

## FINANCIAL SERVICES LAWS AMENDMENT BILL

### Is it a matter between re-entering the dark ages or joining Alice in wonderland?

A commentary by T Friedrich: Managing Director – Retirement Fund Solutions Namibia (Pty) Ltd

Is this an innovative concept for dismantling the legislative powers of parliament and have a government agency usurp these? The Financial Services Laws Amendment Bill, if passed in its current form, will have extremely wide implications for the financial services industry. Effectively, all established principles, practices, processes, legal precedent and procedures that evolved over close to a century will be destined for the waste bin, while the people of Namibia, who have any dealings with any currency denominated figure, will have to wait, hope and pray to heaven that ‘things will work out the way they hoped they would’. *There will be absolutely no certainty* in anything that is being and will be done in the financial services industry anymore, and this situation will prevail for many, many more years. There also now seems to be quite a lot of duplication between the various financial services laws (certainly with the Pension Funds Act that we focus on) and the Namfisa Act if the Bill is promulgated, that will cause a lot of confusion and contradiction. The principle question that begs to be answered is: where will we get the soldiers to wage this war? We all know how scarce expertise and financial resources are in Namibia and just how difficult it is to maintain some order and discipline as things stand. This, in a nut shell is our vision of where we are heading and a vision it can only be since, ‘all meat still has to be put to the bones’. Of major concern too is the extent of power that will be entrusted to the registrar that as a matter of course will have to be managed at significant additional direct costs, and even higher indirect costs, to be regulated, the industry.

For in case parliament is comfortable to abrogate its responsibility towards its constituencies, I shall in what follows, go into a bit more detail, knowing full well that I am busy entering a tunnel with no natural or artificial light.

Before we look at some key definitions and their implications, let us try and understand the executive hierarchy envisaged in the Bill. We have the ‘**Minister**’ (Minister of Finance) who shall be advised by the ‘authority’ on matters related to ‘financial institutions’ and ‘financial services’, of its own accord or at the request of the Minister. He shall also be consulted by the ‘board’ in the exercise of powers conferred upon and the performance of duties assigned to it and the registrar. The Minister may, subject to the provisions of the financial services law(s), give the registrar written direction about the policies or priorities... “but only if the Minister is satisfied that it is necessary to do so in the national interest.” and, take note, “...The Minister must not give a direction in terms of...” the foregoing... “unless he or she has consulted the board about the proposed direction.” (Sounds a bit presumptuous, doesn’t it?)

Then we have the ‘**authority**’, i.e. Namfisa. Interestingly, the “...registrar and the Authority may, after consultation with the advisory committee, make rules, including

different rules in respect of different categories of complaints or investigations by the Ombud...” concerning essentially who may complain, about what one may complain, the rights and duties of the parties to a complaint, administrative and procedural matters etc. If I haven’t lost you yet, it is purely a result of my writing skills and not of what I am trying to interpret. Just one point I take note of, is that Namfisa actually has an interest in any penalties administered on delinquents as any surplus remaining after distribution of a portion to the offended, will form part of its funding, granted, only after 30 years.

Now, Namfisa has a ‘**board**’ to consist of no less than 10 members of whom the majority shall be non-executive, appointed by the Minister “...with due regard to the interests of the users and the suppliers of financial services... intermediaries and the public interest.”

We have Namfisa’s ‘**chief executive officer**’ who is also the ‘**registrar**’. There will be an ‘**executive committee**’ “...which shall during periods between meetings of the board, perform the functions of the board...”, which is thus subordinate to the board. We also will have an ‘**advisory committee**’ “...which may on its own initiative, or must at the request of the Minister or the registrar investigate and report or advise on any matter relating to financial institutions. It consists “...of a chairperson and other members, representative of financial institutions and user of financial services appointed by the minister after consultation with the board.” The registrar is a member of this committee but without voting power. It does not seem to have any authority or power other than advising. But at least, you will be remunerated.

