

## **MEMORANDUM ON THE OBJECTS OF THE PENSION FUNDS AMENDMENT BILL, 2007**

### **1. BACKGROUND TO THE BILL**

- 1.1 The primary objective of the Amendment Bill is to enhance the protection of the pension interest of members, given that dedicated contributions towards their retirement often extend across their lifetimes, and therefore serves as the most significant source of saving for most individuals in formal employment. A number of amendments over time have had this objective at their nexus, for example, the establishment of the Pension Funds Adjudicator, the amendments passed by Parliament in 2001 regarding pension fund surpluses and the determination of minimum benefits.
- 1.2 Over time however, not only have certain references in the Pension Funds Act, 1956 ('the Act') gradually become misaligned with provisions in other legislation, but more seriously, certain provisions of the Act have been challenged by those seeking in many instances to circumvent the spirit of the original legislation passed by Parliament through creative legal interpretations.

### **2. OBJECTS OF THE BILL**

The Objects of the Amendment Bill are to –

- 2.1 to protect the pension interest of members; and
- 2.2 align the Act to changing regulatory policy and practical considerations.

### **3. SUMMARY OF THE BILL**

- 3.1 The Amendment Bill broadly addresses the following areas:
  - 3.1.1 clarifying the surplus utilised improperly in terms of section 15B of the Act and other provisions regarding the process of surplus apportionment. These amendments are necessary to provide clarity to boards of trustees when apportioning surplus, and to close loopholes that allow for creative interpretations not aligned with the

- intention of the legislature in the promulgation of the Pension Fund Second Amendment Act;
- 3.1.2 bringing the regulation of retirement funds established through bargaining council arrangements under the regulatory auspices of the Registrar of Pension Funds. It is further proposed that bargaining council funds not yet registered under the Act must register on or before 1 January 2008. This amendment is necessary to ensure consistency in fund governance and dispute resolution across both bargaining council funds and other occupational funds;
  - 3.1.3 increasing the powers of the Registrar of Pension Funds so as to increase regulatory effectiveness;
  - 3.1.4 providing for specific duties of pension fund administrators;
  - 3.1.5 clarifying the jurisdiction of the Pension Funds Adjudicator. Provision is also made for the appointment of a deputy and acting adjudicator, when necessary, and the alignment of the Act with the Prescription Act;
  - 3.1.6 providing clarity on the treatment of divorce orders and maintenance claims in respect of pension benefits; and
  - 3.1.7 updating provisions in the Act which are no longer aligned to recently promulgated legislation.
- 3.2 The following is a brief summary of the Amendment Bill:

**Section 1(1): Definitions**

*“actuarial surplus” [amendment of existing definition]* - To ensure that any surplus utilised improperly by an employer is taken into account when the actuarial surplus of a fund is determined.

*“adjudicator” [amendment of existing definition]* - To include a deputy adjudicator and an acting adjudicator in the definition. An amendment to section 30C provides for these appointments.

*“administrative penalty” [new definition]* - To facilitate the use of the term in the Act and the Regulations.

*“administrator” [new definition]* - To facilitate the use of the term in the Act and the Regulations.

*“advisory committee” [new definition]* - To provide a definition for the advisory committee created by section 3B, during a previous amendment to the Act.

*“audit-exempt” [new definition]* - To facilitate the use of the term in the Act and the Regulations.

*“augment” [new definition]* - To ensure that the term when used in the Act is interpreted to include reduction, as the term in its ordinary meaning does not include reduction.

*“beneficiary” [new definition]* - To facilitate the use of the term in the Act and the Regulations.

*“benefit” [new definition]* - To facilitate the use of the term in the Act and the Regulations.

*“board member” [new definition]* - To facilitate the use of the term in the Act and the Regulations.

*“contingency reserve account” [amendment of existing definition]* - To clarify that the registrar may disallow or require amendments to a contingency reserve account and to align the Act with the requirements for contingency reserve accounts as set out in PF117.

*“contribution holiday” [amendment of existing definition]* - To remove the word “employer” from the term “employer reserve account” used in the current definition as this exact term is not always used in the rules of funds.

*“court” [amendment of existing definition]* - To replace the reference to “Supreme Court” with “High Court”.

*“defined contribution category of a fund” [amendment of existing definition]* - To allow for benefits as a result of a transfer or amalgamation in terms of section 14 of the Act and other amounts that may be credited or debited to a

member's individual account to be included in the calculation of the value of the benefits payable on retirement.

*“dependant” [amendment of existing definition]* - To delete the reference to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any Asiatic religion. A new definition of spouse is proposed.

*“employer surplus account” [amendment of existing definition]* - To include amounts allocated to the employer surplus account in terms of section 15E(1)(e) of the Act.

*“fund” [amendment of existing definition]* - To facilitate the use of the term in the Act and the Regulations.

*“fund return” [new definition]* - To facilitate the use of the term in the Act and the Regulations.

*“member surplus account” [amendment of existing definition]* - To reflect the definition of “fund return” and to recognise that a fund return may be smoothed by a fund.

*“minimum individual reserve” [amendment of existing definition]* - To provide for pensioners and deferred pensioners in the definition.

*“non-member spouse” [new definition]* - To facilitate the use of the term in the Act and the Regulations.

*“prescribed” and “prescribed by regulation” [new definitions]* - To clarify the meaning of these terms when used in the Act.

*“rules” [amendment of existing definition]* - To clarify what constitute the rules of a fund.

*“spouse” [new definition]* - To clarify who qualifies as a spouse of a member and to align the definition with recently promulgated legislation.

*“surplus apportionment date” [amendment of existing definition]* - To ensure that each fund has a surplus apportionment date irrespective of the fact that a fund may not have surplus to apportion to facilitate the submission of a “nil” return.

*“valuation-exempt” [new definition]* - To facilitate the use of the term in the Act and the Regulations.

## **Section 2: Application of Act**

To make it clear that all bargaining council funds registered in terms of the Act are indeed subject to the Act and to oblige bargaining council funds not yet registered under the Act to register before or on 1 January 2008 in the interest of consistency in fund governance and dispute resolution across bargaining council funds and other occupational funds.

## **Section 5: Effect of registration of pension fund**

To correct references to Acts repealed since the last amendment to the Act. The following references are corrected:

- Stock Exchanges Control Act, No 1 of 1985 replaced with Securities Services Act, No 36 of 2004;
- Insurance Act, No 27 of 1943 replaced with Long-term Insurance Act, No 52 of 1998;
- Banks Act, No 23 of 1965 replaced with Banks Act, No 94 of 1990.

## **Section 7D: Duties of board**

To correct a reference to an Act repealed since the last amendment to the Act. The following reference is corrected:

- Financial Institutions (Investment of Funds) Act, No 39 of 1984 replaced with Financial Institutions (Protection of Funds) Act, No 28 of 2001.

## **Section 9: Appointment of auditor**

To correct a reference to an Act repealed since the last amendment to the Act. The following reference is corrected:

- Public Accountants’ and Auditors’ Act, 1991 (Act No. 80 of 1991) replaced with Auditing Profession Act, 2005 (Act No. 26 of 2005).

**Section 13A: Payment of contributions and certain benefits to pension funds**

To provide clarity on the period in respect of which interest is payable.

**Section 13B: Restrictions on administration of pension funds**

To provide for the duties of pension fund administrators and to authorise the registrar to take certain steps in the event of non-compliance by an administrator with these duties.

**Section 14: Amalgamations and transfers**

- To provide that a scheme for a proposed amalgamation or transfer of a business of a registered fund must be submitted to the registrar within 180 days of the effective date of the transaction to prevent difficulties resulting from the retrospective implementation of a scheme and to ensure the expeditious finalisation of section 14 transfers. The current section does not require a scheme to be submitted within a specified period.
- To exclude certain transactions from the requirement to submit a scheme under certain stated circumstances.
- To determine a fixed period within which assets must be transferred. The current section does not specify a period.
- To provide for the lapsing of a scheme lodged with the registrar where a fund failed to provide the registrar with information requested within a period of 180 days.
- To authorise the registrar to impose conditions on the amendment or withdrawal of a certificate previously issued by him or her in respect of compliance with section 14(1).

**Section 14A: Minimum benefits**

- **14A(1):** to ensure that minimum benefits are also provided to pensioners and deferred pensioners.
- **14A(1)(b) & (c):** to clarify the wording in the interest of simplicity and certainty.
- **14A(1)(d):** to clarify the wording to ensure that boards are compelled to grant at least minimum pension increases.
- **14B(1):** to align the wording used with the definition of “defined contribution category of a fund”.
- **14B(2)(a)(i)(aa):** to ensure that the rate of accrual is equitable and appropriate, should a fund register a rule amendment to reduce the accrual rate prospectively.
- **14B(2)(a)(i)(bb):** to clarify the wording in the interest of simplicity and certainty.
- **14B(2)(a)(i)(cc):** to ensure that any lump sum benefit is included when the minimum individual reserve is determined.
- **14B(2)(a)(ii):** to clarify the wording and to align the wording used with the definition of “fund return”.
- **14B(3)(c):** to exclude certain pension funds (such as retirement annuities and pensions purchased from insurers) from the obligation to grant minimum pension increases as this is not practical.
- **14B(4)(a):** to ensure that minimum pension increases do not compromise a fund’s financial soundness.
- **14B(4)(b)(i):** to ensure that where a pensioner retired in a previous fund all the conditions of this section apply as if the pensioner had retired on the day that he became a pensioner in a current fund. To provide for the re-setting of the moneys available for fund pension increases in the future when there is insufficient actuarial surplus at the surplus apportionment date to permit full increases to be given.
- **14B(4)(c):** to clarify the wording in the interest of simplicity and certainty.

- **14B(6):** to ensure that contingent pensions are included in the calculation of minimum individual reserve where the corresponding beneficiaries are still alive.

### **Section 15B: Apportionment of existing surplus**

- **15B(1)(a):** to clarify which funds must submit surplus schemes to the registrar, e.g. a fund that commenced in 2000 and registered in 2005 must also submit a scheme to the Registrar for approval.
- **15B(1)(b):** to provide that any advancement of a fund's statutory actuarial valuation date must be motivated to the registrar.
- **15B(5):** to include deferred pensioners within the ambit of this subsection.
- **15B(5)(d):** to authorise the registrar to set requirements relating to the method for and timing of the repayment of any surplus utilised improperly.
- **15B(5)(f):** To clarify that fund return is payable to stakeholders from the surplus apportionment date until the date of final settlement.
- **15B(6):** to reword the subsection to clarify what constitutes improper uses and to confirm that improper use investigations must go back to at least 1 January 1980. To provide for specific definitions applicable to this subsection only ("cost", "employer", "former member" and "selected").
- **15B(9)(d):** to clarify that reasonable measures taken to inform affected persons of a scheme is sufficient to comply with this subsection.
- **15B(9) & (10):** to confirm that the statutory actuarial valuation as at the surplus apportionment date and the surplus scheme must be considered jointly to determine whether or not funds have satisfied the provisions of section 15B.
- **15B(11):** to require a "nil" return to be submitted to the registrar where a fund does not have surplus to apportion and to set out the requirements for a "nil" return.



