

RETIREMENT FUNDS ACT, 2022

No. 38



of 2022

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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, funds administrators; and for matters incidental to or connected therewith.

Date of Assent: 29.09.2022

Date of Commencement: ON NOTICE

ENACTED by the Parliament of Botswana.

PART I — *Preliminary*

1. This Act may be cited as the Retirement Funds Act, 2022, and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.

Short title and commencement

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

Interpretation

“accrued benefit” means a benefit that a member has earned based on the membership on the fund that is payable to the member as prescribed in the Income Tax Act;

“actuarial surplus” means (a) – { (b) + (c)}, where —

Cap. 52:01

- (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) retirement consultancy services;
- (b) retirement counselling;
- (c) retirement financial planning; and
- (d) 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;

“auditor” means an auditor registered with the Botswana Institute of Chartered Accountants and the Botswana Accountancy Oversight Authority;

“beneficiary” means a nominee of a member or a dependent 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 Accountancy Oversight Authority” means the Authority established under the Financial Reporting Act;

“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”, other than an employer, in relation to —

- (a) a fund means —
 - (i) a trustee of a governing body,
 - (ii) a principal officer,
 - (iii) a representative in respect of an external fund,
 - (iv) a risk officer,
 - (v) a compliance officer,
 - (vi) an anti-money laundering officer, and
 - (vii) any other senior manager of the fund as approved by the Regulatory Authority; and

Cap. 46:10

Cap. 61:05

- (b) 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 directors,
 - (iii) a person who has the power to appoint another person to be a director or member of a board of directors,
 - (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 administrator,
 - (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, shall not be a controller of a fund administrator;

“curator trustee” means a person who has the care, the control and power of administration of fund assets, including title deeds and securities, in trust and in the name of the fund;

“custodian” means a person approved by the Regulatory Authority responsible for the safe keeping of pension assets in trust on behalf of members;

“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 contribution fund” means a fund in which —

- (a) each member receives a retirement benefit which is not guaranteed and which has a value equal to the balance on the member’s retirement in that member’s individual account; and
- (b) any pension payable on retirement must be fully secured either through an annuity policy owned by the fund or through an annuity policy purchased in the name of the member, after which purchase the fund has no obligation towards the member;

“dependent” means —

- (a) any person to whom a member is liable for maintenance;
 - (b) a factual dependent;
 - (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 fund rules;
- “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 dependent” means a person who was financially dependent on the member at the time of the member’s death;
- “financial services law” has the same meaning assigned to it under the Non-Bank Financial Institutions Regulatory Authority Act;
- “fund” means any scheme or arrangement, whose principal object is to provide a benefit for a person who is or has been a member of the scheme or arrangement, upon retirement on account of age or ill health, or upon a person completing a fixed period of service of not less than five years, whether or not such scheme or arrangement —
- (a) also provides a benefit for dependents 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 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 dependents and beneficiaries of such person upon the person’s death;

“fund rules” means the rules applicable to a fund as approved by the Regulatory Authority, 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 designed to facilitate the preservation of benefits on leaving employment in circumstances other than retirement;

“investment advisor” has the same meaning assigned to it under the Securities Act;

Cap. 56:08

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

“liquidator” means a person appointed to a fund or a fund administrator, in which the fund or fund administrator is being wound up, and who has the responsibility for collecting all assets of the fund or fund administrator and settling all claims against the fund or fund administrator before they are put into dissolution;

“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 whose membership has been terminated in terms of the rules;

“multi-employer fund” means a fund that has more than one participating employer;

“nominee” means a person, other than a dependent, nominated by a member as beneficiary under a fund;

“participating employer” means an employer who participates and contributes in a multi-employer fund;

“pension” means an annuity acquired through a pension fund or an insurance company and pension benefit as determined by the Income Tax Act, which the person would be entitled to on retirement;

“pension fund” means a fund in terms 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 an annuity 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 or keeping records of a fund or fund administrator;

