

5 August 2009

LEGAL UPDATE FAW 13/2009: DIRECTIVE PF NO. 4 – SECTION 28 PENSION FUNDS ACT- VOLUNTARY DISSOLUTION OR PARTIAL DISSOLUTION OF A FUND

On 08 June 2009, the Financial Services Board issued the above Directive which provides guidance in respect of the information which will be required by the Registrar from a fund and/or liquidator in exercising his/her powers and functions under section 28 of the Pension Funds Act.

The Directive sets out the requirements in 10 different forms, each of which deals with a process in the liquidation process. The following forms are available on the FSB's website (www.fsb.co.za , under the retirement fund section). The following forms are available for completion in the format required:

- 1. FORM A:** Application to be listed on the panel of approved liquidators for Pension Funds. A Liquidator must complete form A in order to be listed on the panel of liquidators.
- 2. FORM B:** Application for the approval of the appointment of a liquidator under section 28(2) of the Pension Funds Act.
- 3. FORM C:** This form must also be completed, in addition to form B, where the liquidator has to be replaced. Either the appointed liquidator or the responsible person of the administrator, must complete the form, setting out the reasons for the replacement and confirming that the members of the fund have been informed of the replacement.
- 4. FORM D:** Form D is an application under section 28(17) for exemption from the provisions of section 28 (other than section 28(12)) of the Pension Funds Act. The Registrar will only consider an application for exemption from the provisions of section 28 once the requirements in section 9 of the directive are met.
- 5. FORMS E and F:** Forms E and F are submitted simultaneously. Form F is an application under section 28(7A) for exemption from sections 28(6) and 28(7) of the Act. Together with Form E, which requires written declarations from members and beneficiaries, the declarations must state that all the members and beneficiaries are satisfied with the liquidation and distribution accounts and approved the accounts accordingly. Board Notice 72 of 2001 sets out the circumstances the Registrar will take into account before granting exemption.
- 6. FORM G:** Form G is used to complete an application under section 28(17) for exemption from the provisions of section 28(12) of the Pension Funds Act (submission of final accounts). The liquidator or a responsible person who has been appointed in terms of the Pension Funds Act, in cases where the liquidator cannot be traced, must submit an application in the format of Form G, confirming that the liquidation has been completed in accordance with the requirements of section 28 of the Act and that all benefits have been paid to members and/or beneficiaries.
- 7. FORM H:** Form H is used by the liquidator to request the approval of the Registrar for the Liquidator to make interim payments under section 28(12A) of the Pension Funds Act.

- 8. FORM I:** Form I is used to notify the Registrar to cancel the registration of a fund, or confirm the completion of a partial dissolution of a fund to the Registrar.
- 9. FORM J:** Form J is used where a fund or a participating employer withdrawing from a fund has been exempted from the provisions of section 28 of the Pension Funds Act. The form serves as notification to the Registrar of a declaration of nil assets, members and liabilities, which must be submitted to the Registrar within 30 days after the final distribution of member and beneficiary benefits and must be accompanied by an application for the cancellation of the registration of the fund or participating employer in terms of section 27 of the Act, as set out in Form J.

APPLICATION UNDER SECTION 28 (17) FOR EXEMPTION FROM THE PROVISIONS OF SECTION 28 (OTHER THAN SECTION 28 (12 – which deals with submission of final accounts)) OF THE ACT

As indicated under item 4 above, Form D is used to apply under section 28(17) for exemption from the provisions of section 28 (other than section 28(12)) of the Pension Funds Act. The Registrar will only consider an application for exemption from the provisions of section 28 if the following conditions apply on the date that the fund takes a resolution to liquidate the fund or partially liquidate the fund upon the withdrawal of a participating employer:

- (a) The average benefit per member must be less than **R50 000**;
- (b) the fund or the relevant withdrawing participating employer must not have more than **50 members**;
- (c) the fund or the relevant participating employer must have assets less than **R50 million**; and
- (d) the **surplus** apportionment scheme or nil return must have been approved or noted by the Registrar.

Once exemption has been granted, the following must be complied with:

- (a) The trustees or the authorised representative must inform the Registrar of the name and contact details of the person who will be responsible for managing the winding down process of the fund as set out in Form D.
- (b) The person responsible for managing the winding down process must at least every 90 days, effective on the date on which an exemption is granted, submit a written report to the Registrar containing the following:
 - (i) The method used to calculate benefits;
 - (ii) communication to members and/or beneficiaries;
 - (iii) any outstanding tax issues;
 - (iv) any deaths of members subsequent to the date on which the exemption was granted;
 - (v) how objections to the benefit calculations were resolved;
 - (vi) payments of benefits; and
 - (vii) unclaimed benefits, if any.

- (c) All benefits must be paid to members and/or beneficiaries within 12 months from the date on which the Registrar granted the exemption.
- (d) A declaration of nil assets, members and liabilities must be submitted to the Registrar within 30 days after the final distribution of member and beneficiary benefits and must be accompanied by an application for the cancellation of the registration of the fund or participating employer in terms of section 27 of the Act as set out in **Form J**.

It is important to note that the Registrar may withdraw an exemption granted where the members and/or beneficiaries of a fund or withdrawing participating employer have been prejudiced as a result of the exemption granted or where the requirements outlined above are not complied with.

THE REGISTRAR MAY REQUEST FURTHER PARTICULARS

The Registrar is at liberty to request any additional information not provided for in the Directive, in order to assist him or her in exercising the powers and functions under section 28 of the Pension Funds Act.

ELECTRONIC SUBMISSION OF APPLICATIONS

The Directive requires that all applications must be submitted electronically. All enquiries relating to applications made must be forwarded to penlig@fsb.co.za and must contain the Registrar's case number.

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