- **15B(12):** to enable a fund to apply the requirements of surplus apportionment on a participating employer level, where the participating employers have been administered as separate entities or sub-funds within a fund (in other words, under “umbrella” arrangements).
- **15B(13):** to authorise the registrar to prescribe additional requirements for a “nil” return.

**Section 15C: Apportionment of future surplus**

To clarify that future surplus can be allocated to either the member or employer surplus accounts or both.

**Section 15E: Utilisation of surplus for benefit of employer**

To allow for transfers from the employer surplus account to the member surplus account.

**Section 15F: Existing employer reserve accounts**

To align the wording used with the definition of “employer reserve account”.

**Section 15K(1): Specialist tribunal**

To align this section 15K(1) with section 15B(10).

**New Section 18(5)**

To authorise the registrar to, in the interest of members, require an audit, valuation, inspection or investigation in respect of a fund.

**Section 25: Powers of inspection**

To authorise the registrar to conduct compliance inspections and to instruct any person to conduct an inspection on his or her behalf.

**Section 26: The Registrar may intervene in the management of a fund**

To authorise the registrar to intervene in the management of a fund without first having to obtain a Court order.

**Section 28: Voluntary dissolution of fund**

To authorise the registrar to exempt a fund from any of the provisions of section 28, subject to conditions.

**Section 30A: Submission and consideration of complaints**

To authorise the adjudicator to condone any non-compliance with or to extend any of the timeframes provided for in this section.

**Section 30C: Appointment of Adjudicator**

To authorise the Minister, after consultation with the FSB, to appoint one or more Deputy Adjudicators and an acting Adjudicator, when necessary, to allow for the more efficient functioning of the office of the Pension Funds Adjudicator.

**Section 30I: Time limit for lodging of complaints**

To align the section with legal and legislative best practice on prescription.

**Section 30P: Access to Court**

To replace the reference to “Supreme Court” with “High Court”.

**New Section 30Y: Adjudicator proceedings**

To authorise the Minister to make regulations regarding the processes and procedures the Adjudicator must comply with in exercising his or her functions.

**New Section 33A: Directives**

To authorise the registrar to issue directives to pension funds under certain circumstances.

**Section 36: Regulations**

To delete the need to prescribe the form of documents referred to in the Act by regulation. It is more practical to enable the registrar to prescribe such.

**Section 37: Administrative penalties**

To authorise the registrar to impose administrative penalties in the event of non-compliance with the Act and to delete offences created by the Act.

**Section 37C: Disposition of pension benefits upon death of member**

To ensure that a dedicated pension (a spouse's and dependant's pension) is not subject to the discretion of the trustees in the allocation of death benefits and cannot be re-directed to other beneficiaries.

**Section 37D: Funds may make certain deductions from pension benefits**

- To allow for the deduction of an amount that is due to a non-member spouse or other person in accordance with a valid court order from a member's pension benefit.
- To correct references to Acts repealed since the last amendment to the Act. The following references are corrected:
  - Medical Schemes Act, No 72 of 1967 replaced with Medical Schemes Act, No 131 of 1998.
  - Insurance Act, No 27 of 1943 replaced with Long-term Insurance Act, No 52 of 1998.

**New Clause 40A: Delegations and authorisations**

To authorise the Minister to delegate the powers afforded to him or her under the Act.

**New Section 40B: Retrospectivity**

To clarify the date on which certain provisions of the Bill will take effect and to regulate the implications thereof.

#### **4. ORGANISATIONS AND INSTITUTIONS CONSULTED**

The proposed amendments were made available for public comment for a period of 30 days during the latter half of 2006. Comments were received from a variety of stakeholders, including specific funds, unions, and industry participants. The Bill was revised where considered necessary in the light of comments received.

#### **5. FINANCIAL IMPLICATIONS TO THE STATE**

- 5.1 The Bill will not have financial implications for government.
- 5.2 Limited costs will be incurred by those funds directed by the Registrar to review their apportionment schemes. It is envisaged that this will happen only in a small minority of cases.

#### **6. CONSTITUTIONAL IMPLICATIONS**

None.

#### **7. PARLIAMENTARY PROCEDURE**

- 7.1 The State Law Advisers and the National Treasury are of the opinion that this Bill must be dealt with in accordance with the procedure prescribed by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 7.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

REPUBLIC OF SOUTH AFRICA

PENSION FUNDS AMENDMENT BILL

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*(As introduced in the National Assembly as a section 75-Bill; explanatory  
summary of Bill published in Government Gazette No.      of      ) (The English  
text is the official text of the Bill)*  
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(MINISTER OF FINANCE)

[B      - 2007]

## PENSION FUNDS AMENDMENT BILL, 2007

### GENERAL EXPLANATORY NOTE:

Amendments are affected in the text of the current Act to facilitate consultation.

Words in bold type in square brackets ([     ]) indicate omissions from existing enactments.

Words underlined with a solid line (\_\_\_\_\_ ) indicate insertions in existing enactments.

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## BILL

To amend the Pension Funds Act, 1956 so as to clarify, define or further define certain expressions, to clarify certain provisions in line with their practical application; to update references to legislation and institutions; to delete outdated provisions; to clarify the provisions on the determination and apportionment of actuarial surplus in a pension fund; to provide for the application of the Act to certain funds; to provide for the proper conduct and obligations of an administrator of a pension fund and the sanctions for misconduct; to regulate the amalgamation or transfer of the business of a registered fund; to provide for the granting of a minimum pension increase to pensioners; to extend and clarify the provisions on deductions that may be made from pension benefits; to further define and clarify the powers and functions of the Pension Funds Adjudicator; to extend the regulatory powers of the registrar; to provide for administrative penalties for non-compliance with the Act; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of section 1 of Act 24 of 1956, as amended by section 21 of Act 101 of 1976, section 9 of Act 94 of 1977, section 10 of Act 80 of 1978, section 38 of Act 99 of 1980, section 20 of Act 54 of 1989, section 29 of Act 97 of 1990, section 14 of Act 83 of 1992, section 21 of Act 104 of 1993, section 1 of Act 22 of 1996, section 1 of Act 39 of 2001 and section 1 of Act 65 of 2001

1. Section 1 of the Pension Funds Act, 1956 (in this Act referred to as the principal Act), is amended-
  - (a) by the substitution for the definition of “actuarial surplus” of the following definition:

“ **‘actuarial surplus’**, in relation to a fund which is –

    - (a) subject to actuarial valuation, means the difference between –
      - (i) the value that the valuator has placed on the assets of the fund less any credit balances in the member and employer surplus accounts; and
      - (ii) the value that the valuator has placed on the liabilities of the fund in respect of pensionable service accrued by members prior to the valuation date together with the value of the amounts standing to the credit of those contingency reserve accounts which are established or which the board deems prudent to establish on the advice of the valuator;
    - (b) exempt from actuarial valuation, means the difference between –
      - (i) the fair value of the assets of the fund less any credit balances in the member and employer surplus accounts; and
      - (ii) the sum of the values of the amounts standing to the credit of all the accounts held for individual members, whether contributory or paid-up, plus the value of any other liabilities plus the **[values of]** amounts standing to the credit of any investment reserve account set up to facilitate the smoothing of **[investment**

**returns]** fund return credited to member accounts and such contingency reserve accounts **[as]** which are established or which the board deems prudent to establish:

Provided that, for the purpose of quantifying the actuarial surplus in terms of section 15B, the surplus utilised improperly by the employer in terms of section 15B(6) shall be added to the difference calculated in paragraph (a) or (b), as the case may be;”;

- (b) by the substitution for the definition of “Adjudicator” of the following definition:

“ **‘Adjudicator’** means the Pension Funds Adjudicator or Deputy Pension Funds Adjudicator and any acting Pension Funds Adjudicator appointed under section 30C (1);”;

- (c) by the insertion after the definition of “Adjudicator” of the following definitions:

“ **‘administrative penalty’** in relation to a pension fund, an administrator or other third party, means the financial penalty that may be imposed by the registrar for the failure by a pension fund, administrator or third party to comply with a provision of this Act;

**‘administrator’** means a person approved by the registrar in terms of section 13B(1);

**‘advisory committee’** means the Pension Funds Advisory Committee established by section 3B;

**‘audit-exempt fund’** means a fund which has been exempted by the registrar in terms of section 2(3)(a) of the Act from being required to be subject to audit;

**‘augment’** in relation to any amount, means to increase or decrease such amount;

**‘beneficiary’** means a nominee of a member or a dependant



who is entitled to a benefit, as provided for in the rules of the relevant fund;

‘benefit’ in relation to a fund, means any amount payable to a member or beneficiary in terms of the rules of that fund;”;

- (d) by the insertion after the definition of “board” of the following definition:

“ **‘board member’** means any member of a board;”;

- (e) by the substitution for the definition of “contingency reserve account” of the following definition:

“ **‘contingency reserve account’**, in relation to a fund, means an account of the fund, which has not been disallowed by the Registrar or amended in accordance with the requirements of the Registrar, to which shall be credited or debited such amounts as the board shall determine, on the advice of the valuator where the fund is not exempt from actuarial valuations, in order to provide for explicit contingencies;”;

- (f) by the substitution for the definition of “contribution holiday” of the following definition:

“ **‘contribution holiday’**, in relation to a-

- (a) defined benefit category of a fund, means payment by the employer of less than the difference between the contribution rate **[recommended by]** the valuator recommends be payable by the employer, taking into account the circumstances of the fund and ignoring any surplus or deficit, and the contribution payable by members; or

- (b) defined contribution category of a fund, means payment by the employer of less than the employer contribution rate defined in the rules prior to application of any credit balance in any employer

reserve account as defined in the rules or employer surplus account;”;

- (g) by the substitution for the definition of “court” of the following definition:

“ ‘**court**’ means a provincial or local division of the **[Supreme] High Court of South Africa;**”;

- (h) by the substitution for the definition of “defined contribution category of a fund” of the following definition:

“ ‘**defined contribution category of a fund**’ means a category of members in respect of whom the benefit on retirement has a value equal to the value of-

- (a) the **[fixed-rate]** contributions paid by the member and by the employer **[on behalf of the member, where such fixed rates are defined in the rules]** in terms of the rules of the fund that determine the rates of both their contributions at a fixed rate;
- (b) less such expenses as the board determines should be deducted from the contributions paid;
- (c) plus any amount credited to the member’s individual account upon the commencement of the member’s membership of the fund or upon the conversion of the category of the fund to which the member belongs from a defined benefit category to a defined contribution category of a fund or upon the amalgamation of his or her fund with any other fund, if any, other than amounts taken into account in terms of subparagraph (d);
- (d) plus any other amounts lawfully permitted, credited to or debited from the member’s individual account , if any,  
**[c]\_as** augmented by **[such investment] fund** return**[s and any share of actuarial surplus or transfer from a contingency reserve account as the board determines]**: Provided that the

board may elect to smooth the fund return;”;

- (i) by the substitution for the definition of “dependant” of the following definition:

“ **‘dependant’** in relation to a member, means -

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person -
  - (i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
  - (ii) is the spouse of the member [**including a party to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any Asiatic religion**];
  - (iii) is a child of the member, including a posthumous child, an adopted child and an illegitimate child;
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died;”;

- (j) by the substitution for the definition of “employer surplus account” of the following definition:

“ **‘employer surplus account’**, in relation to a fund, means an account of the fund to which shall be credited-

