

RETIREMENT FUNDS ACT, 2014

No.27



of 2014

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An Act to provide for the licensing, regulation and administration of all retirement funds, including pension and provident funds, and for matters incidental to or connected therewith.

Date of Assent: 27.08.2014

Date of Commencement: ON NOTICE

ENACTED by the Parliament of Botswana.

PART I – Preliminary

1. This Act may be cited as the Retirement Funds Act, and shall come into operation on such a date as the Minister may, by Order published in the *Gazette*, appoint. Short title and commencement
2. In this Act, unless the context otherwise requires — Interpretation
- “actuarial surplus” means $(a) - \{(b) + (c)\}$, where —
- (a) “(a)” is the value that the actuary has placed on the assets of the fund;
 - (b) “(b)” is the value that the actuary 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 those contingency reserve accounts which are established, or which the board deems prudent to establish; and
 - (c) “(c)” is the difference between —
 - (i) the present value of the liabilities of the fund in respect of pensionable service after the valuation date, and
 - (ii) the present value of future retirement funding contributions, if the value in subparagraph (i) is more than that under this subparagraph, and zero or otherwise;
- “actuary” means an associate or fellow of a professional actuarial body that is a member of the International Actuarial Association, or such other body as may be approved by the Regulatory Authority;
- “administrator” means a person who provides administration or similar services to the fund;
- “annuity” means a regular payment (which may be monthly, or less regularly, but at least once a year) for —
- (a) a fixed period;
 - (b) a period defined in the contract or the rules; or
 - (c) the balance of the lifetime of one or more beneficiaries;
- “auditor” means an auditor registered with the Botswana Institute of Chartered Accountants under the Accountants Act; Cap. 61:05
- “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;
- “beneficiary fund” means a fund which is established with the object of receiving, administering, investing and paying benefits on behalf of beneficiaries;

- “board” means the governing body of a fund;
- “board member” means a member of a board;
- “Botswana Institute of Chartered Accountants” means the Institute that is established under the Accountants Act;
- “child” means a person below the age of 18 years;
- “custodian” means a person who holds property of another person for safekeeping;
- “dependant” means —
- (a) any person to whom a member is liable for maintenance;
 - (b) a factual dependant;
 - (c) a person to whom a member is not liable for maintenance, but who —
 - (i) in the opinion of the board, was dependent on the member for maintenance at the time of death of the member,
 - (ii) is the spouse of the member, or
 - (iii) is a child of the member including a posthumous child, or
 - (d) a person in respect of whom a member would have become liable for maintenance, had the member not died;
- “employer” means an employer participating in the fund by contributing to a fund in terms of the rules, or who participates in the administration of the fund;
- “external fund” means a fund which has a head office outside Botswana, but does not include a fund which, though its head office is outside Botswana, 50 per cent or more of its membership consists of persons normally resident in Botswana;
- “factual dependant” means a person who was financially dependent on the member at the time of the member’s death;
- “financial services law” has the same meaning assigned to it under the Non-Bank Financial Institutions Regulatory Authority Act;
- “fund” means any scheme or arrangement, whose principal object is to provide a benefit for a person who is or has been a member of the scheme or arrangement, upon retirement on account of age or ill health, or upon a person completing a fixed period of service, whether or not such scheme or arrangement —
- (a) also provides a benefit for dependants or nominees of a deceased member;
 - (b) also provides a benefit on the death of the member’s spouse, child and parent;
 - (c) also provides a benefit for a member on a temporary or permanent disablement; or
 - (d) continues to admit members or to receive contributions, and includes any retirement fund established in terms of any enactment:
- Provided that a scheme or arrangement which is established to benefit only one member or his or her dependant shall not be regarded as a fund;

- “independent specialist”** means a person who meets the requirements set down by the Regulatory Authority for appointment to the board, as an independent specialist;
- “individual retirement fund”** means a fund which a person applies to join in his or her individual capacity, subject to such conditions as may be determined by the board in terms of the rules, which eligibility to membership is not dependent on an employer-employee relationship, and includes a retirement annuity fund and a fund designed to facilitate the preservation of benefits on leaving employment in circumstances other than retirement;
- “International Actuarial Association”** means the worldwide association of professional actuarial associations;
- “member”** means a person who is admitted to the membership of a fund in terms of the rules, but does not include any member or former member who has received all the benefits which may be due to him or her from the fund and whose membership has been terminated in terms of the rules;
- “nominee”** means a person, other than a dependant, nominated by a member as a beneficiary under a fund;
- “licensed fund”** means an entity which is licensed under this Act to carry on the business of a fund;
- “multi-employer fund”** means a fund which is established for the benefit of employees of different employers who are not associated employers;
- “pension”** includes an annuity acquired through a fund or an insurance company and a commuted lump sum not exceeding one third of the pension benefits of which the person would be entitled on retirement;
- “pension fund”** means any fund of which, its principal object is to provide for the payment of a pension to a person who is or has been a member of the fund, on his retirement;
- “preservation fund”** means a pension or provident fund into which the accrued fund benefits of employees who leave the service of an employer due to dismissal (including retrenchment), or resignation, or in the event of the dissolution of the employer’s pension or provident fund, may be invested;
- “principal office”** means —
- (a) the principal place of doing business of the fund; and
 - (b) the place where records of the fund are kept;
- “principal officer”** means the person responsible for the daily management of a principal office of a licensed fund in Botswana;
- “provident fund”** means a fund which is not a pension fund, which permits a person who is or has been a member of the fund, on his or her retirement, to take his or her benefit as a cash lump sum;
- “Regulatory Authority”** means the Non-Bank Financial Institutions Regulatory Authority established under the Non-Bank Financial Institutions Regulatory Authority Act;

- “retirement date” means the date upon which the member actually ceases employment and draws a retirement benefit;
- “retirement fund” means any fund provided for purposes of retirement under this Act;
- “retirement fund business” means any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments to a person who belongs or belonged to a class of persons for whose benefit that scheme or arrangement has been established, when the person reaches his or her retirement age, or for dependants and beneficiaries of such person upon the person’s death;
- “rules” means the rules applicable to a fund, and includes —
- (a) any document by or in terms of which the fund is established; and
 - (b) the provisions relating to the conduct of the business of the fund, the benefits which may be granted from the fund and the contributions which are payable to the fund;
- “sponsor” means an organisation which —
- (a) is responsible for establishing a multi-employer fund or an individual retirement fund;
 - (b) promotes participation by new employers or members in the fund; and
 - (c) may perform such services for the fund as are set out in the rules or are described in an agreement between the organisation and the fund; and
- “stakeholder” means —
- (a) an employer or employee who participates in the fund; and
 - (b) a member and former member whom the board determines should be treated as a stakeholder.

PART II — *Licensing of Funds*

Prohibition
for operating
fund without
licence

- 3.** (1) A person shall not carry on the business of a fund without a licence issued by the Regulatory Authority.
- (2) A person who contravenes this section commits an offence and is liable to a fine not exceeding P2 500 for each day the offence occurs, or to imprisonment for a term not exceeding five years, or to both.

