

MALAWI GOVERNMENT

(Published 08th April, 2011)

Act

No. 6 of 2011

I assent

DR. BINGU WA MUTHARIKA
PRESIDENT
1ST APRIL, 2011

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A BILL

entitled

An Act to make provision for mandatory pension, and for matters relating to the supervision and regulation of pension funds and umbrella funds, and for matters connected therewith and incidental thereto

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Pension Act, 2010, and shall come into force on such date as the Minister may appoint by notice published in the *Gazette*, and the Minister may appoint different dates for the coming into force of different parts or provisions of this Act. Short title and commencement

2.—(1) Unless expressly exempted by the Minister in writing, with the approval of the Cabinet, this Act shall apply to every employer and employee in Malawi. Application of the Act

(2) The Government, in its capacity as employer, shall be exempt from compliance with the provisions of this Act, provided that such exemption shall only be for a period not exceeding twenty-four months from the date of commencement of this Act.

3.—(1) In this Act, unless the context otherwise requires— Interpretation

“administrator” means a person who, as a business, provides data management, specialist technical services to pension funds or umbrella funds, by arrangement with the trustee or operator of the funds concerned;

“advisory committee”, in relation to a pension fund, means a board, committee or other body that—

(a) is established by or under the fund rules; and

(b) has the function of advising the trustee of the fund about issues relating to the fund that a member or an employer has raised;

“annuity” means the exchange of a capital sum for a regular income benefit, which may or may not increase at a predefined level or according to an appropriate index, payable for the remaining life of the recipient;

“beneficiary”, in relation to a pension fund, means an individual who is, in accordance with the fund rules, entitled to a benefit from that fund;

“child” in relation to a member, means a child of the member, regardless of the circumstances of the birth of the child and includes an adopted child, and an unborn child in the womb of its mother;

“close relation” means spouse, brother, sister, parent, child, child of the spouse, aunt, uncle, grandparent, and the spouse of any of these;

“corporate trustee” means a trustee that is a body corporate;

“defined benefit fund” means a pension fund other than a defined contribution fund where under the fund rules a member’s benefits are calculated, wholly or in part, by reference to any or all of the following—

(a) the amount of the fund member's remuneration at the date on which benefits are payable or a specified earlier date;

(b) the amount of the fund member's remuneration averaged over a specified period before the date on which benefits are payable; or

(c) an amount specified in the fund rules;

"defined contribution fund" means a pension fund that is not a defined benefit fund where under the fund rules a member's benefits on retirement has a value equal to the value of—

(a) the contributions paid by the member and by the employer in terms of the fund rules that determine the rates of both their contributions at a fixed rate;

(b) less such expenses as the trustees determine should be deducted from the contributions paid;

(c) plus any amount credited to the member's account upon the commencement of the member's membership of the fund or upon the conversion of the category of the fund to which the member belongs from a defined benefit fund to a defined contribution fund or upon the amalgamation of the fund with any other fund, other than amounts taken into account in terms of section (d);

(d) plus any other amounts lawfully permitted, credited to or debited from the member's individual account, if any,

as increased or decreased by fund investment return;

"dependant" in relation to a member, includes a spouse and a child of the member;

"director" shall bear the same meaning ascribed to that term in the Financial Services Act, 2010;

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2010

"employee" means—

(a) a person who offers his services under an oral or written contract of employment, whether express or implied; or

(b) a person who performs work or services for another person, including the Government and other public institutions, for remuneration or reward on such terms and conditions, that he is, in relation to that person, in a position of economic dependence on and under an obligation to perform duties for, that person more closely resembling the relationship of employee than that of an independent contractor;

“employee contribution” means a contribution to a pension fund made by the employee, including a contribution deducted by the employer from the employee’s remuneration where the employer is under an obligation to remit the amount concerned to the trustee of the fund;

“employer” means—

(a) any person, or undertaking, corporation, company, public authority or body of persons who or which employs an employee and include heirs, successors and assignees of the employer; and

(b) in relation to a pension fund, means a person who employs a member and who is liable, under the fund rules, to make employer contributions to the fund in respect of the member;

“employer asset” includes—

(a) an asset acquired from an employer or an associate of an employer;

(b) rights under a lease of fund assets to an employer or an associate of an employer; and

(c) a loan to, or rights acquired by the provision by the trustee of financial accommodation of any kind to an employer or an associate of an employer,

but does not include assets that are securities issued by or guaranteed by the Government;