- (a) amounts allocated by the board in terms of section 15B, 15C and 15F [**for use by the employer**] or transferred into the fund for the credit of the account in terms of section 15E(1)(e);
- (b) such contributions as are specified in the rules to be credited to this account; and

- (c) **[investment] fund** return on the balance in the account from time to time **[at a rate determined by the board after taking account of the earnings of the fund, and to which shall be debited]** provided that the board may elect to smooth the fund return,  
and to which shall be debited-
- (d)[i] any actuarial surplus utilised by the employer; and
- (e)[ii] any actuarial surplus transferred to any other account in the fund at the request of the employer or transferred to another fund in terms of section 15E(1)(e);”;
- (k) by the substitution for the definition of “fund” of the following definition:  
“ **‘fund’** means a pension fund organization, and “pension fund” or “registered fund” has the same meaning;”;
- (l) by the insertion after the definition of “fund” of the following definition:  
**‘fund return’**, in relation to-
- (a) the assets of a fund, means any income (received or accrued) and capital gains and losses (realised or unrealised) earned on the assets of the fund, net of expenses and tax charges, associated with the acquisition, holding or disposal of assets; or
- (b) any portion of the assets of a fund, which is separately identifiable, means any income (received or accrued) and capital gains and losses (realised or unrealised) earned on those assets net of expenses and tax charges associated with the acquisition, holding or disposal of assets;
- (c) the assets of a fund, to the extent that those assets consist of long-term policies which are “fund member policies” as defined in Part 5 of the Regulations under the Long-term Insurance Act, 1998, means the “growth rate” (as defined in

- those Regulations) applicable to those policies, as determined in accordance with those Regulations, which in any such case may be positive, negative or nil;”;
- (m) by the substitution for the definition of “member surplus account” of the following definition:
- “ **‘member surplus account’**, in relation to a fund, means an account of the fund to which shall be -
- (a) credited –
- (i) amounts allocated by the board in terms of sections 15B and 15C to be used for the benefit of members; and
- (ii) **[investment] fund** return on the balance in the account from time to time: **[at a rate determined by the board after taking account of the earnings of the fund]** Provided that the board may elect to smooth the fund return; and
- (iii) amounts reallocated from the employer surplus account to the account in terms of section 15E,  
and to which shall be -
- (b) debited –
- (i) the cost of any benefit improvements funded from the account; and
- (ii) any expenses which would otherwise reduce benefits payable to members;”;
- (n) by the substitution for the definition of “minimum individual reserve” of the following definition:
- “ **‘minimum individual reserve’**-
- (a) in relation to a member of a defined benefit category of a fund, means the amount determined in terms of section 14B(2)(a); **[and]**
- (b) in relation to a member of a defined contribution category

- of a fund, means the amount determined in terms of section 14B(2)(b); and
- (c) in relation to a pensioner or a deferred pensioner, means the amount determined in terms of section 14B(6);”;
- (o) by the insertion after the definition of “Minister” of the following definition:  
“ ‘non-member spouse’, means, in relation to a member of a fund, a person who is no longer the spouse of that member due to the dissolution of the relationship by a court order and to whom the court ordering the dissolution of the relationship has granted a share of the member’s pension interest in the fund;”;
- (p) by the deletion of the definition of “Policy Board”;
- (q) by the substitution for the definition of “prescribed” of the following definition:  
“ ‘prescribed’ means prescribed by [or under this Act] the registrar by notice in the Gazette and “prescribe” has a corresponding meaning;”;
- (r) by the insertion after the definition of “prescribed” of the following definition:  
“ ‘prescribed by regulation’ means prescribed by the Minister by regulation;”;
- (s) by the insertion after the definition of “retrenchment” of the following definition:  
“ ‘retirement annuity fund’ means a retirement annuity fund as defined in the Income Tax Act, 1962;”;
- (t) by the substitution for the definition of “rules” of the following definition:  
“ ‘rules’ means the rules of a fund, and includes -  
(a) the act, charter, deed of settlement, memorandum of association, or other document by which the fund is constituted;

- (b) the articles of association or other rules for the conduct of the business of the fund; and
- (c) the provisions relating to **[the] any rights, duties or benefits** which may be granted or imposed by, and the contributions which may become payable to the fund, or provisions in accordance with which the rights, obligations and benefits will be calculated or determined;”;
- (u) by the insertion after the definition of “rules” of the following definition:  
**“ ‘spouse’ means a person who is the spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act 68 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 68 of 1997), or the Civil Union Act, 2006 (Act No. 17 of 2006), or the tenets of any Asiatic religion;”;**
- (v) by the substitution for the definition of “surplus apportionment date” of the following definition:  
**“ ‘surplus apportionment date’ in relation to a fund, means the **[effective date upon which any actuarial surplus is apportioned in terms of section 15B]** first statutory actuarial valuation date following the commencement date;”;**
- (w) by the insertion before the definition of “valuator” of the following definition:  
**“ ‘valuation exempt’, in relation to a fund, means a fund which has been exempted by the registrar under section 2(5)(a) from the requirement to submit a report on its statutory actuarial valuation.”.**

**Substitution of section 2 of Act 24 of 1956, as amended by section 10 of Act 94 of 1977, section 13 of Act 103 of 1979, section 36 of Act 9 of 1989, section 15 of Act 83 of 1992, section 22 of Act 104 of 1993 and section 211 of Act 66 of 1995**

2. The following section is substituted for section 2 of the principal Act:

**“Application of Act**

2. (1) Subject to section 4A and any other law in terms of which a fund is established, the provisions of this Act **[shall not]** apply **[in relation]** to any pension fund, including a pension fund [which has been] established or continued in terms of a collective agreement concluded in a council in terms of the Labour Relations Act, 1995 (Act No.66 of 1995), or [before] the Labour Relations Amendment Act, 1998, and registered in terms of section 4.**[has come into operation, nor, in relation to a pension fund so established or continued and which, in terms of a collective agreement concluded in that council after the coming into operation of the Labour Relations Amendment Act, 1998, is continued or further continued (as the case may be). However, such a pension fund, shall from time to time furnish the registrar with such statistical information as may be requested by the Minister]**
- (2) A pension fund established or continued in terms of a collective agreement concluded in a council in terms of the Labour Relations Act, 1995, or the Labour Relations Amendment Act, 1998, which is not yet registered in terms of section 4, must register in terms of this Act before or on 1 January 2008.
- (3) A pension fund referred to in subsection (2) must, pending registration in terms of this Act, furnish the registrar with such statistical information as may be requested by the registrar.
- [(2)] 4(a)** The provisions of this Act, other than section three and subsections (1) and (2) of section four, shall not apply in relation to a pension fund if the head office of the association which carries on the business of that fund, or, as the case may be, of every employer who is a party to such fund, is outside the Republic, provided -



- (i) the registrar is satisfied that the rules of the fund applicable to members resident in the Republic are not less favourable than those applicable to members resident outside the Republic, taking into consideration differences in the conditions of service;
  - (ii) the registrar is satisfied that adequate arrangements exist ensuring the financial soundness of the fund; and
  - (iii) the fund furnishes such security as the registrar may from time to time require for the payment of any benefits which may become payable to members resident in the Republic who are South African citizens, or otherwise satisfies the registrar that it will be able to pay such benefits.
- (b) The registrar may from time to time require any person carrying on the business in the Republic of a pension fund referred to in paragraph (a), to submit to the registrar such returns and information in connection with that business as the registrar may specify, and if at any time the registrar is no longer satisfied as regards any of the matters specified in paragraph (a) he may advise the person accordingly by notice transmitted to him by registered post, and thereupon the provisions of this Act shall apply in relation to such fund.
- [(3)] (5)(a)** The registrar may in his discretion and subject to such conditions as may be prescribed by regulation exempt in writing any pension fund from the provisions of section 5 (2), 9 or 9A, as well as from any other provision of this Act which, in his opinion, is connected with any such exemption.
- (aA) (i) The provisions of sections 37A, 37B and 37C shall as from the commencement of the Financial Institutions Amendment Act, 1977, apply also with reference to any registered fund to which those provisions did not apply immediately before the said commencement.

- (ii) Any provision inserted in this Act by, or after the commencement of, the Financial Institutions Amendment Act, 1977, shall apply with reference to all registered funds, including any fund previously exempted in terms of this subsection, except in so far as any exemption may have been granted from any such provision in terms of this subsection.
- (b) The registrar may at any time by notice in writing to the fund withdraw, wholly or in part and on any ground which he deems sufficient, any exemption granted under paragraph (a).”.

**Amendment of section 5 of Act 24 of 1956, as mentioned by section 14 of Act 81 of 1957 and section 9 of Act 64 of 1990**

3. Section 5 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

“(2) All moneys and assets belonging to a pension fund shall be kept by that fund and every fund shall maintain such books of account and other records as may be necessary for the purpose of such fund: Provided that such money and assets may, subject to the conditions determined by the Minister by notice in the *Gazette*, also be kept in the name of the pension fund by one or more of the following institutions or persons, namely -

- (a) a **[stock- broker]** stockbroker as defined in section 1 of the **[Stock Exchanges Control Act, 1985 (Act No. 1 of 1985)]** Securities Services Act, 2004 (Act No. 36 of 2004);
- (b) **[an insurer registered or provisionally registered in terms of the Insurance Act, 1943 (Act No. 27 of 1943)]** a long-term insurer registered in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998);

- (c) a **[banking institution registered or provisionally registered under the Banks Act, 1965 (Act No. 23 of 1965)]** bank registered under the Banks Act, 1990 (Act No. 94 of 1990);
- (d) a nominee company; or
- (e) a person approved by the registrar, or who is a member of a category of persons approved by the registrar.”.

**Amendment of section 7D of Act 24 of 1956, as amended by section 2 of Act 22 of 1996**

4. Section 7D of the principal Act is amended by the substitution for paragraph (f) of the following paragraph:

“(f) ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions **[(Investment of Funds)]** (Protection of Funds) Act, [1984 (Act No. 39 of 1984)] 2001 (Act No. 28 of 2001), and all other applicable laws.”.

**Amendment of section 9 of Act 24 of 1956, as amended by section 12 of Act 65 of 1968, section 10 of Act 64 of 1990 and section 23 of Act 104 of 1993**

5. Section 9 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

“(1) Every registered fund shall in the manner **[prescribed by]** set out in its rules appoint an auditor registered under the **[Public Accountants’ and Auditors’ Act, 1991 (Act No. 80 of 1991)]** Auditing Profession Act, 2005 (Act No.26 of 2005), who shall not be an officer of the fund, except where the accounts of such a fund in

terms of the provisions of any law are to be audited by the Auditor-General.”.

**Amendment of section 13A of Act 24 of 1956, as amended by section section 1 of Act 94 of 1997**

6. Section 13A of the principal Act is amended by the substitution for subsection (7) of the following subsection:

- “(7) Interest at a rate as prescribed [**from time to time by the Minister by notice in the *Gazette***] by regulation shall be payable from the first day following the expiration of the period in respect of which such amounts were payable on-
- (a) the amount of any contribution not transmitted into a fund’s bank account before the expiration of the period prescribed therefor by subsection (3)(a)(i);
  - (b) the amount of any contribution not received-
    - (i) by a fund before the expiration of the period prescribed therefor by subsection (3)(a)(ii); or
    - (ii) in the circumstances contemplated in subsection (3)(a)(iii), by the insurer concerned before the expiration of the period prescribed therefor by that subsection;
  - (c) the value of any benefit, or right to any benefit, not transferred by the first fund to the other fund before the expiration of the period prescribed therefor by subsection (5).”.