“principal officer” means a person responsible for the daily operations of a fund, and such duties and responsibilities as statutorily specified;

“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 annuity fund” means a pension fund —

- (a) established for the sole purpose of providing life annuities for the members of the fund or annuities for the dependents or nominees of the deceased members; or
- (b) whose fund rules satisfy the requirement of such a fund as defined in the Income Tax Act and in which no employer-employee relationship is required before a person is eligible to become a member;

“retirement date” means the date upon which the member becomes eligible to draw a retirement benefit;

“retirement fund” means any fund provided for purposes of retirement under this Act;

“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;
- “stakeholder” means —
- (a) an employer or employee who participates in a fund; or
 - (b) a member or former member of a fund whom the board of trustees determines should be treated as a stakeholder;
- “sub-fund” means a fund established by a participating 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;
- “switch instruction” means an instruction issued by the board of trustees to asset managers instructing them to move funds already invested from one type of investment to another; 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 the due date.

PART II — *Licensing of Funds*

3. (1) A person shall not carry on the business of a fund without a licence issued by the Regulatory Authority. Prohibition of operating fund without licence
- (2) A person who contravenes this section commits an offence and is liable to a fine of P2 500 for each day the offence occurs, or to imprisonment for a term not exceeding five years, or to both.
4. 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 — Requirement for licensing fund
- (a) three copies of the fund rules; and
 - (b) such fee as may be prescribed.
5. The Regulatory Authority may issue to a person, a licence to carry on the business of a fund if it is satisfied that — Issue of licence
- (a) the fund rules 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 any other conditions as may be prescribed.
6. (1) A fund shall, upon being issued with a licence, become a body corporate capable of suing and being sued in its own name, and of doing or performing all such acts or things as may be necessary or incidental to the exercise of its powers, or the performance of its functions in terms of its rules. Effect of licensing

(2) Notwithstanding anything to the contrary in any written law, the 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.

Fund rules

7. (1) The fund rules 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 determined 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) 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 fund rules.

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

Amendment of
fund rules

(2) A principal officer shall, within 30 days of the passing of the resolution approving an amendment or replacement of the fund rules, submit three copies of the amendment or replacement rules to the Regulatory Authority, and any other documentation or information as may be determined by the Regulatory Authority.

(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 members, as the case may 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.

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

Payment of
contributions

- (a) any contribution that the employer deducts from the employees remuneration, in terms of the fund rules;
- (b) any contribution for which the employer is liable in terms of the fund rules; and
- (c) any outstanding amount due to the member from the employer, including the member's transfer value for which the employer is liable, in terms of the fund rules.

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 license 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 paragraph (ii) of the proviso to section 14 (2);
- (d) the fund submits such reports as the Regulatory Authority may require; and
- (e) the fund is supervised by a regulatory body recognised by the Regulatory Authority.

(3) An external fund shall not admit members resident in Botswana if it is not licensed under this Act.

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

Special provisions relating to beneficiary fund

(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 dependents 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 dependents whose benefits have not been paid after 24 months of the due date.

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

Special provisions relating to preservation fund

(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 45 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) members who have elected to transfer from any fund to a preservation fund, amounts awarded to those members in terms of a court order.

PART III — Governance of Funds and Funds Administrator

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

Board of trustees

(2) Subject to subsection (3) a board of trustees shall have seven or 11 trustees, 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) one shall be a representative of pensioners and at least two shall be independent trustees, and
- (iii) the number of independent trustees does not exceed the collective number of trustees appointed by the members, the employer and sponsor.