“employer asset percentage”, for a pension fund, means the percentage calculated using the following formula—

$$\frac{\text{total fair market value of fund's employer assets}}{\text{total fair market value of all fund assets}} \times 100$$

where employer assets are those invested in the equity or debt, listed or unlisted, of the employer, or any other financial commitment of the employer to the fund;

“employer contribution” means a contribution to a pension fund made by an employer in respect of an employee, excluding employee contributions, fees and other charges;

“employer representative”, in relation to a group of trustees of a pension fund or the board of directors of a corporate trustee of a pension fund, means a member of the group, committee or board nominated by—

(a) the employers; or

(b) an organization representing the interests of employers;

“equal representation rule” means the rule referred to in section 26 (1) or (2);

“fully funded” in relation to a pension fund, means that the financial obligations to the pension fund’s members, creditors and service providers are fully covered by the assets held in the fund’s name, as confirmed in the case of a defined benefit fund by the valuation conducted by an actuary as at the effective date of the funding assessment;

“fund assets” of a pension fund or an umbrella fund means property of any kind held by the trustee or operator of the fund in that capacity;

“fund information”, in relation to a pension fund, means information about—

(a) the fund’s investment strategy;

(b) the fund’s investment performance and financial position;

(c) fees and charges payable by, or borne by, members or beneficiaries in relation to the fund;

(d) the rights and entitlements of members or beneficiaries under the fund rules and otherwise in relation to the fund;

(e) the obligation of members to pay contributions under the fund rules; and

(f) the obligation of employers to pay contributions under the fund rules and to provide life insurance under the requirements of this Act,

or as specified by Registrar’s Directive;

“guaranteed wages” means basic wages excluding overtime and bonuses;

“independent director”, in relation to a corporate trustee of a pension fund, means a director of the corporate trustee who is not—

(a) a member;

(b) an employer;

(c) an associate of an employer;

(d) an employee of an employer or of an associate of an employer;

(e) in any capacity, a representative of a trade union, or other organization representing the interests of one or more members; or

(f) in any capacity, a representative of an organization representing the interests of one or more employers;

“independent trustee”, in relation to a fund, means a trustee of the fund who is not—

- (a) a member;
- (b) an employer;
- (c) an associate of an employer;
- (d) an employee of an employer or of an associate of an employer;
- (e) in any capacity, a representative of a trade union, or other organization representing the interests of one or more members; or
- (f) in any capacity, a representative of an organization representing the interests of one or more employers;

“investment management agreement” means an agreement between the trustee of a pension fund or the operator of an umbrella fund and an investment manager, for the investment of fund assets that for the purposes of the agreement, are under the control of the investment manager;

“investment manager” means a person who, as a business, invests fund assets of pension funds or umbrella funds by arrangement with the trustees or operators of the funds concerned;

“legal personal representative” means—

- (a) in relation to a deceased person, the executor of the will or administrator of the estate of that person; and
- (b) in relation to a person under a legal disability, the trustee or manager of the estate of that person appointed under law;

“lifetime flat annuity” means an annuity payable for the remaining lifetime of the recipient without increases;

“loan” includes the provision of credit and any other form of financial accommodation, whether or not enforceable, or intended to be enforceable, by legal proceedings;

“member”, in relation to a pension fund, means a person who is, in accordance with the fund rules, a member of the fund;

“member account”, or “member’s account” means an account established under section 11;

“member information”, in relation to a member of a pension fund, means information about the nature and extent of the member’s entitlements under the fund rules and otherwise in relation to the fund;

“member representative”, in relation to a group of trustees of a pension fund, a policy committee of a pension fund or the board of directors of a corporate trustee of a pension fund, means a member of the group, committee or board nominated by the members;

“most representative organization of employees” means the most representative organization of employees enjoying the right of freedom of association;

“most representative organization of employers” means the most representative organization of employers enjoying the right of freedom of association;

“national pension fund” means the national pension fund contemplated under section 6 (2);

“National Pension Scheme” means the Contributory National Pension Scheme established under section 6 (1);

“nomination” means a nomination made by a member under section 70;

“operator”, in relation to an umbrella fund, means the trustee of the trust;

“Pension Administrator” means the National Pension Fund Administrator appointed under section 7;

“pension broker” means a person who as a business, provides consulting or advisory services to pension schemes or funds, including claims assistance, where required;

“pension fund” means—

(a) a pension scheme that is an indefinitely continuing trust whether as a restricted or unrestricted fund and includes a defined contribution fund or a defined benefit fund or a hybrid of the two; or

(b) an association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants of such members or former members, upon the death of such members, or

(c) a business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons;

