

A decorative graphic on the left side of the page consisting of several overlapping, stylized arrows pointing to the right. The arrows are in shades of grey and red, with the largest arrow in the foreground being a solid red color.

## Legal update

No. 8 of 2014 • 14 February 2014

### Changes to the Pension Funds Act: General amendments

#### Summary

The Financial Services Laws General Amendment Act No.45 of 2013 (the Amendment Act) was published in Government Gazette No. 37237 on 16 January 2014. This document deals with some of the more general amendments while other specific amendments are dealt with in Legal Updates 5 – 7 of 2014. The effective date of these provisions is 28 February 2014, except for the amendments discussed in paragraphs 4 and 9.

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## 1. Personal liability of employers for payment of contributions

### Current position

The Pension Funds Act (the Act) requires that the employer pays the employer and the member contributions, as stipulated in the fund rules, to the fund. The contributions must be paid into the bank account of the fund or transmitted directly to the fund by no later than 7 days after the end of the month, for which the contribution is payable.

While the Act imposes legislative duties on the employer, it does not single out any particular person within the employer's organisation who is responsible for the timeous deduction and payment of contributions.

### Position from 28 February 2014

The Amendment Act takes things a step further. The newly inserted section 13A(8) imposes personal liability on certain parties within the employer's organisation. These persons will be held personally responsible for ensuring that contributions are deducted and paid to the fund within the prescribed period.

These parties are:

- If the employer is a company, every director who is regularly involved in the management of the company's overall financial affairs.
- If the employer is a close corporation, every member who controls or is regularly involved in the close corporation's overall financial affairs.
- In respect of any other employers, every person according to whose directions or instructions the governing body or structure of the employer acts, or who controls or is regularly involved in the management of the employer's overall financial affairs.

The fund must ask the employer for the names of the persons referred to above. If the employer fails to give this information to the fund, all the directors, members of the close corporation or the governing body of the employer will be held personally liable.

This means that any person falling into any one of the above categories is legally responsible and accountable for ensuring that the contributions of both the members and the employer are paid to the fund within the 7 day period. Since this is a legal duty, non-compliance with section 13A of the Pension Funds Act may have serious repercussions for the person charged with ensuring compliance.

### Impact on FundsAtWork

The FundsAtWork Umbrella Pension and Provident Funds (the Funds) will soon embark on a campaign to obtain the names of the persons that can be held personally liable. All new installation documents from 1 March 2014 will require this information.

## 2. Administrator

### Current position

Every person involved in administering investments or benefits on behalf of a pension fund has to obtain approval from the registrar.

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#### Position from 28 February 2014

The amendment introduces several new requirements for the approval of an administrator by the registrar.

One significant change is that persons administering only investments on behalf of a pension fund, no longer require approval from the registrar. They will be regulated under the Financial Advisory and Intermediary Services Act and not the Pension Funds Act. Persons involved in the receipt of contributions or the disposition of benefits on behalf of a pension fund still need approval by the registrar.

The amendment provides for the information that must accompany an application for a section 13B licence. The information, to be prescribed by the registrar should satisfy them that the applicant is a fit and proper administrator. It includes information giving evidence of the honesty and integrity of the applicant, their competence and operational ability to fulfil the duties imposed by the Act and their financial soundness. The registrar may request additional information and may take into consideration information regarding the applicant from any source including any other regulator or supervisory authority.

#### New requirements for administrators

- a. The administrator will be required to maintain such financial resources as prescribed by the registrar to meet its commitment and manage its risk. Previously there were no prescribed financial resources and the administrator was only required to maintain adequate financial resources.
- b. If after conducting an inspection, the registrar directs that the administrator withdraw from the administration of the fund and requires the board to arrange for the administration of the fund to be taken over by another administrator, the current administrator could be liable for the costs of appointing the new administrator.
- c. There are specific requirements for an administrator when dealing with records, documentation and information relating to the fund and its members. All records and information belong to the fund. This includes information that the administrator has created, possesses or controls. The administrator must maintain the information in an orderly format and may not destroy or dispose of any information without the consent of the fund.
- d. The administrator will have “whistle-blowing” duties. The administrator must inform the registrar of any material matter relating to the affairs of the fund which, in their opinion, may prejudice the fund or its members.

