

Bill No.                      of 2022

RETIREMENT FUNDS BILL, 2022  
(Published on                      , 2022)

MEMORANDUM

1. A draft of the above Bill, which is intended to be presented to the National Assembly is set out below.
2. The object of the Bill is to repeal and re-enact with amendments, the Retirement Funds Act (Cap. 27:03) to amongst others, expand and strengthen the Non-Bank Financial Institutions Regulatory Authority's (NBFIRA) oversight authority, to improve governance, safety, soundness, fairness, efficiency, orderliness and sustainability of retirement funds.

Hence, the proposed changes seek to –

- (a) strengthen NBFIRA's authority including to initiate the amendment of fund rules based on identified risks to protect members and to appoint statutory managers where necessary;
- (b) expand and re-align definitions such as "controller", "due date", "fund", "occupational pension fund", "participating employer" and "trustee" to ensure a common understanding;
- (c) provide for operational guidelines for key stakeholders including fund administrators;
- (d) improve and ensure a balanced cost effective corporate governance of funds by adjusting the board members' qualifications and composition, warrant the inclusion among the members, of at least one independent trustee, make it mandatory for the board to regulate its proceedings through fund rules, and carry out a self-assessment and hence not require the services of an independent assessor regularly;
- (e) revise the provisions for encashment of residual funds;
- (f) provide for new clauses to guide the process of winding up of retirement funds;
- (g) provide for new clauses to manage unclaimed benefits; and
- (h) prohibit the submission of false or inaccurate statements, reports and returns to NBFIRA.

3. In order to achieve this, the Bill is as follows –

- (a) Part I provides for preliminary matters;
- (b) Part II provides for the licensing of funds whilst Part III provides for the governance of funds;
- (c) Part IV lays out the financial requirements of a fund and includes provisions on assets and investments;
- (d) Part V provides for statutory management, the termination and winding up of funds, whilst Parts VI and VII provide for the amalgamation and transfer of funds and pension funds respectively; and
- (e) Part VIII lays out the miscellaneous provisions including the prohibition of use of names or descriptions which denotes any of the funds in the Act without the permission of the Regulatory Authority.

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PEGGY O. SERAME,  
Minister of Finance and Economic  
Development.

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

*Date of Assent:*

*Date of Commencement:*

ENACTED by the Parliament of Botswana.

## PART I – *Preliminary*

*Short title and commencement*

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.

*Interpretation*

2. In this Act, unless the context otherwise requires –

“active member” means a member of a fund who makes a contribution to the fund or has a contribution made on his or her behalf by his or her employer;

“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 a 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;

“administration services” means those services that are performed by the fund administrator in accordance with the provisions of this Act, its Regulations, the scheme trust deed, rules and any other legal documents related to the fund and instrument of appointment of the administrator, which may include –

- (a) in-house actuarial services;
- (b) retirement consultancy services;
- (c) retirement counselling;
- (d) retirement financial planning; and
- (e) any other related services as approved by the Regulatory Authority.

“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;

Cap. 61:05

“auditor” means an auditor registered with the Botswana Institute of Chartered Accountants under the Accountants Act;

“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 of trustees” means the governing body of a fund;

“board of trustees member” means a member of a board of trustees;

“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;

“controller” in relation to –

- (a) a fund means –

- (i) a person who is in a position to control or exert significant influence over the business or financial operations;
- (ii) a director or member of the governing body;
- (iii) a person who has the power to appoint another person to be a director or member of the governing body; and
- (iv) a person whose consent is needed for the appointment of another person as a director;

(b) in relation to a fund administrator means –

- (i) a person who is in a position to control or exert significant influence over the business or financial operations;
- (ii) a director or member of a board of trustees;
- (iii) a person who has the power to appoint another person to be a director or member of a board of trustees;
- (iv) a person whose consent is needed for the appointment of another person as a director;
- (v) a person who holds at least 20 per cent of the shares of the fund;
- (vi) a person who has the power to control at least 20 per cent of the voting rights attached to shares or other securities of the fund administrator;
- (vii) a person who holds rights in relation to the fund administrator that, if exercised, would result in that person holding at least 20 per cent of the shares of the fund administrator;
- (viii) if the fund administrator is a subsidiary of another person, a person who is a controller of the parent or controlling body; and
- (ix) a person declared by the Regulatory Authority to be a controller of a fund administrator and written notice of the declaration is given to the person, but a Minister or the Regulatory Authority, is not a controller of a fund administrator;

