Trustee Tutor: Issue 9 – The regulators of retirement funds

Retirement funds in South Africa run in a highly regulated environment. There are a number of regulators established to monitor compliance with and adherence to the legislative and governance requirements. This issue of Trustee Tutor sets out the roles of the regulatory bodies involved in retirement funds and how these roles apply to your fund.

It is important to appreciate that the scope and mandate of many of these bodies extends beyond retirement funds. However, to keep this issue of Trustee Tutor specific and relevant to you, we have only included where these regulators impact on the management of retirement funds.

The twin peaks model of financial regulation

The twin peaks model was introduced as South Africa's system of financial regulation on 1 April 2018 through the Financial Sector Regulation Act, 9 of 2017 (FSR Act).

The core objective of the twin peaks model is to promote and maintain stability in South Africa's financial sector. The FSR Act sets up two regulators: the *Prudential Authority*, tasked with overseeing the financial soundness of financial institutions, and the *Financial Sector Conduct Authority*, the market conduct regulator who oversees the efficiency and integrity of financial markets and affording greater financial consumer protection. The twin peaks framework makes the country's financial sector safer and allows it work more effectively in the interests of all South Africans.

The twin peaks framework is said to be a principles based approach, as opposed to the previous rules based approach. Very simply, a *rules based approach* to regulation prescribes in detail or gives a set of rules of how organisations or people should behave. By contrast, within a *principle based approach* certain specific outcomes are set and the controls, measures and procedures on how to achieve those outcomes is left for each organisation to decide.

Implementation of the set of rules within a rules based approach is easier for retirement fund trustees because there is less room for interpretation. This makes compliance a simple exercise: The Regulator sets out the rules and the retirement fund adopts and implements control measures to comply with the set rules.

Implementing a set of principles and outcomes, however, needs interpretation and understanding of how a retirement fund should conduct itself to meet the outcome, and then putting controls and measures in place to make sure that the fund complies with these outcomes and principles. Complying with principles based law is not a "one-size fit all" or "tick box" approach and each retirement fund's compliance framework will be different.

LET'S LOOK AT THESE FIRST TWO REGULATORS IN MORE DETAIL

FSCA
Financial Sector
Conduct Authority

Financial Sector Conduct Authority (FSCA)

THE FSCA IS THE MARKET CONDUCT REGULATOR OF:

- financial institutions, that provide financial products and financial services;
- financial institutions that are licensed in terms of a financial sector law, including banks, insurers, retirement funds and administrators; and
- market infrastructures.

The FSCA's primary role is to ensure a fair and stable financial market, where consumers are informed and protected, and where those that jeopardise the financial well-being of consumers are held accountable.

THE FSCA'S OBJECTIVES ARE TO:

- enhance the efficiency and integrity of financial markets;
- promote fair customer treatment by financial institutions;
- provide financial education and promote financial literacy; and
- assist in maintaining financial stability

THE FSCA AND YOUR FUND

A retirement fund is a registered legal and financial entity with the FSCA. As such, the FSCA is the regulatory body which oversees the management and governance conduct within your fund. The FSCA has a number of regulatory, supervisory and enforcement tools in their toolkit to ensure appropriate conduct in your fund and that members (as consumers) are protected:

***Regulatory submissions* - the FSCA monitors your fund through various reports that need to be submitted to them, namely:**

- Rules and amendments to your rules: all retirement fund rules and any amendments thereto need to be registered by the FSCA.
- Annual financial statements (AFS): each year your fund must submit a set of audited financial statements to the FSCA within six months of your fund's financial year end. The format of these AFS is a standard template set by the FSCA, in which a number of key pieces of information must be disclosed.
- Actuarial valuations: if not valuation exempt, your fund is required to submit an actuarial valuation at least every three years. The actuarial valuation is an assessment of whether the fund has sufficient assets to meet its obligations in terms of the fund's rules.
- Monthly contributions reporting: in terms of Section13A of the Pension Funds Act, monthly contributions due to a retirement fund must be receipted within 7 (calendar) days of the month end. For example, March's contributions are due by the 7th of April. Your fund's monitoring person must report a late, under or non-receipt of contributions to the members, the trustees and the FSCA every month.
- Section 14 applications: the process of transferring members from one retirement fund to another is set out in great detail Section 14 of the Pension Funds Act. In some instances, an application needs to be lodged and approved by the FSCA before any members or their assets can transfer to their new fund.
- Regulation 28 reporting: if your fund breaches the limits set in Regulation 28 of the Pension Funds Act, this breach needs to be reported to the FSCA.
- Fund appointments and exemptions – are processed by the FSCA in order to monitor governance.