Alas, there will be a ‘**board of appeal**’. This shall comprise of a legal practitioner, an industry expert and an auditor, appointed by the Minister. So at least we can hope for some reprieve if things really go awry, and if you do “...feel aggrieved by a decision of the chief executive officer (of Namfisa or the registrar) taken under a financial services law, or a determination by the Ombud in terms of (this Bill)...(you) may...appeal against that decision to the board of appeal.” It is to be noted that appeal regulations have already been promulgated in Government Notice 160 of 22 September 2006.

Finally, there is the ‘**Ombud**’ who “...is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable... with regard to...the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and considerations of equity.” The Ombud is directed to be independent and must also be impartial when dealing with complaints in terms of section 27 (accounting by and auditing of Namfisa – does this make any sense?) and 28 (annual report of Namfisa – does this make any sense?). Do I understand this to mean that he is not required to apply the same values otherwise? “The ‘board’, after consultation with the ‘advisory committee’ must appoint as Ombud, a person qualified as a legal practitioner...with at least twelve years experience...” and “...may appoint one or more persons..” equally qualified with at least seven years experience as deputy ombud. “An official receipt of a complaint... suspends the running of prescription. Where a complaint relates to the complainant having suffered loss “...as a consequence of a contravention of a financial services law...” or where the registrar institutes such an action on behalf of a complainant, “...Notwithstanding the

provisions of any other law, an action... may be commenced within 5 years (the normal prescription period is 3 years)...” after the incident. Take note that “...The Ombud must decline to investigate any complaint which relates to an act or omission which occurred on or after the date of commencement of this Act but on a date more than three years before the date of receipt of such complaint...” This 3 year grace period (how does this relate to the 5 year period, just a few line up?) actually only starts running from the time “...the complainant became aware or ought reasonably to have become aware...”. So what about incidents that occurred before the commencement of this Act? They are still eligible for investigation! The Ombud’s determinations may be to dismiss or uphold a complaint or to award compensation for any “...financial prejudice or damage suffered..”, including a determination on interest. He may also may make any order which a court may make. Concerning penalties, the “...board, with the concurrence of the registrar may ...determine the maximum monetary award..., the granting of costs...” in favour of the Ombud, which shall bear interest. But, don’t despair, if you are seriously unhappy with a determination, you may appeal!

Now let’s move to some of the other key definitions that we have to take cognizance of. We read about ‘**advice**’ being “...any recommendation, guidance or proposal of a financial nature furnished by any means or medium, to any client (not defined) or group of clients...” in connection with, essentially, any currency denominated transaction. So whether I advise for remuneration or not is besides the point. O.K. this is to say unless I can claim innocence under what is defined not to be advice such as factual advice (if you really want to be sure read subsection (8) of section 1), “...an analysis or report on a financial product without any express or implied recommendation, guidance or proposal that any particular transaction in respect of the product is appropriate...” or advice by the board or a board member or a pension fund, friendly society or medical aid fund to its members on benefits enjoyed or to be enjoyed, or any advisory activity exempted by the registrar by notice in the Gazette.

We have a new definition of a ‘**controller**’ who is “...a person that is a controller of the juristic person...”. It is

- “a person who is in a position to control or exert significant influence over the business... of the juristic person...” the juristic person being “a director or member of the governing body..” or “...a person that has the power to appoint a person to be a director or member of the governing body..” or “...a person whose consent is needed for...” such an appointment or”...a person that holds at least 20% of the shares of the body..” or “...who controls at least 20% of the voting rights...” or “...a person determined by the registrar by notice in the Gazette to be controller...”. You as declared controller, may actually “...make a representation to the registrar about the matter.” So what is its relevance? O.K. if your are a controller of a prudentially regulated financial institution, firstly, you cannot take control of any business, because if you do you “...commit an offence unless the registrar has approved the person’s becoming a controller...”. You may also not vary your voting power (decrease or increase) by more than a specified percentage because you “...commit an offence unless the registrar has approved the variation.” Then once you have attained or relinquished control, you have 14

days to report the matter to the registrar and so does the prudentially regulated institution. Doesn't this make the registrar henceforth the controller of all financial institutions in Namibia?

We read about '**financial crime**', being all those things we always thought were of such nature, for example "the financing of terrorist activity". Has anyone actually ever tried to define this term?