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

- (a) exempt any of the following funds from electing trustees, from employers of the funds or their members —
 - (i) a multi-employer fund,
 - (ii) an individual retirement fund,
 - (iii) an external fund,
 - (iv) a preservation fund,
 - (v) a retirement annuity fund, or
 - (vi) a beneficiary fund; or
- (b) permit an individual retirement fund to have less than seven board of trustee members who have been appointed by the sponsor of the fund, subject to approval by 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 an equality of votes:

Provided that —

- (i) where the board of trustees consists of seven 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 trustees appointed by the members shall be present to make a quorum,
- (iii) at least 50 per cent of trustees 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 as determined by the Regulatory Authority.

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

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 fund rules and this Act.

Object of
board of
trustees

- (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 determined 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 of trustees lack sufficient expertise; and
 - (b) adopt and implement, with expert assistance where the board of trustees lack sufficient expertise, an investment policy, communication policy and a risk management policy that complies with such standards as may be determined by the Regulatory Authority.
- (3) A board of trustees shall carry out a board assessment annually or an independent assessor shall carry out a board assessment every three years using the criteria as determined by the Regulatory Authority.

16. (1) A board of trustees shall —

- (a) 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;
- (b) take all reasonable steps to ensure that contributions are paid on time to the licensed fund in terms of this Act;
- (c) 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;
- (d) ensure that the rules, the operation and administration of the licensed fund complies with this Act and other financial services laws;
- (e) 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; and
- (f) appoint and manage service providers who shall perform the functions required by 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 asset managers when appropriate,

Duties of
board of
trustees

- (ii) one or more asset managers, who are competent to implement the investment policy,
- (iii) a custodian, who shall hold the physical assets independently from the fund and any asset 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 32.

(2) The appointment under subsection (1) shall be subject to the following conditions —

- (a) the service provider is licensed to perform the relevant service,
- (b) 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,
- (c) the board of trustees has a contract with the service provider which needs the requirements determined by Regulatory Authority,
- (d) the board of trustees monitors the performance of the service provider in terms of benchmarks as detailed and described in the contract, and
- (e) the board of trustees reviews the appointment of the service provider at least once every three years.

(3) Notwithstanding the provisions of subsection (1) (f), a fund may be permitted to hold and manage investments as may be determined by the Regulatory Authority:

Provided that the fund —

- (i) has the required skills and expertise or engaged an investment advisor when required, and
- (ii) notifies the Regulatory Authority through its annual investment returns.

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 who shall not be a trustee 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 representative in terms of this Act.

(3) A licensed fund or an external fund shall, with the approval of the Regulatory Authority, appoint an acting principal officer or his or her representative within seven days in the absence of the substantive principal officer or his or her representative, or where the principal officer 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 principal officer or his or her representative to ensure that the act is done.

(5) A principal officer 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;
- (b) that may prejudice the interests of its members; or
- (c) that is carried without 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 that knowingly employs a principal officer or his or her representative without the approval of the Regulatory Authority commits an offence and is liable to a fine not exceeding P50 000.

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 fund rules 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.

Duties of
principal
officer

20. (1) A controller who resigns his or her position with a licensed fund or a fund administrator, or whose appointment has been terminated by licensed fund or fund administrator, shall, within 14 days of the resignation or termination, inform the Regulatory Authority of the resignation or termination in writing.

Termination
and resignation
of controllers

(2) A licensed fund or fund administrator shall inform the Regulatory Authority in writing, of the resignation or termination, within three days of the resignation or termination.

(3) A controller who is a principal officer of a licensed fund, or a chief executive officer or a compliance officer of a fund administrator, and who resigns from his or her position or whose appointment is terminated shall, within three days of the resignation or termination, submit to the Regulatory Authority —

(a) a completed form as may be prescribed; and

(b) a report on matters relating to the licensed fund or fund administrator during his or her tenure as a controller.

(4) Any information contained in a report submitted by a controller in terms of subsection (3) (b) 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.

Appointment
of auditor,
actuary, fund
administrator,
custodian,
asset manager
or investment
advisor

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 32 (3) may opt to appoint an actuary.