### **3. Valuations**

The definition of “valuation exempt” has been changed to refer to a fund which has been exempted from sections 9A (the appointment of a valuator) and 16 (submitting a statutory actuarial valuation report), as opposed to just referring to exemption from the requirement to submit a valuation report. Section 17, which dealt with modifications where investigations by a valuator are unnecessary, has been deleted. These provisions have, where required, been incorporated in section 16.

### **4. Fund registration – effective from 30 May 2014**

Section 4 has been amended to require a fund to apply for registration and be provisionally or finally registered before it can commence any pension fund business. It also provides that the registrar may ask the fund for further information about its application or to verify information provided in the application. If the fund fails to give or verify the information as requested within 60 days from the date of the request, the application will lapse.

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Section 31 has been changed to provide that the period for carrying on business as a pension fund subsequent to application is no longer 12 months, but instead a period prescribed by the registrar.

## 5. Rules

Currently, the definition of “rules” includes various documents pertaining to the fund. The amended definition refers only to the rules of a fund registered in term of the Act.

The requirement that amendments be submitted to the registrar within 60 days of the passing of the resolution adopting the amendment remains in place.

A fund may consolidate its rules. Consolidated rules are a collation of the existing rules and amendments. The current Section 12(5) provides that if the registrar is satisfied that the consolidated rules are not substantially different from the existing rules of the fund, the registrar will register the consolidated rules. The word “substantially” has been removed in the amendment. The effect of this is that consolidated rules will now only be registered if they are exactly the same as the existing rules. No changes will be allowed.

The registrar in considering whether to register an amendment may request any additional information. The fund has 180 days to respond to the registrar’s queries failing which the application to have the amendment registered will lapse.

FundsAtWork already complies with these requirements.

## 6. Section 14 transfers

The requirement that the scheme for a transfer must be submitted to the registrar within 180 days of the effective date has been removed. The registrar will prescribe the period within which a scheme may be submitted.

The new section 14(2)(c) specifically provides that transferred assets must be increased or decreased with fund return from the effective date of the transfer until date of payment.

Another new provision is found in section 14(6)(c). The registrar can withdraw or amend a section 14 certificate if, as a result of legislative changes, members would be prejudiced by the implementation of the transfer. An example of such prejudice would be a change in tax laws, resulting in a transfer from a pension fund to a provident being taxable.

Section 14(7)(b) is amended to clarify that no fees or commission of any nature, whether directly or indirectly, payable by any party or any agent, mandatory or representative of such party, are allowed for a transfer between retirement annuity funds.

Section 14(9) is also new. This allows the registrar to exempt any transaction from the requirements of section 14 subject to the requirements and conditions prescribed by the registrar.

## 7. Surplus

The definition of “actuarial surplus” has been changed to enable the registrar to prescribe the basis on which a valuator must calculate the value that they place on the fund’s assets.

The definitions of “employer surplus account” and “member surplus account” have been amended to clarify that these accounts must be provided for in fund rules.

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Various amendments have been made to sections 15A, 15B, 15C, 15D, 15E, 15F and 15K relating to surplus. These amendments are:

- Section 15A(2) and 15C(2): existing and future surplus can be distributed directly to members and former members.
- Section 15B(10) deleted: this section obliged the registrar to refer a surplus apportionment scheme to a special *ad hoc* tribunal where –
  - the trustees did not submit a surplus apportionment scheme,
  - the registrar is not satisfied that the scheme is reasonable and equitable,
  - the registrar considers that unresolved complaints require investigation which may lead to a review of the scheme,
  - 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
  - the board or the former member representative requested it.