Requirement
for licensing
fund

- 4.** (1) A person who wishes to carry on the business of a fund shall make an application to the Regulatory Authority, which application shall be accompanied by —
- (a) three copies of the rules; and
 - (b) such fee as may be prescribed.
- (2) The Regulatory Authority may prescribe specific conditions for the licensing of external funds, which conditions shall include a requirement to hold capital of a minimum amount.

5. The Regulatory Authority may issue a licence to carry on the business of a fund if it is satisfied that — Issue of licence

- (a) the rules are consistent with this Act;
- (b) the fund will maintain a sound financial position;
- (c) the fund will be managed by a board that will carry on the activities of the fund with integrity, prudence and professional skill;
- (d) the licensing of the fund will not be contrary to the public interest; and
- (e) the application complies with other conditions as may be prescribed.

6. (1) A fund shall upon being issued with a licence, become a body corporate capable of suing and being sued in its own name, and of doing or performing all such acts or things as may be necessary or incidental to the exercise of its powers or the performance of its functions in terms of its rules. Effect of licensing

(2) Notwithstanding anything to the contrary in any written law, memorandum, articles of association, constitution or rules of any body having control of the business of a fund, all the assets, rights, liabilities and obligations pertaining to the business of a fund shall be deemed to be assets, rights, liabilities and obligations of the fund to the exclusion of any other person.

(3) A person shall not have a claim on the assets or rights, or be responsible for any liabilities or obligations of the fund under subsection (2), except in so far as the claim has arisen or the responsibility has been incurred in connection with transactions relating to the business of the fund.

(4) The assets, rights, liabilities and obligations of a fund, including any assets held by any person in trust for the fund, existing immediately before its licensing, shall vest in and devolve upon the fund without any formal transfer or cession.

7. (1) The rules shall — Rules of fund

- (a) state the name of a fund;
- (b) state the type and purpose of a fund; and
- (c) comply with such requirements as may be prescribed by the Regulatory Authority.

(2) The requirements to be prescribed under subsection (1) (c) may include —

- (a) the membership of a fund, including the conditions for eligibility, admission to and termination of membership;
- (b) the contributions to be paid into a fund, whether compulsory or otherwise;
- (c) the benefits to be payable from a fund;
- (d) the commutation of any pension;
- (e) the appointment or election of board members and their powers and duties;

- (f) the dissolution of a fund, including the appointment and powers of a liquidator, and the duty of the liquidator and actuary, where appropriate, to recognise the rights and reasonable expectations of the members in relation to service prior to the liquidation date;
 - (g) the amendment or replacement of the rules;
 - (h) the transfer of membership and their associated assets and liabilities into and out of a fund; and
 - (i) the manner in which any dispute between a fund and any member shall be settled in accordance with the fund's dispute resolution process.
- (3) Subject to the provisions of this Act, the rules shall be binding on —
- (a) a fund;
 - (b) any employer and the members and officers of a fund; and
 - (c) any person who puts a claim under the rules.
- 8. (1)** Notwithstanding the provisions of this section, the Regulatory Authority may at any time, direct that the rules be amended to comply with the provisions of this Act.
- (2) A principal officer shall, within one month of the passing of the resolution approving an amendment or replacement of the rules, submit three copies of the amendment or replacement rules to the Regulatory Authority, together with such documentation or information as may be prescribed.
- (3) The Regulatory Authority shall approve an amendment or replacement of the rules if it is satisfied that the amendment —
- (a) is consistent with this Act or any other financial services law;
 - (b) will not render a licensed fund unable to maintain a sound financial position;
 - (c) does not adversely affect the ability of the board to manage a licensed fund with integrity, prudence and professional skill;
 - (d) is not contrary to the public interest; or
 - (e) will not affect any right of a creditor of a licensed fund.
- (4) If an amendment or replacement has the effect of reducing any benefit that has accrued to a member in respect of his or her service prior to the amendment or replacement, the Regulatory Authority may refuse to approve the amendment or replacement —
- (a) if it is of the opinion that it unreasonably prejudices any member or group of members, after taking into account the financial position of a licensed fund; or
 - (b) if it has not been approved by a majority of the members of a licensed fund either in writing or at a meeting called for the purpose by the board or the employers, as the case may be.

(5) Notwithstanding any contrary provision in this Act, where the board is required in terms of subsection (3) to amend or replace the rules in so far as they affect the rights of members or former members, the board may, in making such an amendment or replacement, limit its application to persons who became members after the date on which the amendment or replacement became effective.

(6) The Regulatory Authority shall not regard the rules amended or replaced in terms of subsection (5) as being inconsistent with the provisions of this Act, by reason only that the amendment or replacement does not apply to persons who were members before the effective date.

(7) The Regulatory Authority may at any time, require a fund to consolidate its rules and amendments or replacements into a set of revised rules.

9. (1) The board of a multi-employer or an individual retirement fund may contract with the sponsor of that fund to provide some or all of the services under section 15 (1) (a).

(2) The board of a multi-employer or an individual retirement fund may terminate the services contracted to a sponsor under subsection (1) where, in the opinion of the board, the costs incurred for contracting the services exceed the benefit to the fund.

(3) The board of a multi-employer fund may at the request of the employer, and if the rules permit, establish a management committee for the employer:

Provided that —

- (i) the members employed by an employer who opts to have a management committee shall have the right to elect at least 50 per cent of the members of the management committee; and
- (ii) the quorum at any meeting of the management committee shall be at least 50 per cent of the members elected at paragraph (i).

(4) The board of a multi-employer or individual retirement fund may delegate such powers as it deems necessary to the management committee established under subsection (3).

10. (1) Notwithstanding section 16, the Regulatory Authority may licence an external fund to include members in Botswana, subject to such terms and conditions as may be prescribed.

(2) The Regulatory Authority shall issue a licence for an external fund, where it is satisfied that —

- (a) less than 20 members of the fund are ordinarily resident in Botswana;
- (b) not more than 50 per cent of the members are resident in Botswana;
- (c) the fund complies with sections 13, 14 and 15, except for the appointment of an independent specialist as provided under section 13 (2) (a);

Special provisions relating to multi-employer and individual retirement fund

Special provisions relating to external fund

Special provisions relating to beneficiary fund

- (d) the fund submits such reports as the Regulatory Authority may specify; and
 - (e) the fund is supervised by a regulatory body approved by the Regulatory Authority.
- (3) An external fund shall not admit members resident in Botswana if it is not licensed under this Act.

11. (1) The Regulatory Authority may licence a beneficiary fund subject to such terms and conditions as may be prescribed.

(2) The Regulatory Authority shall issue a licence for a beneficiary fund if it is satisfied that the membership of the fund consists of —

- (a) nominees or dependants of a former member of a fund whose due benefit has been transferred to such beneficiary fund; or
- (b) persons who have elected to transfer from any fund to a beneficiary fund, amounts awarded to them in terms of a court order.

Special provisions relating to preservation fund

12. (1) The Regulatory Authority may licence a preservation fund subject to such terms and conditions as may be prescribed.

