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R. 183 Pension Funds Act (24/1956): Amendment of Regulation 28 of the Regulations made under section 36 3 34070

GOVERNMENT NOTICE

NATIONAL TREASURY**No. R. 183****4 March 2011****PENSION FUNDS ACT, 1956: AMENDMENT OF REGULATION 28 OF THE
REGULATIONS MADE UNDER SECTION 36**

I, Pravin J Gordhan, Minister of Finance, in terms of section 36(1)(bB) and (c) and section 40C of the Pension Funds Act, 1956 (Act No. 24 of 1956), hereby amend Regulation 28 of the Regulations made under section 36 of the Pension Funds Act and published under Government Notice No. R.98 in *Government Gazette* 162 of 26 January 1962, as set out in the Schedule.

An explanatory memorandum regarding the amendment of Regulation 28, and a matrix recording public comments made on the draft Amendment of Regulation 28 that was published on 2 December 2010 draft are also published. This Amendment to Regulation 28 and the supporting documents referred to above are also available on the National Treasury and Financial Services Board websites - www.treasury.gov.za and www.fsb.co.za.

Dated this 22nd day of February, 2011

PRAVIN J GORDHAN 
MINISTER OF FINANCE

SCHEDULE

Definition

1. In these regulations, "the Regulations" means the Pension Fund Regulations published under Government Notice No. R.98 in Government Gazette 162 of 26 January 1962, as amended by Government Notice No. GN R2144 published in Government Gazette 9437 of 28 September 1984, Government Notice No. R1790 published in Government Gazette 9892 of 16 August 1985, Government Notice No. R1037 published in Government Gazette 10249 of 28 May 1986, Government Notice No. R232 published in Government Gazette 10601 of 6 February 1987, Government Notice No. R1452 published in Government Gazette 11992 of 7 July 1989, Government Notice No. R1920 published in Government Gazette 12079 of 1 September 1989; Government Notice No. R2361 published in Government Gazette 13536 of 27 September 1991, Government Notice No. R201 published in Government Gazette 14572 of 12 February 1993, Government Notice No. R2324 published in Government Gazette 15312 of 10 December 1993, Government Notice No. R141 published in Government Gazette 15453 of 28 January 1994, Government Notice No. R1838 published in Government Gazette 16833 of 24 November 1995, Government Notice No. R1677 published in Government Gazette 17500 of 18 October 1996, Government Notice No. R801 published in Government Gazette 18978 of 19 June 1998, Government Notice No. R1020 published in Government Gazette 19131 of 14 August 1998, Government Notice No. R1154 published in Government Gazette 19225 of 11 September 1998, Government Notice No. R1218 published in Government Gazette 19269 of 25 September 1998, Government Notice No. R1644 published in Government Gazette 19596 of 18 December 1998; Government Notice No. R853 published in Government Gazette 20267 of 9 July 1999, Government Notice No. R896 published in Government Gazette 21545 of 8 September 2000, Government Notice R337 published in Government Gazette 22210 of 6 April 2001, Government Notice No. R100 published in Government Gazette 23080 of 1 February 2002, Government Notice No. R1037 published in Government Gazette 23689 of 1 August 2002; General Notice No. 33 published in Government Gazette 24264 of 24 January 2003, Government Notice No. R 558 published in Government Gazette 24780 of 22 April 2003, Government Notice No. R1739 published in Government Gazette 25776 of 28 November 2003,

Government Notice No. R1355 published in Government Gazette 27012 of 19 November 2004, Government Notice No. R 1105 published in Government Gazette 28226 of 14 November 2005, Government Notice No. R491 published in Government Gazette 28884 of 29 May 2006, Government Notice No. R843 published in Government Gazette 29139 of 18 August 2006, Government Notice No. R1217 published in Government Gazette 29446 of 1 December 2006, Government Notice No. R73 published in Government Gazette 31837 of 4 February 2009.

Amendment of regulation 28 of the Regulations

2. Regulation 28 of the Regulations is hereby amended, by the substitution for regulation 28 of the following regulation:

“28. Asset spreading requirements

Preamble

A fund has a fiduciary duty to act in the best interest of its members whose benefits depend on the responsible management of fund assets. This duty supports the adoption of a responsible investment approach to deploying capital into markets that will earn adequate risk adjusted returns suitable for the fund’s specific member profile, liquidity needs and liabilities. Prudent investing should give appropriate consideration to any factor which may materially affect the sustainable long-term performance of a fund’s assets, including factors of an environmental, social and governance character. This concept applies across all assets and categories of assets and should promote the interests of a fund in a stable and transparent environment.

Definitions

(1) In this regulation: –

“**Act**” means the Pension Funds Act, 1956 (Act No. 24 of 1956), and any word or expression to which a meaning is assigned in the Act is assigned to it in this regulation, unless otherwise defined;

“**collective investment scheme**” has the meaning assigned to it in section 1 of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002);

“credit ratings” means credit ratings issued by a credit rating agency as may be prescribed;

“derivative instrument” has the meaning assigned to it in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004);

“exchange” means: -

- (a) an exchange licensed under section 10 of the Securities Services Act, 2004 (Act No. 36 of 2004);
- (b) any other exchange that is a full member of the World Federation of Exchanges; or
- (c) where a fund invests in a collective investment scheme, such an exchange as is referred to in Section 45(b)(ii) of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002);

“fair value” has the meaning assigned to it in financial reporting standards and includes any other conditions as may be prescribed;

“financial reporting standards” has the meaning assigned to it in the Companies Act, 2008 (No. 71 of 2008);

“foreign asset” means an asset that is deemed foreign by the South African Reserve Bank for its reporting purposes, and subject to conditions as may be prescribed;

“foreign bank” means a bank that is not a South African bank and is domiciled, registered and supervised as a bank outside of South Africa;

“fund member policy” has the meaning assigned to it in Part 5A of the Regulations issued under the Long-term Insurance Act;

“fund of hedge funds” means a portfolio that invests only in hedge funds, but may also hold notes, coins, and a balance or deposit in a savings, current or money market account with a South African bank or a foreign bank, and subject to conditions as may be prescribed;

“fund of private equity funds” means a portfolio that invests only in private equity funds, but may also hold notes, coins, and a balance or deposit in a savings, current or money market account with a South African bank or a foreign bank, and subject to conditions as may be prescribed;

“hedge fund” means an asset: -

- a) which uses any strategy or takes any position that could result in the portfolio incurring losses greater than its fair value at any point in time, and which

strategies or positions include but are not limited to leverage and net short positions;