To determine whether the Bill has an impact on you, if you were not already covered previously, you should consider what was added to the previous definition of '**financial institution**'. The new ones are:

- "a person that...provides...investment advisory services to other persons;"
- "a central securities depository, depository institution or a securities clearing house as defined in a prudential standard;"
- "an insurance agent, an insurance broker or a re-insurance broker..." (both long- and short-term)
- "a fund adviser or fund intermediary..." (medical aid funds, unit trusts, participation bonds, pension funds, and the inevitable catch all..) "...any person...who renders an intermediary service or give(s?) advice;"
- "a debt collector as defined in a market conduct standard;"(or a debt administrator, credit bureau, debt consolidation services, debt factoring house,
- "a person rendering pawn services as defined in a market conduct standard;"
- "a deposit-taking micro-finance institution...as defined in a prudential standard and taking deposits not exceeding the limit as set in such prudential standard;"
- "a person who is a fellow of the Institute of Actuaries of England... (and of so many others or similars and... this time no market conduct or prudential standard?);"
- "a hedge fund..."
- "the *Social Security Commission*..."
- "the *Motor Vehicle Accident Fund*..."
- And to round things off, after the above, even if you are not registered but provide any of the above (plus of course what is already in the Namfisa Act), you too are a financial institution.

Then we have the new definition of '**financial product**' which seems to be pre-occupied with securities and instruments, debentures, securitized debt and "any warrant, certificate and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose or convert securities and instruments...". This time no reference to the new standards and no catch all clause. What about an insurance policy, for example – is this definition wide enough?

'**Financial service**' is defined, quite straight forward, as those services provided by financial institutions.

'**Financial services laws**' are the following:

- Namfisa Act

- Friendly Societies Act
- Inspection of Financial Institutions Act
- Long-term Insurance Act
- Short-term Insurance Act
- Medical Aid Fund Act
- Participation Bonds Act
- Pension Funds Act
- Stock Exchanges Control Act
- Unit Trust Control Act
- Usury Act

‘**Intermediary service**’ means “... any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier...” that leads or may lead to a transaction as contemplated in this act. Take note what is not ‘advice’ as per the definition of ‘advice’ above. It includes any act with the view to buying, selling/dealing, managing, administering, keeping in safe custody, maintaining/servicing a financial product, to collecting or accounting for premiums in this respect or to receiving, submitting or processing claims of the client against a product supplier.

The real scary stuff comes, amongst others, with the definition of ‘**market conduct standard**’ and ‘**prudential standard**’. One is practically a carbon copy of the other the difference being that former applies to ‘financial institutions’ that are not ‘**prudentially regulated financial institutions**’, while latter applies to the ‘prudentially regulated financial institutions’. Now here “The registrar may, by notice in the Gazette, determine standards imposing requirements with regard to-...” and I will only give a sample of the more interesting ones:

- “the market conduct of financial institutions...to ensure that the financial institutions...employ fair practices in dealings with members of the public and do not cause or promote instability in the Namibian financial system;” (thanks heaven I am not a financial institutions else these comments might be determined to promote instability in the Namibian financial system!)
- “the market conduct of financial institutions so as to ensure that the affairs of such institution takes place with integrity, prudence and professional skill.”
- “without limiting what a market conduct standard may deal with, such standards may impose requirements...with respect to...
  - Fit and proper requirements for controllers, managers, directors, and other officers of such financial institutions;
  - The governance of such financial institutions;
  - Insurance arrangements to be complied with;
  - The use by such financial institutions of financial instruments and off-balance sheet transactions;
  - Outsourcing;
  - How financial institutions manage risks associated with their businesses;
  - Rules for advertising and marketing...;
  - The powers and duties and functions of controllers, managers, directors and other officers of such financial institutions;

- “the combating of financial crime.”
- “A person that contravenes a...standard...is guilty of an offence, the penalties for which must be stipulated in such standard.”

Do we still need expertise, if everything has been reduced to a standard and all that needs done is...follow the standard?

New standards will be brought to our attention and we will have at least 45 days to make representations. And, take note, the registrar should have “...had regard to...” them!