(2) The Regulatory Authority shall issue a licence for a preservation fund if it is satisfied that the membership of the fund consists of —

- (a) former members of a fund whose membership has been terminated due to —
 - (i) dismissal, retrenchment or resignation from employment, and who have elected to have any lump sum benefit that is payable as a result of the termination transferred to the preservation fund,
 - (ii) the winding up or partial winding up of that fund, and the member elects or is required in terms of the rules to transfer it to the preservation fund, or
 - (iii) a transfer of business from one employer to another in terms of section 33, and the employees are transferred to the transferee employer, and the member elects or is required in terms of the rules to transfer to the preservation fund;
- (b) former members of another preservation fund —
 - (i) if that fund is wound up or is partially wound up; or
 - (ii) if the member elected to have any lump sum benefit transferred to another preservation fund, whilst being a member of the former preservation fund;
- (c) former members of a fund or nominees or dependants of that former member, whose benefit has not been paid within 12 months of the due date; or
- (d) persons who have elected to transfer from any fund to a preservation fund, amounts awarded to those persons in terms of a court order.

PART III — *Governance of Funds*

13. (1) Every licensed fund shall have a board, which shall be the governing body of the fund. Board of fund

(2) Subject to subsection (3) a board shall comprise at least five board members, and not more than 11 board members, except where the Regulatory Authority has approved a number less than or more than the aforesaid number:

Provided that —

- (i) one is an independent specialist selected by other board members;
- (ii) 50 per cent are elected by the members of the fund; and
- (iii) the balance of the board members may be appointed by the employer, or in the case of a multi-employer fund or a beneficiary fund, shall be appointed by the sponsor.

(3) The Regulatory Authority may, on written application to it by a fund —

(a) exempt any of the following funds from electing board members —

- (i) a multi-employer fund,
- (ii) an individual retirement fund,
- (iii) an external fund, and
- (iv) a beneficiary fund; or

(b) permit an individual retirement fund to have less than five board members who may be appointed by the sponsor of the fund, if the Regulatory Authority is satisfied that —

- (i) every member contracts with the fund in his or her individual capacity and membership is not a requirement arising from a contract of employment,
- (ii) the contract with each individual member satisfies at least the following criteria —
 - (aa) the contributions to be made by the member are specified, whether lump sum or regular payments, and shall be invested within a specified period of receipt by the fund,
 - (bb) all the charges that may be deducted from a member's account are specified,
 - (cc) any payment on an intermediary is disclosed to the member and authorised by that member,
 - (dd) the member can at any time transfer his or her interest in the fund to another individual retirement fund without the deduction of any charges, other than the charges that are reasonable in terms of the realisation of the member's interest in the fund,
 - (ee) on retirement, the member may choose any licensed insurer or licensed pension fund from which to purchase an annuity, or

- (ff) the only benefit that is payable to a member by the fund is the full value of his or her account in the fund, less such charges as are specified in the contract,
- (iii) every member has an account which is denominated in terms of units,
- (iv) the unit pricing mechanism is described in the rules in such a way that the persons managing the business of the fund have no discretion as to how the unit price is determined,
- (v) the method of managing the fund is such that, at all times, the fair value of the assets of the fund, as determined in terms of the relevant accounting standards, is equal to the number of units in a member's account, multiplied by the unit price of those units,
- (vi) the methods of communication to members meets standards set by the Regulatory Authority,
- (vii) the fund holds such capital as the Regulatory Authority may prescribe, and
- (viii) the management of the fund is regularly scrutinised by an independent expert who submits a report to the Regulatory Authority to the effect that —
 - (aa) the management of the fund complies with all contracts with members and with other criteria set out in this section, and
 - (bb) the capital held by the fund has at all times satisfied the requirements of the Regulatory Authority.

(4) Subject to subsection (1), the board may through its rules, regulate its own procedure and provide for the constitution of the board, appointment, selection or election of board members and the terms of office, meetings of the board, quorum, voting rights and casting votes in terms of deadlock:

Provided that —

- (i) if the board consists of five or less board members, the quorum of the meeting shall be all the board members;
- (ii) at least 50 per cent of the board members appointed by the members shall be present to make a quorum;
- (iii) at least 50 per cent of the board members appointed by the employer or sponsor shall be present to make a quorum; and
- (iv) the board shall meet at least two times a year.

(5) The board members shall satisfy the minimum standards prescribed by the Regulatory Authority.

(6) If a fund is permitted to have less than five board members in terms of subsection (3) (b), the Regulatory Authority may exempt the fund from compliance with section 9 as it deems necessary.

14. (1) The object of a board shall be to manage a licensed fund in the best interests of its members, and in terms of this Act and the rules.

Objects
of board

- (2) A board shall in pursuing its objects —
- (a) adopt a code of conduct which shall comply with such conditions as may be prescribed by the Regulatory Authority, including —
 - (i) a duty to act with due care, diligence and good faith,
 - (ii) to manage conflicts of interest and act with impartiality in respect of all members, and
 - (iii) to obtain expert advice on matters where board members lack sufficient expertise;
 - (b) adopt and implement, with expert assistance where the board members lack sufficient expertise, an investment policy, communication policy and a risk management policy that complies with such standards as may be prescribed by the Regulatory Authority; and
 - (c) assess its performance at least once a year, using the criteria consistent with that prescribed by the Regulatory Authority.

15. (1) A board shall —

Duties of board

- (a) appoint and manage service providers who will perform the functions required by a licensed fund, including —
 - (i) an administrator who shall —
 - (aa) maintain the membership records of the licensed fund,
 - (bb) collect contributions on behalf of the licensed fund,
 - (cc) pay benefits, and
 - (dd) remit any excess moneys to the investment managers when appropriate,
 - (ii) one or more investment managers who are competent to implement the investment policy,
 - (iii) a custodian who shall hold the physical assets independently from the fund and any investment manager or insurer, where the fund owns assets other than policies of insurance or units in a collective investment scheme,
 - (iv) one or more insurers, where the licensed fund provides any benefits to a member in excess of the assets held in respect of that member,
 - (v) an auditor, and
 - (vi) an actuary, unless the fund has been exempted from requiring actuarial valuation in terms of section 25:

Provided that the appointments under this subsection shall be subject to the following conditions —

- (i) the service provider is licensed to perform the relevant service;
- (ii) the board has taken reasonable steps to assure themselves that the service provider has adequate systems and controls to perform the functions that have been delegated to them;
- (iii) the board has a contract with the service provider which meets the requirements prescribed by the Regulatory Authority;
- (iv) the board monitors the performance of the service provider in terms of benchmarks described in the contract; and

- (v) the board reviews the appointment of the service provider at least once every three years;
- (b) ensure that proper registers and records of the operations of the licensed fund are kept, inclusive of proper minutes of all resolutions passed by the board;
- (c) take all reasonable steps to ensure that contributions are paid on time to the licensed fund in terms of this Act;
- (d) ensure that adequate and appropriate information is communicated to stakeholders informing them of their rights, benefits and duties in terms of the rules, together with such matters as may be prescribed by the Regulatory Authority;
- (e) ensure that the rules, the operation and administration of the licensed fund complies with this Act and other financial services laws; and
- (f) ensure that the licensed fund is protected against the dishonesty of, errors committed by the board, principal officer or any other official of the licensed fund, either by way of guarantee from the employer or by way of insurance of such amount as the board acting on expert advice and after taking account of the risks to which the licensed fund is exposed, deems adequate.