“custodian” means an entity approved by the Regulatory Authority and is responsible for the safe keeping of pension assets in trust on behalf of members and shall include –

- (a) a bank;
- (b) an administrator;
- (c) an investment manager; or
- (d) any other entity approved by the Regulatory Authority;

“deferred member” means a member of a fund who no longer contributes to the fund but who has preserved pension rights with the fund;

“defined benefit fund” means a fund in which –

- (a) each member receives retirement benefit which is guaranteed and which has a value that is based on years of service and the employee’s salary;
- (b) any pension payable on retirement shall be as predetermined by the employer or sponsor, either as a specified pension payment, lump sum or combination thereof on retirement;
- (c) an employee may not be required to contribute towards the plan or product but the employer or sponsor is responsible for all of the planning and investment risk;
- (d) a reserve account is maintained which will cause the Regulatory Authority to require actuarial valuation of the fund; or
- (e) the surviving spouse is often entitled to the benefits where the employee passes away.

“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 of trustees, 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;

“due date” in relation to –

(a) a member, means the date on which the member becomes entitled to his or her pension benefits which shall be the date of the member’s resignation, termination, or retirement from employment; and

(b) a beneficiary becoming entitled to the pension benefits, means the date of the death of a fund member;

“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

Cap. 46:08

completing a fixed period of service of not less than five years, 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 a 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 dependent shall not be regarded as a fund;

“fund administrator” means a person who provides administration services to the fund;

“fund rules” means the rules applicable to a fund, and include –

(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;

“independent trustee” means a person who meets the requirements set down by the Regulatory Authority for appointment to the board of trustees, as an independent trustee;

“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 of trustees 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 employment**, in circumstances other than retirement;

“International Actuarial Association” means the world wide association of professional actuarial associations;

“liquidator” means a person appointed to a fund as a fund administrator, and which fund is being wound up, and

who has the responsibility for collecting all assets of the fund and settling all claims against the fund before they are put into dissolution;

“licensed fund” means an entity which is licensed under this Act to carry on the business of a fund;

“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;

“multi-employer fund” means a fund which is established for the benefit of employees of different employers who are not associated employers;

“occupational pension fund”, means a pension scheme which a person joins as a result of an employee-employer relationship;

“participating employer” means an employer who contributes to a multi-employer fund and has been admitted to participate in the multi-employer fund under the multi-employer fund rules;

“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 to a person who is or has been a member of the fund, on his or her retirement;

“pensioner”, means a member of a fund, who has retired and is in receipt of a pension salary being paid from the fund.

“preservation fund” means a pension or provident fund into which the accrued fund benefits of an employee who leaves the service of an employer due to dismissal, retrenchment or resignation, or in the event of the dissolution of the employer’s pension or provident fund, may be invested;

“principal office” means the principal place of doing business of the fund and keeping the fund’s records;

“principal officer” means a person responsible for the daily operations of a fund including to the Regulatory Authority, its governance, compliance, strategic and executive roles;

“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 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;

“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; or
- (b) a member or former member whom the board of trustees determines should be treated as a stakeholder;

“transfer date” means the date which, at the request of a member, the member’s benefits are transferred from one

fund to another, which shall be within a period of three months from the date of request; and

“unclaimed benefit” means any pension benefit that is due to a retirement fund member or his or her beneficiaries that has remained unclaimed or unpaid for a period exceeding 24 months from due date.

## 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 of the fund; and

(b) such fee as may be prescribed.

(2) The Minister may prescribe specific conditions for the licensing of external funds, which conditions shall include a requirement to hold capital of a minimum amount.

### *Issue of licence*

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

(a) the rules of the fund are consistent with this Act;

(b) the fund will maintain a sound financial position;

(c) the fund will be managed by a board of trustees 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.

### *Effect of licensing*

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.

(2) Notwithstanding anything to the contrary in any written law, memorandum, articles of association, constitution or rules of a body having control of the business of a fund, all 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 the licensing of the fund, shall vest in and devolve upon the fund without any formal transfer or cession.

#### *Rules of fund*

7. (1) The rules of the fund shall –

(a) state the name of the fund;

(b) state the type and purpose of the fund; and

(c) comply with such requirements as may be determined by the Regulatory Authority.

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

(a) membership of a fund, including the conditions for eligibility, admission to and termination of membership;

(b) contributions to be paid into a fund, whether compulsory or otherwise;

(c) benefits to be payable from a fund;

(d) commutation of any pension;

(e) appointment or election of board of trustees' members and their powers and duties;

(f) 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) amendment or replacement of the rules;
- (h) 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, a member and an officer of a fund; and
- (c) any person who puts a claim under the rules of the fund.