“pension scheme” means a scheme the primary purpose of which is the provision of retirement benefits to a member of the scheme on his retirement from any business, trade, profession,

vocation, calling, occupation or employment in which the member was engaged, whether or not it also provides for benefits to be paid in other circumstances (for instance, on the death or disablement of a person), but does not include—

(a) a contract of insurance; or

(b) a contract of employment merely because it provides for payments to be made on termination of the contract;

“pensionable emoluments” means guaranteed wages and other earnings, but not including personal investment income, capital gains or provision from employers in the form of houses or motor vehicles;

“principal officer” means the principal officer of a pension fund or umbrella fund appointed under section 32;

“programmed withdrawal” means the payment by the fund of regular income payments during the remaining life of the member from the date of retirement or the date at which an annuity is purchased;

“Registrar” means the Registrar of Financial Institutions appointed under the Financial Services Act, 2010, or a specialist registrar for pension funds, as may be defined in any modifications to the Financial Services Act, 2010;

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“Registrar’s directive” means a directive issued under this Act or the Financial Services Act, 2010;

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2010

“restricted fund” means a pension fund the rules of which restrict membership of the fund to officers and employees of a specified employer and its related bodies corporate;

“retire”, in relation to a member, means attain the retirement age specified in the rules of the fund at which retirement is to take place, or meet any of the other conditions specified in the rules to take retirement;

“retirement age” means the age stipulated in the rules of a pension fund, which shall be between fifty years and seventy years, or as may be prescribed by the Minister for the purposes of this Act;

“scheme” means any plan, proposal, action, course of action, course of conduct, agreement, arrangement, understanding, promise or undertaking, whatever its legal form, whether express or implied and whether or not enforceable or intended to be enforceable;

“scheme rules”, in relation to a pension fund or an umbrella fund, means the rules contained in a trust instrument, other document or legislation, or combination of them governing the establishment or operation of the fund;

“self-employed individual” means any person who is running a business on his own as a sole trader, whether he has employed any other person or not;

“service retirement” means a minimum of twenty years of continuous service by an employee with one employer;

“spouse” means a person’s husband or wife in relation to a marriage recognized under section 22 (5) of the Constitution;

“statutory covenant” means a covenant set out in or prescribed under section 36 (1) or section 37 (1);

“totally and permanently disabled”, in relation to a member, means permanently incapable, through infirmity of mind or body, from engaging in his business, trade, profession, vocation, calling, occupation or employment or in any other business, trade, profession, vocation, calling, occupation or employment for which he may be trained or fitted;

“trustee”—

(a) in relation to a pension fund with only one trustee, means the trustee of the fund appointed in accordance with the instrument creating the pension fund;

(b) in relation to a restricted fund where there is a group of individual trustees, means all of the trustees appointed in accordance with the instrument creating the restricted fund, acting together;

“umbrella fund” means a collective investment scheme as defined in the Securities Act, 2010, whose rules provide that only trustees of pension funds or operators of umbrella funds may be members of the scheme;

“unrestricted fund” means a pension fund whose rules do not restrict membership of the fund to officers and employees of a specified employer and its related bodies corporate;

(2) Subject to subsection (1) and except where a contrary intention appears, words and expressions used in this Act shall bear the same respective meanings as they have in the Financial Services Act, 2010.

(3) Without limiting the ordinary meaning of “operate”, a person operates a pension scheme or an umbrella fund if the person—

(a) establishes or administers the scheme or fund;

(b) induces or attempts to induce a person to be a member of the scheme or fund or to make payments by way of contribution to or investment in the scheme or fund; or

(c) accepts or makes payments in connexion with the scheme or fund otherwise than as a member or beneficiary of the scheme or fund.

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2010

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2010

(4) A provision included in the fund rules of a pension fund to avoid a breach of a rule of law against remoteness of vesting shall not prevent the fund from being treated as an indefinitely continuing fund for the purposes of the definitions of “pension fund” in subsection (1).

4. The objectives of this Act are to—

Objectives
of the Act

(a) ensure that every employer to which this Act applies provides pension for every person employed by that employer;

(b) ensure that every employee in Malawi receives retirement and supplementary benefits as and when due;

(c) promote the safety, soundness and prudent management of pension funds that provide retirement and death benefits to members and beneficiaries; and

(d) foster agglomeration of national savings in support of economic growth and development of the country.

5. This Act shall apply in addition to the Financial Services Act, 2010.

Application of
the Financial
Services Act
Act No. 26 of
2010

PART II—CONTRIBUTORY NATIONAL PENSION SCHEME

6.—(1) There is hereby established a contributory National Pension Scheme (in this Act otherwise referred to as the “National Pension Scheme”) for the purpose of ensuring that every employee in Malawi receives pension and supplementary benefits on retirement.

