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THE PRESIDENCY

No. 806 29 August 2007

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:–

No. 11 of 2007: Pension Funds Amendment Act, 2007.

AIDS HELPLINE: 0800-123-22 Prevention is the cure

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.

(English text signed by the President.)
(Assented to 26 August 2007.)

ACT

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provisions in line with their practical application; to update references to legislation and institutions; to delete outdated provisions; to clarify the provisions on the determination and apportionment of actuarial surplus in a pension fund; to provide for the application of the said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

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:

" **'actuarial surplus'**, in relation to a fund which is—

(a) subject to actuarial valuation, means the difference between—

(i) the value that the valuator has placed on the assets of the fund less any credit balances in the member and employer surplus accounts; and

(ii) the value that the valuator has placed on the liabilities of the fund in respect of pensionable service accrued by members prior to the valuation date together with the value of the

amounts standing to the credit of those contingency reserve accounts which are established or which the board deems prudent to establish on the advice of the valuator;

(b) exempt from actuarial valuation, means the difference between—

(i) the fair value of the assets of the fund less any credit balances in the member and employer surplus accounts; and

(ii) the sum of the values of the amounts standing to the credit of all the accounts held for individual members, whether contributory or paid-up, plus the value of any other liabilities plus the **[values of]** amounts standing to the credit of any investment reserve account set up to facilitate the smoothing of **[investment returns]** fund return credited to member accounts and such contingency reserve accounts **[as]** which are established or which the board deems prudent to establish:

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

(b) by the substitution for the definition of "Adjudicator" of the following definition:

" **'Adjudicator'** means the Pension Funds Adjudicator or Deputy Pension Funds Adjudicator and any acting Pension Funds Adjudicator appointed under section 30C(1);";

(c) by the insertion after the definition of "Adjudicator" of the following definitions:

" **'administrative penalty'**, in relation to a pension fund, an administrator or other third party, means the financial penalty that may be imposed by the registrar for the failure by a pension fund, administrator or third party to comply with 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]** a 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:

" **'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:

" **'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 benefits which may be granted or imposed by and the contributions which may become payable to the fund, or provisions in accordance with which the rights, obligations and benefits will be calculated or determined;";

(u) by the insertion after the definition of "rules" of the following definition:

" **'spouse'** means a person who is the 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:

" **'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;"; and

(w) by the insertion before the definition of "valuator" of the following definition:

" **'valuation exempt'**, in relation to a fund, means a fund which has been exempted by the registrar under section 2(5)*(a)* from the requirement to submit a report on its statutory actuarial valuation.".

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

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

"**Application of Act**

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 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 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)* 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.

(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.

(*a*A) (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.

(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:

"(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.

(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

(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.

(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—

(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.

(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—

(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—

(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;

(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.".

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**] 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.

(3) *(a)* The board shall establish and implement a policy with regard to increases to be granted to pensioners and deferred pensioners, which policy must—

(i) aim to award a percentage of the consumer price index, or some other measure of price inflation which is deemed suitable by the board; and

(ii) set the frequency with which increases will be considered in line with the policy: Provided that increases should be considered each year, with comparison to the minimum pension increase at least once every three years.

(b) The policy contemplated in paragraph *(a)* must be communicated to pensioners and deferred pensioners when it is established and whenever it is changed.

(c) The policy contemplated in paragraph *(a)* will not be required where—

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

(ii) pensioners on whose behalf 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);

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

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

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

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

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

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

(i) accumulating 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—

(aa) pension payments;

(bb) cash amounts paid on retirement; and

(cc) those expenses that the board deems reasonable,

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

(iv) if the registration of a fund is cancelled in accordance with section 27 and the effective date of cancellation is earlier than the next statutory actuarial valuation date, the effective date of the cancellation shall be the surplus apportionment date.

