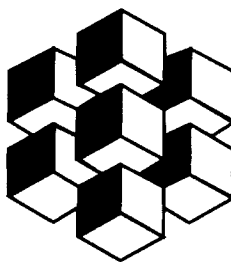


**THE ASSOCIATION OF
TRUST COMPANIES
IN SOUTH AFRICA**

P O Box 27076, Benrose, 2011
Telephone : (082) 449 2569
Fax : (011) 480 3784
Website : <http://www.atcsa.org.za>



**DIE VERENIGING VAN
TRUSTMAATSKAPPYE
IN SUID - AFRIKA**

Posbus 27076, Benrose, 2011
Telefoon : (082) 449 2569
Faks : (011) 480 3784
Email : secretariat@atcsa.org.za

**Est. 1932
(Constituted not for gain)**

The Secretary to Parliament
c/o Mr Bradley Viljoen
Committee Section
Parliament of the RSA
PO Box 15
Cape Town
8000

Tel: (021) 403 3759
Fax: (021) 403 8204
bviljoen@parliament.gov.za

9 May 2008

Dear Sir

**SUBMISSION ON THE PROVISIONS OF THE GENERAL FINANCIAL SERVICES LAWS AMENDMENT BILL
(2008) DEALING WITH BENEFICIARY FUNDS**

This submission is for the Employee Benefits Special Purpose Committee of the Association of Trust Companies in South Africa to highlight certain concerns about the recent amendments that deal with beneficiary funds, and to highlight issues that require further clarity.

1. Commencement and Transitional Provisions

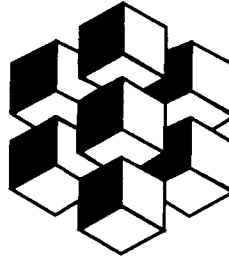
- 1.1. Currently, section 37C(2)(a) says that a s37C payment to a trustee contemplated in the Trust Property Control Act is deemed to be a payment to the beneficiary. The amendments propose that s37C(2)(a) be amended to delete the reference to the Trust Property Control Act and to instead say that a payment to a beneficiary fund will be deemed to be a payment to the beneficiary.
- 1.2. As soon as this amendment comes into effect, retirement funds will no longer be allowed to pay any s37C benefits into trusts because there will no longer be any authorising provision to do so. A

MEMBERS / LEDE

ABSA Trust, BoE Trust Limited, ExecTrust Administrators (Pty) Limited, Fairheads International Trust, Fairheads Umbrella Trust Company (Pty) Limited, Fedtrust (Pty) Limited, First National Bank Trust Services, Graaffs Trust Limited, Investec Private Trust, Legatus Trust, Maitland Trust, Marriott Trust, Molebedi Trust Limited, Old Mutual Trust, Personal Trust International, Sanlam Trust, Sentinel International Trust Company, Standard Executors & Trustees Limited

**THE ASSOCIATION OF
TRUST COMPANIES
IN SOUTH AFRICA**

P O Box 27076, Benrose, 2011
Telephone : (082) 449 2569
Fax : (011) 480 3784
Website : <http://www.atcsa.org.za>



**DIE VERENIGING VAN
TRUSTMAATSKAPPYE
IN SUID - AFRIKA**

Posbus 27076, Benrose, 2011
Telefoon : (082) 449 2569
Faks : (011) 480 3784
Email : secretariat@atcsa.org.za

**Est. 1932
(Constituted not for gain)**

payment into trust will no longer be deemed to be a payment to the beneficiary. Retirement funds will only be able to pay these death benefits into beneficiary funds. It is therefore important to ensure that as soon as this provision comes into effect, retirement funds are in a position to make such payments and beneficiary funds are registered and in a position to receive such payments.

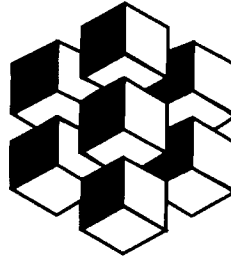
- 1.3. The proposed new section 2A says that "all beneficiary funds **established on or after 1 January 2009** must register" in terms of the Act. This appears to suggest that beneficiary funds established **before 1 January 2009** will not have to register. However, it can surely not have been intended that only beneficiary funds established "on or after 1 January 2009" have the obligation to register - despite the fact that this is what the proposed new section 2A seems to be saying.
- 1.4. It is possible that the intention is rather that beneficiary funds can be established now (before 1 January 2009) and that they can function as such in terms of the Act (that is, they can receive monies from retirement funds) but must ensure that, if established now, they register **by** no later than 1 January 2009. This interpretation is supported if one looks at the proposed new section 37C(2)(b) which says that "**no payments may be made in terms of this section on or after January 2009 to a beneficiary fund which is not registered** under this Act". This suggests that until that date, payments can be made to beneficiary funds that have not been registered. In other words, beneficiary funds established now will have a grace period until 1 January 2009 to receive these payments even if they are not registered, after which date section 37C(2)(b) prohibits payments to unregistered beneficiary funds.
- 1.5. If this is in fact the intention then the wording of section 2A should make this clear. The phrase "on or after 1 January 2009" should also be changed to read "as at or after 1 January 2009" in order to include those funds established before 1 January 2009.
- 1.6. If the intention is rather that beneficiary funds that are established **now** (that is, before 1 January 2009) will still have to be registered before they can receive s37C payments from retirement funds, then this is not clear from the amendments and we suggest that such an intention be made explicit.