Supervisory offsite management – using specific risk indicators, the FSCA may request information from your fund specifically, or from a group of funds, based on identified commonalities. Insights gained from this type of ongoing monitoring will assists the FSCA in formulating pre-emptive responses to emerging conduct risks and to publish leading practice benchmarks through comparative assessments. Trustees must make sure that these requests for information are responded to within the timelines stipulated by the FSCA in their request.

- *Supervisory onsite inspections* – these are face-to-face visits where the FSCA meets with trustees and fund officials to enquire about, monitor and measure a fund's conduct risk evolution over time. There is usually some documentation to submit to the FSCA beforehand and trustees must make sure that this pack of documents is delivered within the FSCA's stipulated timeline. After the visit, the fund will receive a written report of findings which may require changes to the fund's documents or practices, or simply trustees' consideration of points raised.
- *Issuing of conduct standards* - the FSR Act gives to the FSCA the power to issue conduct standards for financial institutions like retirement funds. These conduct standards establish binding principles for retirement funds and trustees need to make sure their funds take note of and implement any changes that may be necessary.
- *Guidance notes* – are issued where there is uncertainty or material inconsistency in the way in which retirement funds implement regulatory requirements. These guidance notes are not binding on the fund but do provide useful information or points of reference to trustees.
- *Interpretation rulings* – are published by the FSCA to promote clarity, consistency and certainty in the interpretation or application of pension fund laws. Whereas guidance notices will typically provide practical information on how to comply with a law, interpretation rulings are more likely to be used where a provision in a law is ambiguous or commonly misinterpreted. Unlike guidance notices, interpretation rulings are binding on the FSCA. In other words, they oblige the FSCA to interpret and apply the applicable law in line with the interpretation ruling, unless or until a legislative change or a court judgment effectively overrides the interpretation ruling.
- *Investigations* – the FSCA has a wide range of investigative powers.
- *Enforceable undertakings* - are contractual arrangements where a retirement fund undertakes to implement specific remedial action within an agreed period as a result of a regulatory contravention. Trustees should note that failure to comply with an enforceable undertaking is a contravention of the law that will result in formal enforcement action from the FSCA.
- *FSCA's trustee toolkit* – is an online development programme for trustees, where the curriculum is based on the FSCA's guidelines on good governance for retirement funds. The programme gives trustees a better understanding of their role and functions, and must be completed by all trustees within 6 months of their appointment.

THE FSCA AND YOUR SERVICE PROVIDERS

The FSCA also monitors the conduct of the majority of your fund's service providers using many of the tools discussed above.

Administrators - Section 13B of the Pension Funds Act requires that companies that administer the investments of retirement funds on that fund's behalf, must be registered with the FSCA, and comply with the conditions the FSCA may prescribe. The FSCA may impose substantial administrative penalties in appropriate cases to promote general and specific deterrence.

Representatives and Key Individuals - The Financial Advisory and Intermediary Services Act, 37 of 2002 (FAIS Act), regulates financial service providers (FSP's) by protecting the consumer against improper conduct by such FSPs. The FAIS Act makes provision for FSP's to be licenced and authorised through the FSCA. The FSCA also regulates members of the industry in the way they provide advice, as well as related intermediary services such as processing your insurance claims, in terms of certain financial products as defined by the FAIS Act. The FSCA may debar or remove key persons and suspend and revoke licences in appropriate circumstances, to ensure compliance with the FSR Act and its subordinate legislation.

Trustees should be comforted that the FSCA monitors the market conduct of their fund's service providers using all their tools available to them, including, onsite inspections, the issuing of conduct standards and directives as well as through enforceable undertakings.