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

(a) 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 investment advisor 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 compliant 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 investment advisor 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 investment
advisor

22. (1) Where the appointment of an auditor, actuary, fund administrator, custodian, asset manager or investment advisor is terminated or he or she resigns, the auditor, actuary, fund administrator, custodian, asset manager or investment advisor 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 investment advisor of a licensed fund shall not exempt an auditor, actuary, fund administrator, custodian, asset manager or investment advisor 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 investment advisor has a duty 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.

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 such fee as may be prescribed.

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

24. (1) 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 resources to meet the fund administrator's commitment to a fund and to manage the risks which the fund is exposed to.

(2) A person who, for any purposes connected with this Act, produces or gives or causes or knowingly allows to be produced or given, financial statements, reports or any other document that the person knows or ought to have reasonably known to be false in a material respect, is liable to a civil penalty not exceeding P100 000 to be imposed by the Regulatory Authority.

25. (1) A fund administrator shall have a board of directors —

- (a) which shall be independent directors;
- (b) which shall comprise of a number of mixed relevant professionals and skills required to exercise their duties diligently as determined by the Regulatory Authority;
- (c) which shall establish sub-committees that have clearly stated terms of reference, including an audit and risk committee, a remuneration committee and a finance committee;
- (d) which shall have at least four meetings per annum; and
- (e) which shall adopt and implement policies including —
 - (i) Board charter,
 - (ii) code of conduct of the board of directors,

Licensing
requirements
of fund
administrator

Duties of fund
administrator

Governance
of fund
administrator

- (iii) conflict of interest policy,
- (iv) risk management policy,
- (v) fraud policy,
- (vi) Anti-Money Laundering and Combating of financing of terrorism policy,
- (vii) communication policy,
- (viii) training policy,
- (ix) remuneration policy,
- (x) information and communication technology policy,
- (xi) dispute resolution policy and procedures, and
- (xii) procurement policy.

(2) Every fund administrator shall have a compliance and internal audit function.

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

Appointment and termination of service providers by auditor, fund administrator, etc.

26. (1) A fund administrator shall appoint service providers, including an auditor who shall not be an officer of the fund administrator.

(2) Where the appointment of the auditor under subsection (1) is terminated, the auditor and the fund administrator 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 the auditor and the fund administrator believe is the reason for that termination or resignation.

PART IV — *Financial Requirements*

Financial statements by fund administrator

27. (1) A fund administrator shall, within four months after the end of its financial year, submit to the Regulatory Authority the following annual returns, as may be prescribed —

- (a) audited financial statements; and
- (b) the annual return for a fund administrator.

(2) Where the fund administrator is a subsidiary, the fund administrator shall report on its administration services and not on the affairs of the group.

(3) If the Regulatory Authority is not satisfied with any audited annual returns submitted in terms of subsection (1), the Regulatory Authority shall return the audited annual returns, directing the fund administrator to provide further information as it may require.

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

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

(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.

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

Duty to report financial crime

(2) The Regulatory Authority may further set out —

- (a) the 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) the 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.

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

Accounts of 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.

(5) A person who, for any purposes connected with this Act, produces or gives or causes or knowingly allows to be produced or given, financial statements, reports or any other document that the person knows or ought to have reasonably known to be false in a material respect, is liable to a civil penalty not exceeding P100 000 to be imposed by the Regulatory Authority.

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

Holding of assets

- (a) the fund; or
- (b) a custodian 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.

32. (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.

Investigations by actuary

(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.

(3) Where the Regulatory Authority is satisfied that the fund 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.

(4) The Regulatory Authority may vary any condition or cancel any exemption granted in terms of subsection (3).

(5) 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.

(6) Where actuarial surplus referred to in subsection (5) 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

33. (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 has not been submitted, —

- (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 30 days; and
- (b) the fund shall submit to the Regulatory Authority a scheme as directed under paragraph (a), which scheme shall be accompanied by a report prepared by an 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.