*Amendment of rules of fund*

8.(1) Notwithstanding the provisions of this section, the Regulatory Authority may at any time, direct that rules of the fund be amended to comply with the provisions of this Act, or for the purposes of protecting the members where necessary.

(2) A principal officer shall, within 30 days of the passing of the resolution approving an amendment or replacement of the rules of the fund, submit three copies of the amendment or replacement rules to the Regulatory Authority, and any other 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 or replacement of the rules –

- (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 of trustees 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 of trustees or the employees, as the case might be.

(5) Notwithstanding any contrary provision in this Act, where the board of trustees 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 of trustees 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.

*Payment of contributions*

9. Notwithstanding the rules of a fund, an employer of a member of a fund shall pay into the fund, the following –

(a) any contribution that the employer deducts from the employees remuneration, in terms of the rules of the fund; and

(b) any contribution for which the employer is liable in terms of the rules of the fund.

*Special provisions relating to multi-employer and individual retirement fund*

10.(1) The board of trustees 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 16 (1) (a).

(2) The board of trustees of a multi-employer fund or an individual retirement fund may terminate the services contracted to a sponsor under subsection (1) where, in the opinion of the said

board, the costs incurred for contracting the services exceed the benefit to the fund.

(3) The board of trustees of a multi-employer fund shall at the request of the employer, establish a management committee for the sub-fund:

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

*Special provisions  
relating to external  
fund*

11.(1) Notwithstanding section 17, the Regulatory Authority may licence an external fund to include members in Botswana, subject to such terms and conditions as may be determined.

(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 14, 15 and 16, except for the appointment of an independent trustee as provided under section 14(2) (ii);
- (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.

*Special provisions  
relating to  
beneficiary fund*

12.(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 where 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;
- (b) persons who have elected to transfer from any fund to a beneficiary fund, amounts awarded to them in terms of a court order; or
- (c) nominees or dependants whose benefits have not been paid after 24 months of the due date.

*Special provisions  
relating to  
preservation fund*

13.(1) The Regulatory Authority may issue a licence for 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 where 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 the fund, and the member elects or is required in terms of the rules, to transfer the fund to the preservation fund, or
  - (iii) a transfer of business from one employer to another in terms of section 41 and the employees are transferred to another employer, and the employee elects or is required in terms of the rules, to transfer to the preservation fund;
- (b) former members of another preservation fund –
  - (i) where that fund is wound up or is partially wound up; or
  - (ii) where 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 whose benefits have not been paid after 24 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*

#### *Board of trustees*

14.(1) A licensed fund shall have a board of trustees, which shall be the governing body of the fund.

(2) Subject to subsection (3) a board of trustees shall comprise of an odd number of trustees of not less than five, and not more than 11 members, except where the Regulatory Authority has approved otherwise:

Provided that –

- (i) the number of trustees elected by the employer or sponsor, in the case of a multi-employer fund or a beneficiary fund, and the number of trustees elected by the members are equal in number,
- (ii) at least one trustee, who shall be elected by the employer or employee trustees, is an independent trustee, and
- (iii) the number of independent trustees does not exceed the collective number of trustees appointed by the members and the employer or sponsor.

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

- (a) exempt any of the following funds from electing their board of trustees' members –
  - (i) a multi-employer fund,
  - (ii) an individual retirement fund,
  - (iii) an external fund,
  - (iv) a beneficiary fund; or

- (b) permit an individual retirement fund to have less than five board of trustees' 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 the 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 a 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 the standards set by the Regulatory Authority,
- (vii) the fund holds such capital as the Regulatory Authority may determine, and
- (viii) the management of the fund is regularly scrutinised by an independent administrator 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 of trustees shall through its rules, regulate its own procedure and provide for the constitution of the board of trustees, appointment, selection or election of its board of trustees members and the terms of office, its meetings, quorum, voting rights and casting votes in a case of a deadlock:

Provided that –

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

(5) The board of trustees shall satisfy the minimum standards determined by the Regulatory Authority.

(6) Where a fund is permitted to have less than five board of trustees members in terms of subsection (3)(b), the Regulatory Authority may exempt the fund from compliance with section 10 of this Act.

