

REPUBLIC OF SOUTH AFRICA

PENSION FUNDS AMENDMENT BILL

*(As amended by the Portfolio Committee on Finance (National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF FINANCE)

[B 11B—2007]

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GENERAL EXPLANATORY NOTE:

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

_____ Words underlined with a solid line indicate insertions in existing enactments.

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provisions in line with their practical application; to update references to legislation and institutions; to delete outdated provisions; to clarify the provisions on the determination and apportionment of actuarial surplus in a pension fund; to provide for the application of the said Act to certain funds; to provide for the obligations and proper conduct 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; and to provide for administrative penalties for non-compliance with the said 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 5

1. Section 1 of the Pension Funds Act, 1956 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the substitution for the definition of “actuarial surplus” of the following definition: 10

“ ‘**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 15

(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 any 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(5) (a) from being required to be subject to audit;
- ‘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 been amended in accordance with the requirements of the Registrar, or which has not been disallowed by the Registrar, and 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 paragraph (a) of the definition of “contribution holiday” of the following paragraph:
- “(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”;
- (g) by the substitution for the definition of “court” of the following definition:
- “**‘court’** means a court of the 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) **[augmented by such investment returns and any share of actuarial surplus or transfer from a contingency reserve account as the board determines]** 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, as increased or decreased by fund return: 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 born out of wedlock.
 - (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]** sections 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];** Provided that the board may elect to smooth the fund return, and to which shall be debited—
 - [i](d)** any actuarial surplus utilised by the employer; and
 - [ii](e)** 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 organisation, 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 if the assets are 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; or
 - (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 (Act No. 52 of 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
 - (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**”, in relation to a member of a fund, means a person who is no longer the spouse of that member due to the dissolution or confirmation of the dissolution of the relationship by court order and to whom the court ordering or confirming 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;”;

- (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 “reserve account” of the following definition: 5
 “**‘retirement annuity fund’** means a retirement annuity fund as defined in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962);”;
- (t) by the substitution for the definition of “rules” of the following definition: 10
 “**‘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, obligations or** 15
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: 20
 “**‘spouse’** means a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act No. 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 a religion;”;
- (v) by the substitution for the definition of “surplus apportionment date” of the following definition: 25
 “**‘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: 30
 “**‘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.” 35

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 hereby substituted for section 2 of the principal Act:

“Application of Act 40

2. (1) **[The]** 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, [which has been] including a pension fund 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), [before the 45
Labour Relations Amendment Act, 1998, 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 50
a pension fund shall from time to time furnish the registrar with such statistical information as may be requested by the Minister] and registered in terms of section 4.

(2) A pension fund established or continued in terms of a collective agreement contemplated in subsection (1) and not yet registered in terms of section 4, must register in terms of this Act before or on 1 January 2008. 55

(b) Despite any other provision of this Act, the first statutory actuarial valuation of a fund registered in accordance with paragraph (a) must

be undertaken at the end of the first financial year following registration or such other date approved by the registrar.

(3) A pension fund contemplated 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, if—

- (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 for 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 amended by section 14 of Act 81 of 1957 and section 9 of Act 64 of 1990

3. Section 5 of the principal Act is hereby 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 inserted by section 2 of Act 22 of 1996

4. Section 7D of the principal Act is hereby 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 substituted by section 12 of Act 65 of 1968 and amended by section 10 of Act 64 of 1990 and section 23 of Act 104 of 1993

5. Section 9 of the principal Act is hereby 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 substituted by section 1 of Act 94 of 1997

6. Section 13A of the principal Act is hereby amended by the substitution in subsection (7) for the words preceding paragraph (a) of the following words:

- “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—”.

