

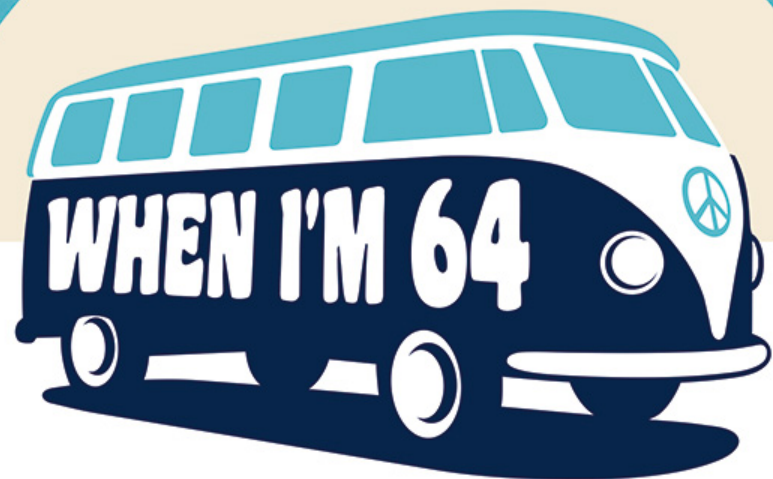
# Regulatory update

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Deputy Executive Officer: Retirement Funds

Deputy Registrar of Pension Funds

Financial Services Board



# Outline

- Review of past processes
  - Cancellations of dormant funds
  - Unclaimed benefits
- Powers granted in terms of 2008 amendments
  - Conditions for the registration of funds
- Powers granted in terms of 2013 amendments
  - Governance Notice
- TCF
- Financial Sector regulation bill



# Cancellation of the registrations of dormant funds

- Dec 2001 Surplus legislation. Approx 15000 funds, of which approx. 13000 wholly underwritten. Thousands dormant. Most valuation exempt. Valuation exemptions withdrawn. **PF 115**, registrar said he would consider bulk 'nil schemes' submitted by underwriters although no provision in PFA for this.
- May 2005 **PF 120**. Said that if all assets and liabilities transferred, must apply for cancellation of the registration of the fund.



# Section 27 of the PFA

## Section 27: Cancellation or suspension of registration

*The registrar shall cancel the registration of a fund -*

- (a) on proof to his satisfaction that the fund has ceased to exist; or*
- (b) . . .*

Registrar's advice well-intentioned but-

- many funds had no boards to make the necessary decisions; and
- the rules of some of the funds required liquidation.



# Cancellation of the registrations of dormant funds

2006

13 132 registered funds

Only approx. 3500 'active'

Project to close the rest (approx. 80% administered by Liberty as a result of acquisitions over the years)



# Cancellation of the registrations of dormant funds

Mar 2007 **PF 126** and **PF 127**– Registrar said-

- Administrator's 'responsible person' could apply to the registrar for appointment of 'authorised representative' of the fund;
- Once appointed, authorised representative could
  - amend rules;
  - determine investment strategy;
  - prepare SAS or 'nil scheme';
  - appoint liquidator ito s28 or apply for cancellation ito s27.



# Cancellation of the registrations of dormant funds

Mar 2007 **PF 126**

- Registrar did not have the power to do this; and
- Probably not wise to appoint administrator nominee alone to decide on, amongst other things-
  - Terms of agreement with administrator
  - Updating and upgrading of records
  - Valuation of assets and liabilities
  - Tracing and payment of UB beneficiaries
  - Selecting UBF and paying UBs to it
- Registrar rightly concerned about costs.  
But solution may not have been appropriate