*Object of board of trustees*

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

(2) A board of trustees 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 a duty to –

(i) act with due care, diligence and good faith,

(ii) manage conflicts of interest and act with impartiality in respect of all members, and

(iii) obtain expert advice on matters where board members lack sufficient expertise;

(b) adopt and implement, with expert assistance where the board of trustees members lack sufficient expertise, and investment policy, communication policy and a risk management policy that complies with such standards as may be prescribed by the Regulatory Authority; and

(c) have its assessment carried out annually either by the board of trustees or an independent assessor using the criteria consistent with that prescribed by the Regulatory Authority.

*Duties of board of trustees*

16.(1) A board of trustees shall appoint and manage service providers –

(a) who shall perform the functions required by a licensed fund, including –

(i) a fund 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 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 15:

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 of trustees 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 of trustees has a contract with the service provider which meets the requirements determined by the Regulatory Authority,
- (iv) the board of trustees monitors the performance of the service provider in terms of benchmarks as detailed described in the contract, and
- (v) the board of trustees reviews the appointment of the service provider at least once every three years;

- (b) who shall 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 of trustees;
- (c) to take all reasonable steps to ensure that contributions are paid on time to the licensed fund in terms of this Act;
- (d) to 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 determined by the Regulatory Authority;
- (e) to ensure that the rules, the operation and administration of the licensed fund complies with this Act and other financial services laws; and
- (f) to ensure that the licensed fund is protected against the dishonesty of, errors committed by the board of trustees, 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 of trustees acting on expert advice and after taking account of the risks to which the licensed fund is exposed, deems adequate.

(2) Subject to subsection (1)(a), the board of trustees shall appoint service providers and the service providers shall act in a fiduciary responsible manner.

(3) The board of trustees of a licensed fund shall notify the Regulatory Authority of any change of address of the principal office within 30 days after the change of address.

*Principal office*

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

(2) The board of trustees of a licensed fund shall notify the Regulatory Authority of the address of the principal office within 30 days of the licensing of the fund.

(3) The board of trustees of a licensed fund shall notify the Regulatory Authority of any change of address of the principal office within 30 days after the change of address.

*Principal officer and representative*

18.(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 controller in terms of this Act.

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

(4) Where a fund is required to take an action in terms of this Act, it shall be the duty of a controller or his or her representative to ensure that the act is done.

(5) A controller or his or her 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 his or her representative commits an offence and is liable to a fine not exceeding P5 000 for each day the offence occurs.

(7) A licensed fund which knowingly employs a controller or his or her representative who is not suitable in terms of this section commits an offence and is liable to a fine not exceeding P50 000.

*Duties of principal officer*

19. The principal officer's duties shall include –

- (a) ensuring that the fund complies with this Act and its Regulations and any other relevant financial services law;
- (b) advising the Regulatory Authority of any changes in the rules of the fund within 30 days of the changes;
- (c) informing all members of the fund of any amendment to the rules;
- (d) submitting the financial statements on behalf of the fund to the Regulatory Authority as prescribed;
- (e) signing all relevant documents to be submitted to the Regulatory Authority and the statutory returns which have to be signed together with the Chairperson of the board of trustees;
- (f) ensuring timely communication with members of the fund on fund matters; and
- (g) any other duties as may be determined by the Regulatory Authority.

*Termination and resignation of controllers*

20.(1) A controller 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.

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

(3) Where the controller who resigns from his or her position, or whose appointment is terminated is a principal officer, the said principal officer shall within 14 days of the resignation or termination submit to the Regulatory Authority, –

- (a) a completed form as prescribed; and
- (b) a report on matters relating to the fund during his or her tenure as controller.

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

(5) A person who contravenes a provision of this section commits an offence and is liable to a fine not exceeding P50 000.

*Auditor, actuary, fund administrator, custodian, asset manager or asset consultant*

21.(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) a fund administrator who is licensed in terms of section 23.

(2) Notwithstanding subsection (1), a fund exempted under section 25 (4) may opt 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.

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

(5) A fund that fails to appoint an auditor, actuary, fund administrator, custodian, asset manager or asset consultant commits an offence and is liable to a fine not exceeding P50 000.

*Termination or resignation of auditor, actuary, fund administrator, custodian, asset manager or asset consultant*

22.(1) Where the appointment of an auditor, actuary, fund administrator, custodian, asset manager or asset consultant is terminated or he or she resigns, the auditor, actuary, fund administrator, custodian, asset manager or asset consultant shall within 14 days of such termination or resignation, inform the Regulatory Authority of the termination or resignation in writing, and shall submit to the Regulatory Authority a statement of what he or she believes to be the reason for that termination or resignation.