(2) Where a board has appointed a service provider in terms of subsection (1), the service provider shall act towards the licensed fund and its members as if it has a fiduciary responsibility.

Principal office

16. (1) A licensed fund shall have a principal office in Botswana.

(2) The board of a licensed fund shall notify the Regulatory Authority of the address of the principal office within one month of the licensing of a fund.

(3) The board of a licensed fund shall notify the Regulatory Authority of any change of address of the principal office within one month after the change of address.

Principal officer and representative

17. (1) A licensed fund shall appoint a principal officer in terms of its rules, and such person shall be appointed if he or she —

- (a) is resident in Botswana; and
- (b) satisfies the criteria for appointment of a principal officer as may be prescribed.

(2) Notwithstanding subsection (1), an external fund shall appoint a representative who shall be the responsible officer of an employer and such person shall be appointed if he or she —

- (a) is ordinarily resident in Botswana; and
- (b) satisfies the criteria for appointment of a principal officer as may be prescribed.

(3) A licensed fund or an external fund may, with the approval of the Regulatory Authority appoint an acting principal officer or representative, whichever is applicable, in the absence of the substantive principal officer or representative, or where the principal officer or representative is unable to perform his or her functions under this Act.

(4) Where anything is required by or in terms of this Act to be done by a fund, it shall be the duty of a principal officer or representative to ensure that the thing so required to be done is in fact done.

(5) A principal officer or representative shall report to the Regulatory Authority within 14 days of being aware of any activity of a licensed fund —

(a) that is not compliant with the provisions of any financial services law; or

(b) that may prejudice the interests of the members, and the activity is not carried out with the approval of the Regulatory Authority or without consultation as may be required by this Act.

(6) A licensed fund that fails to appoint a principal officer or representative commits an offence and is liable to a fine not exceeding P5 000 for each day the offence occurs, to be imposed by the Regulatory Authority.

(7) A licensed fund that knowingly employs a principal officer or representative who is not suitable in terms of this section commits an offence and is liable to a fine not exceeding P50 000 to be imposed by the Regulatory Authority.

18. (1) Any principal officer who resigns his or her position with a licensed fund or whose appointment has been terminated by the licensed fund shall, within 14 days of the resignation or termination, inform the Regulatory Authority of the resignation or termination in writing, and of any matter relating to the affairs of the licensed fund of which he or she became aware of in the performance of his or her duties, and which may prejudice the licensed fund's ability to comply with this Act.

Termination
of principal
officer

(2) A licensed fund shall be obliged to inform the Regulatory Authority in writing, of the resignation or termination of the principal officer and the reasons for the termination within 14 days of the termination.

(3) Any information submitted by a principal officer in terms of subsection (1) shall not be used by the Regulatory Authority in any subsequent criminal proceedings against the principal officer.

(4) A person who contravenes a provision of this section is liable to a fine not exceeding P50 000 as may be imposed by the Regulatory Authority.

19. (1) A licensed fund shall appoint in terms of its rules —

(a) an auditor who shall not be an officer of the fund;

(b) an actuary; and

(c) an administrator who is licensed in terms of section 21.

(2) Notwithstanding subsection (1), a fund exempted under section 25 (4) may opt not to appoint an actuary.

(3) A fund shall appoint an actuary if it is satisfied that —

(a) the person qualifies and is certified as an actuary; and

(b) belongs to a professional actuarial body recognised by the Regulatory Authority.

Auditor,
actuary and
administrator

(4) An auditor, actuary or administrator shall report to the Regulatory Authority any activity of a fund that he or she is aware of or is suspicious of, within 14 days of being aware of, or is in suspicion that the activity is not compliant with the provisions of any financial services law, and which the board has not taken adequate steps to ensure compliance to.

(5) A fund that fails to appoint an auditor, actuary or administrator commits an offence and is liable to a fine not exceeding P5 000 for each day the offence occurs, to be imposed by the Regulator Authority.

Termination or resignation of auditor, actuary and administrator

20. (1) Where the appointment of an auditor, actuary or administrator is terminated for any reason, the auditor, actuary or administrator and licensed fund shall inform the Regulatory Authority of the termination in writing, within 14 days of such termination, and shall submit to the Regulatory Authority a statement of what the auditor, actuary or administrator believes to be the reason for that termination.

(2) The termination of appointment of an auditor, actuary or administrator of a licensed fund does not exempt an auditor, actuary or administrator from submitting a report or informing the Regulatory Authority of matters relating to the licensed fund under this Part, which the auditor, actuary or administrator would have had reason to submit, had the appointment not been terminated.

(3) A person who contravenes a provision of this section is liable to a fine not exceeding P50 000 as may be imposed by the Regulatory Authority.

Requirements for administration of fund

21. (1) A person shall not act as an administrator if the person is not licensed under this Act.

(2) An application to act as an administrator shall be made in such form as may be prescribed and accompanied by such fee as may be prescribed.

(3) A person who contravenes this section commits an offence and is liable to a fine not exceeding P100 000 or to a term of imprisonment not exceeding six months, or to both.

Duties of administrator

22. An administrator shall —

- (a) administer a fund in a responsible manner;
- (b) maintain such books of accounts of a fund and other records as may be necessary for purposes of administering a fund;
- (c) submit to the Regulatory Authority, audited accounts of a fund and such other statements and reports within four months after the end of the financial year, in the prescribed format; and
- (d) maintain adequate financial resources to meet its commitment to a fund and to manage the risks to which the fund is exposed.

PART IV — *Financial Requirements*

Accounts

23. (1) A licensed fund shall maintain such books of accounts and other records as may be necessary for purposes of the fund.

(2) A licensed fund shall within four months after the end of its financial year, submit to the Regulatory Authority, audited accounts and such other statements and reports as may be prescribed, in the prescribed format.

(3) If the Regulatory Authority is not satisfied with any audited accounts, statements or reports submitted in terms of subsection (2), the Regulatory Authority shall return the audited accounts, statements or reports, directing the fund to provide further information as it may require.

(4) A fund shall comply with any direction made under subsection (3) within 30 days of receiving such direction.

(5) Any audited accounts, statements or reports returned to the fund at subsection (3) shall be re-submitted within 30 days of such return.

24. (1) All the assets of a fund, including title deeds and securities shall be registered in the name of —

(a) the fund; or

(b) a nominee appointed by the board and approved by the Regulatory Authority.

(2) An insurance policy or unit in a collective scheme shall be held in the name of the fund or nominee.

25. (1) Subject to the provisions of this section, a licensed fund shall cause its financial condition to be investigated and reported upon by an actuary at such time and in such manner as may be determined by the Regulatory Authority.

(2) A licensed fund shall submit an actuarial report made in terms of subsection (1) to the Regulatory Authority, within 30 days of receiving such report.

(3) An actuarial report made in terms of subsection (1) shall be lodged with the Regulatory Authority within three months of the date specified in that report as the actuarial valuation date.

(4) If the Regulatory Authority is satisfied that the rules and financial methods adopted by a licensed fund will render periodical investigations by an actuary unnecessary, the Regulatory Authority shall, if requested by the fund in writing, exempt such fund from compliance with subsection (1), subject to such conditions as it thinks fit.