34. (1) A fund shall not borrow money in excess of 25 per cent of the previous year's annual contributions, 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;
- (d)** require a fund to take action to remedy any breach of the limits set in paragraph **(c)**; and
- (e)** prohibit any fund from making investments in any high risk jurisdictions as may be determined in accordance with the relevant legislation.

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

- (a)** in the business of an employer or of a related party, 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; 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 portfolios 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 reserves 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

35. (1) The High Court may, on application by the Regulatory Authority, or with the Regulatory Authority's written consent, appoint a person to be a statutory manager of a fund administrator.

(2) The High Court may only make the appointment under subsection (1) —

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

(b) where it appears to the High Court that the fund administrator —
(i) is not complying 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 High Court considers it in the interests of the members of the fund or the clients of the fund administrator to make the appointment.

(3) Subject to subsection (4) the Regulatory Authority may appoint a person to be a statutory manager of a fund administrator where it appears to the Regulatory Authority that —

(a) subsection (2) (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.

(4) An appointment in terms of subsection (3) 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.

(5) The High Court shall confirm the appointment made in terms of subsection (3) 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.

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

Duties of
statutory
manager

36. (1) Where statutory management is granted in respect of a fund administrator, any reference in this Act to a 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 administrator shall —

(a) manage the affairs of the fund administrator to the exclusion of its board of directors or other managers;

(b) have power to repudiate a contract to which the fund administrator is a party, but only if the statutory manager considers the contract detrimental to the interests of the fund or the members of the fund; 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 administrator shall manage the affairs of the fund administrator effectively and shall as soon as practicable, report to the Regulatory Authority —

(a) on the steps to be taken to ensure that the fund administrator —

(i) complies with this Act or financial services laws,

(ii) is financially sound, and

(iii) is not involved in any financial crime; and

(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 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 administrator shall comply with written directions from the Regulatory Authority in relation to his or her functions.

(6) The statutory manager of a 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 35.

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

37. Where a statutory manager is appointed to 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 administrator 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.

38. (1) The Regulatory Authority may appoint a person to be a curator trustee of a fund where it appears to the Regulatory Authority that —

(a) the fund is not complying with this Act or a financial services law;

(b) the fund is, or is likely to be in an unsound financial position;

(c) the fund is, or may be involved in financial crime;

Tenure of
statutory
manager

Appointment
of curator
trustee

- (d) it is necessary to appoint a curator trustee to protect the interests of the fund or the members of the fund; or
 - (e) it is necessary to appoint a curator trustee to protect the stability, fairness, efficiency and orderliness of the retirement funds sector or the financial system.
- (2) The curator trustee of a fund shall —
- (a) manage the affairs of the fund to the exclusion of the board of trustees and management;
 - (b) be entitled to receive remuneration from the fund as determined by the Regulatory Authority; and
 - (c) comply with written directions from the Regulatory Authority in relation to his or her functions.
- (3) The curator trustee of a fund shall manage the affairs of the fund efficiently and shall as soon as practical report to the Regulatory Authority on steps to be taken to ensure that the fund —
- (a) complies with the Act or financial services laws; and
 - (b) is not involved in any financial crime.
- (4) The Regulatory Authority may at any time remove a curator trustee and appoint his or her replacement.
- (5) The curator trustee of a fund shall not be liable for a loss that the fund suffers unless it is established that the loss was caused by the curator trustee's fraud, dishonesty, negligence or wilful failure.

Tenure of curator trustee

39. Where a curator trustee is appointed to a fund, the Regulatory Authority shall ensure that such curator trustee remains appointed until —

- (a) the Regulatory Authority is satisfied that the grounds for making the appointment no longer exist; and
- (b) the Regulatory Authority determines that the provisions of section 40 (1) (c) are applicable to the fund on the basis that the Regulatory Authority considers the fund to be not financially sound and that it is unlikely to return to financial soundness within a reasonable time.