(2) The termination of appointment of an auditor, actuary, fund administrator, custodian, asset manager or asset consultant of a licensed fund does not exempt an auditor, actuary, fund administrator, custodian, asset manager or asset consultant from submitting a report or informing the Regulatory Authority of matters relating to the licensed fund under this Part, of which the auditor, actuary, fund administrator, custodian, asset manager

or asset consultant has 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.

*Requirements for fund administrator*

23.(1) A person shall not act as a fund administrator without a licence under this Act.

(2) An applicant shall make an application to act as a fund administrator in such form and upon payment of a 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 fund administrator*

24. A fund 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 the fund administrator's commitment to a fund and to manage the risks which the fund is exposed to.

*Governance of fund administrator*

25.(1) A fund shall have a board of directors, which –

(a) majority shall be independent directors;

(b) shall comprise of a number of mixed relevant professionals and skills required to exercise their duties diligently as determined by the Regulatory Authority;

(c) shall establish sub-committees which have clearly stated terms of reference including audit and risk committee, remuneration committee and finance committee;

(d) shall have at least four meetings per annum;

(e) shall adopt and implement the following policies –

- (i) Board charter,
  - (ii) Code of conduct of the board of directors,
  - (iii) Conflict of interest policy,
  - (iv) Risk management policy,
  - (v) Fraud policy,
  - (vi) Anti-Money Laundering and Combatting of Financing of Terrorism policy,
  - (vii) Communication policy,
  - (viii) Training policy,
  - (ix) Remuneration policy, and
  - (x) Information and Communication Technology policy;
- (f) Every fund administrator shall ensure that there is compliance with this Act and an internal audit is carried out when requested.

(2) The core functions of a fund administrator in terms of sections 16 and 24 shall not be outsourced to any third party.

*Duty to establish measures to prevent money laundering and financing of terrorism*

26. A pension fund and any person who provides services to a pension fund shall establish procedures to prevent a financial crime or money laundering and financing of terrorism in accordance with the relevant legislation, including –

- (a) forming the necessary know-your-customer due diligence on the members, and fit and proper due diligence on ultimate controllers, beneficial owners and beneficiaries of the pension fund;
- (b) taking enhanced measures with respect to higher risk members;
- (c) monitoring complex, unusually large transactions, or unusual patterns of transactions, that have no apparent or visible economic or lawful purpose;

- (d) developing internal programmes, including training programmes, procedures, controls and audit functions to combat money laundering; and
- (e) ensuring that pension fund's foreign branches and subsidiaries observe appropriate anti-money laundering and combating of financing of terrorism requirements.

(2) The Regulatory Authority may make rules to further enhance anti-money laundering and combating of financing of terrorism measures.

(3) The Regulatory Authority shall have the power to share information and cooperate in all ways necessary with other domestic and foreign supervisors for anti-money laundering and combating the financing of terrorism purposes.

*Duty to report financial crime*

27.(1) A pension fund and any authorised person shall report immediately to the Regulatory Authority any evidence of criminal activity either in a member state or elsewhere which the pension fund or authorised person suspects is associated with the use of its institution or services.

(2) The Regulatory Authority may further set out –

- (a) circumstances in which the reports described in subsection (1) shall be made and whether such reports shall be provided to other authorities within Botswana; and
- (b) procedures that an authorised person shall adopt to minimise the risk that the financial system in Botswana is used to facilitate criminal activity, including measures to reduce money laundering and financing of terrorism.

*PART IV – Financial Requirements*

*Accounts*

28.(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 required.

(3) Where the Regulatory Authority is not satisfied with any audited accounts, statements and reports submitted in terms of

subsection (2), the Regulatory Authority shall return the audited accounts, statements or reports and direct the fund to provide further information as it may require.

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

*Holdings of assets*

29.(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 of trustees 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.

*Investigations by actuary*

30.(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 report made in terms of subsection (1) shall be submitted to the Regulatory Authority within four months of the end of the financial year.

(4) Where 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, where it is requested by the fund in writing, exempt such fund from compliance with subsection (1), subject to such conditions as it deems fit.

(5) The Regulatory Authority may vary any condition or cancel any exemption granted in terms of subsection (4).

(6) Where an actuarial report reveals an actuarial surplus, the board of trustees may apportion the actuarial surplus between stakeholders in a manner that the board of trustees 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;

(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.

*Financial condition of fund*

31.(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 21 (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 deems fit; or

(b) reject the scheme, whereupon the 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 a part of the business of the fund be wound up.

*Investments*

32.(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 it is 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 deems 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 of such investment portfolio shall comply with the limits set under subsection (2) (c).