(5) The Regulatory Authority may vary any conditions fixed in terms of subsection (4), or cancel any exemption granted in terms of that subsection.

(6) If an actuarial report reveals an actuarial surplus, the board may apportion the actuarial surplus between stakeholders in a manner that the board deems equitable and as approved by the Regulatory Authority.

(7) Where actuarial surplus referred to in subsection (6) is apportioned to —

(a) a current member, it shall be used to improve benefits in terms of the rules and shall not be paid to the member until such time as the member qualifies for a benefit in terms of the rules;

Holding of assets

Investigations by actuary

Financial
condition
of fund

- (b) a former member, it shall be paid out in cash to the former member, less tax payable on that amount; or
- (c) an employer, it shall be credited to an employer reserve account established in terms of the rules, and any credit balance which may be utilised at the request of the employer for such purposes as are provided in the rules.

26. (1) Where the Regulatory Authority, after examination of any return or report of a licensed fund, is of the opinion that the fund is not in a financially sound condition, and a satisfactory scheme setting out arrangements for the purpose of bringing the fund into a sound financial condition within a reasonable period have not been submitted to it —

- (a) the Regulatory Authority shall direct the fund to submit a scheme setting out arrangements for the purpose of bringing the fund into a financially sound condition within a period which it considers to be reasonable; and
- (b) the fund shall submit such scheme to the Regulatory Authority within 30 days from the date directed under paragraph (a), together with a report on the scheme by the actuary or, by an auditor where an actuary has not been appointed in terms of section 19 (2).

(2) The Regulatory Authority may after considering a scheme submitted in terms of subsection (1) —

- (a) approve the scheme, subject to such conditions, if any, as it thinks fit; or
- (b) reject the scheme, whereupon, a fund shall submit a new scheme in accordance with the directions of the Regulatory Authority.

(3) Where, after consideration of a scheme submitted in terms of subsection (1), the Regulatory Authority is of the opinion that it is impossible or impracticable to bring a fund into a sound financial condition within a reasonable period, the Regulatory Authority may direct that the whole or any part of the business of the fund be wound up.

Investments

27. (1) A fund shall not borrow money in excess of 25 per cent of the current value of its assets, except with the prior written consent of the Regulatory Authority.

(2) The Regulatory Authority may after consultation with the Minister, by administrative rule —

- (a) prohibit any fund from making investments of a certain description;
- (b) require any fund to realise the whole or part of a particular investment within a specified period;
- (c) set maximum limits as percentages of the total fair value of the assets of a fund for each class of investment, whether an investment in Botswana or a foreign investment; and
- (d) require a fund to take action to remedy any breach of the limits set in paragraph (c).

(3) A licensed fund shall not invest, whether by loan or otherwise —

- (a) in the business of an employer or of an associate of an employer, more than five per cent of the aggregate value of its assets in Botswana, except where such investment carries a guarantee from the Botswana Government:

Provided that the Regulatory Authority may exempt, either wholly or in part, any fund from the provisions of this subsection and subject to such conditions as it thinks fit; and

- (b) its assets in any business referred to in paragraph (a), unless the return on such investment is reasonable and the investment is not prejudicial to the fund.
- (4) The Regulatory Authority may require a fund to take such action as it deems necessary to protect the members of the fund against the risk of —
 - (a) mismanagement of the assets of the fund; or
 - (b) managing the assets in a way that the fund may be unable to meet its liabilities or fulfil the reasonable expectation of its members.
- (5) Where the rules give a member a right to select an investment of their interest from various investment portfolios, each such investment portfolio shall comply with the limits set under subsection (2) (c).
- (6) If an error is made in the timing of the investment of a contribution or in the implementation of a switch instruction that is valid in terms of the rules, each member affected by the error shall be placed in the position that he or she would have been in, if such error had not been made, and the cost of such adjustment shall be debited against the capital held in the fund or paid to the fund by the sponsor or the administrator of the fund.

PART V — *Termination and Winding Up*

28. (1) Subject to the provisions of this Part, a licensed fund may be terminated —

Termination
of fund

- (a) in terms of the rules;
- (b) on the direction of the Regulatory Authority; or
- (c) by liquidation by the Regulatory Authority, where the Regulatory Authority is satisfied that the fund cannot be restored to a financially sound condition within a reasonable period.

(2) Where a fund is terminated in terms of subsection (1), its assets and liabilities are to be transferred to one or more other funds, and the board shall oversee the process of transfer in terms of Part VI.

29. (1) Notwithstanding the rules, where a fund is liquidated and its assets are to be distributed amongst stakeholders, a liquidator approved by the Regulatory Authority shall be appointed in the manner prescribed in the rules.

Winding up
of fund

(2) A liquidator shall, with the approval of the Regulatory Authority, determine the date of liquidation and the period of back-dating, if any, for the purpose of including in the calculations for the liquidation of those members who during that period, resigned or were discharged solely because of the impending winding-up of the business operations of an employer, who shall be deemed members for the purposes of liquidation.

(3) The provisions of this Act shall continue to apply to a fund referred to in subsection (1), as if a liquidator is the board of the fund, until the liquidation is complete.

(4) A liquidator appointed in terms of subsection (1) shall as soon as possible after completion of the liquidation —

- (a) realise the assets of a fund; and
- (b) lodge with the Regulatory Authority —
 - (i) a list of the assets and liabilities of a fund certified by him or her as correct, and
 - (ii) a scheme setting out the manner in which he or she proposes to realise the assets of a fund to discharge the liabilities to persons other than members and beneficiaries and to meet the expenses of the liquidation.

(5) If a minimum benefit applies and the total amount of the minimum benefit for all members of a fund at the effective date of the liquidation is greater than the fair value of the assets of the fund after deducting any current liabilities of the fund, the shortfall shall represent a debt payable by the employer to the fund and the liquidator shall recover this debt from the employer.

(6) A liquidator may apply to the High Court to pay any remaining credit balance in the employer reserve account to the employer, less any tax payable on that amount —

- (a) after satisfying the members rights and reasonable expectations in relation to past service;
- (b) after provision has been made for expenses of the liquidation; and
- (c) when the liquidator has determined that there is a credit balance in an employer reserve account.

(7) For purposes of subsection (6), an actuary shall submit a report, which report shall show the proportion of the amount available for distribution which the actuary recommends should be applied for the benefit of the beneficiary:

Provided that if the fund has not appointed an actuary in terms of section 19, the amount to be applied for the benefit of each beneficiary shall be determined by the liquidator.

(8) A liquidator shall submit the report provided under subsection (7) to the Regulatory Authority with his or her —

- (a) estimate of the total amount available for distribution; and
- (b) recommendation on how to apply the amount for the benefit of the beneficiary.

(9) The report submitted by a liquidator under subsection (8) shall be open for inspection at the principal office of a fund for a period of one month.

(10) The Regulatory Authority shall —

(a) at the expense of the fund cause Notice to be published in the *Gazette* and a newspaper of national circulation to specify the period and the place which the report referred to under subsection (9) will be open for inspection; and

(b) call upon any person who has an objection to the method of distribution recommended by the liquidator to lodge his or her objection in writing, within such period as may be specified in the Notice, which shall not be less than one month from the last day on which the report was open for inspection.