Termination of fund

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

- (a) in terms of the rules; or
- (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), and its assets and liabilities are to be transferred to one or more other funds, the board of trustees shall oversee the process of transfer in terms of Part VI.

Winding up of fund

41. (1) Notwithstanding the fund 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 fund 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 a fund, 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 at 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 (14), 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, submit 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.

42. (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 41 shall apply.

Winding up of
sub-fund

(2) A liquidator shall not be appointed where a sub-fund is liquidated, and the board of trustees shall perform the functions of the liquidator in terms of section 41.

(3) The board of trustees shall perform the functions assigned to the liquidator in terms of section 41 in respect of the assets and liabilities corresponding to the members employed by an employer.

43. The sponsor of an individual retirement fund shall stand in the place of an employer in terms of section 41 (5) and (6):

Winding up
of individual
retirement
fund

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.

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

Liquidation of
licensed fund

- (a) secured creditors shall have preference on the percentage borne by fund on the total assets of the fund at the time the fund borrowed from the creditor, only up to the limit of the borrowing permitted under section 34; 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*

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

Amalgamation
and transfer

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

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

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

46. (1) Notwithstanding any provision of the rules, and unless the stakeholders have in writing waived the requirement for notice, the licensed fund 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.

Notice of
intention
to amalgamate
or transfer

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

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

(3) A licensed fund 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 report 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;
- (f) a notice advising stakeholders of the intended amalgamation or transfer; and
- (g) proof of consent of members.

(4) The Regulatory Authority may, upon receipt of the documents under subsection (3), require additional information from a licensed fund which 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 scheme report required under subsection (3) (c) 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

47. (1) The Regulatory Authority may provide approval 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; and
- (d) any new fund that is created may be licensed in terms of this Act.

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

48. (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 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 as a result of the amalgamation, 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 fund credit 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 determined 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.

Effects of
amalgamation
or transfer

PART VII — *Provisions relating to Pension Benefits*

Benefits not
reducible,
transferrable
or cedable

49. (1) Notwithstanding the rules, and subject to section 53, 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 of 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' Courts 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 dependents of a member or beneficiary or to a guardian or trustee for the benefit of a dependent 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 51, 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

50. 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

51. (1) Subject to section 50, 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 dependents 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 dependents 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 dependent or nominee under this section shall be deemed to be a payment to the dependent 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 dependent 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 dependents and nominees.

52. (1) Notwithstanding section 49, a licensed fund may deduct from a benefit payable to a member or to his or her dependents or nominees —

- (a) in the event of the death of the member —
 - (i) any amount due on the benefit in terms of the Income Tax Act, or
 - (ii) an amount of the benefit to which the member or a beneficiary becomes entitled, in terms of the fund rules;
- (b) 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 is not otherwise reasonably possible to negotiate the repayment or to transfer the loan or the guarantee;
- (c) in the case of a default on the repayment of any loan by a deferred member, having provided proof that he or she is unemployed for six consecutive months, 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;
- (d) any amount due on the repayment of a mortgage loan by a member on the date —

Deductions
from member's
benefits

- (i) of his or her retirement due to medical reasons, or
 - (ii) which he or she becomes a deferred member of the fund, where 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, prior to the purchase of annuity, any additional payment shall not exceed fifty per cent of the member's total benefits,
 - (bb) the member shall demonstrate that his or her accrued benefits will cover the mortgage loan, or
 - (ii) where a person's membership is deferred —
 - (aa) the member shall demonstrate that the amount owed shall be covered by his or her accrued benefits,
 - (bb) the member requesting such payment makes that request for the first time,
 - (cc) the member shall provide proof that he or she is unemployed for six consecutive months,
 - (dd) only one fund may make payment for the mortgage loan, in the event that the person is a deferred member in more than one fund, and
 - (ee) no other deductions may be made on the remaining portion of the member's pension benefits;
- (e) any amount due by the member to his or her employer on the date —
- (i) of his or her retirement, or
 - (ii) which he or she ceases to be a member of the fund, and to which the member has admitted liability in writing in respect of —
 - (aa) a loan granted by the employer to the member,
 - (bb) an amount which the employer is liable under a guarantee furnished in respect of a loan by some other person to the member, or
 - (cc) compensation, including legal costs, recoverable from a member in respect of —
 - (A) any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, or
 - (B) a judgement obtained against the member in any court, which judgement states the amount to be paid by the member, and pay such amount to the employer concerned;