The
Contributory
National
Pension
Scheme

(2) The National Pension Scheme shall comprise—

(a) a national pension fund to be established under this Act, by the Minister, by Order published in the *Gazette*; and

(b) other pension funds licensed under this Act.

(3) Every employer shall make provision for every person under his employment to be a member of the National Pension Scheme.

7.—(1) There is hereby established a National Pension Administrator (in this Act otherwise referred to as the “Pension Administrator”).

The National
Pension Fund
Administrator

(2) The Pension Administrator shall be a body corporate with perpetual succession and a common seal capable of suing and being sued in its corporate name and with power to do or perform all such acts and things as a body corporate may by law do or perform.

(3) The principal object of the Pension Administrator shall be to—

(a) act as an administrator for the National Pension Scheme; and

(b) set up and manage the national pension fund.

(4) There shall be a Board of Trustees which shall be responsible for the administrative and management policy of the Pension Administrator.

(5) The Board of Trustees shall consist of seven trustees appointed by the President on recommendation of the Minister, and shall include a representative from the most representative organization of employers, most representative organization of employees, and either the Secretary to the Treasury or the secretary responsible for labour, or the secretary responsible for economic planning.

(6) A person shall not be appointed as trustee unless the Minister is satisfied that the person is a fit and proper person to hold the office of a trustee as defined by the Registrar, and qualified for the appointment by virtue of his qualification and experience in the following fields—

- (a) financial markets and financial products;
- (b) pension, insurance and social security;
- (c) law;
- (d) accounting; or
- (e) economics and finance.

Cap. 5:03

(7) In addition to the powers, duties and functions of the trustees under the Trustees Incorporation Act, the Registrar may issue Registrar's directives on the powers, duties and functions of the trustees.

(8) The existence of the Pension Administrator shall not preclude the Registrar from licensing other pension funds whether as restricted or unrestricted or umbrella funds to participate in the management of funds under the National Pension Scheme:

Provided that the Pension Administrator shall at all times manage not more than twenty per cent of funds under the National Pension Scheme.

(9) The Registrar may, from time to time, by order published in the *Gazette*, revise the proportion of funds under the National Pension Scheme to be under the management of the Pension Administrator as provided under subsection (8).

(10) The Government shall at all times maintain capital of the Pension Administrator in compliance with the minimum capital and solvency directive issued by the Registrar.

(11) The Pension Administrator shall at all times comply with all other regulatory requirements prescribed and issued under all applicable financial services laws.

8.—(1) Notwithstanding section 7, the Minister may, upon consultation with the Minister responsible for labour and the Registrar, designate any Government agency or private organization to perform any part of the functions of the Pension Administrator.

Designating of Government or other agency for some duties of the Pension Administrator

(2) Any Government agency or private organization appointed under subsection (1) as Pension Administrator shall exercise all the powers and duties of the Pension Administrator as outlined under section 7, or in the Registrar's directives.

PART III—MANDATORY PROVISIONS

9.—(1) Subject to section 10, every employer shall make provision for every person under his employment to be a member of the National Pension Scheme.

Obligation of employer

(2) The Minister responsible for labour and the Registrar, in consultation with the Minister, shall be responsible for ensuring compliance with this Part.

(3) Any employer who, without reasonable excuse, fails to comply with this section, shall be liable to administrative penalties under the Financial Services Act, 2010.

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10.—(1) The Minister, in consultation with the Minister responsible for labour and the Registrar, may by notice published in the *Gazette*, prescribe a salary threshold above which an employee's earnings shall not constitute part of that employee's pensionable emoluments.

Minister's power to exempt

(2) Notwithstanding the provisions of section 6 (1), the Minister shall, in consultation with the Minister responsible for labour and the Registrar, by order published in the *Gazette*, prescribe a salary threshold below which an employer and employee shall be exempted from complying with the requirements of section 9 and section 15:

Provided that—

(a) where an employer has more than five employees, that employer shall provide pension for those employees notwithstanding that the salary of those employees is below the salary threshold prescribed under this subsection; and

(b) employers who have existing pension schemes at the commencement of this Act shall ensure that every employee who was a member of such pension scheme continues to be a member of the pension scheme notwithstanding that the employee's salary is below the salary threshold prescribed under this subsection.

(3) The Minister, in consultation with the Minister responsible for labour, and the Registrar, may, by order published in the *Gazette*, exempt any class or category of employers or employees from complying with the requirements of this Act.