**Amendment of section 13B of Act 24 of 1956**

7. Section 13B of the principal Act is amended –
- (a) by the substitution for subsection (4) of the following subsection:  
“(4) An administrator must-

- (a) endeavour to avoid conflict between the interests of the administrator and the duties owed to the fund, and any conflict of interest or potential conflict of interest must be managed and disclosed by the administrator to board;
  - (b) administer the fund in a responsible manner;
  - (c) keep proper records;
  - (d) employ adequately trained staff and ensure that they are properly supervised;
  - (e) have well-defined compliance procedures;
  - (f) maintain adequate financial resources to meet its commitments and to manage the risks to which the fund is exposed;
  - (g) furnish the registrar with such information as requested by the registrar where such request is reasonable, the purpose for the request is disclosed and reasonable notice is given to the administrator in order to meet the request.”;
- (b) by the addition of the following subsections:
- “(5) If the registrar, after an inspection or investigation under section 25, considers that the interests of the members of a fund or of the public so require, the registrar may-
- (a) direct the administrator to take any steps, or to refrain from performing or continuing to perform any act, in order to terminate or remedy any irregularity or undesirable practice or state of affairs disclosed by the inspection or investigation;
  - (b) direct the administrator to withdraw from the administration of the fund, whereupon the board of the fund must in accordance with the registrar’s directions, but subject to this Act and the rules of the

- fund, arrange for the administration of the fund to be taken over by another administrator or person; or
- (c) suspend or withdraw the approval granted to the administrator on such conditions and for such period as the registrar deems fit, provided that where an administrator's approval is suspended, the registrar may permit the administrator to continue to provide services to the funds under its administration subsequent to the date of the suspension, but it may not enter into an agreement to provide any new or additional services to any fund while the suspension is in force.
- (6) The registrar may, despite and in addition to taking any step he or she may take under this Act, impose an administrative penalty prescribed by regulation on an administrator for any failure to comply with any conditions determined in terms of subsection (1) or any directive in terms of subsection (5).
- (7) Before taking any action in terms of subsection (5) or (6), the registrar must inform the administrator and the board of the fund of the proposed action and grounds therefor, and afford them a reasonable opportunity to be heard.
- (8) The registrar may through appropriate media make known –
- (a) the suspension or withdrawal of an approval referred to in subsection (5);
- (b) any non-compliance and administrative penalty referred to in subsection (6):
- Provided that such publication is in the public interest.
- (9)[4] If the registrar deems it desirable in the public interest he may on such conditions, to such extent and in such manner as he may deem fit, exempt any person or category of persons from the provisions of this section, and may at any

time revoke or amend any such exemption in a similar manner.”.

**Substitution of section 14 of Act 24 of 1956, as amended by section 15 of Act 81 of 1957, section 3 of Act 54 of 1991, section 21 of Act 83 of 1992 and section 2 of Act 39 of 2001**

8. The following section is substituted for section 14 of the principle Act:

**“Amalgamations and transfers**

**14(1)** Subject to subsection (2), no transaction involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person (irrespective of whether that other person is or is not a registered fund), or the transfer of any business from a registered fund to any other person, or the transfer of any business from any other person to a registered fund, shall be of any force or effect unless-

- (a) the scheme for the proposed transaction, including a copy of every actuarial or other statement taken into account for the purposes of the scheme, has been submitted to the registrar within 180 days of the effective date of the transaction;
- (b) the registrar has been furnished with such additional particulars or such a special report by a valuator, as he may deem necessary for the purposes of this subsection;
- (c) the registrar is satisfied that the scheme referred to in paragraph (a) is reasonable and equitable and accords full recognition -
  - (i) to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund where such rights and reasonable benefit

- expectations relate to service prior to the date of transfer;
- (ii) to any additional benefits in respect of service prior to the date of transfer, the payment of which has become established practice; and
  - (iii) to the payment of minimum benefits referred to in section 14A, and that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirements of this Act or to remain in a sound financial condition or, in the case of a fund which is not in a sound financial condition, to attain such a condition within a period of time deemed by the registrar to be satisfactory;
- (d) the registrar has been furnished with such evidence as he may require that the provisions of the said scheme and the provisions, in so far as they are applicable, of the rules of every registered fund which is a party to the transaction, have been carried out or that adequate arrangements have been made to carry out such provisions at such times as may be required by the said scheme;
- (e) the registrar has forwarded a certificate to the principal officer of every such fund to the effect that all the requirements of this subsection have been satisfied.
- (2) With effect from the commencement of the Pension Funds Amendment Act, 2007, subsection (1) does not apply where the affected members were duly informed and at least 75 % of those members agreed to such transaction and any objection they may have had has been resolved to the satisfaction of the board of the fund concerned, and -



- (a) both transferor and transferee funds are valuation exempt;  
or
- (b) the transferor or transferee fund is neither registered nor required to register under this Act and the other fund is valuation exempt;

Provided that:

- (i) such registered funds will keep proper records of all such transactions;
- (ii) comply with any further requirements as the registrar may prescribe;
- (iii) the assets and liabilities shall be transferred within 180 days of the effective date of transfer; and
- (iv) any assets transferred must be augmented with fund return from the effective date until the date of final settlement.

**[(2)] (3)** Whenever a scheme for any transaction referred to in subsection (1) has come into force in accordance with the provisions of this section, the relevant assets and liabilities of the bodies so amalgamated shall respectively vest in and become binding upon the resultant body, or as the case may be, the relevant assets and liabilities of the body transferring its assets and liabilities or any portion thereof shall respectively vest in and become binding upon the body to which they are to be transferred.

**[(3)] (4)** The officer in charge of a deeds registry in which is registered any deed or other document relating to any asset which is transferred in accordance with the provisions of subsection **[2](3)**, shall, upon production to him by the person concerned of such deed or other document and of the certificate referred to in paragraph (e) of subsection (1), without payment of transfer duty, stamp duty, registration fees or charges, make the endorsements upon such deed or

document and the alterations in his registers that are necessary by reason of the amalgamation or transfer.

- [(4)] (5)** A transaction effected in terms of this section shall not deprive any creditor of a party thereto (other than in his capacity as a member or a shareholder of such party) of any right or remedy which he had immediately prior to that date against any party to the transaction or against any member or shareholder or officer of such party.
- (6)** The assets and liabilities shall be transferred within 60 days of the date of the certificate issued by the registrar in terms of paragraph (e) of subsection (1).
- (7)** Any application for approval of a scheme lodged with the registrar in terms of paragraph (a) of subsection (1) shall lapse if the registrar requests further information and no satisfactory response is received from either the transferor or the transferee fund, as the case may be, within a period of 180 days from the date of such request.
- (8)** The registrar may prescribe any conditions for the withdrawal or amendment of a certificate issued in terms of paragraph (e) of subsection (1), in circumstances where the registrar is satisfied that the-
- (a)** scheme or information provided in terms of subsection (1) was so inaccurate that he would not have granted such certificate had he been aware of the actual facts; or
- (b)** certificate contains a *bona fide* error.
- (9)** Notwithstanding anything to the contrary in the rules of a fund, a retirement annuity fund shall not bar the transfer of business that relates to a member's interest or non-member spouse's interest, at the

request of such a member or non-member spouse from one retirement annuity fund to another.

- (b) No fees or commissions of any nature, other than fees payable by the transferring member or non-member spouse personally and any fees payable to the registrar, are payable by any party to the transfer in return for the facilitation, intermediation or recommendation of the transfer.”.

### **Amendment of section 14A of Act 24 of 1956**

9. Section 14A of the principal Act is amended by the substitution for subsection (1) of the following subsection:

“(1) Every registered fund shall provide the following minimum benefits **[to a member]**:

- (a) The benefit paid to a member who ceases to be member of the fund prior to retirement in circumstances other than liquidation of the fund shall not be less than the minimum individual reserve;
- (b) the benefit paid to a member if the fund is liquidated in terms of section 28 or 29 shall not be less than the minimum individual reserve: Provided that, where the fair value of the assets of the fund after recovery of any debt owed by the employer in terms of section 30(3) is lower than the sum **[of the total]** of the minimum individual reserves for all members who are being included in the distribution of the assets after adjustment for any benefits paid previously and the cost of annuity policies which will provide equivalent pensions to all existing pensioners and deferred pensioners, the minimum individual reserve may be proportionally

- reduced in the ratio which the fair value of the assets bears to the total of all the minimum individual reserves adjusted for any benefits paid previously plus the cost of such annuity policies;
- (c) if a category of the fund is converted from a defined benefit category to a defined contribution category, the amount to be credited to the member's individual account shall not be less than the minimum individual reserve: Provided that, where the fair value of the assets of the fund after recovery of any debt owed by the employer in terms of section 30(3) is lower than the sum **[of the total]** of the minimum individual reserves for all members after adjustment for any benefits paid previously and the cost of annuity policies which will provide equivalent pensions to all existing pensioners and deferred pensioners, the minimum individual reserve may be proportionally reduced in the ratio which the fair value of the assets bears to the total of all the minimum individual reserves adjusted for any benefits paid previously plus the cost of such annuity policies;
- (d) **[starting with the pension increase to be granted]** on, or within six months from the effective date of the first actuarial valuation following the commencement date, and at least once every three years thereafter, the board shall grant a **[the]** pension increase **[to be granted]** to pensioners and deferred pensioners which shall not be less than the minimum pension increase.”.

### **Substitution of section 14B of Act 24 of 1956**

**10.** The following section is substituted for section 14B of the principal Act:

**“Determination of member’s individual account, minimum individual reserve and minimum pension increase**

**14B. (1)** The member’s individual account in relation to an individual member of a defined contribution category of a fund shall be determined by the board in accordance with the formula-  
 $MC+EC-X+[AS] IC+OC$  where-

(a) MC represents the **[fixed-rate]** contributions paid by the member; EC represents the **[fixed-rate]** contributions paid by the employer [on behalf] in respect of the member;

X represents such expenses as the board determines should be paid out of the contributions paid by and **[behalf] in respect** of the member; **[and]**

**[AS represents any actuarial surplus apportioned to the account of the member; and]**

IC represents the amount credited to the member’s individual account upon the commencement of the member’s membership of the fund or upon the conversion of the category of the fund to which the member belongs from a defined benefit category to a defined contribution category of a fund or upon the amalgamation of his or her fund with any other fund, if any, other than amounts taken into account in terms of OC below; and

OC represents any other amounts lawfully permitted, credited to or debited from to the member’s individual account, if any; and

(b) MC, EC, X, **[and AS]** IC and OC are augmented with **[such investment] fund return [returns as the board determines having regard to the gross investment**

**return earned by the fund on the assets backing the fund's liability in respect of the member and such expenses as the board determines should be paid out of the gross investment return]:**  
Provided that the board may elect to smooth the fund return **[these investment returns]**.