To form meaningful and balanced insights in pursuing their supervisory mandate, the FSCA gathers information from a broad spectrum of sources extending beyond the institutions that it regulates. These sources include:

- Complaints and queries from consumers and other impacted stakeholders;
- Consumer bodies and industry associations;
- Alternative dispute resolution structures, including ombud structures;
- Other regulatory bodies, government departments and state agencies;
- Consumer and other media, including social media platforms;
- Whistleblowers;
- Publicly available or privately commissioned studies relating to general or specific consumer and industry trends; and
- Targeted mystery shopping exercises to obtain real time consumer experience insights.

AS FAR AS RETIREMENT FUNDS ARE CONCERNED, THE FSCA IS ONE OF THE KEY REGULATORS WHO MONITOR COMPLIANCE, GOVERNANCE AND MARKET CONDUCT OF BOTH THE FUND ITSELF AND THE ITS SERVICE PROVIDERS, TO ENSURE THE PROTECTION OF CUSTOMERS IN THE RETIREMENT SECTOR.

South African Reserve Bank
Prudential Authority

Prudential Authority (PA)

The PA and your fund

It is very seldom that the trustees of a retirement fund will interact with the PA.

The second regulatory pillar in the twin peaks model is the Prudential Authority (PA). The PA regulates financial institutions and market infrastructures to promote and enforce their safety, financial soundness and financial stability. Where the FSCA is focused on regulating the conduct of financial institutions, the PA is responsible for regulating the financial soundness and stability of financial institutions.

In fulfilling its mandate to promote and enhance the safety and soundness of financial institutions, the PA is responsible for:

- assisting the SARB maintain financial stability;
- cooperating and collaborating with other regulators, including the SARB, in issuing regulatory instruments (prudential standards and joint standards);
- conducting information gathering, supervisory onsite inspections and investigations;
- taking enforcement action (directives, leniency agreements, enforceable undertakings, etc.);
- issuing administrative penalties;
- regulating significant owners of financial institutions; and
- regulating and supervising financial conglomerates.

The PA sits within the administration of the South African Reserve Bank.

South African Reserve Bank

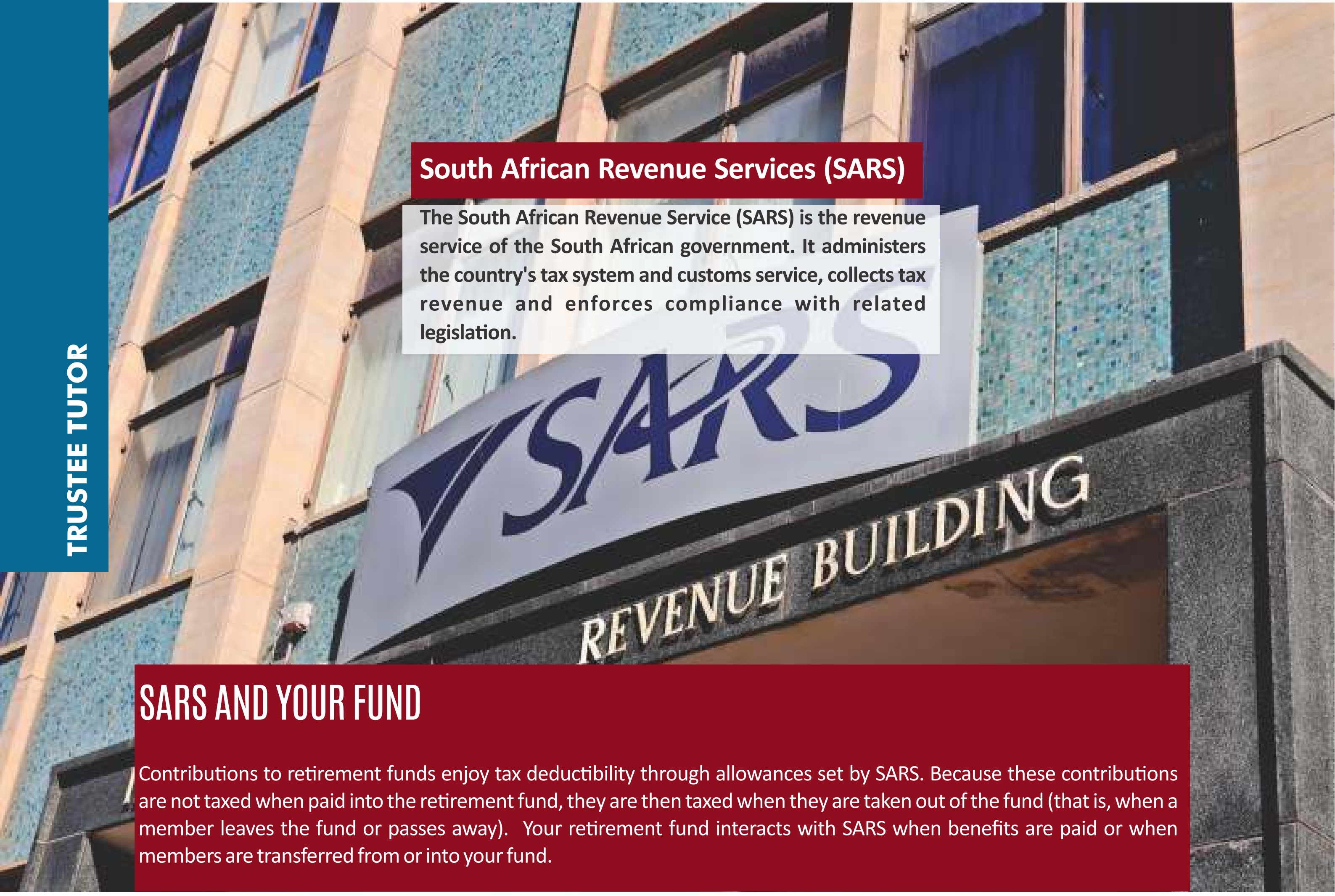
South African Reserve Bank (SARB)