- b) managed by a person licensed as a hedge fund Financial Services Provider as defined in the Code of Conduct for Administrative and Discretionary Financial Service Providers, 2003, or if a foreign hedge fund managed by a person licensed as a Category I Financial Services Provider that is authorized to render financial services on securities and instruments as defined in the Determination Of Fit And Proper Requirements For Financial Services Providers, 2008; and
- c) subject to conditions as may be prescribed;

“investment policy statement” means a document which, at least: -

- a) describes a fund’s general investment philosophy and objectives as determined by its liability profile and risk appetite;
- b) addresses the principles referred to in subregulation (2)(c); and
- c) complies with conditions as may be prescribed;

“Islamic debt instrument” means a bond based on the ownership of an underlying immovable property or a tangible asset or portfolio of immovable properties or tangible assets, governed by Shari’ah rules, and that is issued by: –

- a) the Government of the Republic;
- b) the South African Reserve Bank;
- c) any public entity listed in the Public Finance Management Act, 1999 (Act No. 1 of 1999);
- d) a South African bank; or
- e) a foreign bank

that is negotiable and in respect of which the title to the underlying property or asset or portfolio of properties and assets is vested in a special purpose vehicle that derives its income from commercial activities related to that property, asset or portfolio;

“Islamic liquidity management financial instrument” means a financial instrument, governed by Shari’ah rules, issued by a South African bank or a foreign bank: –

- a) that is negotiable; and
- b) in respect of which ownership of the underlying tangible asset or assets passes from a fund to a third party within seven business days from the date

of purchase thereof, and at which purchase date the future sale price of the tangible asset or assets is fixed notwithstanding any increase or decrease in the fair value thereof;

“listed” means to be compliant with the listings and disclosure requirements of an exchange and any other condition as may be prescribed;

“Long-term Insurance Act” means the Long-term Insurance Act, 1998 (Act No. 52 of 1998);

“long-term insurer” means a person registered or deemed to be registered as a long-term insurer in terms of the Long-term Insurance Act;

“pension preservation fund” has the meaning assigned to it in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962);

“PostBank” means the SA Post Office Limited established pursuant to section 3 the Post Office Act, 1958 (Act No. 44 of 1958), and the South African Postbank Limited Act, 2010 (Act No. 9 of 2010);

“prescribed” means prescribed by the Registrar by notice on the official website, as defined in section 1 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002) of the Financial Services Board, unless notice in the *Gazette* is specifically required under a provision of the Act;

“private equity fund” means a managed pool of capital that:

- a) has as its main business the making of equity, equity orientated or equity related investments in unlisted companies to earn income and capital gains;
- b) is not offered to the public as contemplated in the Companies Act, 2008 (No. 71 of 2008);
- c) is managed by a person licensed as a discretionary Financial Services Provider as defined in the Code of Conduct for Administrative and Discretionary Financial Service Providers, 2003, or if a foreign private equity fund managed by a person licensed as a Category I Financial Services Provider that is authorized to render financial services on securities and instruments as defined in the Determination Of Fit And Proper Requirements For Financial Services Providers, 2008; and
- d) is subject to conditions as may be prescribed;

“property company” means a company –

- a) of which 75% or more of the fair value of its assets consists of immovable property, irrespective of whether such property is held directly by that

company as registered owner, or indirectly through ownership of the shares or the exercise of control over another company that is the registered owner of the property; or

- b) of which 75% or more of its income is derived from investments in immovable property, or from an investment in a company of which 75% or more of the income of that company is derived from investments in immovable property;

“provident preservation fund” has the meaning assigned to it in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962);

“reporting period” means the financial year determined in the rules of a fund;

“South African bank” means a bank or branch as defined in and registered under the Banks Act, 1990 (Act No. 94 of 1990), a mutual bank as defined and registered under in the Mutual Banks Act, 1993 (Act No. 124 of 1993), a cooperative bank as defined in the Cooperative Banks Act, 2007 (Act No. 40 of 2007), or the PostBank.

Principles

(2)(a) A fund must at all times comply with the limits as set out in this regulation;

(b) A fund must have an investment policy statement, which must be reviewed at least annually.

(c) A fund and its board must at all times apply the following principles:-

- (i) promote the education of the board with respect to pension fund investment, governance and other related matters;
- (ii) monitor compliance with this regulation by its advisors and service providers;
- (iii) in contracting services to the fund or its board, consider the need to promote broad-based black economic empowerment of those providing services;
- (iv) ensure that the fund’s assets are appropriate for its liabilities;
- (v) before making a contractual commitment to invest in a third party managed asset or investing in an asset, perform reasonable due diligence taking into account risks relevant to the investment including, but not limited to, credit, market and

liquidity risks, as well as operational risk for assets not listed on an exchange;

- (vi) in addition to (v), before making a contractual commitment to invest in a third party managed foreign asset or investing in a foreign asset, perform reasonable due diligence taking into account risks relevant to a foreign asset including but not limited to currency and country risks;
- (vii) in performing the due diligence referred to in (v) and (vi), a fund may take credit ratings into account, but such credit ratings should not be relied on in isolation for risk assessment or analysis of an asset, should not be to the exclusion of a fund's own due diligence, and the use of such credit ratings shall in no way relieve a fund of its obligation to comply with all the principles set out in paragraph 2(c);
- (viii) understand the changing risk profile of assets of the fund over time, taking into account comprehensive risk analysis, including but not limited to credit, market, liquidity and operational risk, and currency, geographic and sovereign risk of foreign assets; and
- (ix) before making an investment in and while invested in an asset consider any factor which may materially affect the sustainable long term performance of the asset including, but not limited to, those of an environmental, social and governance character.

(d) With the appointment of third parties to perform functions which are required to be performed in order to comply with the principles in (c) above, the fund retains the responsibility for compliance with such principles.

Asset limits

(3)(a) A fund must only hold assets and categories of assets referred to in Table 1 and must comply with the limits set out in this regulation.

(b) Any portion of a fund's total assets associated with a specific category of members, or a specific member where the fund provides individual member choice, must comply with the limits in this regulation.

(c) Notwithstanding (a) and (b), the portion of the total assets of a retirement annuity fund, pension preservation fund or provident preservation fund that is associated with a fund member policy, or with another contractual arrangement between the member and the fund relating exclusively to the fund's liability to a particular member (or to the surviving spouse, children, dependants or nominees of the member) in terms of the rules of the fund, entered into before 1 April 2011, need not comply with the limits set out in this regulation until: -

- (i) the contractual terms relating to the amount or frequency of premiums or contributions payable in terms of the policy or other contractual arrangement are amended, including where an additional amount over and above any regular contractual premium or contribution is contributed to the policy or arrangement; or
- (ii) any change is made to the category of underlying assets held in respect of the policy or arrangement.