- (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 a chronic 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 50 per cent of the member's total benefits at the time of the deduction; 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.

Cap. 29:06

(2) For the purposes of subsection (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) A member shall be entitled to access only one option of the deduction options provided in terms of subsection (1) (d), (e), (h) or as prescribed in the Regulations.

(4) 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.

(5) A maintenance order issued by a court as provided under subsection (1) (i) (ii) shall take precedence over a decree granted to a spouse of a member as provided under subsection (1) (i)(v).

(6) 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) or (d);
- (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.

Unclaimed
benefits

53. (1) A fund shall have a process for tracing the member, beneficiaries or nominees of unclaimed benefits.

(2) Where a benefit remains unclaimed for a period of not more than 24 months, the fund shall, in a newspaper of wide circulation and through electronic media, publicise the names of the member, beneficiaries and nominees of the unclaimed benefits.

(3) A fund which has any unclaimed benefits shall report such to the Regulatory Authority annually, and shall pay all such benefits listed in the report in a manner and time as may be determined by the Regulatory Authority.

Minimum
benefits

54. (1) The Minister may, by Order published in the *Gazette*, specify the date the minimum benefits shall apply.

(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 determined 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*

55. The Regulatory Authority may, on application, consider and allow an extension of the submission date of statutory returns and any other documentation as may be determined.

Application
for extensions

56. (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 —

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

(a) the fund rules; and

(b) the last audited income and expenditure accounts and balance sheet of the fund.

(2) The rules and audited accounts under subsection (1) may be 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.

57. 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.

Effect of
certification
of Regulatory
Authority on
documents

58. (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.

Service of
process

(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.

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

General
prohibitions

(a) apply to his or her 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.

(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 for a person to object to 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 P250 000.

(5) A fund that conducts a business in contravention of this section commits an offence and is liable to a fine not exceeding P250 000 to be imposed by the Regulatory Authority.

60. (1) The Regulatory Authority may conduct an investigation or inspection —

- (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 or fund administrator 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 or inspections under this Act.

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

(3) A person appointed as an investigator or inspector 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 or inspection —

- (a) an investigator or inspector may require a person to produce such documentation and information as it may require for the purposes of the investigation or inspection, within a stipulated time; or
- (b) an investigator or inspector may enter any premises used or likely to be used by the person referred to under subsection (1), at any reasonable time to inspect or investigate 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 or inspector 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.

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

Enforcement
of rights
of members

62. 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.

Inspection of
documents

63. 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.

Penalties

64. The Regulatory Authority may make administrative rules in relation to the business of a fund and management of a retirement annuity fund.

Administrative
rules

65. 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.

Regulations

66. The Retirement Funds Act (hereinafter referred to as "the repealed Act") is hereby repealed.

Repeal of
Cap. 27:03

67. (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 the repealed Act, shall be deemed to be licensed to carry on a retirement fund business in terms of this Act.

Transitional
and savings
provisions

(2) A person carrying on a 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 trustee, controller or fund administrator of a fund appointed under the repealed Act, shall continue to be a trustee, controller or fund administrator of a fund as if appointed under this Act.

(5) A person carrying on administration services in terms of the repealed Act shall carry on that business subject to the conditions referred to under this Act.

PASSED by the National Assembly this 19th day of August, 2022.

BARBARA N. DITHAPO,
Clerk of the National Assembly.