Amendment of section 13B of Act 24 of 1956, as inserted by section 20 of 1992

7. Section 13B of the principal Act is hereby amended—

- (a) by the substitution for subsection (4) of the following subsection:

“(4) If the registrar deems it desirable in the public interest **[he] the registrar may on such conditions, to such extent and in such manner as [he may deem] it is deemed** fit, exempt any person or category of persons from the provisions of **[this section]** subsections (1) and (3), and may at any time revoke or amend any such exemption in a similar manner.”; and

- (b) by the addition of the following subsections:

“(5) An administrator contemplated in subsection (1) 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 disclosed by the administrator to the board setting out full particulars of how such conflict will be managed;
- (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.

(6) 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.

(7) The registrar may, despite 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 under subsection (1) or any directive issued under subsection (6).

(8) Before taking any action under subsection (6) or (7), 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.

(9) If it is in the public interest, the registrar may through appropriate media make known—

- (a) the suspension or withdrawal of an approval referred to in subsection (6);
- (b) any non-compliance and administrative penalty referred to in subsection (7).”.

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. Section 14 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
 - “[No] Subject to subsection (8), 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-”;
- (b) by the substitution in subsection (1) for paragraph (a) of the following paragraph:
 - “(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;”;
- (c) by the substitution for subsection (2) of the following subsection:
 - “(2) (a) 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. 5

(b) Any transfer contemplated in paragraph (a) must be effected within 60 days of the date of the certificate issued by the registrar in terms of paragraph (e) of subsection (1).”; and

(d) by the addition of the following subsections: 10

“(5) Any application for approval of a scheme lodged with the registrar in terms of subsection (1)(a) 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. 15

(6) The registrar may withdraw or amend a certificate issued in terms of subsection (1)(e), in circumstances where the registrar is satisfied that—

(a) the 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 20

(b) the certificate contains a *bona fide* error.

(7) (a) Notwithstanding anything to the contrary in the rules of a fund, a retirement annuity fund shall not prohibit 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. 25

(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 or by any agent or mandatory of such party— 30

(i) in return for the facilitation, intermediation or recommendation of the transfer; or

(ii) for financial services rendered by a financial services provider or representative after the transfer in respect of the transferred interest of the transferring member or non-member spouse which exceed the fees or commission that would have been permissible for such services had the transfer not been done. 35

(8) With effect from the commencement of the Pension Funds Amendment Act, 2007, subsection (1) does not apply where the affected members were duly informed of a proposed transaction and any objection the members may have has been resolved to the satisfaction of the board of the fund concerned, and— 40

(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, and, furthermore, that— 45

(i) such registered funds keep proper records of all such transactions;

(ii) such registered funds comply with any further requirements as the registrar may prescribe; 50

(iii) the assets and liabilities are transferred within 180 days of the effective date of transfer; and

(iv) any assets transferred must be increased or decreased with fund return from the effective date until the date of final settlement.”. 55

Amendment of section 14A of Act 24 of 1956, as inserted by section 3 of Act 39 of 2001

9. Section 14A of the principal Act is hereby 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 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, as inserted by section 3 of Act 39 of 2001

10. The following section is hereby 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—

$$MC+EC-X+[AS] \underline{IC+OC}$$

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; and

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

(b) MC, EC, X, **[and AS]** IC and OC are **[augmented]** increased or decreased with **[such investment 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] fund** return: Provided that the board may elect to smooth **[these investment returns]** the fund return.

(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 **[and]** of 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 of payment of a contribution by **[interest at a rate which is reasonable in relation to the 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] fund return plus any amount payable in terms of the rules of the fund in excess of the member contributions increased or decreased as from the date that the member joined the fund: 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. 5

(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 10
- (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. 15

(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); 20
- (ii) pensioners on whose behalf a fund, on or after retirement in terms of the rules of the fund, purchased a policy of insurance from a long-term insurer registered in terms of section 7 of the Long-term Insurance Act, 1998 (Act No. 52 of 1998); 25
- (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. 30