MEMBERS / LEDE

ABSA Trust, BoE Trust Limited, ExecTrust Administrators (Pty) Limited, Fairheads International Trust, Fairheads Umbrella Trust Company (Pty) Limited, Fedtrust (Pty) Limited, First National Bank Trust Services, Graaffs Trust Limited, Investec Private Trust, Legatus Trust, Maitland Trust, Marriott Trust, Molebedi Trust Limited, Old Mutual Trust, Personal Trust International, Sanlam Trust, Sentinel International Trust Company, Standard Executors & Trustees Limited

**THE ASSOCIATION OF
TRUST COMPANIES
IN SOUTH AFRICA**

P O Box 27076, Benrose, 2011
Telephone : (082) 449 2569
Fax : (011) 480 3784
Website : <http://www.atcsa.org.za>



**DIE VERENIGING VAN
TRUSTMAATSKAPPE
IN SUID - AFRIKA**

Posbus 27076, Benrose, 2011
Telefoon : (082) 449 2569
Faks : (011) 480 3784
Email : secretariat@atcsa.org.za

**Est. 1932
(Constituted not for gain)**

We also suggest in that case that the commencement of s37C(2) be delayed for a period to allow beneficiary funds to register (even if provisionally) so as to ensure that retirement funds are not left in the position that the Act only allows them to pay s37C benefits into a beneficiary fund, but there are no registered beneficiary funds into which they can pay such benefits.

2. Powers of beneficiary fund trustees

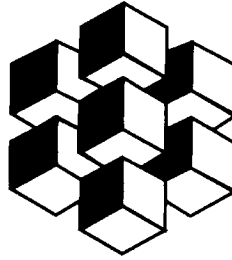
- 2.1. Unlike retirement fund trustees, beneficiary fund trustees must be able to make regular monthly payments (from income earned and/or capital) and ad hoc discretionary capital payments (such as school and university fees, medical expenses and so on). Currently, the reason that retirement funds place these benefits into 'trust' is because the guardian of a minor beneficiary may be considered incapable of administering the money responsibly on behalf of the minor, or because the major beneficiary is labouring under a legal disability which prevents his or her being able to manage the money responsibly, or because the beneficiary has consented to the benefit being placed 'in trust'. These are the same reasons that retirement funds will pay s37C benefits into beneficiary funds.
- 2.2. Beneficiary funds are therefore not simple investment vehicles. They are there to take over the administration of these benefits because the retirement fund considers that the beneficiaries or their guardians cannot do so responsibly. Beneficiary funds must then administer the benefit in a way that best meets the ongoing financial needs of the beneficiary (until they reach age of majority or, in the case of a major beneficiary, upon the date they become entitled to the benefit) as long as the benefit remains with the beneficiary fund, while at the same time trying to preserve as much of the capital balance as is possible.
- 2.3. Currently, the power to make on going monthly payments and ad hoc discretionary capital payments is not set out in the amendments. We presume then that it will either be set out in the

MEMBERS / LEDE

ABSA Trust, BoE Trust Limited, ExecTrust Administrators (Pty) Limited, Fairheads International Trust, Fairheads Umbrella Trust Company (Pty) Limited, Fedtrust (Pty) Limited, First National Bank Trust Services, Graaffs Trust Limited, Investec Private Trust, Legatus Trust, Maitland Trust, Marriott Trust, Molebedi Trust Limited, Old Mutual Trust, Personal Trust International, Sanlam Trust, Sentinel International Trust Company, Standard Executors & Trustees Limited

**THE ASSOCIATION OF
TRUST COMPANIES
IN SOUTH AFRICA**

P O Box 27076, Benrose, 2011
Telephone : (082) 449 2569
Fax : (011) 480 3784
Website : <http://www.atcsa.org.za>



**DIE VERENIGING VAN
TRUSTMAATSKAPPYE
IN SUID - AFRIKA**

Posbus 27076, Benrose, 2011
Telefoon : (082) 449 2569
Faks : (011) 480 3784
Email : secretariat@atcsa.org.za

**Est. 1932
(Constituted not for gain)**

regulations or, if not, that the rules of the beneficiary funds will make clear that the trustees of these beneficiary funds have such powers.

