had accurate and complete information; or

(c) the decision is, for any reason, invalid.

(2) A revocation of a decision in terms of subsection (1) has effect from the date on which the revoked decision was made.

(3) A financial sector regulator may not take action in terms of subsection (1): -

(a) if the action would adversely affect the existing or accrued rights of any person (except the person in relation to whom the regulator made thedecision); or

(b) if: - (i) the financial sector regulator has been notified that an application to the Tribunal or a court in relation to the decision will be made; or

(ii) proceedings have commenced in the Tribunal or a court in relation to the decision.

(4) Before a financial sector regulator takes action in terms of subsection (1),it must: -

(a) notify its intention to do so to the person in relation to whom the regulator made a decision; and

(b) give the person a reasonable period, of at least 14 days, to make submissions to the regulator.

(5) In determining whether to take action in terms of subsection (1), the financial sector regulator must take into account all the submissions received during the period referred to in subsection (4)(b)."

The Constitutional Court handed down judgment in the Hunter matter in September 2018. The judgment did not deal with the functus officio rule, and the question on whether or not the FSCA may revoke the past cancellation decisions was left open. Due to the fact that the Constitutional Court judgment did not pronounce on the functus officio rule and the debate about whether or not the provisions of section 95 of the FSR Act may be invoked to reinstate the registration of funds erroneously cancelled, the FSCA resolved to seek legal advice from its lawyers. The FSCA's communication also reiterated that whilst advice on the legal remedies was awaited, it appreciated the importance of members with valid claims receiving their benefits.

Towards the end of February 2019, the FSCA received legal advice that informed the development of the content of the 2019 Circular and which differentiated between cancellations prior to and from 1 April 2018. In light of the advice, it was deemed necessary and prudent to provide guidance to the retirement funds industry on how it ought to proceed, both with regard to applications already submitted for the cancellation of the registration of funds, as well as the steps required to be taken with regard to the reinstatement of funds erroneously cancelled.

The 2019 Circular was prepared in terms of the provisions of section 141 of the FSR Act, i.e. it is a Guidance Notice. It does not have the force of law. The 2019 Circular stated that where a fund or administrator becomes aware that the cancellation of registration of a fund prior to 1 April 2018 was made in error, the FSCA should be informed, the relevant facts and information be disclosed, and

application be made to a competent court to review and set aside the cancellation decision. The Circular does not specify any steps or investigations to be undertaken by funds and administrators to uncover any errors made in the past. This is so because the FSCA at that time had decided on an approach of engagement with relevant administrators to undertake appropriate steps to ascertain and uncover any errors that may have been made or to follow up on issues identified in Mr Mort's reports.

The FSCA did not see the need to undertake any further investigations or to issue directives to funds and administrators at the time (and still does not) as it was satisfied that funds and administrators (particularly Liberty) were and are well-aware of their statutory obligations and were and are still taking appropriate steps. In this regard, it is appropriate to refer to Liberty's first reinstatement application issued under case number 81725/17, outlining its statutory duties as follows:

The Applicant has the following continuing obligations and common law duties which it believes it can only satisfy by prosecuting this application:

The Applicant is an approved administrator in terms of section 13B of the Act. Accordingly, in terms of section 13B(5) of the Act, it must, among other duties prescribed, "administer the fund in a responsible manner" and "keep proper records". The Applicant has a direct and substantial interest in conducting its affairs in accordance with applicable laws and in ensuring that it does not breach applicable law by omission, and for those reasons it brings this application, and (I am advised) is entitled to do so.

Section 2 of the Financial Institutions (Protection of Funds) Act 28 of 2001 ("FIPFA") sets out the "duties of persons dealing with funds of, and with trust property controlled by, financial institutions". It provides as follows:

"A director, member, partner, official, employee or agent of a financial institution or of a nominee company who invests, holds, keeps in safe custody, controls, administers or alienates any funds of the financial institution or any trust property - must, with regard to such funds, observe the utmost good faith and exercise proper care and diligence;"

The Applicant is a financial institution and, in that capacity, must comply with its duty under the FIPFA to administer the Affected Funds' trust property. Its ability to do so is frustrated while the Affected Funds remain deregistered. The Applicant has a direct and substantial interest in conducting its affairs in accordance with applicable laws and in ensuring that it does not breach applicable law by omission, and for those reasons it brings this application.