# Cancellation of the registrations of dormant funds

Before September 2007, section 26 said

- (1) *If in the opinion of the registrar a registered fund is not in a sound financial condition, and if such fund has failed to act in accordance with the provisions of section eighteen, or if such action is necessary as a result of an investigation under section twenty-five, the registrar may apply to court for an order directing that the rules of the fund relating to the appointment, powers, remuneration (if any) and removal from office of the board, or relating to such other matter as the registrar may regard as appropriate, be altered in a manner to be specified by the registrar in such application.*
- (2) *The court shall consider the equitable interests of the members of the fund (or of the several classes of members, if there is more than one such class) and of any other person who has rendered, or who intends to render financial assistance to the fund, and, subject to such considerations as aforesaid, shall make such order as it deems most advantageous to the members of the fund.*
- (3) *Unless the court orders otherwise, the costs of the registrar in or in connection with an application in terms of this section shall be paid by the fund, and shall be a first charge upon the assets of such a fund.'*





# Cancellation of the registrations of dormant funds

From 13 September 2007, section 26 said

- '(2) Where a fund has no properly constituted board contemplated in section 7A and has failed to constitute a board after 90 days' written notice by the registrar, the registrar may, notwithstanding the rules of the fund, at the cost of the fund —*
- (a) appoint so many persons as may be necessary to the board of the fund or appoint so many persons as may be necessary to make up the full complement or quorum of the board; and*
  - (b) assign to such board such specific duties as the registrar deems expedient.*
- (3) A board constituted in terms of subsection (2) holds office until the registrar is satisfied that the fund has constituted a valid board in terms of section 7A and the registrar has relieved the former board in writing of its duties.'*

Counsel has confirmed that this wording did not authorise the appointment of 'section 26(2) trustees'



# Cancellation of the registrations of dormant funds

From 28 February 2014, section 26 says

- (2) *Where a fund has no properly constituted board contemplated in section 7A and has failed to constitute a board after 90 days' written notice by the registrar, or where a fund cannot constitute a board properly or where a board fails to comply with any requirements prescribed by the registrar in terms of section 7A(3) the registrar may, notwithstanding the rules of the fund, at the cost of the fund —*
- (a) *appoint so many persons as may be necessary to the board of the fund or appoint so many persons as may be necessary to make up the full complement or quorum of the board; and*
  - (b) *assign to such board such specific duties as the registrar deems expedient.*
- (3) *A board constituted in terms of subsection (2) holds office until the registrar is satisfied that the fund has constituted a valid board in terms of section 7A and the registrar has relieved the former board in writing of its duties.'*

Does not fix problem for dormant funds - (2) must still be read with (3).



# Counsel's advice

- Appointment of 'section 26 trustees' for dormant funds unlawful.
- Registrar should apply to court for appointments of curators to these funds.
- Proof that a fund has 'ceased to exist' should include-
  - Affidavit by PO, valuator, auditor, if any, that fund has no assets & liabilities.
  - Registrar must check veracity of statement by-
    - Checking own records
    - Compliance visits & inspections if necessary
    - Publish notice in GG and in at least 2 newspapers and at least 2 official languages, allowing at least 30 days for interested persons to object.



# Counsel's advice

- Nothing in the PFA dealing with the 'cancellation of the registration of participating employers'
  - We will ask him for more detailed advice on this.
- Not clear that we were entitled to reverse cancellations made in mistake
  - We will ask him for more detailed advice after we have identified the cancellations made in error and the reasons for them.



# Way forward

- No more appointments of section 26(2) trustees for dormant funds.
- Will consider appointments of curators to groups of dormant funds.
- Only obliged to take steps to remedy defects in processes if they might have resulted in prejudice - We must check our records and those of fund administrators to try to establish whether any such prejudice e.g-
  - Are all assets and liabilities fully accounted for?
  - Were the costs incurred in closure appropriate?
  - Did 'authorised persons' / 'section 26(2) trustees' fulfil fiduciary duties?
  - If assets to provide for UB liabilities transferred to occupational funds, did latter assume liability to pay?