Cap. 55:01

(4) Without limiting the provisions of section 91, all matters relating to employers and employees exempt by subsections (2) and (3) shall be governed by the provisions of the Employment Act.

(5) Where the exemption under subsection (2) and subsection (3) no longer applies, an employer shall recognize as part of an employee's pension dues, the employee's entitlements accrued from the date of employment of the employee to the date when the employee becomes a member of the National Pension Scheme.

Trustee to
establish
separate
accounts

11. The trustees of a pension fund shall establish and maintain a separate account in its books for each member, in accordance with the Registrar's directives.

Minimum
contribution
rates

12.—(1) Subject to subsection (2), and without limiting the powers of the Minister to make regulations on pension contribution, contributions relating to pensionable emoluments for an employee shall, under the National Pension Scheme, be made in the following manner—

(a) a minimum of ten per cent (10%) by the employer; and

(b) a minimum of five per cent (5%) by the employee:

Provided that the minimum contribution rate prescribed in paragraph (a) may be set at seven and a half per cent (7½%) for the employer from the date of commencement of this Act until the latest 1st January before the expiry of two years from that date.

(2) The rates of contribution prescribed in subsection (1) may, upon agreement between an employer and an employee, be revised upwards, from time to time, provided that the Registrar shall be notified of any such revision.

(3) Notwithstanding the provisions of subsections (1) and (2), an employer may agree or elect to bear the full burden of the total contributions provided that in such case the employer's contribution shall not be less than the sum of the employer and employee contributions prescribed in subsection (1).

(4) An employee or a self-employed individual may, in addition to the total contributions being made by him and his employer, make voluntary contributions to his account:

Provided that such contributions do not exceed the threshold set by the Minister under section 10 (1).

(5) Subject to such directives as may be issued from time to time by the Registrar, and notwithstanding the requirements of section 9 and this section, an employee shall be entitled to make voluntary contributions to any unrestricted fund or to the restricted fund to which the employer of that employee is currently contributing.

(6) In addition to the minimum contributions prescribed in subsections (1) and (3), an employer shall cover the cost of the pension fund in respect of those employees who elect to stay as members of the fund nominated by the employer.

13.—(1) All contributions made by both the employee and employer, up to the limits specified in section 10 (1) and any income accruing to the credit of such contributions after being invested, shall be deductible from the relevant taxable income. Taxation

(2) Any lump sum received at retirement, as specified in section 68, shall be exempt from income tax.

14. An employee may transfer pension benefits accruing to his account to any unrestricted fund without giving any reason for the transfer, and upon such transfer the employer of that employee shall redirect the contribution that he is required to make under section 9 to the fund selected by the employee: Pension benefits to be transferable

Provided that—

(a) the employee shall only be allowed to transfer pension benefits once in two years at most, or as may be determined by the Registrar in a Registrar's directive from time to time;

(b) in respect of the fees levied by any fund other than the fund nominated by the employer, the employer shall pay only that amount of the fees equal to the fees that would otherwise be paid for that member, to the nominated fund, not any excess above this amount; and

(c) the employer shall not be required to cover the costs of the transfer.

15.—(1) An employer shall, in addition to making pension contributions on behalf of its employees, maintain a life insurance policy in favour of each of its employees for a minimum life insurance policy cover of one times the annual pensionable emoluments of the employee. Life insurance policy

(2) The benefits of the life insurance policy specified in subsection (1) shall form part of the member's death benefits and shall be distributed in accordance with section 70.

(3) The Minister may, by notice published in the *Gazette*, amend the minimum life insurance policy cover prescribed in subsection (1).

(4) The Minister may make regulations prescribing the manner in which the life insurance policy cover required in subsection (1) may be arranged.

PART IV—REGISTRATION AND LICENSING

Pension schemes and umbrella funds to be registered and trustees licensed

16.—(1) A person shall not operate a pension scheme unless—
 (a) the scheme is registered as a pension fund and has legal personality; and
 (b) the trustee of the fund is licensed as a trustee of the fund.

(2) A person shall not operate an umbrella fund unless—
 (a) the fund is registered as an umbrella fund and has legal personality; and
 (b) the operator of the fund is licensed as operator of the fund.

(3) Any person who contravenes subsection (1) or (2) commits an offence and shall be liable upon conviction—

(a) in the case of a natural person, to a fine of ten million Kwacha (K10,000,000) and to imprisonment for four years; and

(b) in the case of a corporation, to administrative penalties as provided for in the Financial Services Act, 2010.