(d) A fund must not invest or contractually commit to invest in an asset, including a hedge fund or private equity fund, where the fund may suffer a loss in excess of its investment or contractual commitment in the asset. This does not preclude a fund from investing in derivative instruments subject to subregulation (7). Hedge funds and private equity funds that may expose the fund to a liability must be held in a limited liability structure.

(e) Assets and categories of assets referred to in Table 1 must be calculated at fair value for reporting purposes.

(f) The aggregate exposure to assets specified in the following items of Table 1 must not exceed 35 percent of the aggregate fair value of the total assets of a fund: -

- (i) item 2.1(e)(ii): Other debt instruments not listed on an exchange;
- (ii) item 3.1(b): Preference and ordinary shares in companies, excluding shares in property companies, not listed on an exchange;
- (iii) item 4.1(b): Immovable property, preference and ordinary shares in property companies, and linked units comprising shares linked to debentures in property companies, not listed on an exchange; and

- (iv) item 8: Hedge funds, private equity funds and any other asset not referred to in this schedule.

(g) The aggregate exposure to assets specified in the following items of Table 1 must not exceed 15 percent of the aggregate fair value of the total assets of a fund: -

- (i) item 3.1(b): Preference and ordinary shares in companies, excluding shares in property companies, not listed on an exchange; and
- (ii) item 8.1(b): Private equity funds.

(h) The aggregate exposure by a fund to an issuer or entity by the fund specified in items 1.1 and 2.1(c) of Table 1, irrespective of the limits referred to in Column 1 of Table 1, must not exceed 25 percent of the aggregate fair value of the total assets of the fund.

(i) The aggregate exposure to foreign assets, referred to in Column 1 of Table 1 and expressed as a percentage, must not exceed the maximum allowable amount that a fund may invest in foreign assets as determined by the South African Reserve Bank, or such other amount as may be prescribed.

(j) Notwithstanding paragraphs (a)-(i), the limits set out in this regulation may be exceeded where the excess is due to a change in the fair value or characteristic of an asset, and not as a result of discretionary transacting either by the fund or on the fund's behalf, provided that where a fund exceeds any limit: -

- (i) such fund must inform the Registrar without delay of the limit being exceeded, including the reasons for such excess;
- (ii) such fund must not, for as long as the excess exists, make any further investments or contractual commitments to invest in those assets or categories of assets; and
- (iii) the board must ensure compliance with the relevant limits within 12 months from the date of the excess arising or such other period as determined by the Registrar.

Look-through

(4)(a) A fund must not utilise any asset to circumvent the limits as set out in this regulation and, where an asset is made up of underlying assets, the fund must include and disclose the underlying assets in the category in Table 1 to which the economic exposure of the underlying assets relate.

(b) Notwithstanding (a), where the fair value of an asset comprises less than 5 percent of the aggregate fair value of the assets of the fund, then the fund need only disclose the categories of assets specified in Table 1, and not each underlying asset.

(c) Notwithstanding (a) and (b), any direct or indirect exposure to a hedge fund or private equity fund must be disclosed as an investment into a hedge fund or private equity fund as the case may be, and the fund need not apply the look-through principle in respect of the underlying assets of a hedge fund or private equity fund.

(d) Notwithstanding (b) and (c), and in accordance with conditions set by the South African Reserve Bank, when applying look-through any direct or indirect exposure to a foreign asset must be disclosed as a foreign asset.

Borrowing

(5)(a) A fund must not borrow.

(b) Notwithstanding (a): -

- (i) a fund may only borrow money for bridging purposes to maintain sufficient liquidity to meet its operational requirements;
- (ii) the aggregate of any loans for bridging purposes must not, throughout the financial year as determined in the rules of a fund, exceed 50 percent of the gross income of the fund (income of the fund before payment of management fees and administration fees) during the preceding financial year;
- (iii) any loan for bridging purposes must be repaid within 12 months of entering into the loan; and
- (iv) any loan for bridging purposes must not be subject to an early settlement penalty.

(c) A fund may as collateral for default on a loan referred to in paragraph (b) cede a proportionate share of its assets to the lender.

Securities lending

(6) A fund may engage in securities lending subject to conditions as prescribed.

Derivative instruments

(7) Notwithstanding subregulation 3(d), a fund may invest in derivative instruments subject to conditions as prescribed.

Reporting and exclusions

(8)(a) The Registrar may prescribe the format, content and any other particulars in respect of the disclosure of compliance with this regulation.

(b) In applying the limits set out in this regulation, subject to such prescribed reporting and disclosure, a fund may exclude the following assets or categories of assets: -

- (i) participatory interests in a collective investment scheme, in respect of which a fund obtained a certificate issued by the scheme at the end of the financial year of the fund, confirming that the assets of the scheme relevant to the fund have complied with the limits as set out in this regulation, provided that:
 - (aa) the auditor of the scheme confirms the accuracy of the certificate at the financial year end of the scheme; and
 - (bb) the confirmation is made available to the fund on request;
- (ii) a linked policy as defined in the Long-term Insurance Act, in respect of which a fund obtained a certificate issued by the long-term insurer at the end of the financial year of the fund, confirming that the assets held by the insurer in respect of its net liabilities under the said policy have complied with the limits as set out in this regulation, provided that:
 - (aa) the auditor of the insurer confirms the accuracy of the certificate at the financial year end of the insurer; and
 - (bb) the confirmation is made available to the fund on request;
- (iii) a long-term policy as defined in the Long-term Insurance Act, other than a policy referred to in paragraph (ii) above, that guarantees or partially guarantees policy benefits and in respect of which a fund obtained a certificate issued by the statutory actuary of the long-term insurer that the guarantee or partial guarantee is consistent with guidance issued by the Registrar of Long-term Insurance, under the Long-term Insurance Act, in

respect of what constitutes a guarantee or partial guarantee for purposes of this sub-regulation, provided that:

- (aa) the auditor of the insurer confirms the accuracy of the certificate at the financial year end of the insurer; and
 - (bb) the confirmation is made available to the fund on request; and
- (iv) an asset issued by an entity that is regulated by the Financial Services Board, in respect of which a fund obtained a certificate issued by the auditor of the issuer of the asset at the end of the financial year of the fund, confirming that the underlying assets in respect of such asset have complied with the limits as set out in this regulation, and subject to conditions as may be prescribed;

Exemptions

(9) The Registrar may on written application by a fund or in general, exempt a fund, or categories, types or kinds of funds, from all or any of the provisions of this regulation, subject to conditions that the Registrar may impose.