The South African Reserve Bank (SARB) is the central bank of South Africa. The FSR Act gives the SARB the clear mandate to maintain and enhance financial stability within the country. Financial stability is very important – the public needs to be confident that banks and other financial services providers are able to provide their services and that the payment and settlement systems will work as expected.

One of the main objectives of the SARB is to protect the value of the currency in the interest of balanced and sustainable economic growth. Other functions of the SARB are the setting of interest rates to keep inflation low and steady and the issuing of all the country's money notes and coins.

THE SARB AND YOUR FUND

Of specific application to retirement funds, the SARB regulates cross-border transactions with the view of preventing the abuse of the financial system. As you know, retirement funds may invest a portion of their assets offshore (up to the regulation 28 limits). Every quarter, your fund must submit a report to the SARB providing information on the allocation of assets according to the major asset classes, in a standard reporting format (and template) provided by the SARB. A retirement fund must also get an audit report every year from its external auditors assessing the fund's quarterly asset allocation reports. This reporting is included in your retirement fund's annual financial statements.



South African Revenue Services (SARS)

The South African Revenue Service (SARS) is the revenue service of the South African government. It administers the country's tax system and customs service, collects tax revenue and enforces compliance with related legislation.

SARS AND YOUR FUND

Contributions to retirement funds enjoy tax deductibility through allowances set by SARS. Because these contributions are not taxed when paid into the retirement fund, they are then taxed when they are taken out of the fund (that is, when a member leaves the fund or passes away). Your retirement fund interacts with SARS when benefits are paid or when members are transferred from or into your fund.

INFORMATION REGULATOR (SOUTH AFRICA)

Information Regulator (IR)

The IR's function is to monitor and enforce compliance by public and private bodies with the provisions of the Promotion of Access to Information Act, 2 of 2000 (PAIA) and the Protection of Personal Information Act, 4 of 2013 (POPIA). For clarity, a retirement fund is a private body.

In simple terms, the IR deals with the regulation and enforcement of the laws around the protection of personal information. Their aim is to safeguard data subjects from harm by ensuring that their personal information is protected and processed correctly by responsible parties.