(11) If an objection —

(a) is not lodged with the Regulatory Authority under subsection (10), the Regulatory Authority shall direct a liquidator to complete the liquidation in accordance with the scheme recommended; or

(b) is lodged with the Regulatory Authority under subsection (10) the Regulatory Authority shall consider the objection and direct a liquidator to complete the liquidation in accordance with the scheme as recommended or as amended by the Regulatory Authority, in such manner as it thinks fit.

(12) Subject to subsection 13, the Regulatory Authority may give a liquidator such direction relating to the liquidation as it thinks fit, and the direction shall be binding on the liquidator.

(13) A liquidator shall send a copy of the direction received under subsection (12) to every member, beneficiary and creditor of a fund, within one month of receipt of the direction.

(14) A liquidator or any other person aggrieved by the direction of the Regulatory Authority under subsection (12) may have the right to appeal for an order setting aside the direction or to make such order as it thinks fit, within two months after the direction is communicated to the liquidator.

(15) A liquidator shall within one month of completion of the liquidation, lodge with the Regulatory Authority, a final account signed and certified by him or her as correct showing the manner in which the assets of a fund have been realised and distributed.

(16) Every claim against a fund shall be proved to the satisfaction of a liquidator, subject to a right of appeal to the High Court, and the liquidator may require any claim to be made on affidavit.

(17) The Regulatory Authority may authorise a departure from the process referred to under subsection (6), where the process may cause a significant reduction in the member's benefit, subject to such terms and conditions as the Regulatory Authority may impose.

Winding up
of
multi-employer
fund

30. (1) Subject to subsection (2), where the participation of an employer in a multi-employer fund ceases, and the assets corresponding to the members employed by the employer are to be distributed amongst stakeholders, section 29 shall apply.

(2) A liquidator shall not be appointed and the board shall perform the functions assigned to the liquidator in section 29 in respect of the assets and liabilities corresponding to the members employed by an employer.

Winding up
of individual
retirement
fund

31. The sponsor of an individual retirement fund shall stand in the place of an employer in terms of section 29 (5) and (6), provided that the balances in any reserve account, other than a sponsor reserve holding any capital of a fund, shall be used for the benefit of the members.

Liquidation
of licensed
fund

32. Notwithstanding any other written law, in the event of the liquidation or bankruptcy of a licensed fund —

- (a) secured creditors shall have preference on the percentage borne by an individual on the total assets of the fund at the time the individual borrowed from the creditor, only up to the limit of the borrowing permitted under section 27; and
- (b) the members of the fund shall have preference against all claimants in the distribution of such assets of the fund as shall remain after the claims of secured creditors have been met under paragraph (a).

PART VI — *Amalgamations and Transfers*

Amalgamation
and transfer

33. (1) Subject to the provisions of this Part, with the approval of the Regulatory Authority —

- (a) two or more licensed funds may amalgamate and become one licensed fund; or
- (b) a licensed fund may transfer all or any of its assets and liabilities to another licensed fund.

(2) At the written request of a member, this Part shall not apply to the transfer —

- (a) of a portion of a benefit due to the member from one fund to another, which benefit that member does not take as a cash lump sum on change of his or her employment; or
- (b) of his or her interest in one licensed individual retirement fund to another, subject to such conditions as the Regulatory Authority may prescribe:

Provided that both funds are exempt from actuarial valuation in terms of section 25 (4).

Notice of
intention to
amalgamate
or transfer

34. (1) Notwithstanding any provision of the rules, and unless the stakeholders have in writing waived the requirement for notice, the stakeholders shall be given at least four weeks written notice of intention to lodge an application for amalgamation or transfer, together with such information as the Regulatory Authority may require.

(2) A notice under subsection (1) shall, in a language that the members can reasonably be expected to understand, set out —

- (a) the terms of the amalgamation or transfer;
- (b) the determination of the value including the sharing of any reserves in the transfer or fund; and
- (c) the application of the transfer value in the transferee fund.

(3) Notice of any proposed amalgamation or transfer referred to under subsection (2) and the terms of the notice, shall be submitted to the Regulatory Authority, together with a copy of the scheme setting out details of the proposed amalgamation or transfer, including a copy of every actuarial report or other statement taken into account for the purposes of the scheme and the notice advising stakeholders of the intended amalgamation or transfer.

(4) The Regulatory Authority may, after submission of the notice under subsection (3), require additional information from the person who has submitted the notice, including any special report by an actuary or auditor as it thinks fit.

(5) When a new fund is to be created as a consequence of the amalgamation or transfer, a report required under subsection (3) shall include an application for licensing a new fund in terms of this Act.

(6) Stakeholders may in writing lodge an objection to the proposed amalgamation or transfer with the principal officer during the notice period specified under subsection (1).

(7) An objection lodged under subsection (6) shall be considered by the board before submitting an application to the Regulatory Authority, and a summary of any such objection and the action taken by the board in response to the objection shall be attached to the application submitted.

35. The Regulatory Authority may forward a certificate to a fund indicating that the fund may amalgamate or transfer the assets and liabilities, and that the new fund is licensed in terms of this Act, if it is satisfied that —

- (a) the proposed amalgamation or transfer has given full recognition to the transferring member's rights and reasonable expectations in respect of benefits related to their service prior to the effective date of the transfer or amalgamation, and to the participation in any reserve account;
- (b) the proposed amalgamation or transfer would not render any fund that is a party to it and which will continue to exist if the proposed amalgamation or transfer is completed, unable —
 - (i) to meet the requirements of this Act,
 - (ii) to remain in a sound financial condition, or
 - (iii) in the case of a fund that is not in a sound financial condition, to attain such a condition within a period considered by the Regulatory Authority to be satisfactory;
- (c) the provisions of any rules, of a fund that is a party to the proposed amalgamation or transfer —

Certificate to
amalgamate
or transfer

Effects of
amalgamation
or transfer

- (i) have been complied with, or
 - (ii) that adequate arrangements have been made to ensure that such provisions will be complied with at the appropriate time; and
- (d) any new fund that is created may be licensed in terms of this Act.
- 36.** (1) Upon completion of an amalgamation of two or more funds —
- (a) any fund that has ceased to have any assets or liabilities as a result of the amalgamation or transfer shall be deemed to be dissolved and the Regulatory Authority shall cancel the licence of any such fund; and
 - (b) where a new fund is created in the amalgamation or transfer, the assets of the amalgamated funds shall vest in the new fund which shall assume the liabilities of the amalgamated funds.
- (2) Upon completion of the transfer of all the assets and liabilities of a licensed fund —
- (a) the fund shall be deemed to be dissolved and the Regulatory Authority shall cancel the licence of the fund;
 - (b) if any change of name in the new fund has been agreed upon, the Regulatory Authority shall enter the new name in its records in place of the name of the dissolved fund, and shall issue a licence to the fund under its new name; and
 - (c) the assets of the dissolved fund shall be transferred to the new fund, and the new fund shall assume the liabilities of the dissolved fund.
- (3) The amalgamation of two or more licensed funds or the transfer of assets and liabilities under this Part shall not affect the rights of a creditor of a party to the transaction, otherwise than in his or her capacity as a member of such party.
- (4) If a fund uses all or part of the capital sum available in respect of a member on the member's retirement to purchase an annuity policy from a licensed insurer, and that annuity policy complies with such conditions as may be prescribed by the Regulatory Authority —
- (a) the provisions of this Part shall not apply;
 - (b) the purchase of the annuity policy shall be regarded as a benefit payment; and
 - (c) the fund shall have no other obligation in respect of that member for the provision of any further benefits in relation to the capital used to purchase the annuity.