# Way forward re dormant funds

- Termination of participation by employer in umbrella fund –
  - By rule amendment
  - Will probably require statement by valuator for section 30(3) purposes



# Unclaimed benefits – regulation 35(4)

- Regulation 35(4) – establishment of contingency reserve account (CRA) to which shares of surplus for untraced FMs must be allocated and may only be withdrawn on payment.
- Advice from Adv Breitenbach
  - Definitions of CRA and actuarial surplus make it clear that decisions to establish a CRA and on the amount to be allocated to it must be made by fund's board provided those decisions supported by the fund's valuator.
  - Section 15B gives the board of a fund a discretion to allocation surplus shares for untraced FMS to a CRA.
  - Regulation 35(4) inconsistent with these so invalid.





# Unclaimed benefits

NB, however –

- Regulation 35(4) still there until withdrawn or set aside.
- We will be consulting NT on the way to achieve this in an orderly manner.
- Registrar still has the power to reject report on statutory actuarial valuation if, in his opinion, it does not correctly reflect the financial condition of the fund.
- We will be looking at approaches to the matter to be reflected in a guidance circular.



# Unclaimed benefits – transfers to UBFs

Transfers to UBFs not exempt from section 14

- Initially FSB's view that they were a form of benefit payment.
- Directive 2 of 2 December 2008
  - Transfers between valuation exempt funds exempted from s 14 provided members made aware of it, given opportunity to object and had objections properly addressed.
  - This exemption could not have applied to transfers to unclaimed benefits funds because members could not be consulted.



# Unclaimed benefits – transfers to UBFs

## Definition of ‘member’ in section 1

*“**member**”, in relation to -*

*(a) a fund referred to in paragraph (a) or (c) of the definition of “pension fund organization”, means any member or former member of the association by which such fund has been established;*

*(b) a fund referred to in paragraph (b) of that definition, means a person who belongs or belonged to a class of persons for whose benefit that fund has been established,*

*but does not include any person who has received all the benefits which may be due to that person from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund.’*



# Unclaimed benefits – transfers to UBFs

- Transfers to UBFs **not** exempt from section 14
- Directive 6 purported to exempt transfers to UBF from section 14(1) but made exemption subject to consultation conditions.
- Implication:
  - Several transfers have been of no force or effect.
  - We are working on replacement to Directive 6 – will consult on draft new directive before publishing.



# Unclaimed benefits – fiduciary duties

- Legal obligation to try to trace and pay those entitled to unclaimed benefits ('beneficiaries')
  - intend to take more intrusive steps to assess compliance;
  - also want to be more helpful – reviving data base project;
- No legal obligation to transfer liabilities for unclaimed benefits to unclaimed benefits funds ('UBFs')
  - Probably not entitled to transfer those liabilities which accrued before rule amendments allowing transfers to UBFs other than in the context of the closure of the fund
  - Will scrutinise closely decisions to transfer to UBF –
    - Do rules of transferor fund allow it to offload liabilities?
    - Do rules of transferee fund allow it to accept liabilities?



# Context: New powers given to the registrar in December 2008

**Conditions for the registration of funds** (now in terms of section 4 read with section 11 and regulation 30)

- Asked counsel for advice on whether we can compel funds that are already registered to amend their rules to comply with new conditions.
- Answer:
  - Cannot now force existing funds to amend their rules save to the extent necessary for consistency with the law;
  - If the rules of an existing fund prevent compliance with new regulations (eg those to be issued by NT) or prescribed requirements in terms of various sections, must be amended.



# Context: New powers given to the registrar in December 2008

## Conditions for the registration of funds

- Will be asking for amendments to allow us to prescribe requirements with which existing funds must comply.
- In the interim will prepare-
  - Guidance
  - Proposed new standards
  - Model rules

based on 'business model analyses' and more sophisticated approaches to risk-based supervision.





# Context: New powers given to the registrar in February 2013

## Section 7C(2)(f) – duty to comply with such requirements as may be prescribed –

- Asked counsel for advice on scope of registrar's powers.
- Advocates Cockrell and Friedman advised that conferring such broad powers on a person expected to have appropriate expertise is not unconstitutional.
- Although we have not been given explicit 'decisional referents', the registrar's power to prescribe requirements is limited
  - Prescribed requirements may only limit rights if justifiable;
  - In exercising discretion, registrar must only take into account relevant considerations and disregard those that are irrelevant.