Act No. 26 of 2010

Registration criteria for registered fund schemes
 Act No. 26 of 2010

17.—(1) If an application is made in accordance with the Financial Services Act, 2010, for registration of a restricted fund as a pension fund, the Registrar shall so register the fund if—

(a) the fund rules provide that the fund shall be maintained solely to provide pensions or annuities for one or more of the following—

(i) members on their reaching retirement age;

(ii) members on their ceasing to be engaged in their business, trade, profession, vocation, calling, occupation or employment;

(iii) dependants of members on the members' deaths; or

(iv) for any of such purposes and the purpose of providing pensions or annuities for members on their ceasing to be engaged in their business, trade, profession, vocation, calling, occupation or employment because of ill-health;

(b) the fund rules provide for contributions to the fund to be made at specified times and rates;

(c) it appears to the Registrar that the fund complies with this Act and the other financial services laws;

(d) the trustee of the fund is licensed as required by this Act;

(e) the fund rules provide that each employer shall ensure that, for all employees of the employer who are eligible under the fund rules to be members, it is a condition of their employment that they be and remain a member of the fund or of some other registered pension fund;

(f) the fund assets shall be held by a custodian;

(g) subject to subsection (2), the fund rules provide that a trustee and, where the trustee is a corporate trustee, the directors of the trustee, are not to be paid any fee out of the fund assets for acting as trustee;

(h) if subsection (2) applies, the fee is, in the Registrar's opinion, reasonable in the circumstances;

(i) the principal officer has been approved by the Registrar in terms of the fit and proper person requirements as determined in the Registrar's directive; and

(j) the Registrar has no reason to believe that the fund and the trustee will not comply with this Act and other financial services laws, including the Registrar's directives, if the fund is registered.

(2) The fund rules may permit an independent trustee who is an individual, or, in the case of a corporate trustee, an independent director of the corporate trustee, to be paid a fee out of the scheme assets for acting as trustee or director.

18. If an application is made in accordance with the Financial Services Act, 2010, for registration of an unrestricted fund as a pension fund, the Registrar shall not register the fund unless he is satisfied that—

Registration
criteria for
unrestricted
funds
Act No. 26 of
2010

(a) the fund rules provide that the fund shall be maintained solely to provide pensions or annuities for one or more of the following—

(i) members on their reaching retirement age;

(ii) members on their ceasing to be engaged in their business, trade, profession, vocation, calling, occupation or employment;

(iii) dependants of members on the members' deaths; or

(iv) for any of such purposes and the purpose of providing pensions or annuities for members on their ceasing to be engaged in their business, trade, profession, vocation, calling, occupation or employment because of ill-health;

(b) the fund rules provide for contributions to the fund to be made at specified times and rates;

(c) the fund complies with this Act and the other financial services laws;

(d) the trustee of the fund is licensed as required by this Act;

(e) the fund assets shall be held by a custodian;

(f) the principal officer has been approved by the Registrar in terms of the fit and proper person requirements as determined in the Registrar's directive;

(g) any fee payable in accordance with the fund rules out of the fund assets to the trustee for acting as trustee is, in the Registrar's opinion, reasonable in the circumstances; and

(h) the Registrar has no reason to believe that the fund and the trustee will not comply with this Act and other financial services laws, including the Registrar's directives, if the fund is registered.

Registration
criteria for
umbrella
funds
Act No. 26 of
2010

19. If an application is made in accordance with the Financial Services Act, 2010, for registration of a fund as an umbrella fund, the Registrar shall not register the fund unless—

(a) the fund complies with this Act and the other financial services laws;

(b) the operator of the fund is licensed as required by this Act;

(c) the principal officer has been approved by the Registrar in terms of the fit and proper person requirements as determined in the Registrar's directive; and

(d) the Registrar has no reason to believe that the fund and the operator will not comply with this Act and other financial services laws, including the Registrar's directives, if the fund is registered.

Notice of
registration to
Commissioner
of Taxes

20. Upon registration of a pension fund or umbrella fund, the trustee or operator of that fund shall give notice to the Commissioner of Taxes of such registration, as required by a Registrar's directive.

Investment
managers,
custodians,
administrators
and pension
brokers to be
licensed

21.—(1) A person shall not act as—

(a) an investment manager for a pension fund;

(b) an investment manager for an umbrella fund;

(c) a custodian for a pension fund or an umbrella fund;

(d) an administrator for a pension fund; or

(e) a pension broker,

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2010

unless he is licensed as such under the requirements of the Financial Services Act, 2010.