PART VII — *Provisions relating to Pension Benefits*

Benefits not
reducible,
transferrable
or cedable
Cap. 29:06

- 37.** (1) Notwithstanding the rules, except for deductions permitted in terms of subsection (4), or under the Matrimonial Causes Act or any law governing maintenance of dependants of a member, a benefit provided for in the rules, or a right to such benefit, or a right in respect of contributions made by or on behalf of the member, shall not —

- (a) be capable of being reduced, transferred or ceded, pledged or hypothecated;
- (b) be liable to be attached or subjected to any form or execution under a judgment or order of a court; or
- (c) be capable of being taken into account in a determination of a judgment debtor's financial position in terms of the Magistrates' Court Act.

Cap. 04:04

(2) A licensed fund may withhold or suspend payment on a benefit or a right, where a member or beneficiary attempts to transfer, cede, pledge or hypothecate a benefit or right:

Provided that a fund may pay any such benefit or any benefit in pursuance of such contribution or part of that benefit to any one or more of the dependants of a member or beneficiary or to a guardian or trustee for the benefit of a dependant during such period as the fund will determine.

(3) A benefit referred to in subsection (1) shall include an annuity purchased or to be purchased by a fund on behalf of a member.

(4) This section shall not apply to anything done to reduce or obtain a debt —

- (a) including a reduction or settlement by a fund under section 39, to the extent to which the fund may reduce or settle such debt; or
- (b) which is owed to a fund by a member in respect of contributions made in arrears, but excludes amounts which are in arrear due to the failure of an employer to pay the member's contribution to the fund after deduction of that contribution from that member's remuneration.

38. Notwithstanding the provisions of any written law relating to insolvency, if the estate of any person entitled to a benefit payable in terms of the rules, including an annuity purchased by a fund from the insurer of the person, is sequestrated or surrendered, such benefit or any part of it which became payable, shall not be deemed to form part of the assets in the insolvent estate of the person and may not in any way be attached or appropriated by the trustee in his or her insolvent estate or by his or her creditors.

Exclusion from member's estate

39. (1) Subject to section 38, any benefit payable by a fund upon the death of a member shall not form part of the assets in the estate of the member, but shall be paid to dependants and nominees designated in writing to the fund by that member before the member's death, in such proportions as the board may deem equitable:

Disposition of lump sum benefits on death of member

Provided that, within a period of 12 months after the death of a member —

- (i) the board does not become aware of any dependants of the member; and
- (ii) the member has not designated a nominee, or if the member has designated a nominee, the designation is to receive only a portion of the benefit,

the balance of the benefit after payment of the portion to the nominee shall form part of the estate of that member.

(2) A benefit referred to under subsection (1) shall not include a benefit payable as a pension to a spouse or child of a member in terms of the rules, which benefit shall be dealt with in terms of the rules.

(3) For the purposes of this section, a payment by a licensed fund for the benefit of a dependant or nominee under this section shall be deemed to be a payment to the dependant or nominee if payment is made to —

(a) a trust, in which case the board may determine the age at which the remaining capital is paid out to a beneficiary;

(b) a person recognised by law or appointed by court as the person responsible for managing the affairs of that dependant or nominee; or

(c) a beneficiary fund licensed under this Act.

(4) Where a benefit payment is made to a trust on behalf of a beneficiary who is a minor, and the beneficiary dies, the trustees of that trust may in their discretion distribute any remaining capital between other dependants and nominees.

Deductions
from member's
benefits

Cap. 52:01

40. (1) A licensed fund may deduct from a benefit payable to a member, or to his or her dependants or nominees, in the event of the death of the member —

(a) any amount due on the benefit in terms of the Income Tax Act;

(b) an amount of the benefit to which the member or a beneficiary becomes entitled in terms of the rules;

(c) in the case of a transfer of the member to another fund, the amount of the benefit which the fund is entitled to transfer, if the board of the transferor fund is satisfied that it is not otherwise reasonably possible to negotiate the repayment or to transfer the loan or the guarantee;

(d) in the case of a default on the repayment of any loan by the member in circumstances where his or her membership of the fund is not terminated, the amount of the benefit which the member would have received on termination of membership on the date of default, if such a deduction is only effected as a last resort after the board of the fund is satisfied that no other arrangement for the required payment can be made;

(e) any amount due by the member to his or her employer on the date of his or her retirement, or on the date which he or she ceases to be a member of the fund and to which the member has admitted liability in writing in respect of —

(i) a loan granted by the employer to the member,

(ii) an amount which the employer is liable under a guarantee furnished in respect of a loan by some other person to the member, or

- (iii) compensation, including legal costs, recoverable from the member in respect of —
 - (aa) any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, or
 - (bb) a judgment obtained against the member in any court, which judgment states the amount to be paid by the member,

and pay such amount to the employer concerned;

- (f) any amount which the fund has paid or will pay by arrangement with, and on behalf of the member or beneficiary to a medical fund or insurer, as may be approved by the Regulatory Authority, and pay such amount to the medical fund or insurer, which ever is appropriate;
- (g) any amount payable in terms of a maintenance order issued by a court; or
- (h) any amount assigned from the member's pension benefit to a non-member spouse in terms of a decree granted under the Matrimonial Causes Act.

(2) For the purposes of subsections (1) (d) and (e), the amount deducted shall be deemed to be a benefit which a member is entitled to on termination of his or her membership of a fund, which termination is not a result of retirement or death arising at the date of the transfer or the default.

(3) An amount that is deducted in terms of subsections (1) (g) and (h) may only be deducted after the amount of pension interest available has been reduced by the amount referred to in subsection (1) (a):

Provided that the aggregate of all amounts deducted in terms of this subsection may not exceed a member's pension benefit available at any given time.

(4) A maintenance order issued by a court as provided under subsection (1) (g) shall take precedence over a decree granted to a spouse of a member as provided under subsection (1) (h).

(5) At the dissolution of a marriage, either through civil law or any customary law, where a spouse is awarded a portion of a pension benefit in the form of a lump sum from a member's benefit, that amount shall —

- (a) reduce the member's accrued benefit at the date of dissolution;
- (b) accrue an investment return, at the rate earned by the fund, whether positive or negative, after deduction of expenses, from the date of the decree to the date when payment or transfer is achieved under paragraph (c);
- (c) be paid to the former spouse to whom the amount is assigned, less any income tax due on the payment; or
- (d) be transferred to another fund of which the former spouse is a member or one which that spouse elects.

Minimum benefits

41. (1) The Minister may, by Notice published in the *Gazette*, prescribe that minimum benefits shall apply from a date to be specified in that Notice.