3. Section 37A

As the function of the beneficiary fund will also be to make discretionary ad hoc capital payments to meet the financial needs of the beneficiary (such as school or university fees, medical expenses or other unforeseen and ad hoc expenses) the capital amount of the benefit may be reduced. It should be clarified in s37A that such capital payments do not constitute a prohibited reduction of the benefit. They are rather part and parcel of the process of administering the money for the benefit of the minor child (or other beneficiary) by addressing their financial needs.

4. Ownership of the assets

4.1. Currently, in most cases, the s37C benefits that are paid into trusts vest in the beneficiaries themselves and are merely administered by the trustees of the trust. The benefit is the property of the beneficiary and it is for this reason that when a beneficiary dies, the benefit is paid into his or her estate or, if there is no estate, is paid into the guardian's fund.

4.2. However, by virtue of section 5 of the Act, once beneficiary funds are registered, the benefits granted to beneficiaries in terms of s37C will not vest in the beneficiaries but will rather vest in the beneficiary fund. This has certain important implications:

4.2.1. If all the assets are deemed to belong to the fund, then it is not clear if, how and when the income earned and income distributed to beneficiaries will be taxed, and in whose hands it will be taxed and at what rate.

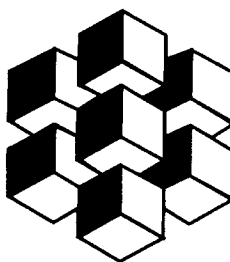
4.2.2. It is not clear why, if the assets are now to vest in the beneficiary fund, they will also be paid into the estate of the beneficiary or the guardian's fund if there is no estate. (Most

MEMBERS / LEDE

ABSA Trust, BoE Trust Limited, ExecTrust Administrators (Pty) Limited, Fairheads International Trust, Fairheads Umbrella Trust Company (Pty) Limited, Fedtrust (Pty) Limited, First National Bank Trust Services, Graaffs Trust Limited, Investec Private Trust, Legatus Trust, Maitland Trust, Marriott Trust, Molebedi Trust Limited, Old Mutual Trust, Personal Trust International, Sanlam Trust, Sentinel International Trust Company, Standard Executors & Trustees Limited

**THE ASSOCIATION OF
TRUST COMPANIES
IN SOUTH AFRICA**

P O Box 27076, Benrose, 2011
Telephone : (082) 449 2569
Fax : (011) 480 3784
Website : <http://www.atcsa.org.za>



**DIE VERENIGING VAN
TRUSTMAATSKAPPYE
IN SUID - AFRIKA**

Posbus 27076, Benrose, 2011
Telefoon : (082) 449 2569
Faks : (011) 480 3784
Email : secretariat@atcsa.org.za

**Est. 1932
(Constituted not for gain)**

often the beneficiaries that die are still minors who do not have a will and currently these benefits are often paid in terms of intestate succession.)

5. Transfer of existing trusts

It should be noted that if the assets of the new beneficiary funds are to vest in the funds themselves and not the beneficiaries of that fund, then transferring existing trusts to beneficiary funds becomes problematic. This is because in many instances the beneficiary's benefit vests in him or her and not in the trust. It would therefore not be possible to reverse the vesting of the benefit in the beneficiary and now cause it to vest in the fund.

6. Transfer of benefits from one beneficiary fund to another

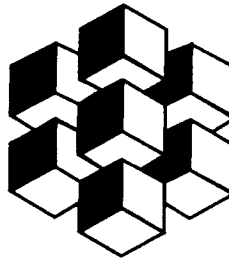
- 6.1. In terms of the proposed amendment to s14, approval from the registrar will not be necessary to transfer benefits from one beneficiary fund to another. However, it is not clear under what circumstances such transfers will be allowed. 'Membership' of a beneficiary fund will not depend on employment with a particular employer, nor will it depend on the beneficiary's election as to which beneficiary fund to participate in. This election is made by the retirement fund and not the beneficiary.
- 6.2. It is anticipated that retirement funds will elect to 'participate' in a beneficiary fund, such 'participation' meaning simply that it will place s37C moneys in that beneficiary fund. Retirement funds, it is expected, will decide where to place s37C moneys based on a range of factors, such as the fees charged by the beneficiary funds, the governance processes and so on. However, once they decide to pay a particular beneficiary's benefit into the beneficiary fund, it is not expected that the retirement fund trustees will participate in the administration of that benefit in any way. That is then the function of the beneficiary fund trustees. (This is similar to the way preservation funds have functioned up until now where employers were still required to 'participate' in such funds for

MEMBERS / LEDE

ABSA Trust, BoE Trust Limited, ExecTrust Administrators (Pty) Limited, Fairheads International Trust, Fairheads Umbrella Trust Company (Pty) Limited, Fedtrust (Pty) Limited, First National Bank Trust Services, Graaffs Trust Limited, Investec Private Trust, Legatus Trust, Maitland Trust, Marriott Trust, Molebedi Trust Limited, Old Mutual Trust, Personal Trust International, Sanlam Trust, Sentinel International Trust Company, Standard Executors & Trustees Limited