(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— 35

- (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); 40

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 with fund return 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— 45
 - (aa) pension payments;
 - (bb) cash amounts paid on retirement; and 50
 - (cc) those expenses that the board deems reasonable, 55

plus the liability in respect of any special increases that have been granted to pensioners and deferred pensioners which were funded otherwise than through **[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** 60

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 return: 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 that 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, as inserted by section 4 of Act 39 of 2001

11. The following section is hereby 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 (in this section referred to as the scheme) plus the details regarding any surplus utilised improperly by the employer as defined in subsection (6) 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 therefor;

- (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 5
 - (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. 10
- (2) A scheme—
- (a) shall comply with such conditions as **[the registrar]** may **[prescribe by regulation]** be prescribed; and 15
 - (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; 20
 - (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— 25
- (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 30
 - (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 35
 - (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). 40
- (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— 45
- (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— 55
 - (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— 60

- (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, 5
 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; 10
- (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 15
 (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: 20
 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 25
 (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 14B(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 30
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 14B(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 35
 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]** 40
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 45
 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— 50
 (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: 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]** and the employer 55
must submit a scheme conforming with the prescribed requirements and repay that debt within a maximum period approved by the registrar; 60
- (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 increased or decreased 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) [Surplus utilised improperly by the employer prior to the surplus apportionment date shall consist of—

- (a) 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;
- (b) the cost of any additional pensions or deferred pensions granted to selected members in lieu of the employer's obligation to subsidise the medical costs after retirement of those members;
- (c) 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
- (d) the value of any contribution holiday enjoyed by the employer after the commencement date:

Provided that the board may exclude from surplus utilised improperly by the employer any use of actuarial surplus which the registrar is satisfied was approved by the members, or by trade unions representing the members, after a clear and comprehensive communication exercise as part of a negotiated utilisation of surplus by stakeholders]

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, determined in accordance with this section, and whom benefited from the improper use: Provided that where a subsequent employer or employers by contract or law became liable for the employee-related liabilities of the previous employer or employers, the subsequent employer is also liable for the apportionment of surplus used improperly;

'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 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 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 medical costs of those members after retirement;
- (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 5
- (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 occurred as part of a negotiated utilisation of surplus by stakeholders; 10
- (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 such specific purpose; 15
- (iii) for the purposes of paragraph (b)(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) such surplus utilised for the purposes of remedying past unfair discrimination if the registrar is satisfied that the surplus utilised improperly was used for such purposes. 20
- (d) The investigation contemplated in paragraph (b) shall—
- (i) be conducted at the fund's surplus apportionment date; and
- (ii) be carried out by the board irrespective of the fund's financial position at the surplus apportionment date. 25
- (e) Any surplus utilised improperly shall be increased or decreased by fund return from the effective date of the use until the date of receipt thereof by the fund.
- (7) At least 75 per cent of the members of the board duly constituted in terms of section 7A must approve the scheme. 30
- (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. 35
- (9) An apportionment in terms of this section shall be of no force or effect unless—
- (a) the scheme, **[including a copy of every]** the statutory actuarial valuation as at the surplus apportionment date of the fund, as well as a copy of any other 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 prescribed; 40
- (b) the registrar has been furnished with a certificate signed by the valuator stating— 45
- (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; 50
- (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— 55
- (i) the registrar shall require such report where there are complaints in respect of the apportionment of surplus which 60

- 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 **[employer]** fund demonstrates that reasonable measures have been taken to inform employers, 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 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 ‘nil return’ means a written statement by the board, as may be prescribed, including the investigation, existence and details of improper utilisation of surplus 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 within 12 weeks after the date of submission of a nil return object to such return in writing to the board, and a copy of the objection must be forwarded by the board to the registrar.

(e) (i) The board must consider such objections and to the satisfaction of the registrar demonstrate that the objections have been dealt with.

(ii) 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 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.”.