- (2) In determining the minimum individual reserve of a member of a -
- (a) defined benefit category of a fund, the board shall determine the greater of-
- (i) the fair value equivalent of the present value of the member's accrued deferred pension:  
Provided that-
- (aa) where there is not a uniform rate of accrual over the full period of membership of the fund, the accrued deferred pension shall be calculated assuming a uniform rate of accrual as if the member had remained in service until normal retirement date as defined in the rules of the fund, but which uniform rate of accrual will not be less than the uniform rate of accrual that is calculated based on the period of service completed up to the date of calculation; and
- (bb) the fair value equivalent of **[and]** the present value shall assume rates of increase in the pension before and after retirement, mortality rates and rates of

- discount as prescribed by the registrar **[by notice in the Gazette]**; and
- (cc) the term ‘accrued deferred pensions’ in this section shall include the portion of any lump sum benefit payable at normal retirement date which corresponds to prior service; and
- (ii) an amount equal to the value of the member’s contributions, less such expenses as the board deems appropriate to deduct from the contributions, augmented as from the **[commencement]** date that the member joined the fund by **[interest at a rate which is reasonable in relation to]** the fund return [gross investment return earned by the fund on the assets backing the fund’s liability in respect of the member, net of such expenses as the board determines should be offset against the gross investment return, plus such share of the employer contributions paid in respect of the member as has vested in the employee in terms of the rules of the fund, augmented with the same rate of interest] plus any amount payable in terms of the rules of the fund in excess of the member contributions augmented as from the date that the member joined the fund by fund return: Provided that the board may elect to smooth **[the interest contemplated in this subparagraph]** the fund return; and

- (b) defined contribution category of a fund, the board shall determine the value of the member's individual account as determined in terms of subsection (1) plus a share of the investment reserve account, the member surplus account, and such contingency reserve accounts as the board may determine should be included in terms of section 15G, in the proportion that the member's individual account value as at the effective date of the calculation bears to the total of all members' individual account values as at that date or such other method of apportionment as the board deems reasonable.
- (3) (a) The board shall establish and implement a policy with regard to increases to be granted to pensioners and deferred pensioners, which policy must-
  - (i) aim to award a percentage of the consumer price index, or some other measure of price inflation which is deemed suitable by the board; and
  - (ii) set the frequency with which increases will be considered in line with the policy: Provided that increases should be considered each year, with comparison to the minimum pension increase at least once every three years.
- (b) The policy contemplated in paragraph (a) must be communicated to pensioners and deferred pensioners when it is established and whenever it is changed.
- (c) The policy contemplated in paragraph (a) will not be required where-
  - (i) pensioners on or after retirement in terms of the rules of a fund, purchased a policy from a long-term insurer



registered in terms of section 7 of the Long-term Insurance Act, 1998 (Act No. 52 of 1998);

(ii) pensioners on whose behalf the fund, on or after retirement in terms of the rules of a fund, purchased a policy of insurance from a long-term insurer registered in terms of section 7 of the Long-term Insurance Act, 1998;

(iii) pensioners elected to receive a level pension, or a pension with fixed increases, or a pension the amount of which is elected by the pensioner from time to time, paid from the fund in terms of the rules of the fund.

(4) (a) In determining the minimum pension increase, the board shall increase pensions by a factor, P, where P is equal to the greater of the increase that the board would grant in terms of the pension increase policy established in terms of subsection (3) and-

(i) the increase in paragraph (b), if the increase in paragraph (b) is less than the increase in paragraph (c); or

(ii) the increase in paragraph (c), if the increase in paragraph (b) is greater than or equal to the increase in paragraph (c):

Provided that if the application of the increase factor, P, causes a fund to become financially unsound, the board may limit P to such amount as will not cause the fund to be in a financially unsound condition.

(b) The board shall determine the increase that would result from-

(i) accumulating the liabilities for pensioners at their dates of retirement in the fund, or date of joining the fund if the pensioner retired from another fund and

became a member of the fund as a result of an approval granted in terms of section 14(1) and deferred pensioners at their dates of termination of service, including any contingent liabilities payable, in terms of the rules of a fund, on termination of those pensions or deferred pensions to persons who are still alive at the effective date of the calculation, adjusted to an equivalent fair value of assets less-

- (aa) pension payments;
- (bb) cash amounts paid on retirement; and
- (cc) those expenses that the board deems reasonable,

plus the liability in respect of any special increases that have been granted to pensioners and deferred pensioners which were funded otherwise than through fund return [the nett investment return earned by the fund on the assets backing the pensioner and deferred pensioner liabilities, where such liabilities in respect of special increases have been adjusted to an equivalent fair value of assets, and augmented by the gross investment return earned on the assets of the fund less such expenses as the board deems reasonable to deduct from such investment return, but the board may use the gross investment return earned on the assets backing pensioner and deferred pensioner liabilities instead of using the gross investment return earned on the assets of the fund if such assets have been invested separately from the other assets of the fund]:  
Provided that, if the board is unable to grant the full

minimum pension increase as at the surplus apportionment date, the board may reduce the amount determined in terms of this subparagraph at the surplus apportionment date such that the amount equals the pensioner liability as at the surplus apportionment date after enhancement in terms of section 15B(5)(b), if applicable, increased to an equivalent fair value of assets, and the board may accumulate thereafter in terms of this paragraph, using such reduced amount, as if it was the balance determined in terms of this paragraph as at the surplus apportionment date prior to such reduction;  
and

- (ii) dividing the amount calculated in terms of subparagraph (i) by the present value of current pensions and deferred pensions after making allowance for mortality, expenses and future pension increases at the rate determined by the board, adjusted to an equivalent fair value of assets.
- (c) The board shall determine the increase required to each pension to provide the pension payable in the month following retirement, nett of the commutation of any portion of the pension for cash or the deferred pension at the date of termination of service, multiplied by the change in the consumer price index from the date of retirement in the case of a pensioner, or the date of termination of service in the case of a deferred pensioner, to the effective date of the calculation of the increase.
- (d) Where the board finds it impractical to derive the increases in paragraphs(a), (b) and (c) for each individual pensioner or deferred pensioner, the board may use an approximate

method which will preserve the broad principles behind paragraphs (a), (b) and (c).

- (5) For purposes of subsection (4), where the pension has arisen because of the death of a member rather than the member's retirement, any reference in that subsection to 'retirement' shall be construed as a reference to death.
- (6) In determining the minimum individual reserve of a pensioner or a deferred pensioner, the board shall determine the fair value equivalent of the present value of the pension, or the deferred pension, payable to that member after implementation of any minimum pension increase in terms of subsections (4) and (5), including the present value of any contingent pension payable to the member's spouse, children and other dependants."

#### **Substitution of section 15B of Act 24 of 1956**

11. The following section is substituted for section 15B of the principal Act:

#### **“Apportionment of existing surplus**

- 15B(1)** (a) Subject to paragraph (b), the board of **[a]** every fund that commenced prior to 7 March 2002 shall submit to the registrar a scheme for the proposed apportionment of any actuarial surplus plus the details regarding any surplus utilised improperly by the employer as defined in subsection (6) (in this section referred to as the scheme) as at the effective date of the statutory actuarial valuation of the fund coincident with, or next following, the commencement date.

- (b) The board shall submit the scheme not later than 18 months after the effective date contemplated in paragraph (a): Provided that-
- (i) if the board elects to apportion actuarial surplus at a date earlier than the effective date of the next statutory actuarial valuation, it may do so if the statutory valuation date is advanced to such earlier date and the registrar is satisfied as to the reasons therefore;
  - (ii) if the fund is liquidated in terms of section 28 or 29 at a date prior to the effective date of the next statutory actuarial valuation, the effective date of the liquidation shall be the surplus apportionment date; **[and]**
  - (iii) if a category of members of the fund is converted from defined benefit to defined contribution and the effective date of the conversion is earlier than the next statutory actuarial valuation date, the effective date of the conversion shall be the surplus apportionment date and a statutory actuarial valuation is required as at such date; or
  - (iv) if the registration of a fund is cancelled in accordance with section 27 and the effective date of cancellation is earlier than the next statutory actuarial valuation date, the effective date of the cancellation shall be the surplus apportionment date.
- (2) A scheme -
- (a) shall comply with such conditions as **[the registrar]** may be prescribed **[by regulation]**; and

- (b) may involve-
  - (i) the improvement of benefits to existing members;
  - (ii) increases to benefits or transfer values in respect of former members;
  - (iii) the crediting of an amount to the member surplus account;
  - (iv) the crediting of an amount to the employer surplus account; or
  - (v) any two or more of the matters contemplated in subparagraphs (i) to (iv).
- (3) The board shall appoint a person to represent the interests of former members in the development of the scheme and such person shall-
  - (a) assist the board in-
    - (i) identifying former members;
    - (ii) communicating proposals to former members and to the funds to which former members transferred;
    - (iii) conveying proposals from former members, and the funds to which they transferred, to the board; and
    - (iv) collating any objections to the scheme from former members and the funds to which they transferred;
  - (b) be required to report, in writing to the board, on-
    - (i) the adequacy of the steps taken by the board to include former members in terms of subsection (4); and
    - (ii) where it was necessary for the board to apply its discretion with regard to the inclusion of former members and the apportionment of actuarial surplus to such former members, whether or not the exercise of such discretion was reasonable taking into account the demands of equity within the bounds of

practicality and the circumstances of the particular fund:

Provided that such report must accompany the scheme when it is submitted to the registrar in terms of subsection (9).

- (4) The board shall determine who may participate in the apportionment of actuarial surplus, and shall include in such apportionment existing members and any former members who left the fund in the period from 1 January 1980 to the surplus apportionment date: Provided that -
- (a) the board may exclude from participation former members in respect of whom the board satisfies the registrar that insufficient records are available to enable the additional benefits that may be due to such former members to be calculated, after the board has taken reasonable steps-
    - (i) to obtain such records from the administrator;
    - (ii) to construct such records from the records of the-
      - (aa) employer;
      - (bb) any fund to which former members transferred;or
      - (cc) a trade union or staff association active in the workplace during this period; or
    - (iii) if the steps in subparagraphs (i) and (ii) do not yield sufficient information, to obtain such records from the potential claimants themselves following an advertisement-
      - (aa) on a national basis and in the area where the former members used to work; or
      - (bb) on a more limited basis as approved by the registrar if representations by the fund satisfy

the registrar that limited advertisement will be adequate,

inviting the former members to come forward with evidence to substantiate their claim, after which advertisement the board should wait at least six months but no longer than nine months before excluding any former members because of a lack of sufficient information to enable the calculations to be performed;

- (b) rather than excluding former members whose individual benefits cannot be determined, the board may set aside a portion of the actuarial surplus in a contingency reserve account explicitly established to satisfy claims of former members in terms of subsection (5)(e).
- (5) The board shall apportion the actuarial surplus between the various classes of stakeholders whom the board has determined shall participate in the apportionment in terms of subsection (4), following which such portion as is due to the employer shall be credited to the employer surplus account: Provided that-
- (a) the actuarial surplus to be apportioned shall be increased by the amount of actuarial surplus utilised improperly by the employer prior to the surplus apportionment date as determined in terms of subsection (6);
  - (b) former members shall have the benefits previously paid to them, or the amounts previously transferred on their behalf, increased to the minimum benefit determined in terms of section 14(B)(2) or 14B(6) as at the date when they left the fund, with such increase adjusted to the surplus apportionment date using the nett investment earnings of the fund over the corresponding period, and pensioners and deferred pensioners shall have their pensions increased to the minimum pension as determined in terms of section