The Applicant is the agent in this instance of the Affected Funds, and as a financial institution it must accordingly observe the utmost good faith and exercise proper care and diligence in relation to assets held on behalf of its principals. The Applicant has a direct and substantial interest in conducting its affairs in accordance with applicable laws and in ensuring that it does not breach applicable law by omission, and for those reasons it brings this application. If the Applicant does not take action to set aside the Registrar's decision in this instance, it leaves itself exposed to potential legal action by the regulatory authorities and former members and/or beneficiaries of former members, as the case may be, of the retirement funds referred to below who may feel that they would have benefitted from the assets of these retirement funds if they had not been erroneously deregistered.

The first reinstatement application also provided details of Liberty's own "clean-up processes" undertaken over the period 2008 to 2013 as well as internal audit steps since 2014. Apart from the legal advice with regard to the functus officio rule and the content of Mr Mort's reports, the FSCA also took guidance regarding the ongoing treatment of historic cancellations from the Hunter judgment.

The Constitutional Court did not order any further or better investigation beyond those that had already been undertaken, including the inspections by Mr Mort. The FSCA had decided on a course of engagement with administrators as it was satisfied that a further investigation was not necessary or warranted.

The FSCA was also cognisant of the context of the Cancellations Project and the following facts:

- Some 2 242 of funds cancelled as part of the Cancellations Project had properly constituted boards at the time of their cancellations. Put differently, they were not orphan funds.

• The balance of 4 515 were orphan funds.

• At the direction of the Deputy Registrar of Pension Funds, two personnel of the FSB had un-dertaken an internal assessment of FSB documentation. Their assessment related to the 6 757 cancelled funds and identified 539 funds where the FSB's records captured on its systems (or lack of records or lack of understanding of those records) indicated that the cancellations may have been erroneous as these funds may still have had assets and liabilities.

• The focus of Mr Mort's inspection was on the funds audited by KPMG and specifically the 453 audited funds mentioned in annexure J to the KMPG report. The FSB's records relating to the vast majority of cancelled funds showed that those funds had no assets, members or liabilities when their registrations were cancelled. In practical terms, this means that the financial statements and other documentation, such as section 14 approvals relating to these funds, showed that they had nil balances in respect of assets and members as at the time of cancellation.

5.3.3 Treatment of Unclaimed Benefits

In September 2022, the FSCA published a discussion paper which provided recommendations on how unclaimed benefits should be treated titled "A Framework for Unclaimed Financial Assets in South Africa". One of the key proposals in the paper is to centralise all unclaimed assets under one fund, with proper governance.

According to the discussion paper, as of 2021, unclaimed benefits in the retirement fund sector are the largest contributor to the pool of estimated unclaimed assets – approximately 53% (R47,2 billion) of the total estimated unclaimed asset value (R88.56 billion). These assets are held by approximately 1 306 retirement funds on behalf of 4,45 million members and beneficiaries.

Unclaimed retirement fund assets are either held in unclaimed benefit funds or in occupational funds as unclaimed benefits. The vast majority of unclaimed assets in the retirement funds sector reside in occupational funds - 2020 statistics reflected unclaimed benefits of R37 billion held in occupational funds (78.4%) and unclaimed benefits of R 10.2 billion held in unclaimed benefit funds (21.6%). The overall increase in unclaimed benefit assets in 2014 was mainly due to two large funds that changed their accounting policies in 2013 which resulted in the reclassification of R11 billion assets that were identified as unclaimed benefits in the following year.