(6) Where 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 fund administrator.

PART V – *Statutory Management, Termination and Winding Up*

*Appointment of  
statutory manager*

33.(1) The High Court may, on application by a fund, appoint a person to be a statutory manager or a fund administrator.

(2) An application under subsection (1) shall be made by the Regulatory Authority or with the Regulatory Authority's written consent.

(3) The High Court may only make the appointment –

(a) where the High Court is satisfied that the fund or the fund administrator requested the appointment;  
or

(b) where it appears to the High Court that the fund or the fund administrator –

(i) does not comply with this Act or a financial services law,

(ii) is or is likely to be in an unsound financial position, or

(iii) is or may be involved in financial crime,

and the Court considers it in the interests of the members of the fund or the clients of the fund administrator to make the appointment.

(4) Subject to subsection (5) the Regulatory Authority may appoint a person to be a statutory manager or a fund administrator or where it appears to the Regulatory Authority that –

(a) subsection 3(b) is applicable; or

(b) it is necessary to appoint a statutory manager urgently to protect –

(i) the interests of the members of the fund or the clients of the fund administrator,

(ii) the stability, fairness, efficiency and orderliness of the financial system, or

- (iii) the safety and soundness of financial institutions.

(5) An appointment in terms of subsection (4) shall take effect immediately and the Regulatory Authority shall within five working days after the appointment or as soon as practicable, apply to the High Court for an order confirming the appointment.

(6) The High Court shall confirm the appointment made in terms of subsection (4) unless it is satisfied that the Regulatory Authority was not entitled to make the appointment or that the grounds for making the appointment no longer exist.

(7) The High Court may further give an order on ancillary matters, including costs.

*Duties of statutory manager*

34.(1) Where statutory management is granted in respect of a fund or a fund administrator, any reference in this Act to a fund or fund administrator shall, unless inconsistent with the provisions of this Act, be construed as a reference to a statutory manager.

(2) The statutory manager of a fund shall –

- (a) manage the affairs of the fund or the fund administrator to the exclusion of its board of trustees, directors or other managers;
- (b) have power to repudiate a contract to which the fund or fund administrator is a party, but only if the statutory manager considers the contract detrimental to the interests of the members of the fund or clients of the fund administrator; and
- (c) be entitled to receive such remuneration from the institution as the High Court orders.

(3) A repudiation of a contract in terms of subsection (2)(b) shall not affect any rights of the parties that have accrued before the repudiation.

(4) The statutory manager of a fund or a fund administrator shall manage the affairs of the fund or fund administrator efficiently and shall as soon as practicable, report to the Regulatory Authority –

- (a) on the steps to be taken to ensure that the fund or fund administrator –

- (i) complies with this Act or financial services laws,
  - (ii) is financially sound, or
  - (iii) is not involved in any financial crime;
- (b) where the statutory manager considers that it is not practicable to take steps in paragraph (a), the statutory manager shall consider –
- (i) whether steps may be taken to transfer the business of the fund or the fund administrator to another appropriate person and, if so, to whom and on what terms; and
  - (ii) whether the institution may be wound up.

(5) A statutory manager of a fund or fund administrator shall comply with written directions from the Regulatory Authority in relation to his or her functions.

(6) The statutory manager of a fund or fund administrator may apply to the High Court at any time for directions.

(7) The Regulatory Authority may at any time remove a statutory manager from office, and appoint a replacement, for whom the Regulatory Authority shall apply to court for an order confirming the appointment in terms of section 33.

(8) The statutory manager of a fund or a fund administrator is not liable for a loss that the fund or fund administrator suffers unless it is established that the loss was caused by the statutory manager's fraud, dishonesty, negligence or wilful failure to comply with the law.

*Tenure of statutory manager*

35. Where a statutory manager is appointed to a fund or as a fund administrator, the Regulatory Authority shall ensure that such statutory manager remains appointed until –

- (a) the Regulatory Authority is satisfied that the grounds for making the appointment no longer exist; or
- (b) the Regulatory Authority applies to the High Court for the fund to be wound up on the basis that the Regulatory Authority considers the fund to be insolvent and that it is unlikely to return to solvency within a reasonable time.

*Termination of fund*

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

- (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 of trustees shall oversee the process of transfer in terms of Part VI.

*Winding up of fund*

37.(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 set out in the rules.

(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 the liquidator is the board of trustees of the fund, until the liquidation is complete.