(2) On retirement or withdrawal from a fund through dismissal, retrenchment or resignation, a member shall receive, transfer to another fund, or purchase an annuity —

(a) if he or she is a member of a defined contribution fund, in the form of a cash lump sum, less any tax payable on such amount, the balance in his or her individual account representing —

- (i) the sum of member and employer contributions,
- (ii) transfers into the fund on his or her behalf, and
- (iii) such other investment return, positive or negative, as the board has caused to be credited to his or her account, less such expenses as the board has caused to be debited to his or her account; or

(b) if he or she is a member of a fund other than a defined contribution fund, the present value of the benefit payable on the normal retirement date in respect of pensionable service prior to his or her withdrawal from the fund, which present value is determined by an actuary using assumptions as may be prescribed by the Regulatory Authority.

(3) If the Minister does not prescribe benefits in terms of subsection (1), the member shall receive at least his or her own contributions, accumulated with such rate of investment return, positive or negative, as the board has caused to be credited to his or her account.

PART VIII — *Miscellaneous Provisions*

Right to obtain copies of or to inspect and retain documents

42. (1) A licensed fund shall give any member, pensioner or other stakeholder by request made by the member, pensioner or stakeholder a copy of —

- (a) the rules; and
- (b) the last audited income and expenditure accounts and balance sheet of the fund.

(2) The rules and audited accounts under subsection (1) may be made by hard copy or in an electronic form, and service shall be deemed to be effected if it is shown that the document was dispatched by post or by any electronic means approved by the member, pensioner or stakeholder.

Effect of certification of Regulatory Authority on documents

43. Any document that purports to have been certified by the Regulatory Authority to be a document lodged with it in terms of this Act or to be a copy of such document shall be *prima facie* presumed to be such a document or copy, and every document or copy which purports to be so certified shall be admissible in evidence as if it were the original document.

44. (1) Service of process in any legal proceedings against a licensed fund may be effected at the principal office of the fund in Botswana.

Service of process

(2) If a licensed fund has no principal office in Botswana or it has ceased to exist, process in any legal proceedings against the licensed fund may be served at the office of the Regulatory Authority, and service upon the Regulatory Authority shall be deemed to be service upon the fund.

45. (1) A person shall not, without the approval of the Regulatory Authority —

Prohibitions

(a) apply to his or her, or its business or undertaking, a name or description which includes the words —

- (i) “retirement fund”,
- (ii) “retirement annuity fund”,
- (iii) “pension fund”, or
- (iv) “provident fund”; or

(b) perform any act which indicates that the person carries on or is authorised to carry on a retirement fund business, unless that person is authorised to carry on that business.

(2) A retirement fund shall not conduct business under a name or translation, shortened form or derivative of such name, if it —

- (a) is identical to that of another retirement fund;
- (b) so closely resembles that of another retirement fund, that it is likely to be mistaken for that other fund;
- (c) is identical to that of a retirement fund which was previously licensed, and reasonable grounds exist to object such use; or
- (d) is misleading or undesirable.

(3) A retirement fund shall not change the name of a fund, translate or use a shortened form or derivative of such name, without the approval of the Regulatory Authority.

(4) A person who contravenes subsection (1) commits an offence and is liable to a fine not exceeding P30 000 to be imposed by the Regulatory Authority.

(5) A fund that conducts a business in contravention of this section commits an offence and is liable to a fine not exceeding P30 000 to be imposed by the Regulatory Authority.

46. (1) The Regulatory Authority may conduct an investigation —

Investigations and inspections

(a) into the activities of any person who is not licensed under this Act, who is suspected of carrying on a retirement fund business;

(b) where it has reasonable grounds to suspect that —

- (i) an offence has been or may have been committed under this Act, or
- (ii) a fund is not complying with, or has not complied with the provisions of this Act; or

(c) where it suspects on reasonable grounds that a person has in possession or under his, her or its control any evidence that may be relevant to any matter that may be subject to investigations under this Act.

(2) The Regulatory Authority shall, in writing, appoint officers of the Regulatory Authority as investigators.

(3) A person appointed as an investigator under subsection (2) shall be issued with an identity card, which he or she shall produce upon entering any premises for investigation or inspection.

(4) In conducting an investigation —

(a) an investigator may require a person to produce such documentation and information as it may require for the purposes of the investigation, within a stipulated time; or

(b) the investigator may enter any premises used or apparently used by the person referred to under subsection (1), at any reasonable time to inspect and make copies, or take extracts from, any relevant records, documents or things in those premises.

(5) A person who fails to produce any document or information required, or who prevents an investigator from entering and inspecting and taking such copies as may be required under subsection (4), shall be liable to a fine not exceeding P50 000 to be imposed by the Regulatory Authority.

Trusteeship
of assets

47. (1) The Regulatory Authority may at any time before or during an investigation under this Act, require a retirement fund to transfer all or a specified portion of its assets into a trust to be administered by a person nominated by the Regulatory Authority.

(2) The assets placed under trusteeship in terms of subsection (1) shall not be mortgaged, pledged or otherwise encumbered in any manner in favour of another person, except with the prior consent of the Regulatory Authority.

Enforcement
of rights of
members

48. Notwithstanding the rules, a member of a retirement fund shall be entitled to be heard in accordance with the fund's dispute resolution process.

Inspection
of documents

49. The Regulatory Authority may permit any person, on the payment of a prescribed fee, to inspect any document lodged with the Regulatory Authority, and to obtain a copy or extract of such document.

Penalties

50. A person who contravenes a provision of this Act, where no specific penalty is provided shall be liable to a fine not exceeding P50 000 to be imposed by the Regulatory Authority.

Regulations

51. The Minister may make regulations prescribing anything under this Act which is to be prescribed or which is necessary or convenient to be prescribed for the better carrying out of the objects and purposes of this Act, or to give force and effect to its provisions.

Administrative
Rules

52. The Regulatory Authority may make administrative rules in relation to the business of a fund.

53. The Pension and Provident Funds Act (hereinafter referred to as the “repealed Act”) is hereby repealed.

Repeal of
Cap. 27:03

54. (1) A person who immediately before the commencement of this Act was licensed in terms of the repealed Act, and was by virtue of that licence, authorised to carry on a retirement fund business as defined in that Act, shall be deemed to be licensed to carry on a retirement fund business in terms of this Act.

Transitional
provisions

(2) A person carrying on a retirement fund business in terms of the repealed Act shall carry on that business subject to the conditions referred to under this Act.

(3) A person referred to in subsection (1) shall, within a period of six months after the commencement of this Act, make an application to the Regulatory Authority in terms of section 4, for the issue of a new licence in exchange for the licence issued to that person under the repealed Act.

(4) The Regulatory Authority shall upon receipt of an application made in terms of subsection (3), consider such application in terms of the provisions of this Act, and shall issue a new licence in terms of the provisions of this Act.

(5) Any board of a fund established under the repealed Act shall continue to be in existence as if established under this Act, and the board shall within a period of 12 months after the commencement of this Act, ensure that it complies with Part III of this Act.

(6) A board member of a fund appointed under the repealed Act, shall continue to be a board member as if appointed under this Act, and shall within a period of 12 months after the commencement of this Act, satisfy the minimum standards required under section 13 (5) of this Act.

PASSED by the National Assembly this 28th day of July, 2014.

BARBARA N. DITHAPO,
Clerk of the National Assembly.