# Governance Notice

Taking a while because

- Needed to establish extent of powers;
- To be useful, it must be based on
  - Clear understanding of the legal architecture of funds and the nature of the relationships between stakeholders;
  - Existing law and ways in which it has been violated in relation to governance issues in the past;
  - TCF principles;
- Must separate prescribed requirements and advice.



# Embedding TCF principles

**Outcome 1:** Customers are confident that they are dealing with firms where the fair treatment of customers is central to the firm culture.

**Outcome 2:** Products and services marketed and sold in the retail market are designed to meet the needs of identified customer groups and are targeted accordingly.

**Outcome 3:** Customers are given clear information and are kept appropriately informed before, during and after the time of contracting.

**Outcome 4:** Where customers receive advice, the advice is suitable and takes account of their circumstances.

**Outcome 5:** Customers are provided with products that perform as firms have led them to expect, and the associated service is both of an acceptable standard and what they have been led to expect.

**Outcome 6:** Customers do not face unreasonable post-sale barriers to change product, switch provider, submit a claim or make a complaint.



# Financial Sector Regulation Bill

- **Change to structure of regulation**

- Prudential v Market Conduct/ Conduct of business – to be subject to regulation by separate regulators
  - Other than re retirement funds (for the moment, at least)

- **Changes to methods of supervision**

- Greater consistency in regulation and supervision across sectors – including integrated licensing
- More intensive use of ‘business model’ analysis to refine risk based supervision and the allocation of our resources
- Wider application of the principle of proportionality
- Integrated surveillance and enforcement



# S16(1) of Financial Sector Regulation bill

- '(1) When exercising its powers and performing its duties, a regulatory authority must take into account the need for—
- (a) an appropriate degree of transparency in its decision-making processes;
  - (b) consistency in its conduct;
  - (c) adopting a risk-based approach to supervision;
  - (d) achieving outcomes-based results through the application of a combination of binding principles and rules; and
  - (e) compliance, as appropriate, with international standards and best practice.
- (2) The provisions of subsection (1) may not be interpreted as strict binding legal norms, but rather as general guiding principles allowing such flexibility and deviation as may be reasonable or appropriate in the circumstances of a particular case.
- (3) The Minister may make regulations expanding upon the principles contemplated in subsection (1), including adding new principles.'

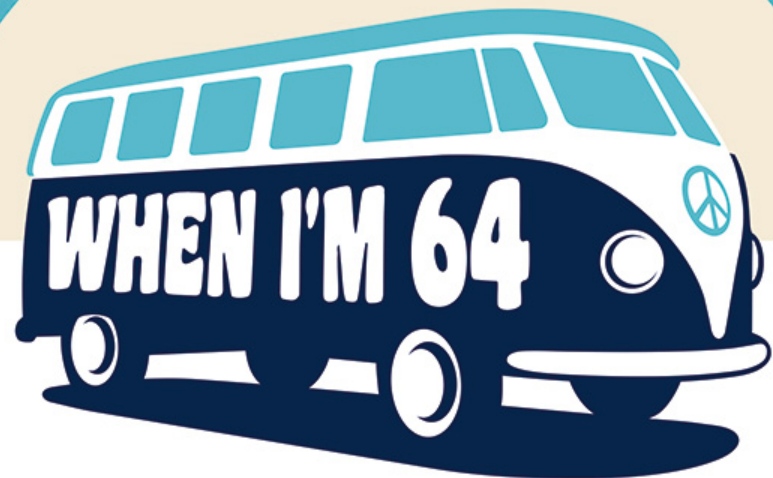


# Final requests to you

- Please blow the whistle when you become aware of substantial breaches of duty by –
  - Your colleagues
  - Me or my colleagues
  - Anyone else.
- Culture of deference can expose us all to risk.
- Disclosure and robust debate are important tools to minimise and manage risks in relation to the work that both you and we are required to do.



# Thank you



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