The powers, duties and functions of the IR are to:

- monitor and enforce compliance with the data privacy laws;
- provide education to stakeholders;
- handle complaints;
- do research and to report to Parliament,
- facilitate cross-border cooperation in the enforcement of privacy laws by participating in relevant initiatives on this; and
- issue codes of conduct and set guidelines that help various bodies with the development and application of industry/sector specific codes of conduct to ensure the proper implementation of the conditions for the lawful processing of personal information.

THE IR AND YOUR FUND

Practically, retirement fund trustees will engage with the IR's office when they:

- register their Information Officer;
- report any data breaches;
- deal with complaints that members may have reported to the IR on the processing of their personal information; and
- submit any requests for prior authorisation before processing any information that requires this authorisation (this is very infrequent).

Office of the Pension Funds Adjudicator (OPFA)

The OPFA is the ombud within the retirement funds industry who is mandated to resolve complaints in terms of the Pension Funds Act, with the aim of upholding the integrity of the retirement funds industry and protecting the interests of retirement fund members. The OPFA's office investigates and determines complaints relating to the improper application of retirement fund rules, maladministration, disputes of fact or law, and employer dereliction of duty in respect of retirement funds.

The OPFA ensures the procedurally fair, economical and expeditious resolution of complaints by:

- ensuring that its services are accessible to all;
- investigating complaints in a procedurally fair manner; and
- reaching a just and expeditious resolution of complaints in accordance with the law.

THE OPFA AND YOUR FUND

It is very important that your retirement fund have a complaints framework and policy in place, and that your members know how and where to lodge their complaints.

Trustees should always be given the opportunity to resolve a member's complaint before it is referred to the OPFA. Should the member remain unsatisfied with the trustees'/fund's response to their matter, they are then able to lodge their complaint with the OPFA.

Trustees must monitor all complaints and must respond to the OPFA's requests and investigations within their stipulated turnaround times.

If the member or the fund are unsatisfied with the decision reached by the OPFA, the matter can then be referred to the Financial

Financial Services Tribunal

The role of the Financial Services Tribunal is to hear applications for reconsideration of a decision made by a decision maker, such as the Ombud, the FSCA or even a financial services provider. In the case of retirement funds specifically, where a party is unhappy with a decision reached by the OPFA, they may refer the matter to the Tribunal.

The application must be made within 60 days after the applicant was informed of the OPFA's determination or any longer period that may be allowed if good cause is shown. And the application must be lodged with the Tribunal and all the other parties to the decision.

There are clear and strict turnaround times applicable to matters referred to the Tribunal, to enable the Tribunal to investigate the matter thoroughly and allow all parties to make submissions.

Once their investigation is complete, the Tribunal can decide to set aside the OPFA's determination and refer the matter back to the OPFA for further consideration, substitute a decision or dismiss the application. In exceptional circumstances, the Tribunal can order that a party to the proceedings must pay some or all of the costs reasonably and properly incurred by the other party in connection with the proceedings

The Tribunal's order has the same effect as a civil judgment and may be enforced as if it was granted by a court. A party who is unhappy with the Tribunal's decision can apply to the high court for review.

THE TRIBUNAL AND YOUR FUND

Members who are dissatisfied with a decision made by the OPFA may apply for reconsideration of the matter by the Tribunal. Trustees will receive formal notice of the Tribunal's involvement in a matter and the fund must respond within the stipulated timeframes. The Tribunal's proceedings are conducted with as little formality and technicality and expeditiously as possible and decisions are often made on the documents. Should a hearing be held, the parties may be represented by a legal representative of their choice.

Financial Services Intelligence Centre (FIC)

The Financial Intelligence Centre (FIC) is South Africa's national centre for the gathering, analysis and dissemination of financial intelligence. The FIC was established to identify proceeds of crime, combat money laundering and the financing of terrorism and, in so doing, has a primary role to protect the integrity of South Africa's financial system.

The FIC was established in terms of the Financial Intelligence Centre Act, 38 of 2001 (FIC Act), which also contains a number of control measures aimed at facilitating the detection of money laundering and terrorist financing, and imposes specific responsibilities on accountable institutions that relate to their business relationship with clients.