TABLE 1

		Column 1	Column 2	
Item	Categories of assets		Limits being the maximum percentage of aggregate fair value of total assets of fund	
			Per issuer/entity, as applicable	For all issuers/entities
1.	CASH			100%
1.1	Notes and coins; any balance or deposit in an account held with a South African bank; A money market instrument issued by a South African bank including an Islamic liquidity management financial instrument; Any positive net balance in a margin account with an exchange; and Any positive net balance in a settlement account with an exchange, operated for the buying and selling of assets.		25%	100%
1.2	Any balance or deposit held with a foreign bank; A money market instrument issued by a foreign bank including an Islamic liquidity management financial instrument;		5%	
2.	DEBT INSTRUMENTS INCLUDING ISLAMIC DEBT INSTRUMENTS			100% for debt instruments issued by or guaranteed by the Republic, otherwise 75%
2.1	Inside the Republic and foreign assets			
	(a)	Debt instruments issued by, and loans to, the government of the Republic, and any debt or loan guaranteed by the Republic		100%
	(b)	Debt instruments issued or guaranteed by the government of a foreign country	10%	
	(c)	Debt instruments issued or guaranteed by a South African bank against its balance sheet: -		75%
	(i)	listed on an exchange with an issuer market capitalisation of R20 billion or more, or an amount or conditions as prescribed	25%	

	(ii)	listed on an exchange with an issuer market capitalisation of between R2 billion and R20 billion, or an amount or conditions as prescribed	15%	
	(iii)	listed on an exchange with an issuer market capitalisation of less than R2 billion, or an amount or conditions as prescribed	10%	
	(iv)	not listed on an exchange	5%	25%
(d)		Debt instruments issued or guaranteed by an entity that has equity listed on an exchange, or debt instruments issued or guaranteed by a public entity under the Public Finance Management Act, 1999 (Act No. 1 of 1999) as prescribed: -	10%	50%
	(i)	listed on an exchange	10%	50%
	(ii)	not listed on an exchange	5%	25%
(e)		Other debt instruments: -	5%	25%
	(i)	listed on an exchange	5%	25%
	(ii)	not listed on an exchange	5%	15%
3.	EQUITIES			75%
3.1	Inside the Republic and foreign assets			
(a)		Preference and ordinary shares in companies, excluding shares in property companies, listed on an exchange: -		75%
	(i)	issuer market capitalisation of R20 billion or more, or an amount or conditions as prescribed	15%	
	(ii)	issuer market capitalisation of between R2 billion and R20 billion, or an amount or conditions as prescribed	10%	
	(iii)	issuer market capitalisation of less than R2 billion, or an amount or conditions as prescribed	5%	
(b)		Preference and ordinary shares in companies, excluding shares in property companies, not listed on an exchange	2.5%	10%

4.	IMMOVABLE PROPERTY		25%
4.1	Inside the Republic and foreign assets		
	(a)	Preference shares, ordinary shares and linked units comprising shares linked to debentures in property companies, or units in a Collective Investment Scheme in Property, listed on an exchange:-	25%
	(i)	issuer market capitalisation of R10 billion or more, or an amount or conditions as prescribed	15%
	(ii)	issuer market capitalisation of between R3 billion and R10 billion, or an amount or conditions as prescribed	10%
	(iii)	issuer market capitalisation of less than R3 billion, or an amount or conditions as prescribed	5%
	(b)	Immovable property, preference and ordinary shares in property companies, and linked units comprising shares linked to debentures in property companies, not listed on an exchange	5% 15%
5.	COMMODITIES		10%
5.1	Inside the Republic and foreign assets		
	(a)	Kruger Rands and other commodities listed on an exchange, including exchange traded commodities: -	10%
	(i)	gold	10%
	(ii)	each other commodity	5%
6.	INVESTMENTS IN THE BUSINESS OF A PARTICIPATING EMPLOYER INSIDE THE REPUBLIC IN TERMS OF: -		
	(a)	section 19(4) of the Pension Funds Act	5%
	(b)	To the extent it has been allowed by an exemption in terms of section 19(4A) of the Pension Funds Act	10%
7.	HOUSING LOANS GRANTED TO MEMBERS IN ACCORDANCE WITH THE PROVISIONS OF SECTION 19(5)		95%

8.	HEDGE FUNDS, PRIVATE EQUITY FUNDS AND ANY OTHER ASSET NOT REFERRED TO IN THIS SCHEDULE			15%
8.1	Inside the Republic and foreign assets			
	(a)	Hedge funds		10%
		(i)	Funds of hedge funds	5% per fund of hedge funds
		(ii)	Hedge funds	2.5% per hedge fund
	(b)	Private equity funds		10%
		(i)	Funds of private equity funds	5% per fund of private equity funds
		(ii)	Private equity funds	2.5% per private equity fund
	(c)	Other assets not referred to in this schedule and excluding a hedge fund or private equity fund		2.5%

Effective date

3. This regulation comes into effect on 1 July 2011, provided that transitional arrangements may be prescribed.



**EXPLANATORY MEMORANDUM
ON THE FINAL
REGULATION 28 THAT GIVES EFFECT TO SECTION 36(1)(bB) OF THE
PENSION FUNDS ACT 1956**

23 FEBRUARY 2011

[W.P. — '11]

FINAL REGULATION 28 EXPLANATORY MEMORANDUM

REGULATION 28 THAT GIVES EFFECT TO SECTION 36(1)(bB) OF THE
PENSION FUNDS ACT 1956

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FINAL REGULATION 28 EXPLANATORY MEMORANDUM

I. INTRODUCTION

Section 36(1)(bB) of the Pension Funds Act, No 24 of 1956, empowers the Minister of Finance to make regulations limiting the amount and the extent to which a pension fund may invest in particular assets. Of the R5.2 trillion total household savings in South Africa, Regulation 28 currently applies to all private retirement fund assets worth R1.1 trillion, and may be extended to the Government Employees Pension Fund (capturing an addition R1 trillion in assets).

The aim of retirement fund investment regulation is to ensure that the savings South Africans contribute towards their retirement is invested in a prudent manner that not only protects the retirement fund member, but is channelled in ways that achieve economic development and growth.

To achieve this, rules governing retirement fund investment should allow for inflation-beating capital growth for younger members and inflation-matching income for older and retired members. This can be reflected through the right mix of low risk-return "safe" assets with higher risk-return innovative products. The rules should likewise strike a balance between regulatory paternalism and empowering those entrusted with the management of retirement fund assets to do due diligence and make decisions of what investments are most appropriate for their fund's particular liability and liquidity profile.

An important consideration is the level of expertise on boards of trustees and their ability not only to make investment decisions, but also to delegate certain tasks (but never their ultimate responsibility) to advisors like asset managers, asset consultants and risk consultants. To the extent that trustees are inadequately informed of investment and liquidity requirements, governance, and risk management, the regulation must give stronger direction through rules rather than guiding principles.