(4) The 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) Where 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 the 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 may be applied for the benefit of the beneficiary:

Provided that if the fund has not appointed an actuary in terms of section 21, 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 in a newspaper of national circulation to specify the period and the place which the report referred to under subsection (9) shall 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) Where an objection –

(a) is not lodged with the Regulatory Authority under subsection (10), the Regulatory Authority shall direct a liquidator to complete 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 considers appropriate.

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

(13) A person aggrieved by the direction of the Regulatory Authority shall within two months of the direction being communicated to him or her, send to the High Court, a copy of the direction received under subsection (12) and may appeal to the High Court for an order setting aside the direction or for the High Court to make such other order as it deems fit,.

(14) A liquidator shall within 30 days of completion of the liquidation, lodge with the Regulatory Authority, a final account signed and certified by him or her as correct, and showing the manner in which the assets of a fund have been realised and distributed.

(15) A liquidator shall satisfy himself or herself of a claim against a fund, subject to a right of appeal to the High Court, and the liquidator may require any claim to be made on affidavit.

(16) 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 determine.

*Winding up of multi-employer fund*

38.(1) Subject to subsection (2), where the participation of an employer fund ceases and the assets corresponding to the members employed by the employer are to be distributed amongst stakeholders, section 37 shall apply.

(2) A liquidator shall not be appointed where ...

(3) The board of trustees shall perform the functions assigned to the liquidator in terms of section 37 in respect of the assets and liabilities corresponding to the members employed by an employer.

*Winding up of individual retirement fund*

39. The sponsor of an individual retirement fund shall stand in the place of an employer in terms of section 37 (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*

40. 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 32; and
- (b) the members of the fund shall have preference against a claimant 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*

41.(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) A member may in writing, request this Part not to 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 determine:

Provided that both funds are exempt from actuarial valuation in terms of section 30 (4).

*Notice of intention  
to amalgamate  
or transfer*

42.(1) Notwithstanding any provision of the rules, and unless the stakeholders have in writing waived the requirement for notice, The regulatory shall give the stakeholders at least four weeks written notice of an 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 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) A person shall submit to the Regulatory Authority the following –

- (a) a notice of any proposed amalgamation or transfer referred to under subsection (2);
- (b) the terms of the notice;
- (c) a copy of the scheme setting out details of the proposed amalgamation or transfer;
- (d) a copy of every actuarial report;
- (e) any other statement taken into account for the purposes of the scheme; and
- (f) a notice advising stakeholders of the intended amalgamation or transfer.

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

(5) Where a new fund is to be created as a consequence of the amalgamation or transfer, a report required under subsection

(3)(d) shall include an application for licensing a new fund in terms of this Act.

(6) A stakeholder 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) The board of trustees shall, before submitting an application to the Regulatory Authority, consider the objection lodged under subsection (6) and attach to the application submitted, a summary of the objection and the action taken by it in response to the objection.

*Certificate to  
amalgamate or  
transfer*

43. (1) The Regulatory Authority may provide approval in terms of Section 41 (1) to a fund and approve that the new fund shall be 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 shall 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) any rules of a fund that is a party to the proposed amalgamation or transfer have been provided and have been –

(i) complied with, or

(ii) where such provisions may be complied with at an appropriate time, adequate arrangements have been made to ensure compliance.

(d) any new fund that is created may be licensed in terms of this Act.

(2) The Regulatory Authority shall, upon completion of amalgamation, issue a certificate of amalgamation or transfer to the new fund.

*Effects of amalgamation  
or transfer*

44.(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) where 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 except in his or her capacity as a member of such party.

(4) Where 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*

45.(1) Notwithstanding the rules, and subject to section 40, a benefit provided for in the fund 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 may 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 47, 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.

*Exclusion from member’s estate*

46. Notwithstanding the provisions of any written law relating to insolvency, where an 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 is 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.

*Disposition of lump sum benefits on death of member*

47.(1) Subject to section 46, 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 of trustees may deem equitable:

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

- (i) the board of trustees does not become aware of any dependants of the member, and
- (ii) the member has not designated a nominee, or where 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 where payment is made to a –

- (a) trust, in which case the board of trustees may determine the age at which the remaining capital is paid out to a beneficiary;
- (b) person recognised by law or appointed by court as the person responsible for managing the affairs of that dependant or nominee; or
- (c) 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*

48.(1) Notwithstanding section 47, 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, –