THE FIC AND YOUR FUND

A retirement fund is not an accountable institution for the purposes of the FIC Act and is therefore not subject to the majority of its obligations.

However, this does not mean that your retirement fund is completely exempt from complying with the FIC Act. The FIC Act imposes a broader reporting of suspicious and unusual transactions obligation on any person who carries on a business or is in charge of a business or who is employed by a business, which includes the business of a retirement fund, to file a prescribed report with the FIC.

Retirement fund trustees and their appointed administrators must be aware and alert that their funds could be used for money laundering purposes. Funds should therefore have appropriate control measures to pick up suspicious financial activity, for example, trustees could ask their administrators to flag deposits above a certain amount or made in specific circumstances.

As a trustee it is important to understand the extent of the regulatory framework in which your fund operates and to comply with the requirements of these regulators as they are applicable. Ongoing training and trustee development is crucial to make sure that you stay on top of your fund's compliance and governance requirements within this framework.

Please contact Toni-Leigh Cantin on 087 330 5626 or cantint@icts.co.za for more information or visit our website www.icts.co.za

TRUSTEE TUTOR

Trustee Tutor: Issue 9

The regulators of retirement funds

For an on-line version of the required reading material as well as electronic CPD Submission form, go to https://www.pensionsworldsa.co.za or https://www.ebnet.co.za

How to?

Answer all the questions by inserting the correct answer(s) into the block provided next to each question, scan the pages and email to Toni Cantin at ICTS, using cpd@icts.co.za

1. The twin peaks model of regulation was introduced in South Africa in:

   a. 2015 ☐
   b. 2016 ☐
   c. 2017 ☐
   d. 2018 ☐

2. The Financial Sector Regulation Act, 9 of 2017 (FSR Act) sets up the Prudential Authority (PA) and the Financial Services Conduct Authority (FSCA).

   a. True ☐
   b. False ☐

3. The FSCA is the market conduct regulator of:

   a. Financial institutions, that provide financial products and financial ☐
   b. Financial institutions that are licensed in terms of a financial sector law, including banks, insurers, retirement funds and administrators ☐
   c. Market infrastructures ☐
   d. All of the above. ☐

4. Choose the <u>incorrect</u> statement. The FSCA's objectives are to:

   a. Monitor the financial soundness of financial institutions. ☐
   b. Enhance the efficiency and integrity of financial markets. ☐
   c. Promote fair customer treatment by financial institutions. ☐
   d. Provide financial education and promote financial literacy. ☐

5. Which of the following is not a regulatory, supervisory or enforcement tool in the FSCA's toolkit to ensure appropriate conduct by a retirement fund?

   a. Onsite inspections. ☐
   b. Regulatory submissions. ☐
   c. Debarring a trustee. ☐
   d. Issuing of guidance notes ☐

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6. The FSCA gets its information from:

   a. Complaints and queries from consumers and other impacted stakeholders. ☐
   b. Alternative dispute resolution structures, including ombud structures. ☐
   c. Whistleblowers. ☐
   d. All of the above. ☐

7. Which of the following statements is correct.

The role of the South African Reserve Bank is to:

   a. Protect the value of the currency in the interest of balanced and sustainable economic growth ☐
   b. Look at reports providing information on the allocation of assets according ☐
   c. Review your latest actuarial valuation to ensure that governance is in place. ☐
   d. a and b only. ☐

8. The Information Regulator deals with the regulation and enforcement of the laws around the protection of personal information

   a. True ☐
   b. False ☐

9. Which of the following statements is <u>incorrect</u>:

   a. The OPFA is the ombud within the retirement funds industry who is mandated to resolve complaints in terms of the Pension Funds Act ☐
   b. The OPFA ensures that its services are easily accessible by all. ☐
   c. Trustees do not need to be given the opportunity to resolve a member's complaint before it is referred to the OPFA. ☐
   d. The OPFA investigates compliance in fair manner. ☐

10. In general, an applicant must submit a matter the Financial Services Tribunal within __ days:

   a. 30 ☐
   b. 60 ☐
   c. 90 ☐
   d. 120 ☐