Amendment of section 15E of Act 24 of 1956, as inserted by section 4 of Act 39 of 2001

12. Section 15E of the principal Act is hereby amended—

(a) by the deletion in subsection (1) of the word “and” at the end of paragraph (f) and the addition in that subsection of the word “and” at the end of paragraph (g); and

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

“(h) transferring part, or all, of the employer surplus account to the member surplus account in the same fund:”.

Amendment of section 15F of Act 24 of 1956, as inserted by section 4 of Act 39 of 2001

13. Section 15F of the principal Act is hereby amended—

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

“(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.”; and

(b) by the substitution for subsection (3) of the following subsection:

“(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, as inserted by section 4 of Act 39 of 2001

14. Section 15K of the principal Act is hereby 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. Section 18 of the principal Act is hereby amended by the addition of the following subsection:

- “(5) (a) The registrar may at any time following an inspection carried out or investigation conducted 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 investigation in terms of section 16 or an audit or both an audit and such 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 contemplated in paragraph (a) shall constitute a first charge on the assets of the fund unless otherwise determined by the registrar.
- (c) Following the audit or investigation contemplated in paragraph (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 substituted by section 11 of Act 68 of 1962

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

“Inspections and investigations

25. (1) In addition to the powers and duties conferred or imposed upon him or her by this Act, the registrar shall have all the powers and duties conferred or imposed upon him or her by the Inspection of Financial Institutions Act, [1962] 1998 (Act No. 80 of 1998).
- (2) Notwithstanding subsection (1), the registrar may 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 purposes of the compliance visit; and
 - (b) may require an administrator or any person holding, or who is accountable for, any such document or record or involved in the management of the business or affairs of the fund, to provide such information and explanation as may be necessary for purposes of the compliance visit.
- [~~(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), or 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 hereby substituted for section 26 of the principal Act:

“Registrar may intervene in management of fund

26. (1) The registrar may, after considering the interests of the members of a 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 results of an inspection or investigation under section 25 necessitates amendment of the rules of the fund or if the registrar is of the opinion that the fund—
- (a) 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) has failed to act in accordance with the provisions of section 18; or
- (c) is not managed in accordance with this Act or the rules of the fund.
- (2) Where a fund has no properly constituted board contemplated in section 7A and has failed to constitute a board after 90 days written notice by the registrar, the registrar may, notwithstanding the rules of the fund, at the cost of the fund—
- (a) appoint so many persons as may be necessary 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 hereby 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 authorise 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].”; and
- (b) by the addition of the following subsection:
- “(17) The registrar may prescribe the circumstances under which a fund may be exempted from the provisions of this section and must prescribe the requirements to be complied with for such exemption to be granted.”.

Amendment of section 30A of Act 24 of 1956, as inserted by section 3 of Act 22 of 1996

19. Section 30A(1) of the principal Act is hereby 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 for consideration by the board of the fund.”; and

(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 for section 30C of Act 24 of 1956, as inserted by section 3 of Act 22 of 1996

20. The following section is hereby 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) a person to the office of Adjudicator;
- (b) one or more persons to the office of Deputy Adjudicator; and
- (c) when deemed necessary, an Acting Adjudicator.

(2) No person shall be appointed as Adjudicator, 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] 74 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, Deputy Adjudicator or Acting Adjudicator; or
- (c) possesses such other experience as renders him or her suitable for appointment as Adjudicator, Deputy Adjudicator or Acting Adjudicator.

(3) The Adjudicator and Deputy Adjudicator shall be appointed by the Minister for a period of no more than three years and may be reappointed on expiry of his or her term of office.

(4) The Adjudicator and Deputy Adjudicator may at any time resign as Adjudicator or Deputy 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 or Deputy Adjudicator wishes to vacate his or her office, unless the Minister allows a shorter period.

(5) The Minister may remove the Adjudicator or Deputy Adjudicator from office on the grounds of misbehaviour, incapacity or incompetence, after consultation with the [Policy Board] Financial Services Board.