The increase was also informed by the amendments that were made to the definition of "unclaimed benefit" in 2014. The amended definition provides for the inclusion of a death benefit payable to a beneficiary as well as any amount that remained unclaimed or unpaid to a non-member spouse within 24 months from the date when the last deductions were made. It is important to note that the increase in asset value of unclaimed benefits is not only due to an increase in the number of unclaimed benefits, but also due to investment income earned on the assets relating to these unclaimed benefits. There were a number of initiatives and measures that were undertaken by the FSB, and subsequently progressed by the FSCA, to address the problem of unclaimed benefits held by retirement funds. The initiatives that were undertaken are as follows:

• The implementation of the unclaimed benefits search engine facility on the FSCA's website which collates unclaimed benefit data from retirement funds and administrators, and can be accessed directly by members of the public to ascertain whether there are any unclaimed benefits due to them. This search engine facility can be accessed either through the website, sending an e-mail, short message service (SMS) or facsimile. The SMS option enables the public to make an enquiry free of charge.

• Members of the public may also send letters to the FSCA, contact the FSCA's toll-free call centre or visit its office for assistance.

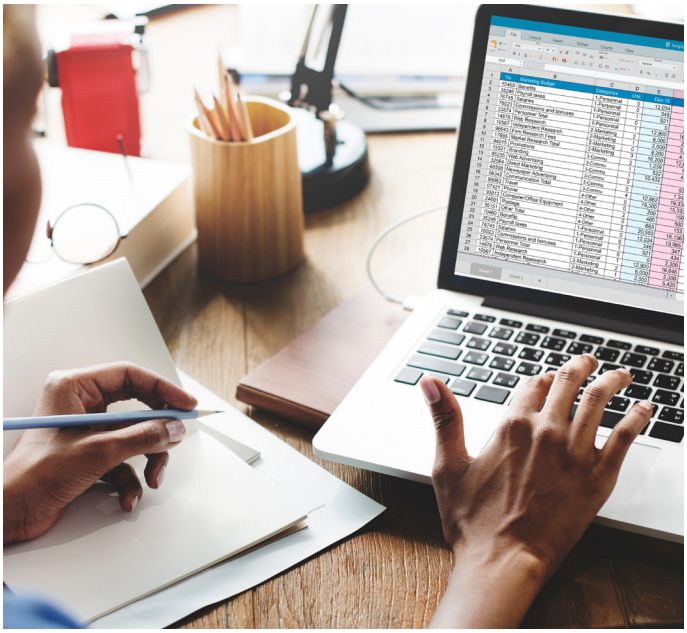
• The implementation of "Taking Regulation to the People" ("TRP") which includes staff members visiting various areas around the country and providing general financial education, which covers unclaimed benefits as well, through its Consumer Education Department. This exercise also includes staff members assisting members of the public with completing claim forms and liaising with retirement funds to ascertain whether any unclaimed benefits may be due.

• Requirement on funds of keep records of data and submitting annual financial statements to

the FSCA was implemented from 2009 to submit . All funds are required to update their unclaimed benefits data with the FSCA on a quarterly basis.

These pro-active measures which were undertaken by the then FSB and carried on by the FSCA have yielded positive results. Over the relatively short period from 28 February 2017 to 29 June 2018, around 45 200 enquiries were processed, of which 7 980 resulted in a match representing potential benefits for former (unclaimed benefit) m embers with a n aggregate value of approximately R1.9 billion.
An analysis of the financial statements indicated that over the last decade (2010 to 2020), unclaimed benefits o f a pproximately R 38 billion have been paid to approximately 1.3 million members and beneficiaries. Over the five years from 2016 to 2020 (the information for 2021 is not yet available), an amount of approximately R22 billion has been paid to 591 867 members and beneficiaries representing a n a verage b enefit of approximately R37 000 per member.

There are regular supervisory engagements with funds to assess new developments and challenges, and to find p ragmatic (preventative solutions to mitigate against the emergence of new unclaimed benefits.



5.4 Continuous and dedicated engagements with the administrators

Upon receipt of Mr Mort's reports and following the workshop held in November 2018, it was decided, as part of the Special Ad-Hoc Project, that the Retirement Funds Supervision Department of the FSCA would engage with administrators about historic cancellations. In order to spread the workload of the special project, over and above the normal functions of the FSCA, the administrators with the highest number of cancellations were prioritised.