(2) Any person who contravenes subsection (1) commits an offence and shall be liable upon conviction—

(a) in the case of a natural person, to a fine of ten million Kwacha (K10,000,000) and to four years imprisonment; and

(b) in the case of a corporation, to administrative penalties as provided in the Financial Services Act, 2010.

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2010

22. The provisions relating to licensing and registration of applications contained in the Financial Services Act, 2010, shall apply *mutatis mutandis* to this Act.

Licensing and registration procedure Act No. 26 of 2010

23.—(1) A person may be licensed as a trustee in respect of pension funds of a class specified in the licence.

Licensing on a "class" basis

(2) A person may be licensed as an operator of umbrella funds of a class specified in the licence.

(3) An investment manager may be licensed in respect of pension funds of a class specified in the licence.

PART V—REQUIREMENTS FOR TRUSTEES, INVESTMENT MANAGERS, ADMINISTRATORS, CUSTODIANS, PENSION BROKERS AND ACTUARIES OF PENSION FUNDS AND UMBRELLA FUNDS

Division 1—Trustees of Pension Funds and Operators of Umbrella Funds

24. A person shall not be appointed as a trustee of a pension fund, an operator of an umbrella fund or a director of a corporate trustee of a pension fund unless he has consented in writing to the appointment.

Trustees, operators and directors to consent to appointment

25.—(1) An umbrella fund and an unrestricted fund shall have a single trustee, which shall be a body corporate.

Composition of trustees

(2) A restricted fund which has an individual as a trustee—

(a) shall have at least six individuals as trustees called "a group of individual trustees".

(3) If—

(a) a vacancy occurs in the membership of a group of individual trustees of a restricted fund;

(b) immediately before the vacancy occurred, the fund had at least six individuals as trustees;

(c) the vacancy is filled within ninety days after it occurred; and

(d) immediately after the vacancy is filled, the fund has at least six individuals as trustees,

the fund shall be deemed to have had at least six individuals as trustees during the period of the vacancy.

26.—(1) If a restricted fund has a group of individual trustees, the group shall consist of equal numbers of employer representatives and member representatives.

Equal representation rule

(2) If a restricted fund has a corporate trustee that is not the trustee of another fund or trust, the board of directors of the corporate trustee shall consist of equal numbers of employer representatives and member representatives.

(3) For a fund where the equal representation rule applies, if—

(a) a vacancy occurs in the membership of a group of individual trustees or, if the trustee is a corporate trustee, on the board of directors of the corporate trustee;

(b) immediately before the vacancy occurred, the fund complied with the equal representation rule;

(c) the vacancy is filled within ninety days after it occurred; and

(d) immediately after the vacancy is filled, the fund complies with the equal representation rule,

the fund shall be deemed to have complied with the equal representation rule during the period of the vacancy.

Additional
independent
trustees and
independent
directors

27. If the fund rules of a restricted fund provide that—

(a) an independent additional trustee may be appointed as a trustee, or an independent additional director may be appointed as a director, at the request of the employer representatives, or the member representatives, who are the members of the group or board; and

(b) the additional independent trustee or additional independent director may not exercise a vote in any proceedings of the group or board,

the appointment of such an additional independent trustee or additional independent director does not contravene the equal representation rule.

Advisory
committees

28.—(1) This section applies in respect of—

(a) an unrestricted fund; and

(b) a restricted fund which has a corporate trustee that is not the trustee of another fund or trust.

(2) The trustee shall make arrangements, whether through the fund rules or otherwise, in accordance with the Registrar's directives, for the establishment and operation of one or more advisory committees for the fund.

(3) While advisory committees shall not have power beyond the power to advise the trustee, in the event of a dispute by a member of the fund, failure of the trustee to provide evidence that it has failed to respond adequately to concerns raised by the advisory committee shall be regarded by the Registrar as a breach of the trustee's fiduciary responsibility to the members of the fund.

29.—(1) This section applies to a pension fund to which the equal representation rule applies.

Rules for
appointment
of member
representatives

(2) The trustee shall establish rules, whether by inclusion in the fund rules or otherwise—

(a) setting out a procedure for appointing the member representatives; and

(b) ensuring that the member representatives so appointed shall be removed only by the same procedure as that by which they were appointed, except in the event of—

(i) mental or physical infirmity;

(ii) retirement;

(iii) termination of employment with a fund employer; or

(iv) such other circumstances as are prescribed in Registrar's directives for the purposes of this section.

(3) The trustee shall publish the rules established under subsection (2) in a way that will make members aware of the procedure for appointment and removal of member representatives.