- 14(B)(4), as a prior charge on the actuarial surplus to be apportioned: Provided further that, where the actuarial surplus to be apportioned is insufficient to permit such increases after being increased in terms of paragraph (a), the amounts shall be proportioned downwards until the total to be paid to former members, **[and] pensioners and deferred pensioners** equals the actuarial surplus to be apportioned;
- (c) after deducting the cost of the increases to former members, **[and] pensioners and deferred pensioners** in terms of paragraph (b) the balance of the actuarial surplus shall be equitably split between existing members, former members and the employer in such proportions as the board shall determine after taking account of the financial history of the fund: Provided further that the registrar may prescribe certain methods which, if used, shall be deemed to be equitable;
- (d) if the amount apportioned to the employer in terms of paragraph (c) is less than the actuarial surplus utilised improperly by the employer as determined in subsection (6), the difference between the amount-
- (i) determined in terms of subsection (6); and
  - (ii) apportioned to the employer in terms of paragraph (c), shall represent a debt owed by the employer to the fund **[which the employer must redeem within a period to be agreed with the board]** and the employer must submit a scheme conforming with the prescribed requirements and repay that debt within a period approved by the registrar; **[Provided further that the fund shall notify the registrar, in writing**

**and in the prescribed manner, of the amount and terms of repayment of any such debt; and];**

- (e) the board shall determine how, in the case of existing members and former members, the allocated portion of actuarial surplus shall be applied for their benefit, including the crediting of any portion to the members' surplus accounts or to the members' individual accounts, as the case may be: Provided further that the board may allocate a portion of the actuarial surplus to be used for former members to a contingency reserve account which will be used to satisfy the claims of former members -
- (i) who have been identified in subsection (4)(a) but who cannot be traced; or
  - (ii) who did not substantiate their claim during the nine-month period following the advertisement in subsection (4)(a)(iii) but who do so after the end of this period; and
- (f) the surplus due to any stakeholder as a result of a surplus apportionment scheme approved by the registrar, shall be augmented with fund return from the date determined in line with section 15B(1) until the date the surplus is awarded, paid or allocated.
- (6) (a) For the purposes of this subsection-  
“cost” means the difference between the accrued liabilities in the fund as determined by the valuator immediately before, and immediately after the improper utilisation of surplus: Provided that, where more than one use of actuarial surplus occurred simultaneously, the valuator shall determine how the difference between the accrued liabilities before any of the uses, and the accrued liabilities after all the uses at that date, shall be split between those uses;

“employer” means the employer or employers participating in the fund at the time of the improper utilisation of surplus: Provided that where the employer has expressly passed on, ceded or transferred the obligation to redeem such debt to a subsequent employer or employers, the debt shall be redeemed by such subsequent employer or employers;

“selected”, in relation to members, means, in the case of a granting of benefits, a group of members to whom the benefits were granted to the exclusion of other members, and, in the case of a granting of benefits conditional on election by the member , a group of members to which the election was granted to the exclusion of the other members .

(b) The board shall investigate any improper utilisation of surplus by the employer prior to the surplus apportionment date which shall consist of any of the following amounts incurred in the period from 1 January 1980 or since the date of the fund's commencement or such earlier date agreed to by the employer to the surplus apportionment date:

(i) the cost of benefit improvements for executives in excess of the cost that would have applied had the executives enjoyed the benefits provided to other members;

(ii) the cost of any additional pensions or deferred pensions or lump sum benefits granted to selected members in lieu of the employer's obligation to subsidise the medical costs after retirement of those members;

(iii) the cost to recognise prior pensionable service for selected members or for members transferred into the fund in excess of any amount paid into the fund in respect of such prior service; and

- (iv) the value of any contribution holiday enjoyed by the employer after the commencement date.
- (c) The board may exclude the following from surplus utilised improperly-
  - (i) any use of actuarial surplus which the registrar is satisfied was approved by the members, or by trade unions representing members, after a clear and comprehensive communication exercise as part of a negotiated utilisation of surplus by stakeholders;
  - (ii) the cost or value of surplus utilised improperly by the employer shall be reduced by any contributions or payments made to the fund by the employer and for this specific purpose;
  - (iii) for the purposes of paragraph (a)(i), where, in accordance with the rules of the fund, the use for the executive benefit in question has existed in the fund in its current form since inception of the fund; or
  - (iv) where the registrar is satisfied that the surplus utilised improperly was utilised for the purpose of remedying past unfair discrimination.
- (d) The investigation shall be conducted at the fund's surplus apportionment date.
- (e) The investigation shall be completed by the board irrespective of the fund's financial position at the surplus apportionment date.
- (f) Any surplus utilised improperly shall be augmented by fund return from the effective date of the use until the date of receipt thereof by the fund.
- (g) The registrar may prescribe the maximum period by which the debt referred to in subsection 5(d) may be agreed to be redeemed.

- (7) At least 75 per cent of the members of the board duly constituted in terms of section 7A must approve the scheme.
- (8) Notwithstanding anything to the contrary in the rules, no person other than the relevant board or, in the event of referral to the special ad hoc tribunal referred to in section 15K, the special ad hoc tribunal, and the registrar may approve the scheme.
- (9) An apportionment in terms of this section shall be of no force or effect unless-
  - (a) the scheme, the statutory actuarial valuation as at the surplus apportionment date of the fund, [including] as well as a copy of any other [every] actuarial or other statement taken into account for purposes of the scheme and the report by the person appointed in terms of subsection (3) has been submitted to the registrar and the registrar is satisfied that the statutory actuarial valuation has been prepared on actuarially sound and acceptable principles;
  - (b) the registrar has been furnished with a certificate signed by the valuator stating -
    - (i) whether the valuator finds that the process of apportionment complied with **[the] this** Act; and
    - (ii) where it was necessary for the board to apply its discretion, whether the exercise of such discretion was not unreasonable taking into account the demands of equity within the bounds of practicality and the circumstances of the particular fund, together with such additional particulars or such special report by the valuator as the registrar may deem necessary for purposes of this subsection;
  - (c) the registrar has been furnished with such additional report as he or she may require from an independent actuary appointed by him or her on such matters associated with the

apportionment of the actuarial surplus as the registrar shall determine and including such information as may be prescribed: Provided that -

- (i) the registrar shall require such report where there are complaints in respect of the apportionment of surplus which have not been resolved to the satisfaction of the complainants concerned; and
  - (ii) the costs resulting from the appointment of such independent actuary shall be borne by the fund;
- (d) the fund can demonstrate that reasonable measures have been taken to inform employers [employer], members and former members, together with any fund to which former members transferred, [have been informed] of the scheme in a manner which is clear and understandable to the members and former members and which gives details of the allocation of the actuarial surplus for the benefit of the various stakeholders, including the amounts of any actuarial surplus which it is intended to credit to the member surplus account and to the employer surplus account, respectively, and the costs of any benefit improvements for members and former members: Provided that-
- (i) the manner of communication and the type of information to be included in this communication may be prescribed and such prescription may include a requirement that the person appointed in terms of subsection (3), the independent actuary, if any, and the valuator shall certify that they are satisfied that the communication material is objective and contains sufficient information to enable any stakeholder to judge the reasonableness of the scheme; and

- (ii) the communication shall be explicit about how and where any complaint should be lodged;
  - (e) the employer, members, former members, and any fund to which former members have transferred have had 12 weeks after despatch of the communication in which to complain, in writing, to the board;
  - (f) the board has considered any objection contemplated in paragraph (e) before submitting the scheme to the registrar;
  - (g) the principal officer of the fund has furnished the registrar with details of all objections lodged with the board and the actions taken to address such objections;
  - (h) the registrar is satisfied that the scheme is reasonable and equitable and accords full recognition to the rights and reasonable benefit expectations of existing members and former members in respect of service prior to the surplus apportionment date; and
  - (i) the registrar has forwarded a certificate to the principal officer of the fund to the effect that all the requirements of this subsection have been fulfilled.
- (10) If the board fails to submit a scheme in terms of subsection (1) or if the registrar is not satisfied that the **[distribution] scheme** is reasonable and equitable, or if the registrar considers that unresolved complaints require investigation which may lead to a review of such scheme or if the statutory actuarial valuation as at the surplus apportionment date of the fund for the purpose of determining the actuarial surplus in the fund is unacceptable to the registrar, or at the request of the board or at the request of the person appointed in terms of subsection (3), the registrar shall require the board to refer the **[apportionment of the surplus] scheme** to **[the] a special ad hoc tribunal [referred to in] in terms of** section 15K, and such tribunal shall exercise the powers of the

board in terms of this section, and any reference in this section to the board shall be construed as a reference to the tribunal.

- (11) (a) Where a board is not required in terms of subsection (1)(a) to submit a scheme to the registrar, such board shall submit a nil return, together with such additional particulars or reports by the board or other parties as the registrar may deem necessary.
- (b) For purposes of this section a nil return means a written statement by the board, as may be prescribed, including the investigation, existence and details of improper utilisation of surplus as contemplated in subsection (6).
- (c) The effective date of the nil return is the surplus apportionment date.
- (d) The employer, members, former members, and any fund to which former members have transferred may up to a period of 12 weeks after the submission of the nil return object to the return in writing to the board and a copy of the objections must be forwarded by the board to the registrar;
- (e) The board must consider such objections and to the satisfaction of the registrar demonstrate that the objections have been dealt with. If the registrar is not satisfied that the objections have been dealt with satisfactorily, the registrar may direct that the nil return be reviewed or a scheme be submitted by the board where the registrar is of the opinion that a scheme is required in terms of this Act.
- (f) The nil return shall be submitted to the registrar within 18 months of the fund's surplus apportionment date, provided that a fund may apply to the registrar in writing to extend the period for such submission.
- (g) The costs of submitting a nil return to the registrar shall be borne by the fund.



- (h) The registrar may direct the fund to communicate the nil return to members, former members and current employers and may specify the manner in which the communication must take place.
  - (i) The registrar may prescribe additional requirements for nil returns.
- (12) Where the board of a fund satisfies the registrar that employers which participate in the fund, on the understanding that their membership, financial position and contribution rates will be determined separately for each employer and communicated to such employer, the registrar may permit such board to apply this section to the actuarial surplus in respect of the members employed by a particular participating employer as if the corresponding membership, assets and liabilities constituted a separate fund.”.

### **Substitution of section 15E of Act 24 of 1956**

12. The following section is substituted for section 15E of the principal Act:

#### **“Utilisation of surplus for benefit of employer**

- 15E.** (1) Notwithstanding anything to the contrary in the rules a participating employer may request the board to use actuarial surplus allocated to the employer surplus account in terms of sections 15B, 15C and 15F for use by that employer for any of the following purposes, namely-
- (a) funding a contribution holiday;
  - (b) payment of pensions, or an increase in pensions in course of payment, so as to compensate members for the loss of any

- subsidy from the employer of their medical costs after retirement;
- (c) meeting, in full or in part, expenses which the employer is obliged to pay in terms of the rules of the fund;
  - (d) improving the benefits payable to all members, or a category of members as defined in the rules, as determined by the employer;
  - (e) transferring part, or all, of the employer surplus account in terms of subsection (2) to the employer surplus account in another fund where the employer is a participating employer;
  - (f) on liquidation of the fund in terms of section 28 or 29, payment in cash to the employer in terms of section 15I;
- [and]**
- (g) in order to avoid retrenchment of a significant proportion of the workforce, payment in cash to the employer in terms of section 15J; and
  - (h) transferring part, or all, of the employer surplus account to the member surplus account in the same fund:

Provided that the members of the board who have been elected by members of the fund shall not have a vote in any deliberation over the use of any credit balance in the employer surplus account.