Instead, section 15K now deals with the circumstances under which the registrar *may* appoint a specialist *ad hoc* tribunal. These include the registrar not agreeing with the result of the surplus apportionment investigation or where a nil return is submitted, the registrar not being satisfied that a nil return is justified.

- Section 15B(13): the registrar can withdraw the surplus apportionment certificate on application by the fund trustees, subject to the conditions prescribed by the registrar.
- Section 15D(1)(a) and (b): the balance in the member surplus account can now be used to improve benefits for all members (as opposed to only existing members), and where reasonable and equitable, to improve benefits paid to or amounts transferred for former members who exited the fund after the surplus apportionment date.
- Sections 15E(1)(a) and (i): a participating employer can require (as opposed to request) that the trustees use the surplus in the employer surplus account for the purposes allowed. An additional purpose has been added: repaying part or all of the surplus utilised improperly by the employer.
- Section 15E(2): all or a portion of the employer surplus account can be transferred to the employer surplus account in another fund. Currently only a portion can be transferred.
- Section 15F(2)(b): a transfer of the credit balance in an existing reserve account to the employer surplus account is allowed if the allocation was negotiated between the stakeholders. In addition, the registrar must now also be satisfied that the allocation of actuarial surplus to the existing reserve account was reasonable and equitable.
- Section 15K: various changes with regards to the specialist tribunal have been made, one of which relates to the specialist tribunal's right to decide in favour of the fund submitting a surplus apportionment scheme where they estimate that the costs of the tribunal performing the surplus apportionment exercise will exceed the actuarial surplus.

## 8. Pension increase policy

The amendment to section 14A requires that a pension increase must be granted to pensioners and deferred every 3 years, with effect from the valuation date on which the increase is based. This increase must not be less than the minimum pension increase, starting with the first actuarial valuation following the commencement date.

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FundsAtWork currently does not pay pensions. Members of the FundsAtWork Umbrella and Preservation Funds are required to use their retirement benefits to buy a pension in their name from an insurer. The pension increase policy is therefore currently not applicable to FundsAtWork.

## **9. Financial soundness – effective from 29 August 2014**

Section 18 has been amended to provide for the registrar's power to prescribe criteria for the financial soundness of a fund. Where the fund is not in a sound financial position, the registrar may direct the fund to submit a scheme setting out the arrangements which the fund has made or intends making to bring the fund into a financially sound condition, within the period and subject to the conditions determined by the registrar.

## **10. Registrar's powers**

The definition of "registrar" has been amended by deleting the references to "Registrar or the Deputy Registrar" and merely referring to the "person" mentioned in section 3. Section 3 in turn specifies that the person appointed as the executive officer is the Registrar of Pension Funds, while the person appointed as the deputy executive officer is the Deputy Registrar of Pension Funds. It goes further to state that the Deputy Registrar will exercise the powers delegated to him which he is authorised to perform under the Financial Services Board Act.

Section 3B, which deals with the establishment and functioning of the Pension Funds Advisory Committee, is deleted. This enhances the independence and impartiality of the registrar.

There are various amendments which refer to the registrar having to prescribe requirements or conditions. Before the Amendment Act, this would have entailed publication in a Government Gazette, which is an expensive and lengthy process. The newly inserted definitions for "official web site", "prescribe" and "publish" will allow the registrar to publish these prescriptions on the Financial Services Board's (FSB) website, unless it is specifically required that they must be Gazetted.

The definition of "this Act" has also been expanded to include any matter prescribed by the registrar by notice in a Government Gazette, in addition to any regulation.

Section 14 allows the registrar to now also address enquiries relating to fund matters to an approved administrator or third party, in addition to the fund.

Section 25 has been amended to allow the registrar to direct the person concerned to take certain actions following an onsite-visit or inspection.

Section 26 allows the registrar to declare that a specific practice or method of conducting business is unacceptable, irregular or undesirable and that the fund, administrator or person must refrain from that practice.