Besides that the fact that the registrar will have to do all the thinking for us in future, the registrar has further powers to give directions how to conduct the affairs of your financial institution, “...to

- cause and auditor chosen by the registrar to audit the records...at the expense of the financial institution;
- cause a valuator chosen by the registrar to prepare a report...at the expense of the financial institution;
- ensure that a specified director or employee of the financial institution does not take part in the management or conduct of the business...except as permitted by the registrar;
- to appoint a specified person or persons to a specified office of the financial institution...;
- not to borrow a specified amount;
- not to pay dividends on any shares;

... and so on. So we don't need managers anymore as the registrar will do it all for us! Wonder who will carry the can if things go wrong... take note that the registrar and those surrounding him, are all “...not liable in respect of anything done or omitted to be done or omitted to be done in good faith in the exercise of any power or the performance of any power...”. No such luck for us as managers or directors, good faith and professional judgment does not exonerate us!

You might have wondered how the ‘**prudentially registered financial institution**’ is defined, and rightly so, because the requirements for these are much more specific and stricter than for an ordinary financial institution. Take note of the following identified as such, and I try to abbreviate (the more unusual one in italics):

- asset manager, asset administrator, investment manager, *investment advisor*
- *property manager, property administrator*
- *securities depository, securities clearing house* (sorry for the latter, you will have to wait for a prudential standard for a definition)
- stock exchange
- *friendly society* (I feel sorry for you, after all, you are just trying to help)
- insurer or reinsurer (all of you)
- medical aid fund or *fund intermediary*
- *debt collector* (wait for the market conduct standard for your definition)
- *debt administrator* (wait for the market conduct standard for your definition)

- *deposit taking micro finance institution debt administrator* (wait for the market conduct standard for your definition)
- *debt factoring house* (wait for the market conduct standard for your definition)
- *debt administrator* (wait for the market conduct standard for your definition)
- *hedge fund* (wait for the prudential standard for your definition), and by the way if you are concerned with the management of such fund, *you too*
- *Social Security Commission and Motor Vehicle Accident Fund* (I guess I need not comment on these)

To my mind, one serious omission with regard to prudentially regulated financial institutions and more specifically those whose business is protected by means of legislation (primarily insurance companies) and who also compete in the open market for unregulated business, is a mechanism to prevent such organisation from exploiting its position at the expense of their clients by attempting to tie a client to their organisation. Banks for example are now prohibited to sell tied product to their clients such as mortgage protection insurance cover.

In case you want to know who is a ‘**product supplier**’, it is quite simply someone who issues a financial product by virtue of an authority, approval or right granted to that person under any law.

The next new definition of consequence is that of ‘**undesirable practice**’ meaning something determined as such by the registrar by notice in the Gazette, in relation to a financial service of a financial product.

### **Registration of Financial Institutions**

Now we come to the body of the Bill. Clearly, having drawn the battle lines by way of definition, the Bill requires that anyone who provides a financial service must be registered, it describes the process of registration and how registration may be varied, suspended or cancelled. Section 4 (registration of pension funds) and section 27 (variation, suspension and cancellation of registration) of the Pension Funds Act deal with the same topics and we suspect that there is likely to be conflicting requirements. This needs to be investigated, also with reference to the other financial services laws.

### **Prohibition of False or Misleading Statements**

We read that we “...must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive in relation to a financial service or financial product...” and there is a long list from what we should refrain (sect 18BB).

### **Reporting obligations**

The registrar “...must impose requirements on any of ... financial institutions/their affiliates.. a director or senior officer of a financial institution...an auditor...or valuator...controllers...managers or officers of financial institutions, to make reports to the registrar, and to give information or documents to the registrar about matters concerning the financial institution...”. The “...registrar may...require lodgment of returns...” require reporting of changes in management and contraventions of anything contained in the Bill and, listen to this, if you report financial difficulties or any

contravention "...whether or not the report is required by law, (you) shall not be liable for damages or other sanction in relation to a loss...unless...the report was made in bad faith". Take note also that you commit an offence if you contravene these stipulations or if you "...subject another person to any prejudice in his...employment penalize.." that person on the grounds of having made such a report.

### **Self Regulatory Organisations**

Now lets move to some lighter reading. The Bill provides for the recognition of self regulatory organisations and for the registrar delegating some or all of his powers. So much for the lighter reading.