- (2) The registrar may approve the transfer of a portion of the employer surplus account from the fund to the employer surplus account in another fund, if the following conditions are satisfied, namely that-
  - (a) the employer who has control of the employer surplus account in terms of the rules of the fund has similar control of the employer surplus account in the transferee fund;
  - (b) employees of the employer are members or former members of the fund to which the transfer is made;

- (c) the employer applies to the registrar for approval of the transfer, giving such details and supporting reports as the registrar may require; and
- (d) the registrar is satisfied that such transfer is necessary in order to achieve an equitable distribution of the surplus between the funds.”.

### **Amendment of section 15F of Act 24 of 1956**

13. Section 15F of the principal Act is amended by the substitution for subsections (1) and (3) of the following subsections:

- “(1) On or after the commencement date, the board may apply to the registrar to transfer all or some of the credit balance in an existing **[employer]** reserve account as defined in the rules to the employer surplus account.
  
- (3) Any remaining portion of the credit balance in an existing **[employer]** reserve account shall be treated as actuarial surplus to be distributed in terms of section 15B.”.

### **Amendment of section 15K of Act 24 of 1956**

14. Section 15K of the principal Act is amended by the substitution for subsection (1) of the following subsection:

- “(1) (a) When the board fails to submit a scheme for the apportionment of an actuarial surplus in terms of section 15B within the prescribed period, **[or if the registrar is not satisfied that the scheme submitted by the board in terms of section 15B is reasonable and equitable or if**

the registrar considers that unresolved complaints require investigation which may lead to a review of such scheme or if the board requests it, the registrar shall require the board to refer the scheme to a special ad hoc tribunal to perform the functions of the board set out in section 15B] the registrar shall appoint a special ad hoc tribunal to perform the functions of the board set out in section 15B.

- (b) The registrar shall require the board to refer the scheme for the apportionment of an actuarial surplus in terms of section 15B to a special ad hoc tribunal to perform the functions of the board set out in section 15B, if –
- (i) the registrar is not satisfied that the scheme submitted by the board in terms of section 15B is reasonable and equitable;
  - (ii) the registrar considers that unresolved complaints require investigation which may lead to a review of such scheme;
  - (iii) the statutory actuarial valuation as at the surplus apportionment date of the fund for the purpose of determining the actuarial surplus in the fund is unacceptable to the registrar;
  - (iv) the board requests it; or
  - (v) the person appointed in terms of section 15B(3) requests it.”.

**Amendment of section 18 of Act 24 of 1956, as amended by section 10 of Act 50 of 1986**

15. The following subsection is added to section 18 of the principal Act:

- “(5) (a) The registrar may at any time following an inspection or investigation under section 25, or for any other reason which the registrar may consider necessary in the interests of the members of a fund, direct that an audit, investigation in terms of section 16 or both an audit and investigation be conducted into the financial position of a fund generally or with reference to any financial aspect of the fund.
- (b) The costs pertaining to the audit or investigation referred to in subsection (a) shall constitute a first charge on the assets of the fund unless otherwise determined by the registrar.
- (c) Following the audit or investigation referred to in subsection (a), a report must within the time and in the format stipulated by the registrar, be furnished to the registrar and the board.”.

**Substitution of section 25 of Act 24 of 1956, as amended by section 11 of Act 68 of 1962**

16. The following section is substituted for section 25 of the principal Act:

**“Powers of inspection**

25. (1) In addition to the powers and duties conferred or imposed upon him by this Act, the registrar shall have all the powers and duties conferred or imposed upon him by the Inspection of Financial Institutions Act, [1962] 1998.
- (2) The registrar may, alternatively, instruct any person to conduct a compliance visit of the business and affairs of a fund or of an administrator approved in terms of section 13B, in order to determine whether this Act, the rules of the fund or the conditions of the administrator’s approval are being complied with.

- (3) A person conducting a compliance visit in terms of subsection (2)-
- (a) has a right of access at any reasonable time to all such documents or records as may reasonably be required for the purpose of the compliance visit; and
  - (b) may require any person holding or accountable for any such document or record, or believed to be involved in the management of the business or affairs of the fund or administrator, to provide such information and explanation as may be necessary for that purpose.

**[(2)] (4)** Any reference in this Act to an inspection carried out or an investigation **[made]** conducted under this section **[shall]** must be construed as a reference to an inspection **[made under the Inspection of Financial Institutions Act, 1962]** carried out under subsection (1), and a compliance visit conducted under subsection (2), as the case may be.”.

**Substitution of section 26 of Act 24 of 1956, as amended by section 6 of Act 22 of 1996**

17. The following section is substituted for section 26 of the principal Act:

**“The [court] registrar may [alter the basis of] intervene in the management of a fund**

**26. (1)** The registrar may, after considering the interests of the members of the fund (or of the several categories of members if there is more than one such category), direct that the rules of the fund, including rules relating to the appointment, powers, remuneration (if any) and removal of the board, be amended, if the registrar is of the opinion that –

- (a) a registered fund is not in a sound financial condition or does not comply with the provisions of this Act or the regulations affecting the financial soundness of the fund;
  - (b) a registered fund has failed to act in accordance with the provisions of section 18;
  - (c) a registered fund is not managed in accordance with this Act or the rules of the fund; or
  - (d) the results of an inspection or investigation under section 25, necessitates amendment of the rules of a registered fund.
- (2) Where a fund has no properly constituted board as contemplated in section 7A and has failed to constitute a board after 90 days written notice by the registrar, the registrar may, notwithstanding the provisions of the rules of the fund, at the cost of the fund –
- (a) appoint so many persons as deemed necessary by the registrar 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.
- (3) A board constituted in terms of subsection (2) holds office until the registrar is satisfied that the fund has constituted a valid board in terms of section 7A and the registrar has relieved the former board in writing of its duties.
- (4) If the registrar has reason to believe that a board member is not fit and proper to hold office, the registrar may, after giving the board member a reasonable opportunity to be heard, direct the board member to vacate office.
- (5) In the circumstances described in subsection (4), the fund shall cause the vacancy to be filled in accordance with the provisions of section 7A and the rules of the fund, failing which the registrar may adopt the course set out in subsection (2).”.

**Amendment of section 28 of Act 24 of 1956, as amended by section 15 of Act 103 of 1979, section 25 of Act 83 of 1992 , section 6 of Act 22 of 1996 and section 3 of Act 94 of 1997**

**18. Section 28 of the principal Act is amended-**

- (a) by the substitution for subsection (12A) of the following subsection:  
“(12A) Notwithstanding any provision to the contrary in this section, the registrar, on good cause shown, may authorize the liquidator to make payment of any amounts to the members and beneficiaries of a fund before submission of the final accounts and report (if any), subject to the conditions that **[the registrar]** may be [prescribe] prescribed from time to time **[by notice in the Gazette]**.”;
- (b) by the addition of the following subsection:  
“(17) The registrar may prescribe the circumstances under which a fund can be exempted from the provisions of this section, and the requirements to be complied with for such exemption to be granted.”.

**Amendment of section 30A of Act 24 of 1956**

**19. Section 30 A(1) of the principal Act is amended-**

- (a) by the substitution for subsection (1) of the following subsection:  
“(1) Notwithstanding the provisions of the rules of any fund, a complainant **[shall have the right to] may** lodge a written complaint with a fund or an employer who participates in a fund for consideration by the board of the fund.”;
- (b) by the addition of the following subsection:  
“(4) Subject to section 30I, the Adjudicator may on good cause shown by any affected party -



- (a) extend a period specified in subsection (2) or (3) before or after expiry of that period; or
- (b) condone non-compliance with any time limit specified in subsection (2) or (3).".

### **Substitution of section 30C of Act 24 of 1956**

20. The following section is substituted for section 30C of the principal Act:

#### **“Appointment of Adjudicator**

- 30C.** (1) The Minister shall, after consultation with the **[Policy Board]** Financial Services Board, appoint a person to the office of Adjudicator, one or more persons to the office of Deputy Adjudicator, and when deemed necessary, an Acting Adjudicator.
- (2) No person shall be appointed as Adjudicator or Deputy Adjudicator or Acting Adjudicator unless he or she is qualified to be admitted to practise as an advocate under the Admission of Advocates Act, 1964 (Act No. 67 of 1964), or as an attorney under the Attorneys Act, 1979 (Act No. 53 of 1979), and -
- (a) for an uninterrupted period of at least 10 years practised as an advocate or an attorney; or
  - (b) for an uninterrupted period of at least 10 years was involved in the tuition of law and also practised as an advocate or attorney for such period as renders him or her suitable for appointment as Adjudicator; or
  - (c) possesses such other experience as renders him or her suitable for appointment as Adjudicator.
- (3) The Adjudicator shall be appointed by the Minister for a period of three years and may be reappointed on expiry of his or her term of office.

- (4) The Adjudicator may at any time resign as Adjudicator by tendering his or her resignation in writing to the Minister: Provided that the resignation shall be addressed to the Minister at least three calendar months prior to the date on which the Adjudicator wishes to vacate his or her office, unless the Minister allows a shorter period.
- (5) The Minister may remove the Adjudicator from office on the grounds of misbehaviour, incapacity or incompetence, after consultation with the Financial Services Board [Policy Board].
- (6) In the event of the resignation, removal or expiry of the term of office of the Adjudicator, the Minister may appoint an acting Adjudicator to act as Adjudicator until a competent person is appointed in terms of subsection (1). All the powers, rights and obligations of the Adjudicator as provided for in this Chapter vest in the Acting Adjudicator.”.

#### **Amendment of section 30I of Act 24 of 1956**

21. Section 30I of the principal Act is amended –
  - (a) by the substitution for subsection (2) of the following subsection:

“(2) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), apply in respect of the calculation of the three year period referred to in subsection (1).”; and
  - (b) by the deletion of subsection (3).

#### **Substitution of section 30P of Act 24 of 1956**

22. The following section is substituted for section 30P of the principal Act:

**“Access to court**

- 30P.** (1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the **[Supreme] High** Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.
- (2) The division of the **[Supreme] High** Court contemplated in subsection (1) **[shall have the power to] may** consider the merits of the complaint **[in question] made to the Adjudicator under section 30A(3) and on which the Adjudicator's determination was based, [to take evidence] and [to] may** make any order it deems fit. No new evidence may be allowed."

#### **Insertion of section 30Y in Act 24 of 1956**

- 23.** The following section is inserted after section 30X of the principal Act:

#### **"Adjudicator proceedings**

- 30Y.** The processes and procedures to be applied by the Adjudicator in performing his functions under this Chapter, may be prescribed by regulation."