The FSCA's records showed that almost 91% of cancelled funds were administered by seven administrators. The seven administrators and the number of funds cancelled for each are reflected in the table below.

ADMINSTRATOR	NUMBER OF FUNDS
Liberty	3 900
MMI	1 114
Sanlam	655
Alexander Forbes	253
Old Mutual	200
Gallet Retirement Fund Administrators	42
ABSA Consultants and Actuaries	35
Total	6199

The FSCA's project also entailed having regular meetings with these administrators to deal with all aspects relating to terminating funds, historic cancellations and unclaimed benefits. For obvious reasons, the focus was on Liberty as the administrator with the most cancellations and as it had encountered the most challenges relating to data and information transfers subsequent to historic acquisitions of other administration businesses.

The FSCA's Retirement Funds Supervision Department has held meetings with Liberty, Old Mutual, Sanlam, Alexander Forbes and MMI to discuss cancellations of terminating funds, section 26 appointments, and reinstatements relating to historic cancellations and any other burning issues. With regard to historic cancellations, the engagement with these administrators focused on the need to verify from membership data available to them any cancelled fund that still had assets and members. As membership data lies in the domain of the administrator and not the FSCA, administrators were required to self-report any errors. However, the FSCA utilised the information at its disposal to direct attention to specific funds and guided administrators' focus in this regard.
From the FSCA's general engagement with administrators, it was apparent that they not only appreciated their statutory duties, but also that they carried reputational risk. The administrators voluntarily undertook to conduct internal investigations and report their findings to the FSCA as and when any case was uncovered. This is what Circular 2019 addresses.

The FSCA appreciates that administrators, in particular those that had acquired the businesses of other administrators, were faced with the difficulty of a lack of historic records or information which, in some instances, may simply not be available, not withstanding efforts made to gather the information.

The FSCA is fully aware of the real problem of data and record challenges, given the nature of transfers of administration businesses. To, therefore, require administrators to act in accordance with directives that would turn out to be impractical or impossible to adhere to would negatively affect the credibility and efficacy of the regulator. For this reason, the FSCA decided upon a process of guidance and constructive engagement with the administrators concerned.

6. Conclusion.

As the custodian of public data on retirement funds, it was incumbent on the FSCA, and the then FSB, to clean up its records so as to accurately reflect registered active retirement funds and thereby restoring the integrity of its register and ensuring the effective supervision.

The Cancellations Project formed the subject-matter of litigation over a number of years from 2015 to 2018, with various allegations of irregularities and corruption on the part of the retirement funds industry and FSB officials. All the Courts, including the highest Court in the land, the Constitutional Court, ruled in favour of the FSB. The most recent court application lodged by Open Secrets and Unpaid Benefits Campaign in 2021 was withdrawn against the FSCA in September 2022.