(4) Any person who contravenes subsections (2) and (3) commits an offence and shall be liable to an administrative penalty under the Financial Services Act, 2010.

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2010

Division 2—Investment managers, administrators, pension brokers, custodians and actuaries of pension funds and umbrella funds

30. The Registrar shall not license an individual as—

(a) an investment manager or a custodian for pension funds or umbrella funds;

(b) an administrator of pension funds; or

(c) a pension broker.

Investment
managers,
pension
brokers,
custodians and
administrators
to be bodies
corporate

31.—(1) If the trustee of a pension fund—

(a) appoints a person other than a body corporate to be investment manager, administrator, pension broker or custodian for the fund; or

(b) appoints a person to be investment manager, administrator, pension broker, actuary or custodian for the fund otherwise than in writing,

Appointment
of investment
managers,
pension
brokers,
custodians and
administrators
to be in
writing

the trustee and the person appointed shall each be liable to administrative penalties under the Financial Services Act, 2010.

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2010

(2) If, in contravention to this Act, the operator of an umbrella fund—

(a) appoints a person other than a body corporate to be investment manager, pension broker or custodian for the fund; or

- (b) appoints a person to be investment manager, pension broker or custodian for the fund otherwise than in writing,
that operator and the person appointed shall each be liable to administrative penalties under the Financial Services Act, 2010.
- Act No. 26 of 2010 (3) An appointment referred to in subsection (1) or (2) shall be void.
- Appointment of principal officer 32.—(1) A pension fund or umbrella fund shall appoint a principal officer whose appointment shall be subject to the prior approval of the Registrar in terms of fit and proper person requirements as determined in the Registrar's directives.
- (2) No pension fund or umbrella fund shall remove or change its principal officer except with the prior written approval of the Registrar.
- Individual not to act as investment manager, pension broker, custodian or administrator 33.—(1) An individual shall not act as an investment manager, pension broker or a custodian for pension funds or umbrella funds.
- (2) An individual shall not act as an administrator of pension funds.
- (3) Any person who contravenes subsection (1) or (2) commits an offence and shall be liable upon conviction to a fine of ten million Kwacha (K10,000,000) and to four years imprisonment.
- PART VI—REQUIREMENTS FOR FUND RULES OF PENSION FUNDS AND UMBRELLA FUNDS
- Pension fund rules to be enforceable 34. The fund rules of a pension fund shall be legally enforceable as between the members and the trustee, and as between the trustee and each employer.
- Pension funds to be held on trust 35. The fund rules of a pension fund shall provide that—
- (a) contributions to the fund, whether employer contributions or employee contributions, shall be paid to the trustee or as the trustee directs; and
- (b) the fund assets shall be held by the trustee in trust for members, in accordance with this Act.
- Statutory covenants for pension funds 36.—(1) The fund rules of a pension fund shall provide that the trustee of the fund covenants in favour of the members—
- (a) to act honestly in all matters concerning the fund;
- (b) to exercise, in relation to all matters affecting the fund, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide;

(c) to obtain skilled advice to assist in instances in which the complexity of issues is such that an ordinary prudent person would not be expected to make sound decisions taking all facts into account, a service for which reasonable fees may be paid from the assets of the fund;

(d) to ensure that the trustee's duties and powers are performed and exercised in the best interests of the members and beneficiaries of the fund;

(e) to formulate an investment strategy having regard to the whole of the circumstances of the fund including, but not limited to, the following—

(i) the risk involved in making, holding and realising, and the likely return from, the fund's investments having regard to its objectives and its expected cash flow requirements;

(ii) the composition of the fund's investments as a whole, including the extent to which the investments are diverse or involve risks from inadequate diversification;

(iii) the liquidity of the fund's investments having regard to its expected cash flow requirements; and

(iv) the ability of the fund to discharge its existing and prospective liabilities;

(f) to give effect to the investment strategy formulated under paragraph (e);

(g) to keep the money and other assets of the fund separate from any money and assets—

(i) that are held by the trustee personally; or

(ii) that is money or are assets of another person, including an employer or a related party of an employer;

(h) not to do anything that would prevent the trustee from, or hinder the trustee in, properly performing or exercising the functions and powers of the trustee;

(i) if there are reserves of the fund, to formulate and to give effect to a strategy for their prudential management, consistent with the fund's investment strategy and its capacity to discharge its liabilities as and when they fall due; and

(j) such additional covenants as may be prescribed in Registrar's directives for the purposes of this section.

(2) The covenant referred to in subsection (1) (h) shall not prevent the trustee from engaging or authorizing persons to carry out specified actions on behalf of the trustee.