#### **Insertion of section 33A in Act 24 of 1956**

- 24.** The following section is inserted after section 33 of the principal Act:

#### **"Directives**

- 33A.** (1) The registrar may, in order to ensure compliance with or to prevent a contravention of the Act, issue a directive to a pension fund, an

- administrator or any other person setting out what practices or actions are required or prohibited.
- (2) A directive referred to in subsection (1) may –
- (a) apply to pension funds generally; or
- (b) be limited in its application to a particular pension fund or kind of pension fund, which may be defined either in relation to a type or budgetary size of pension fund or in any other manner.
- (3) A directive issued in terms of subsection (1) takes effect on the date determined by the registrar in the directive.
- (4) (a) The registrar must issue a directive in terms of subsection (1) in accordance with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).
- (b) In the event of a departure from the provisions of the Promotion of Administrative Justice Act, which may only occur in accordance with sections 3(4) and 4(4) of that Act, the directive must include a statement to that effect and the reasons for the departure, which take into account all the factors contained in section 3(4) and 4(4) of that Act.
- (5) The registrar may cancel, amend or revoke any previously issued directives.
- (6) The registrar may where a directive is issued to ensure the protection of the members and the public in general, publish the directive in the *Gazette* and any other media that the registrar deems appropriate.”.

**Substitution of section 36 of Act 24 of 1956, as amended by section 18 of Act 103 of 1979, section 18 of Act 86 of 1984, section 9 of Act 53 of 1989, section 27 of Act 83 of 1992, section 2 of Act 7 of 1993 and section 3 of Act 65 of 2001**

25. The following section is substituted for section 36 of the principal Act:

**“Regulations**

36. (1) The Minister may make regulations, not inconsistent with the provisions of this Act -

(a) in regard to all matters which by this Act are required or permitted to be prescribed by regulation;

**[(b) prescribing the form of any document referred to in this Act for which provision is not otherwise made in this Act, or prescribing alterations or additions to any such form]**

**(b)[bA]** prescribing matters in addition to those contemplated in any other provision of this Act in respect of which fees shall be payable, the fee payable in respect of each such matter, and, in relation to such fees as well as fees payable under any such other provision of this Act, the persons by whom the fees shall be payable, the manner of payment thereof and, where it is deemed necessary, the payment of interest in respect of overdue fees;

**(bA)[bB]** limiting the amount which and the extent to which a fund may invest in particular assets or in particular kinds or categories of assets, prescribing the basis on which the limit shall be determined and defining the kinds or categories of assets to which the limit applies;

**(bB)[bC]** authorizing the registrar to grant unconditional or conditional exemption, whether unlimited or limited in duration, from provisions of the regulations contemplated in paragraph **[(bB)] (bA)**;

- (bC)[bD] prescribing additional conditions under which a fund may grant a loan to a member or furnish a guarantee in favour of a person other than the fund in respect of a loan granted or to be granted by such other person for the purposes contemplated in section 19(5);
  - (c) generally, as to all matters which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved.
- (2) Different regulations may in terms of subsection (1) be made in respect of different funds.
  - (3) Fees which are in terms of or by virtue of a provision of this Act payable, and interest so payable in respect of overdue fees, shall be a debt due to the Financial Services Board established by section 2 of the Financial Services Board Act, 1990 (Act 97/90), and may be recovered by the registrar by action in any competent court.”.

**Substitution of section 37 of Act 24 of 1956, as amended by section 14 of Act 65 of 1968, section 19 of Act 86 of 1984, section 13 of Act 50 of 1986, section 28 of Act 83 of 1992, section 3 of Act 7 of 1993 and section 9 of Act 88 of 1996**

26. The following section is substituted for section 37 of the principal Act:

**“Administrative penalties**

37. (1) The Minister may publish penalties in respect of non-compliance to provisions of this Act or Regulations by Notice in the Gazette, and . the registrar may, despite and in addition to taking any step he or she may take under this Act, impose an administrative penalty, as prescribed by regulation and in accordance with the processes and

procedures provided for in the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), on a pension fund, administrator or third party for any failure to comply with this Act: Provided that an administrative penalty will only be imposed after allowing the pension fund or third party a reasonable opportunity to make representations. [Any person who-

- (a) contravenes or fails to comply with the provisions of section 9, 9A, 13A, 13B or 35; or**
  - (b) fails to make a return or transmit or deposit a scheme, report, account, statement or other document when required to do so in terms of this Act; or**
  - (c) contravenes the provisions of section nineteen or any condition on which he has been exempted from those provisions; or**
  - (d) fails or refuses to furnish information, or produce documents or accounts, or render other assistance to the registrar when called upon to do so in terms of this Act; or**
  - (e) after the expiration of a period of six months from the commencement of this Act, induces or attempts to induce any person to become a member of, or to contribute to a fund not registered under this Act; or**
  - (f) contravenes or fails to comply with the provisions of section 10, 31, or 32A (2) or (4),**
- shall be guilty of an offence, and liable on conviction -**
- (i) in the case of an offence referred to in paragraph (a) to a fine not exceeding R2 000;**
  - (ii) in the case of an offence referred to in paragraph (b) or (c) to a fine not exceeding R500;**
  - (iii) in the case of an offence referred to in paragraph (d) or (e) to a fine not exceeding R1 000; and**

- (iv) in the case of an offence referred to in paragraph (f) to a fine not exceeding R1 000 or, if the offender is an individual, to imprisonment for a period not exceeding twelve months, or to both such fine and such imprisonment.]
- (2) [Without derogation from the provisions of subsection (1), a person who has failed to make a return or to transmit or deposit a scheme, report, account, statement or other document within the time prescribed in the appropriate provision of the Act, may thereafter furnish such return, or transmit or deposit such scheme, report, account, statement or other document subject to the payment of a penalty prescribed by regulation.] An administrative penalty referred to in subsection (1) may not exceed the amount prescribed by regulation for every day during which such failure continues.
- (3) [Any penalty prescribed under subsection (2) may vary according to the period which has elapsed since the last day on which the return, scheme, report, account, statement or other document in question was required to be made, transmitted or deposited.] An administrative penalty imposed under subsection (1) must be paid to the registrar within the period specified by the registrar, which period may not be unreasonable.
- (4) [For the purpose of subsection (2) the registrar shall make a decision as to the time within which a return, scheme, report, account, statement or other document referred to in that subsection was required to be furnished, transmitted or deposited.] If a pension fund, or any third party, fails to pay an administrative penalty within the specified period the registrar may by way of civil action in a competent court recover the amount of the administrative penalty from the pension fund or third party.



- [(5) Any penalty payable under subsection (2) shall be a debt due to the Financial Services Board established by section 2 of the Financial Services Board Act, 1990 (Act 97 of 1990), and may be recovered by the registrar by action in any competent court.]**

**Amendment of section 37C of Act 24 of 1956, as amended by section 13 of Act 80 of 1978, section 41 of Act 99 of 1980, section 21 of Act 54 of 1989, section 29 of Act 83 of 1992, section 28 of Act 104 of 1993 and section 5 of Act 22 of 1996**

- 27. Section 37C of the principal Act is amended –**
- (a) by the substitution for the introductory part of subsection (1) of the following introductory part:
- “(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to one or more dependants in terms of the rules of a registered fund, which must be dealt with in terms of those rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of section 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:”;
- (b) by the substitution for subsection (3) of the following subsection:
- “(3) Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as the board may from time to time consider appropriate and in the best interests of such dependant or nominee: Provided that interest at a reasonable rate, having regard to the **[investment] fund**

return earned by the fund, shall be added to the outstanding balance at such times as the board may determine: Provided further that any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full.”.

**Substitution of section 37D of Act 24 of 1956, as amended by section 14 of Act 80 of 1978 and section 4 of Act 65 of 2001**

**28.** Section 37D of the principal Act is amended –

(a) by the substitution for paragraphs (c) of subsection (1) of the following paragraph:

“(c) deduct any amount which the fund has paid or will pay by arrangement with, and on behalf of, a member or beneficiary in respect of -

(i) such member’s or beneficiary’s subscription to a medical scheme, registered otherwise than provisionally in terms of the Medical Schemes Act, **[1967 (Act No. 72 of 1967)]**1998 (Act No. 131 of 1998);

(ii) any insurance premium payable by such member or beneficiary to **[an insurer registered in terms of the Insurance Act, 1943 (Act No. 27 of 1943)]** a long-term insurer registered in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998);

(iii) any purpose approved by the registrar, on the conditions determined by him, upon a request in writing from the fund,

from the benefit to which the member or beneficiary is entitled in terms of the rules of the fund, and pay such

amount, if due, to such medical scheme, insurer or person concerned, as the case may be.”;

(b) by the addition to subsection (1) of the following paragraph:

- “(d) deduct from a member’s benefit or minimum individual reserve, as the case may be, any amount assigned from his pension interest to a non-member spouse or any other person in terms of a valid order made by a competent court. For purposes of section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979) the pension benefit referred to in that section is deemed to accrue to the member on the date of the court order. Provided that-
- (i) such deduction shall be effected by the pension fund named in the order upon receipt of the order;
  - (ii) such deduction shall have the effect of reducing the accrued benefit at the date of such deduction;
  - (iii) the non-member spouse shall have the option to elect that the assigned amount be paid directly to him or her, or that it be transferred to an approved retirement fund on his or her behalf, and such transfer or payment must take place within 60 days of such election having been exercised;
  - (iv) the non-member spouse or other person shall not acquire the rights of a member or beneficiary in relation to the pension fund; and
  - (v) the non-member spouse or other person shall be entitled to the accrual of interest on the assigned amount at fund return from the expiry of the period referred to in subparagraph (iii) until payment or transfer thereof, but not to any other interest or growth.”.

### **Insertion of sections 40A and 40B in Act 24 of 1956**

29. The following sections are inserted after section 40 of the principal Act:

**“Delegation and authorisation**

- 40A.** (1) The Minister may, on the conditions determined by notice in the Gazette (which may at any time be withdrawn, amended or replaced by the Minister) delegate to any officer in the National Treasury the exercise of any power conferred upon the Minister, or authorise that officer to carry out any duty or obligation imposed on the Minister in this Act or any regulation.
- (2) A delegation or authorisation in terms of subsection (1) does not prohibit the exercise of power or carrying out of the duty or obligation concerned by the Minister.
- (3) Anything done or omitted by a delegated officer or an authorised person in terms of subsection (1), is deemed to have been done or omitted by the Minister.

**Retrospectivity**

- 40B.** The definitions in section 1(1) of “actuarial surplus”, “augment”, “contingency reserve account”, “contribution holiday”, “defined benefit category of a fund”, “employer surplus account”, “fund return”, “member surplus account”, “minimum individual reserve”, “surplus apportionment date” and sections 14A, 14B, 15B, 15C, 15E, 15F and 15K are deemed to have come into operation on 7 December 2001, for funds whose surplus schemes have not been approved by the registrar:
- Provided that in the case of funds whose schemes have been submitted but not yet approved on the effective date of this amendment, the registrar must inform such funds of the instances where their schemes do not comply with this amendment and grant such funds a reasonable period of time to review and resubmit their schemes.”.

**Short title**

- 30.** This Act is called the Pension Funds Amendment Act, 2007, and comes into operation on a date determined by the President by proclamation in the *Gazette*.