(6) (a) In the event of the resignation, removal or expiry of the term of office of the Adjudicator and subject to subsection (1), the Minister may appoint an Acting Adjudicator to act as Adjudicator until a competent person is appointed in terms of subsection (1).

(b) An Acting Adjudicator has all the powers and must perform all the duties of the Adjudicator.”.

Amendment of section 30I of Act 24 of 1956, as inserted by section 3 of Act 22 of 1996

21. Section 30I of the principal Act is hereby 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), relating to a debt 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, as inserted by section 3 of Act 22 of 1996

22. The following section is hereby 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, to take evidence]** made to the Adjudicator under section 30A(3) and on which the Adjudicator’s determination was based, and **[to]** may make any order it deems fit.

(3) Subsection (2) shall not affect the court’s power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced.”.

Insertion of section 30Y in Act 24 of 1956

23. The following section is hereby inserted in the principal Act after section 30X:

“Adjudicator proceedings

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

Insertion of section 33A in Act 24 of 1956

24. The following section is hereby inserted in the principal Act after section 33:

“Directives

33A. (1) The registrar may, in order to ensure compliance with or to prevent a contravention of this Act, issue a directive to a pension fund, an administrator or any other person in which practices or actions that are required or prohibited are set out.

(2) A directive issued in terms of 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 among other things be defined either in relation to a type or budgetary size of a pension fund.

(3) A directive issued in terms of subsection (1) takes effect on the date determined by the registrar in the directive.

(4) In the event of a departure from section 3(1) or 4(1), (2) or (3) of the Promotion of Administrative Justice Act, (Act No. 3 of 2000), the directive must include a statement to that effect and the reasons for such departure.

(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.”

Amendment 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 5

25. Section 36 of the principal Act is hereby amended by the deletion in subsection (1) of paragraph (b).

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 10

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

“Power of registrar to impose administrative penalty

37. (1) The Minister may prescribe by regulation administrative penalties for non-compliance with this Act. 15

(2) If the Registrar on reasonable grounds believes that an administrator, pension fund or third party has failed to comply with this Act, the Registrar may, after consideration of all material facts, impose an administrative penalty not exceeding R5 000 000 for every day during which non-compliance with this Act continues. 20

(3) Before imposing a penalty the Registrar must in writing—
 (a) inform the administrator, pension fund or third party of his or her intention to impose a penalty;
 (b) specify the particulars of the alleged non-compliance;
 (c) provide reasons for the penalty intended to be imposed;
 (d) specify the amount of the penalty intended to be imposed;
 (e) invite interested persons to make representations within a period specified by the registrar; and
 (f) inform the administrator, pension fund or third party that it may be assisted by a legal representative or other adviser. 25 30

(4) If the Registrar after consideration of representations made decides to impose an administrative penalty, he or she must by written notice inform the administrator, pension fund or third party that it may, within 30 days after the date of the notice, pay the penalty or lodge an appeal in accordance with section 26 of the Financial Service Board Act, 1990 (Act No. 97 of 1990).or commence review proceedings. 35

(5) If an administrator, pension fund or third party fails to pay an administrative penalty the registrar may by way of civil action in a competent court recover such administrative penalty.”

Amendment of section 37C of Act 24 of 1956, as substituted by section 41 of Act 99 of 1980 and amended by 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 40

27. Section 37C of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 45

“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 the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such 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] sections 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:”; and 50

(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: 5

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.”. 10

Substitution of section 37D of Act 24 of 1956, as inserted by section 14 of Act 94 of 1977 and 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 hereby amended—

(a) by the substitution in subsection (1)(c) for subparagraphs (i) and (ii) of the following subparagraphs, respectively: 15

“(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); 20

(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);” and

(b) by the addition to subsection (1) of the following paragraphs: 25

“(d) deduct from a member’s benefit or minimum individual reserve, as the case may be, any amount assigned from his or her pension interest to a non-member spouse or any other person in terms of a valid order made by a competent court; 30