*Cap. 52:01*

- (a) any amount due on the benefit in terms of the Income Tax Act;
- (b) an amount of the benefit which the member or a beneficiary becomes entitled to, 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, where the board of trustees 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 on the repayment of a mortgage loan by a member on the date of his or her retirement due to medical reasons, or on the date which he or she becomes a deferred member of the fund, if such deduction is effected as the last resort after the board of trustees is satisfied that no other arrangement can be made, provided that:
  - (i) where a member is retiring –
    - (aa) the amount of the benefit which he or she would have received on termination of membership, is utilised for the repayment required, and thereafter, any other outstanding payment is deducted from the remaining portion of the member's pension benefits, and

- (bb) the member shall demonstrate that his or her accrued benefits will cover the loan, or
- (ii) where his or her membership is deferred –
  - (aa) a maximum of 1/3 of his or her accrued benefits, is utilised for the repayment required,
  - (bb) the member shall demonstrate that the amount required, shall cover that loan,
  - (cc) the member requesting such payment is makes that request for the first time,
  - (dd) the member shall provide proof that he or she is unemployed for six consecutive months,
  - (ee) only one fund may make payment for the loan, in the event that the person is a deferred member in more than one fund, and
  - (ff) no other deductions may be made on the remaining portion of the members pension benefits,
- (f) any amount 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;
- (g) an amount which the employer is liable for under a guarantee furnished in respect of a loan by some other person to the member;
- (h) the member's total accrued benefits, after the date of his or her retirement, or on the date which he or she becomes a deferred member of the fund, for the medical treatment of a terminal ailment or achronic disease in respect of the member, categorised as such by an independent medical practitioner appointed by the fund with the consent of the member:

Provided that the amount paid shall be limited to the amount required for such medical treatment; or

- (i) compensation, including legal costs, recoverable from the member in respect of –
- (i) any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member,
  - (ii) 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,
  - (iii) any amount which the fund has paid or shall 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, whichever is appropriate,
  - (iv) any amount payable in terms of a maintenance order issued by a court, or
  - (v) 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; or
- (j) an amount which the employer is liable under a guarantee furnished in respect of a loan by some other person to the member.

Cap. 29:06

(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 subsection (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*

49.(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 of trustees has caused to be credited to his or her account, less such expenses as such 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) Where 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 of trustees has caused to be credited to his or her account.

#### PART VIII – *Miscellaneous Provisions*

*Applications for extensions, etc.*

50.(1) An application for an extension of the submission date of statutory returns and any other documentation as determined by the Regulatory Authority, shall be considered on a case by case basis.

(2) Notwithstanding subsection (1), the Regulatory Authority shall not grant in excess of two extensions per annum for the submission of statutory returns and any other documentation.

*Right to obtain copies of or to inspect and retain documents*

51.(1) A licensed fund shall give any member, pensioner or any other stakeholder upon a request made by a member, pensioner or stakeholder a copy of –

(a) the rules of the fund; 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 in a 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 an electronic means approved by the member, pensioner or stakeholder.

*Effect of certification of Regulatory Authority on documents*

52. 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.

*Service of process*

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

(2) Where 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 the service upon the Regulatory Authority shall be deemed to be service upon the fund.

*Prohibitions*

54.(1) A person shall not, without the approval of the Regulatory Authority –

- (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, where the name –

- (a) is identical to the name of another retirement fund;
- (b) closely resembles that of another retirement fund such that it is likely to be mistaken for the 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.

(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.

*Investigations and inspections*

55.(1) The Regulatory Authority may conduct an investigation –

(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 has reasonable grounds to suspect 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) When 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 likely to be 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 or documents in the premises.

(5) A person who fails to produce any document or information required, or who prevents an investigator from entering any premises or inspecting including taking such copies as may be required under subsection (4), commits an offence and is liable to a fine not exceeding P50 000.

*Trusteeship of assets*

56.(1) The Regulatory Authority may at any time before or during an investigation under this Act, require a retirement fund to transfer all or 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* 57. 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* 58. 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* 59. A person who contravenes any provision of this Act, where no specific penalty is provided commits an offence and is liable to a fine not exceeding P50 000.

*Regulations* 60. 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* 61. The Regulatory Authority may make administrative rules in relation to the business of a fund.

*Repeal of Cap. 27:03* 62. The Retirement Funds Act (hereinafter referred to as the "repealed Act") is hereby repealed.

*Transitional provision* 63.(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.

(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) Any board of trustees of a fund established under the repealed Act shall continue to be in existence as if established under this Act.

(4) A board of trustees member of a fund appointed under the repealed Act, shall continue to be a board of trustees member as if appointed under this Act.