II. PROCESS

The National Treasury released a first draft Regulation 28 for public comment on 17 February 2010. After deliberating on comments received on this draft, a second draft was released after the 2010 MTBPS on 2 December. Another round of public comments and industry engagement followed and has culminated in this final Regulation 28.

The feedback received from the December 2010 draft was overwhelmingly positive and mostly proposing technical refinements, although important issues were put forward, namely:

- The proposed treatment of cash and debt instruments could artificially restructure the market in a way which could undermine liquidity management by a fund.
- Debt limits proposed remain perhaps overly strict and could be relaxed in certain controlled instances.
- Limits on alternative investments, and unlisted equity in particular, were likewise considered overly strict in a manner that could impede investment into this pro-development funding channel.
- Investment into Africa, while better facilitated, could be further promoted to support economic growth in the region and the positioning of South Africa as a regional financial centre.

The National Treasury has in response brought about several changes which we hope improves the December 2010 draft. The Regulation now better recognises and promotes the responsibility of funds and boards of trustees towards sound retirement fund investment. It expands the allowance for debt issued by listed or regulated entities. This supports a stronger corporate debt market and addresses the bank structural funding mismatch between short-term borrowing and long-term lending, whilst crucially still protecting retirement funds and their member's savings. The Regulation better enables investment into unlisted and alternative assets to support economic development that may be funded through such capital-raising channels. Investment into Africa is likewise supported through providing for alternative ways of accessing this market in a responsible way. Importantly, the Regulation continues to better align retirement fund regulation with other government policy objectives like socially responsible investments and transformation. These revisions are explained in greater detail in Part V of this Explanatory Memorandum.

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III. BACKGROUND

The key reasons to update Regulation 28 are:

- It references other Acts and regulations that have been amended or substantially altered since 1998.
- There is inconsistency in the application of definitions, asset categories and the structure of limits between retirement funds, insurers and other investment funds.
- The rules-based approach to diversification neglects to guide retirement fund trustees as to what investment strategy would be appropriate for the specific nature and obligations of their fund.
- There are significant loopholes and many retirement funds have been able to circumvent the rules.
- New investment channels are not explicitly accommodated nor expressly prohibited, exposing funds to unregulated entities and behaviour.
- Increased foreign exposure to retirement funds brought about through the relaxation of exchange controls, while good for investment diversification, requires a specialised knowledge by trustees and fund advisors.
- The exclusion from Regulation 28 of insurance policies with any form of a guarantee, irrespective how minimal, has allowed insurers to offer products to retirement funds that systematically exceed the asset limits and yet give minimal underwriting protection.
- The limits may encourage a “herd” mentality amongst asset managers and prevent funds from making what may be appropriate investments into, for example, alternative investments or structured products.
- Regulation 28 applies only to a fund as a whole and therefore may overly expose an individual member to a high risk asset category, or alternatively mean that a member cannot invest in an asset suited to his or her portfolio because the aggregate limit for the retirement fund is already reached.
- Credit risk may be an issue as assets within an asset category attract the same limits irrespective of their credit-risk profile.

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- There is no provision for Islamic-compliant retirement funds to diversify risk through debt (and therefore interest earning) equivalent instruments.

IV. THE CURRENT REGULATION

Regulation 28 prescribes maxima for various types of investment that may be made by a retirement fund. The maxima relate to the fair value of the assets of the fund under the direct control of the trustees, and exclude from consideration insurance policies that (i) provide any form of guarantee; (ii) where performance is linked to the performance of underlying assets and the investment of the underlying assets conforms to the requirements of regulation; and (iii) collective investment schemes which conform to the requirements of Regulation 28.

The prevailing maxima are broadly:

- Not more than 75 percent may be invested in equities.
- Not more than 25 percent may be invested in property.
- Not more than 90 percent may be invested in a combination of equities and property.
- Not more than 5 percent may be invested in the sponsoring employer.
- Not more than 15 percent may be invested in a listed equity with a defined large market capitalisation, and not more than 10 percent in any other single equity stock.
- Not more than 20 percent may be invested with any single bank.
- Not more than 15 percent may be invested off-shore, although increased foreign limits by the South African Reserve Bank are accommodated by the Registrar of Retirement Funds on an application basis.
- Not more than 2,5 percent may be invested in "other assets," which are not specified.

There are no restrictions on investments into bank issued money-market instruments or RSA Government issued bonds.

Derivative instruments are not defined, leaving them to fall within the category of "other assets". No guidance is given as to how derivatives may be used.

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Regulation 28 does not entrench a "look-through" principle to report on underlying assets backing an investment.

There is provision for the Registrar to exempt funds from some or all of these maxima on prior written application. It was on this basis that the Registrar adjusted foreign exposure limits for retirement funds in line with revised exchange control limits.

V. EXPLANATION OF THE NEW AND FINAL REGULATION 28

1. DEFINITIONS

Building on the Budget 2010 and December drafts of the regulation, definitions have been refined to mitigate the risk of regulatory avoidance, better support the governing limits and requirements, and take account of the changing investment landscape. In this regard, derivatives, hedge funds and private equity funds are explicitly defined and referenced in the Regulation. The definition for a property company is tightened to ensure that these entities more closely reflect the risk-return profile related to rental income rather than property development or other property related services. More generally, references are updated to reflect changes in the exchange control environment, as well as other relevant governing legislation like the Collective Investment Schemes Control Act of 2002 and the Security Services Act of 2004.

2. PREAMBLE AND PRINCIPLES

A preamble frames the Regulation. It highlights the fiduciary responsibility of a retirement fund's board to invest members' savings in a way that promotes the long-term sustainability of the asset values when taking into account environmental, social and governance (ESG) issues. Read together with the principles, the preamble represents a new approach to Regulation 28, and better guides trustees to consider what investment strategy would be appropriate for the specific nature and obligations of their fund. Recognition is given to the fact that an overly conservative investment strategy (dominated for example by cash and non inflation-linked bonds) can be as damaging to long-term savings as one that is overly exposed to perceived risky assets.

In the context of approximately 3 500 active retirement funds (recently consolidated down from 13 000 funds) and a general lack of investment expertise among trustees, the Regulation remains primarily rules-based. However principles are introduced into the Regulation to strengthen the investment decision making processes, and improve the transparency and accountability to a fund's members and the Registrar. In effect these

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principles, as captured through an Investment Policy Statement (IPS), should inform a fund's investment approach related to the aspects identified in the Regulation. These include:

- Promoting relevant trustee education.
- Monitoring compliance by the fund and its agents.
- Ensuring asset/liability matching by the fund.
- Performing appropriate due diligence on investments, making sure not to rely wholly on credit rating agencies for assessing credit risk.
- Taking into account the long-term sustainability of investments, in particular considering the impact of ESG aspects.