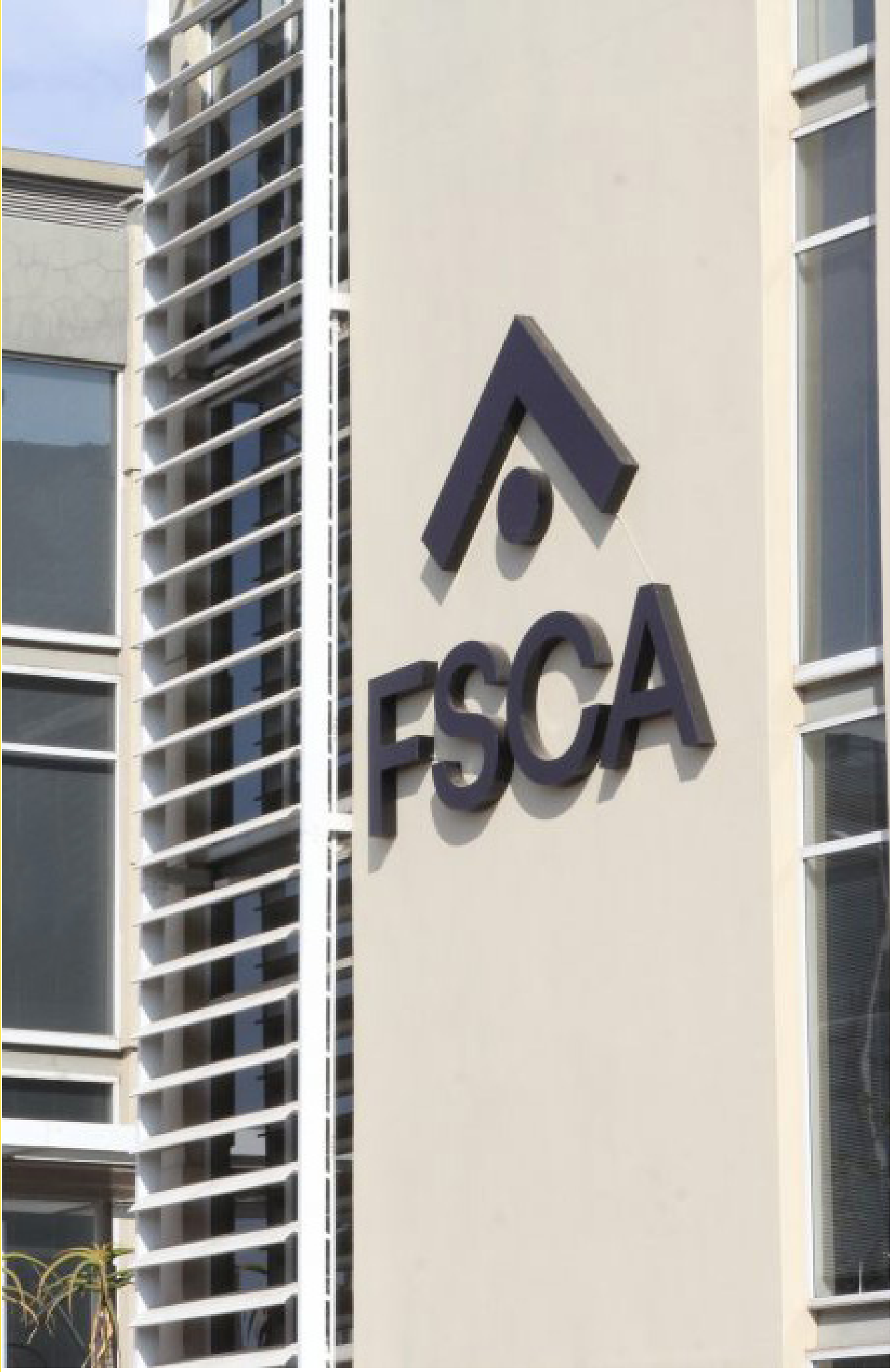
Given the enormity of the Cancellations Project, mistakes were inevitable but not systemic, and where they were uncovered they were rectified. Three independent investigations by Judge O'Regan, KPMG and Mr Mort were initiated by the then FSB Board into the Cancellations Project to review the cancellations process, identify any mistakes or wrong doing and to make recommendations to rectify any findings.

The culmination of the investigations which ended with the Mort investigation found neither evidence of any material financial prejudice having been suffered by any member, beneficiary or creditor nor did he find evidence of corruption. Mr Mort is an experienced pensions lawyer and was assisted by an experienced actuary, Mr Andrew.

Despite the Constitutional Court majority judgment in favour of the FSB, the organisation also considered the minority judgment and Mr Mort's findings as part of its review and took steps to enhance its cancellation processes. This is reflected in the internal Special Ad-Hoc Project, enhanced internal processes, various Guidance Notices and Circulars, and requirement to submit Factual Findings Reports as part of the application to terminate a fund.

As part of its supervisory functions and duties, the FSCA continues to engage with administrators, funds, civil society organisations like Open Secrets and UBC, and going forward it will also publish the list of deregistered or reinstated retirement funds and participating employers on its website for purposes of transparency.

As a financial regulator, the FSCA understands, appreciates and takes seriously its mandate to protect financial customers and members of retirement funds, and will continuously strive to uphold the highest level of professionalism in discharging its duties and mandate.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