(2) A scheme—

(a) shall comply with such conditions as **[the registrar]** may **[prescribe by regulation]** be prescribed; and

(b) may involve—

(i) the improvement of benefits to existing members;

(ii) increases to benefits or transfer values in respect of former members;

(iii) the crediting of an amount to the member surplus account;

(iv) the crediting of an amount to the employer surplus account; or

(v) any two or more of the matters contemplated in subparagraphs (i) to (iv).

(3) The board shall appoint a person to represent the interests of former members in the development of the scheme and such person shall—

(a) assist the board in—

(i) identifying former members;

(ii) communicating proposals to former members and to the funds to which former members transferred;

(iii) conveying proposals from former members, and the funds to which they transferred, to the board; and

(iv) collating any objections to the scheme from former members and the funds to which they transferred;

(b) be required to report, in writing to the board, on—

(i) the adequacy of the steps taken by the board to include former members in terms of subsection (4); and

(ii) where it was necessary for the board to apply its discretion with regard to the inclusion of former members and the apportionment of actuarial surplus to such former members, whether or not the exercise of such discretion was reasonable taking into account the demands of equity within the bounds of practicality and the circumstances of the particular fund: Provided that such report must accompany the scheme when it is submitted to the registrar in terms of subsection (9).

(4) The board shall determine who may participate in the apportionment of actuarial surplus, and shall include in such apportionment existing members and any former members who left the fund in the period from 1 January 1980 to the surplus apportionment date: Provided that—

(a) the board may exclude from participation former members in respect of whom the board satisfies the registrar that insufficient records are available to enable the additional benefits that may be due to such former members to be calculated, after the board has taken reasonable steps—

(i) to obtain such records from the administrator;

(ii) to construct such records from the records of the—

(aa) employer;

(bb) any fund to which former members transferred; or

(cc) a trade union or staff association active in the workplace during this period; or

(iii) if the steps in subparagraphs (i) and (ii) do not yield sufficient information, to obtain such records from the potential claimants themselves following an advertisement—

(aa) on a national basis and in the area where the former members used to work; or

(bb) on a more limited basis as approved by the registrar if representations by the fund satisfy the registrar that limited advertisement will be adequate,

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

(b) rather than excluding former members whose individual benefits cannot be determined, the board may set aside a portion of the actuarial surplus in a contingency reserve account explicitly established to satisfy claims of former members in terms of subsection (5)*(e)*.

(5) The board shall apportion the actuarial surplus between the various classes of stakeholders whom the board has determined shall participate in the apportionment in terms of subsection (4), following which such portion as is due to the employer shall be credited to the employer surplus account: Provided that—

(a) the actuarial surplus to be apportioned shall be increased by the amount of actuarial surplus utilised improperly by the employer prior to the surplus apportionment date as determined in terms of subsection (6);

(b) former members shall have the benefits previously paid to them, or the amounts previously transferred on their behalf, increased to the minimum benefit determined in terms of section 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 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 increases after being increased in terms of paragraph *(a)*, the amounts shall be proportioned downwards until the total to be paid to former members, **[and]** pensioners and deferred pensioners equals the actuarial surplus to be apportioned;

(c) after deducting the cost of the increases to former members, **[and]** pensioners and deferred pensioners in terms of paragraph *(b)* the balance of the actuarial surplus shall be equitably split between existing members, former members and the employer in such proportions as the board shall determine after taking account of the financial history of the fund: Provided further that the registrar may prescribe certain methods which, if used, shall be deemed to be equitable;

(d) if the amount apportioned to the employer in terms of paragraph *(c)* is less than the actuarial surplus utilised improperly by the employer as determined in subsection (6), the difference between the amount—

(i) determined in terms of subsection (6); and

(ii) apportioned to the employer in terms of paragraph *(c)*,

shall represent a debt owed by the employer to the fund **[which the employer must redeem within a period to be agreed with the board: 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 must submit a scheme conforming with the prescribed requirements and repay that debt within a maximum period approved by the registrar;

(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.