The IPS should also contain other details relevant to investment policy, including for example asset mix and rate-of-return calculations. These will be provided for by the Registrar by Notice (to give effect to what is currently contained in Annexure B to the PF Circular 130).

3. ASSET LIMITS

3.1 GENERAL

A fund may only invest in assets specified in the Regulation and within the issuer and aggregate limits defined. Provision is however made for involuntary breaches that fall beyond the control of the Board, brought about for example by market movements or corporate actions.

In making investment decisions, a retirement fund should be guided first and foremost by what is best for the fund and its members, and should invest accordingly; indeed what is enabled through the Regulation limits may not be in the best interests of each and every fund or member. On the other hand, asset limits imposed should not prevent a fund from achieving its optimal investment allocation. Where funds begin to meet the limits and think it prudent to exceed them, the Board should engage the Registrar on a possible exemption. The National Treasury has in some instances taken a more conservative view on limits in this final Regulation 28 with the idea that these can (and should where appropriate) be tested by market participants in the future.

Mindful that individual member protection is as important as ensuring the sustainability of the fund as a whole, retirement products should be compliant not only at fund level but also at member level. However, an exception is made for certain existing individual contractual arrangements, to include retirement annuity, pension preservation and provident preservation funds, that are in place before 1 April 2011 – these products will be allowed to remain outside of Regulation 28 limits until such time that any material contractual provisions related to that arrangement are changed.

Ahead of the explanation on asset categories to follow, consider firstly that the definitions of the various assets serve as a funnel: cash, equities and immovable property are narrowly defined, meaning that anything outside of these definitions would most likely be placed under debt, unless it is a private

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equity or hedge fund, as explicitly defined (or another alternative investment), in which case it must be disclosed in that category. Consider also that significantly tighter limits apply to unregulated and unlisted products, relative to those that are regulated and/or listed. In addition to the category and issuer limits that are identified, overarching limits are applied to unlisted and alternative assets (at 35 percent) and unlisted equity held directly or through a private equity fund (at 15 percent, consistent with exposure limits to unlisted assets in other asset classes, like debt and property).

The Regulation does not prescribe what assets a fund should be invested in as this would counter the principles guiding a fund to act in its best interests. Instead, as already explained the Regulation requires a fund to explicitly consider its approach to ESG issues (with respect to its investments) and transformation (with respect to services provided to a fund). Moreover, economic development is more strongly supported by increased flexibility afforded to investment into private equity funds and public entity debt.

3.2 CASH

To better align the “cash” asset class to comprise instruments collectively used for liquidity management, money market instruments are included back into this definition (which in the December 2010 draft separated out physical cash from all other debt, including money market instruments). But regulatory concerns remain internationally over maturity transformation in money market funds, which globally are being reviewed as a shadow banking system. Work is therefore being done to strengthen money market fund regulation in accordance with coming international standards, in a way that will better protect investors, including retirement funds, and guard against financial system instability in the future.¹

3.3 DEBT INSTRUMENTS

To improve diversification across the asset categories, reduce regulatory induced distortions away from longer-dated debt into money-market instruments and equities, and better support the corporate debt markets (for broader economic gains), restrictions on investments into transparent debt products are significantly eased.

All else being equal, for debt and equity issued by the same entity the debt ranks higher in the creditor line and will be paid out first. However, in many instances a lack of transparency in the debt markets means the investor has too little information about the issuer to do a proper risk assessment. Recent developments around increasing transparency in South Africa’s listed debt market will go some way to managing these concerns. Nevertheless a fully “visible” issuer is paramount to the new flexibility given to funds.

The aggregate limit for (on-balance sheet) bank issued, corporate and public entity debt is therefore raised to 75 percent, now equal to the overall limit on equities. Within this higher limit, bank issued debt, recognising these entities

¹ This will be considered as part of a National Treasury led project on structural funding for the banks.

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as being prudentially regulated, can be held at the maximum (75 percent) if that debt is listed,² while listed debt issued by listed corporates and public entities can be held at a lower maximum of 50 percent, and listed debt of unlisted entities at 25 percent. Stricter limits apply across each of these issuer sub-categories for unlisted debt instruments. This recognises the pricing, liquidity and disclosure advantages of listed over unlisted debt.

Funds are not required to apply credit ratings in assessing credit risk. Where ratings are used, such should form part of a broader due diligence and should not be relied upon in isolation.

3.4 EQUITIES

Equities as an asset class is narrowly defined to include only preference and ordinary shares in companies. The overall limit of 75 percent is retained, subject also to per-issuer limits divided into three categories – small (5 percent), medium (10 percent) and large (15 percent). The limits will be checked for inflationary pressures over time and the Financial Services Board is enabled to update these accordingly. The limit for unlisted equities, whether held directly or through a private equity vehicle, is increased to 15 percent, subject to strict investment diversification and valuation requirements.

3.5 IMMOVABLE PROPERTY

As unlisted property may have significantly different risk management implications and risk profile from investing through a listed property vehicle, regulatory treatment distinguishes between listed (25 percent) and unlisted (15 percent) property exposure. Similar to equities, listed property is divided into three sub-categories – small (5 percent), medium (10 percent) and large (15 percent). The market capitalisation limits differ from that of equities to reflect the different structure of the listed property landscape.

Over time the limits will be checked and tested by the Registrar of Retirement Funds, and may be updated accordingly.

Debt instruments backed by property are now classified as debt rather than property, as these better reflect the characteristics of that asset class.

3.6 COMMODITIES

In recognition of hedging potential, a fund can invest in listed commodities of up to 10 percent in gold, or up to 5 percent in other commodities (up to a combined maximum across all commodities of 10 percent).

3.7 OTHER ASSETS AND ALTERNATIVE INVESTMENTS

Hedge funds and private equity funds are defined. If read together with the look-through principle and anti-avoidance clause, the new Regulation

² The raised limit on bank issued debt should ease structural funding challenges faced by the banks that may be caused by the prevailing Regulation 28.

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prevents these products from being reported as the linking structure (for example a debenture issued against private equity fund cash flows). Instead the hedge fund or private equity fund must be disclosed as such.

Definitions provide guidance to the investment activities of these vehicles, and require that managers be registered under the relevant categories of the Financial Advisory and Intermediary Services Act of 2002 (FAIS). Given the particularly broad activity definition for hedge funds, the FAIS requirement gives added protection that products being disclosed as hedge funds are in fact hedge funds, and not some other product being “wrapped” in a hedge fund guise.

Accessing hedge funds or private equity funds through a fund of funds structure provides a valuable extra layer of due diligence and built-in diversification. Consequently the allowance per fund of hedge funds and fund of private equity funds is 5 percent (compared to 2,5 percent for investment into individual funds).