The registrar is also allowed to intervene in the management of a fund where the fund cannot constitute a board properly or the trustees are unable to attain or maintain the required levels of skills and training. Where the registrar believes that a trustee is not fit and proper to act as such, the registrar is allowed to replace that trustee.

A new section 29A has been inserted. This section deals with the winding-up of an unregistered fund and allows the registrar to apply for the sequestration or liquidation of the person concerned and the unregistered fund.

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## **11. Changes relating to voluntary liquidation**

Section 28 of the Act has been amended to provide that a liquidator in discharging the liabilities of the fund must give full recognition to minimum benefits referred to in section 14A.

The amendment also allows the liquidator to transfer benefits to an unclaimed benefit fund if he is satisfied that the benefits will remain unclaimed.

## **12. Complainant**

The definition of “complainant” has been amended to include a spouse or former spouse of a member or former member of a fund. This addition clarifies that spouses or former spouses have the right to lodge complaints with the adjudicator.

## **13. Companies Act**

A definition for “Companies Act” has been inserted, referring to the new Companies Act of 2008. Various changes have been made in the Act, taking the impact of the Companies Act into account. For instance, the Amendment Act includes a new section 18A, dealing with the business rescue of a fund, and a new section 19(5D), which states that a fund may not acquire or hold shares or any other financial interest in another entity which results in the fund exercising control over that entity without the registrar’s prior approval.

## **14. Contingency reserve account**

The definition for “contingency reserve account” has been amended to clarify that this account must be provided for in the fund rules, and must provide for a specific category of contingency. The implication of this is that there has to be an account for each category of contingency.

## **15. Defined contribution category of a fund**

This definition provides that a member’s interest in the fund must be at least equal to a minimum benefit throughout his membership of the fund, and not only at his retirement.

This amendment will also allow a fund to deduct reasonable expenses even where there are no contributions payable, for instance in a paid-up fund or a preservation fund. The amendment to section 14B confirms that reasonable expenses can be deducted in calculating the individual account of a member in a defined contribution category of a fund.

## **16. Fund return – deemed to have come into operation on 7 December 2001**

The definition of “fund return” will allow trustees to use a reasonable approximation, made in the prescribed manner, to allocate a fund return if an exact allocation cannot be made. This will assist funds that do not smooth fund returns and who are faced with mismatches due to timing differences between actual transactions taking place and these transactions being deemed to have taken place for purposes of calculating benefits or costs or accruing investment returns.

This amendment is deemed to have come into operation on 7 December 2001.

FundsAtWork is already complying with this amendment.

## **17. Member**

The definition of “member” has been expanded to include a member and former member of a beneficiary fund.

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## 18. Preservation funds

Definitions for “pension preservation fund” and “provident preservation fund” have been added. These definitions cross-reference to the definitions in the Income Tax Act.

### Impact for FundsAtWork

These changes will apply regardless of whether or not our Rules are amended to include each provision specifically.

## 19. Pension Funds Adjudicator

The Act has been amended to make the board of the FSB the accounting authority of the Pension Fund Adjudicator’s office. It also stipulates that that board must comply with the Public Finance Management Act.

Whereas the penalty for anyone who:

- insults the Adjudicator;
- tries to bribe the Adjudicator;
- interrupts proceedings conducted by the Adjudicator or misbehave themselves, or
- does anything that is similar to contempt of court

is currently limited to imprisonment of up to 3 months, section 30V has been amended to increase this to a fine of up R1 million or imprisonment of up to one year, or both.

## 20. Communication

A new section 32A has been inserted. This deals with the registrar’s powers in respect of for communication and provides that the registrar may prescribe what must be communicated to the stakeholders of a fund and when. It further states that any fund-related advertisement, brochure or similar communication may not be misleading, confusing or contain any incorrect factual statement.

## 21. Penalties

A new section 37(1) has been included in the Amendment Act. This subsection criminalises the inducement or attempted inducement of any person to become a member of or to contribute to an unregistered fund. The penalty for this and the other offences listed in section 37(1) is a fine of up R1 million or imprisonment of up to one year, or both.

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