**THE ASSOCIATION OF
TRUST COMPANIES
IN SOUTH AFRICA**

P O Box 27076, Benrose, 2011
Telephone : (082) 449 2569
Fax : (011) 480 3784
Website : <http://www.atcsa.org.za>



**DIE VERENIGING VAN
TRUSTMAATSKAPPYE
IN SUID - AFRIKA**

Posbus 27076, Benrose, 2011
Telefoon : (082) 449 2569
Faks : (011) 480 3784
Email : secretariat@atcsa.org.za

**Est. 1932
(Constituted not for gain)**

their employees to be able to transfer benefits to those preservation funds – but played no role in the administration of the benefit.)

- 6.3. However, one expects that retirement funds will be free to participate in as many beneficiary funds as they wish at any one time, and that they should also be free to terminate their 'participation' in a beneficiary fund. The question that arises is when will they be allowed to request the transfer of beneficiary's benefits to a different beneficiary fund, and whether the beneficiary fund can object if it does not consider this to be in the best interests of the beneficiary?

7. Licensing of administrators

Clarity is needed on what licence requirements will apply to the administrators who administer the beneficiary fund. As part of the transitional phase, one would hope that those specialised trust company administrators will be given sufficient time within which to obtain the relevant licences before the amendment comes into effect and payments to beneficiary funds are required to begin.

8. Tax Directives

Currently retirement funds are required to apply for tax directives each time a benefit is payable. It is assumed that this will not be required in the case of the monthly and ad hoc discretionary payments made by the beneficiary funds. To require tax directives each and every time such a payment is made will complicate the administration of these funds unnecessarily and will increase the administration costs significantly. It will also delay payments to the beneficiaries, which in many cases are urgent. This will certainly not be in the interests of the beneficiaries.

9. Costs

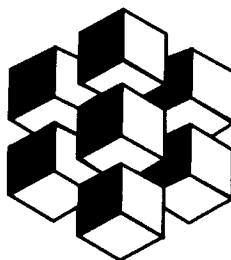
We have been advised that the regulator has indicated its intention not to require the payment of FSB and adjudicator levies from beneficiary funds. This approach is supported as it will keep down the administration costs

MEMBERS / LEDE

ABSA Trust, BoE Trust Limited, ExecTrust Administrators (Pty) Limited, Fairheads International Trust, Fairheads Umbrella Trust Company (Pty) Limited, Fedtrust (Pty) Limited, First National Bank Trust Services, Graaffs Trust Limited, Investec Private Trust, Legatus Trust, Maitland Trust, Marriott Trust, Molebedi Trust Limited, Old Mutual Trust, Personal Trust International, Sanlam Trust, Sentinel International Trust Company, Standard Executors & Trustees Limited

**THE ASSOCIATION OF
TRUST COMPANIES
IN SOUTH AFRICA**

P O Box 27076, Benrose, 2011
Telephone : (082) 449 2569
Fax : (011) 480 3784
Website : <http://www.atcsa.org.za>



**DIE VERENIGING VAN
TRUSTMAATSKAPPYE
IN SUID - AFRIKA**

Posbus 27076, Benrose, 2011
Telefoon : (082) 449 2569
Faks : (011) 480 3784
Email : secretariat@atcsa.org.za

**Est. 1932
(Constituted not for gain)**

for beneficiaries. Although this is not set out in the amendments we assume that it will be made clear in the regulations.

10. Exemptions

Beneficiary funds are subject to all the provisions of the Act that "funds" are generally subject to, and beneficiaries will be subject to all the provisions that "members" are generally subject to. We presume that the registrar will exercise his power in terms of the proposed new s2(5)(a) and 2(5)(aA) to grant the appropriate exemptions to make the arrangement workable.

11. Conclusion

We appreciate this opportunity to provide input in relation to this Bill. Please feel free to contact the writer should you wish to do so. We are willing to participate in any public hearings you may be planning in this regard.

Yours sincerely

Giselle Gould

Member of the Employee Benefit Special Purpose Committee of the Association of Trust Companies

011 883 9755

084 586 2554

MEMBERS / LEDE

ABSA Trust, BoE Trust Limited, ExecTrust Administrators (Pty) Limited, Fairheads International Trust, Fairheads Umbrella Trust Company (Pty) Limited, Fedtrust (Pty) Limited, First National Bank Trust Services, Graaffs Trust Limited, Investec Private Trust, Legatus Trust, Maitland Trust, Marriott Trust, Molebedi Trust Limited, Old Mutual Trust, Personal Trust International, Sanlam Trust, Sentinel International Trust Company, Standard Executors & Trustees Limited