Provision is made for the Registrar of Retirement Funds to impose additional requirements to investments made through a partnership or trust structure. The Registrar is expected to also impose valuation standards informed by international best practice.

3.8 HOUSING LOANS

The December 2010 draft provided that housing loans issued directly by the fund should be curtailed to 5 percent of a member’s accumulated retirement savings, compared to the prevailing 95 percent. Housing loans could still be obtained from a bank using a member’s retirement fund savings as surety. This change in approach has been removed. While abuses are observed in the issuing of these loans, the National Treasury agrees that the December proposal exposed the fund to considerable risk. The existing regulatory treatment should therefore prevail.

3.9 FOREIGN ASSETS AND REGIONAL DEVELOPMENT

Foreign assets are currently defined in terms of the South African Reserve Bank’s Financial Surveillance Department regulation and requirements. Regulation 28 therefore references this authority.

The concept of a “recognised foreign exchange” as contained in earlier drafts of the Regulation falls away, being incorporated into the definition of “exchange”. To be considered as “listed” for the purposes of Regulation 28, a security must be listed on an exchange that is a full member of the World Federation of Exchanges (WFE). In addition, a registered Collective Investment Scheme holding foreign assets on an exchange that satisfies due diligence performed by the manager in terms of guidelines set by the Registrar of Collective Investment Schemes, likewise satisfies the definition. This latter allowance supports exposure by retirement funds to African and other foreign assets through a suitably regulated vehicle. Regional investment is further supported through the higher limits placed on unlisted

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debt and (directly held) unlisted equity (of 15 and 10 percent, respectively), as this is where securities listed on foreign exchanges that are not WFE members are accommodated. Lastly, it is noted that inward or dual listed securities on a South African exchange will be treated as “listed” for prudential purposes, and therefore be subject to up to the 75 and 50 percent limits for equities and debt respectively (although will of course remain subject to relevant foreign exposure limits). Through this channel, non-South African companies and foreign governments can access significantly more South African capital, and should support building South Africa as a regional financial centre and Gateway to Africa.

4. LOOK-THROUGH

In the past, asset managers would often hold more risky assets such as hedge funds through product wrappers, which would for instance reflect on Regulation 28 disclosure documents simply as “unlisted debenture” under the 25 percent allowance. To deal with this challenge of not seeing the real economic exposure of certain assets to a fund, the look-through principle provides that a fund cannot use an asset structure to circumvent the limits, and must “look-through” the linking structure to disclose the underlying assets.³

An exception however is made for private equity funds and hedge funds, where these vehicles themselves are seen in terms of Regulation 28 as the “final” asset, and must be reported as such – in other words no further look-through applies (this means that hedge funds will not be subject to derivatives requirements, and listed equity held by a private equity fund will be classified as unlisted for the purposes of Regulation 28). Tight definitions of hedge and private equity funds seek to ensure that the exemption of look-through is not abused, resulting in these vehicles being used to circumvent limits under the Regulation.

To alleviate extensive disclosure requirements, a *de minimis* rule is applied – if an asset comprises less than 5 percent of the aggregate fair value of the assets of the fund, then the fund need only disclose the categories of underlying assets making up the investment, and not each underlying asset.

5. BORROWING

Because of the risks involved, the Regulation is clear that funds should never borrow for the purposes of investing that borrowed money. The only time a retirement fund should be allowed to borrow money is when it runs into liquidity issues and needs cash to distribute to members leaving the fund. Even then, this borrowing should be limited in value, time constrained, and

³ The Registrar of Retirement Funds will in addition require the disclosure of asset exposure obtained through the linking structure. Consider for example an exchange traded note linked to an underlying commodity asset. Applying the look-through principle requires reporting of the commodity exposure under Regulation 28 limits, but the credit risk associated by the issuer of the note is also relevant and will need to be disclosed to the Registrar for monitoring.

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stay away from exploitative and/or inappropriate loan covenants, especially with regards to early settlement penalties or collateral arrangements.

6. REPORTING, EXCLUSIONS AND EXEMPTIONS

Not all investments of a fund need to be included in the calculation of the percentage limits. Some investments may be excluded on the grounds that they themselves comply with the Regulation. More specifically, collective investment schemes, linked insurance policies, and guaranteed long-term insurance policies may be excluded in this way.

To promote competition and improve the service offering to retirement funds, an entity that is regulated by the Financial Services Board and offers a Regulation 28 compliant product (like an investment fund managed by a FAIS registered manager), can now be similarly excluded from Regulation 28 limit calculations.

Funds may also apply to the Registrar for exemption from certain provisions of the Regulation for a certain time and with regards to certain limits.

It is important to reiterate that in its investment decision making, a fund should be driven by what is best for the fund, which in some instances may differ from limits imposed by Regulation 28. Where this is the case, funds are encouraged to engage with the Registrar of Retirement Funds to explore the possibility of obtaining exemption from certain limits should these become inappropriate. The National Treasury and the Financial Services Board will monitor the take-up of the new limits over time, to assess their ongoing suitability.

7. IMPLEMENTATION OF THE REGULATION

The Regulation will be effective from 1 July 2011. While certain funds may not be able to comply fully with the Regulation at that time, earlier implementation is intended to give funds the space to begin re-equilibrating to the new, more flexible limits. Those funds that do not expect to meet the compliance deadline should apply to the Registrar before 31 May 2011. Exemption may be granted on the basis that the fund can prove its path towards compliance.

It should be noted that only individual retirement policy contracts entered into before 1 April 2011 will be exempt in terms of the grandfathering clause. It is therefore emphasised that no additional policies that are not Regulation 28 compliant should be sold, as irrespective of any contractual arrangement entered into these will be required to be compliant as at 31 July 2011.

Industry participants are also warned against exploiting the grandfathering provisions to evade Regulation 28 – behaviour will be monitored and the grandfathering provisions will be removed should abuses be observed.

To further support stakeholder understanding of the intention and principles underpinning the final Regulation 28, the National Treasury and the Financial Services Board will host two public forums during March 2011. The purpose of these forums is to ensure that retirement fund and ancillary stakeholders are aware of their responsibilities under the new Regulation 28.

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Notices and the guidance note on the treatment of securities lending, derivatives and part-guaranteed insurance policies will be drafted by the Financial Services Board in consultation with the National Treasury, and will be subject to stakeholder engagement. These, as well as a Guidance Note issued by the Registrar of Retirement Funds on hedge funds and private equity valuation, are expected to be finalised by 31 March 2011. A Notice on the appropriate use of credit ratings issued by credit rating agencies will be finalised at a later stage, following from the implementation of regulation of those entities.