(e) for the 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; 35

(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 pension fund on his or her behalf, and such transfer or payment must take place within 60 days of such election having been exercised; 40

(iv) the non-member spouse shall not acquire the rights of a member or beneficiary in relation to the pension fund; and

(v) the non-member spouse 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.”. 45

Insertion of sections 40A, 40B and 40C in Act 24 of 1956

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

“Delegation and assignment

40A. (1) The Minister may, in writing, delegate a power or assign a duty to any official in the National Treasury. 5

(2) The Minister must regularly review and, if necessary, amend or withdraw a delegation made under subsection (1). 10

(3) A delegation or assignment to an official contemplated in subsection (1)—

(a) is subject to such limitations and conditions as the Minister may impose; and 10

(b) does not divest the Minister of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty. 15

(4) The Minister may confirm, vary or revoke any decision taken by an official as a result of a delegation in terms of this section subject to any rights that may have vested as a consequence of the decision. 15

Retrospectivity

40B. The definitions in section 1(1) of “actuarial surplus”, “contingency reserve account”, “contribution holiday”, “defined benefit category of a fund”, “employer surplus account”, “fund return”, “member surplus account”, “minimum individual reserve” and “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 apportionment schemes have not been approved or whose nil returns referred to in section 15B(11)(b) have not been received by the registrar: Provided that— 20

(a) in the case of funds whose surplus apportionment schemes have been submitted but not yet approved on the effective date of this amendment; 30

(b) in the case of a nil return referred to in section 15B(11)(b) that has been received by or on the effective date of this amendment but in respect of which the Registrar is not satisfied that the requirements of section 15B(11) have been met, 35

the registrar must inform such funds of the instances where their schemes or nil returns do not comply with requirements of the Act and grant the funds a reasonable period of time to review and resubmit their schemes or returns for approval or noting.”. 35

Regulations

40C. Before regulations in terms of this Act are promulgated, the Minister must publish the draft regulations in the *Government Gazette* for public comment and submit the regulations to Parliament, while it is in session, for parliamentary scrutiny at least one month before their promulgation. 40

Short title and commencement 45

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*.

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

1. BACKGROUND TO BILL

- 1.1 The purpose of this Bill is to enhance the protection of the pension interest of members. Most individuals in the formal sector contribute towards their retirement, which dedicated contribution often extends across their lifetimes. It therefore serves as the most significant source of saving for these individuals. A number of amendments endeavoured to afford the pension interest with the necessary protection, 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 Despite these attempts certain references in the Pension Funds Act, 1956 ('the Act') have gradually become misaligned with provisions in other legislation, and in the more serious circumstances, certain provisions of the Act have been challenged with the intention to circumvent the spirit of the original legislation passed by Parliament by applying creative legal interpretations.

2. OBJECTS OF BILL

The objects of the Bill are to—

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

3. SUMMARY OF BILL

- 3.1 The Bill 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 provide clarity to boards of trustees when apportioning surplus, and endeavour to close loopholes that allow for creative interpretations that are not aligned with the intention of the legislature expressed in the Pension Funds Second Amendment Act, 2001 (Act No. 39 of 2001);
 - 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 registered under the Act must register on or before 1 January 2008. This amendment will ensure consistency in fund governance and dispute resolution across both bargaining council funds and other occupational funds;
 - 3.1.3 powers of the Registrar of Pension Funds are addressed so as to increase regulatory effectiveness;
 - 3.1.4 the specific duties of pension fund administrators;
 - 3.1.5 the jurisdiction of the Pension Funds Adjudicator is clarified. 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, 1969 (Act No. 68 of 1969);
 - 3.1.6 clarity on how to deal with divorce orders and maintenance claims in respect of pension benefits; and

- 3.1.7 updating of provisions in the Act which are no longer aligned to recently promulgated legislation.

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 FOR STATE

- 5.1 The Bill will not have financial implications for the State.
- 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.

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