VI. CONCLUSION

The revised Regulation 28 is considered rigorous, flexible and fair, attempting to promote transparency in those areas where rules have traditionally been circumvented, but also allowing for some level of innovative financial strategies and instruments where appropriate.

The National Treasury remains informed by international best-practice in this area, while being sensitive to South Africa's local context. Stakeholder representations have been extensively considered and tested against our financial sector policy objectives of member protection, sector stability and efficiency, as well as broader objectives of channelling savings for investment to promote economic growth and support ESG considerations.

The National Treasury is sensitive to the fact that the new Regulation 28 may pose significant challenges to some retirement funds in terms of achieving compliance, as these funds may be operating widely outside of the proposed asset class limits. Even for those retirement funds that are broadly compliant with the existing Regulation, a tighter approach in instances like member-level compliance, part-guaranteed policies and unlisted debt may require a period of adjustment. Retirement funds should engage the Registrar of Retirement Funds in this regard.

The National Treasury and Financial Services Board thank all stakeholders for their open and constructive engagement on this Regulation.

REGULATION 28 COMMENTS ON SECOND DRAFT – RESPONDENTS

ENTITY
ABSA Capital
ABSIP
Actuarial Society of South Africa (ASSA)
Alexander Forbes Financial Services (Pty) Ltd
Anton Kleinschmidt
ASISA
Brait
Capricorn Fund Managers (Pty) Ltd
Coronation Fund Managers
Fedgroup
Fifth Quadrant Actuaries & Consultants (Pty) Ltd
FPI (Financial Planning Institute of Southern Africa)
George W Nicholas
Investec Asset Management
Investec Bank Limited
Investment Data Services Group (Pty) Ltd (IDS)
IRF (Institute of Retirement Funds)
JSE
Leonard Roberts
Malcolm McClean
Mergence Investment Managers (Pty) Ltd
Mezzanine Partners
Mine Employees Pension Fund (MPF)
Novare Investments
Oasis Group Holdings (Pty) Ltd
Price Waterhouse Coopers
Public Investment Corporation (PIC)
Riscura
Sagree Naicker
SAVCA
Standard Bank
Tennant Benefit Consultants (Pty) Ltd

REGULATION 28 COMMENTS ON SECOND DRAFT – COMMENTS

REG	WORDING/PROPOSED WORDING	COMMENT
General		<p>Instead of focusing on limits which may be regarded as "safe" or low risk, recognise the variety of risks to which retirement funds are exposed and foster a culture amongst fiduciaries (Trustees) to properly manage these risks, while at the same time allowing them sufficient flexibility to do so.</p>
Pre-ambble	<p>A fund and its agents have a fiduciary duty to act in the full best interests of those for whose assets they are responsible. This duty supports the adoption of a responsible investment approach to deploying capital into markets that will earn them adequate risk adjusted returns.</p> <p>Prudent investing should give appropriate consideration to any factor which may materially affect the sustainable long term performance of their investments, including those of an environmental, social and governance character.</p> <p>This applies across all asset classes and should promote the vested interest the Fund has in a stable and transparent environment.</p>	<p>The reference to "and its agents" should be deleted. The inclusion thereof may imply that trustees of retirement funds can delegate their responsibility to agents when in fact the retirement fund remains responsible even though it appoints advising agents or other agents to fulfil functions on its behalf.</p>
28 (1) Principles		<p>Provide consistency in terms of the points ending in a either semi-colons or full-stops but not a mixture.</p> <p>Require retirement funds to develop and implement an investment strategy and policy which should be reviewed annually.</p> <p>Apply look through to hedge funds and private equity funds, otherwise it gives a way and means for such funds to bypass the regulation and possibly invest pension assets in an imprudent and overly risky way. That hedge fund provides can now do what they wish without worrying about reg28 limits is deeply concerning and creates a whole new area of possible abuse and arbitrage between different investment structures that wasn't in regulation before.</p> <p>Define the term "investment policy statement".</p>
28(1)(a)	<p>A fund must have an investment policy statement, being a document which describes the fund's general investment philosophy and approach and which addresses the principles referred to in (1)(b).</p>	<p>Require that an IPS should include a number of risk and investment principles, have clear guidelines and be enforceable.</p> <p>Define or cross reference "investment policy statement" in a way that clarifies what the investment policy statement must do and what its purpose is No content or purpose for the investment policy statement is provided by clause (1)(a). If all the content is provided for by sub-clause (b) then the drafting should reflect that.</p>

28(1)(b)	<p>A fund, its advisors and its trustees must at all times apply the following principles:-</p> <p>CURRENT WORDING: "A fund, its advisors and its trustees must at all times ..."</p> <p>SUGGESTED WORDING: "A fund must at all times ..."</p> <p>[A minority view was that there is no harm in advisors being included here.]</p> <p>It is proposed that the use of the word "must" should be deleted and replaced with "shall". It is suggested that this be done consistently throughout the Regulation (i.e. a global delete and replace).</p> <p>(b) A fund, its advisors and its trustees must shall at all times apply the following principles:-</p>	<p>Add principle to clarify that fund cannot delegate its responsibility and such third parties should not be required to for example promote the education of trustees.</p> <p>Advisors are covered by other legislation which may conflict.</p>
28(1)(b)(i)	<p>comply with the spirit of this regulation and not try to circumvent this regulation;</p> <p>CURRENT WORDING: "comply with the spirit of this regulation and not try to circumvent this regulation"</p> <p>SUGGESTED WORDING: "invest with prudence and care, balancing the need for investment returns with appropriate risk management"</p>	<p>Delete this principle. From a jurisprudential perspective this wording is flawed as it assumes that the subjects of the legislation have perfect insight to the spirit of the legislation. This attempts to superimpose a new and overriding principle of interpretation of statutes on existing laws (common and other). It is also highly irregular in legislation.</p> <p>Impossible for the reader to know "the spirit" of any regulation.</p> <p>Anti-avoidance is already sufficiently covered in 2(c).</p>
28(1)(b)(iii)		<p>Remove this clause or change wording that aligns itself to prudent investment since "spirit" is not well defined in law.</p> <p>Allow for an exemption from this principle for a fund with a well formulated investment policy, especially for larger Funds that do not require immediate liquidity for asset bases of over R10 billion, broad membership bases and cash flows going out 50 years. In these cases, appropriate asset liability studies will potentially show the Regulation proposals leading to sub-optimal investment strategies that distinctly act against member interest. It would lend itself to the idea that the Regulation requires a rewrite to be in line with asset vs. liability principles.</p>
28(1)(b)(iv)	<p>ensure that the fund's assets, including foreign assets, are appropriate for its liabilities;</p>	<p>Delete "including foreign assets" and rephrase as it is superfluous</p>