### **Enforceable Undertakings**

There is a new provision for a person making and the registrar accepting "...a written undertaking in connection with a matter in relation to which the registrar has a function in terms of a financial services law...". Such undertaking may only be withdrawn or varied with the registrar's consent and he may enforce compliance through the High Court. The remedies of the High Court are set out here (section 18 DA (4)).

### **Compensation for Breaches of Financial Services Laws**

You may seek to recover any loss (take note that this may be any loss and not only financial loss) resulting from a contravention of this Bill by action in a court, or if you don't want to do this the registrar may step into your shoes. And a word of caution to would be offenders here, "...if the court thinks fit, (it) may order a defendant to pay a penalty for punitive purposes not exceeding four times the amount of the profit or gains that may have accrued to the defendant..." over and above you being required to compensate for the loss incurred by the claimant.

### **Administrative Penalties**

The registrar too can have a go at you by way of an administrative, monetary, penalty, if he "...is satisfied... that a person has contravened a financial services law. The amount will be not more as may be prescribed from time to time. It goes without saying that the registrar may also approach the High Court to get you to 'toe the line'. The court may "...order the defendant to pay the registrar's costs of the proceeding including on an indemnity basis."

### **Compromises, Arrangements, Transfers of Business, Statutory Management and Winding up**

The Bill takes a totally new approach to schemes to make a compromise or arrangement, to transfer business, to effect statutory management or the winding up. In the past each 'financial services law' contained its own provisions in this regard while the Bill now envisages that these provisions are consolidated into one set of rules within the Namfisa Act. A court may not make and order in terms of Sections 311 (compromise or arrangement) and 314 (reconstruction or amalgamation) of the Companies Act in relation to any institution subject to the control of the registrar unless the registrar has approved such a scheme and the registrar is entitled to be heard at such court proceedings. This part, as was the case before, stipulates that "...none of the business or a prudentially

regulated financial institution... may be transferred to another person or amalgamated with the business of another person except under a scheme... that has been approved by the registrar.” Application for approval must be made as prescribed by regulation and must contain a report by a valuator, as in the past, and, as a new requirement, a report by an auditor. There must be “...particulars of the voting at the meetings (if any) of the prudentially regulated financial institution... at which the scheme was considered...” and “...such other information as may be prescribed.” As a new requirement certainly as far as pension funds are concerned “...notice of the application, as approved by the registrar, must be published in the Gazette and otherwise as determined by the registrar.” The registrar, has exceptionally wide discretion on accepting, declining or requiring changes to such an application. Certainly, for pension funds the process will be substantially more cumbersome even without the registrar’s prescriptions by regulation and one may argue that this is likely to limit and inhibit competition.

The effect of the approval of such a scheme by the registrar is that the scheme “...binds all persons concerned, and has effect despite any provision to the contrary in any document; and if the scheme provides that assets or liabilities... are transferred to another institution, ...that property is transferred to and vests in, and those liabilities are transferred to and become the liabilities of, the transferee, free, if the scheme so provides, of any charge or encumbrance.” “Within 90 days after... a scheme...has been approved..., each prudentially regulated financial institution concerned must give the registrar... a statement of its assets and of its liabilities at the date of the... approval, duly certified by its auditor; and a declaration... by two or more of its directors that, to the best of their knowledge and belief, every payment made or to be made... is fully set out in the scheme and that no payments other than those... have been or are to be made...”.

Strangely, we read that “... a transaction effected in terms of this part, shall not deprive a creditor or a party thereto (other than in its capacity as a member...) of a right or remedy that it had immediately after the relevant scheme took effect against any party to the scheme or against any member... of such party.” One may be forgiven for asking what the purpose of the whole process is, if the transferor party cannot fully and finally rid itself of all liability, once it rid itself of the relevant assets. After all any effected party had an opportunity to raise its concerns before approval of the scheme.

The registrar and any other person, subject to the registrar’s consent, may make an application to the High Court to appoint a person to be the statutory manager of a prudentially regulated financial institution and the High Court’s remedies and obligations in such a situation are set out in the Bill. The person to be appointed as statutory manager must be approved, and he may at any time be removed by the registrar. His powers and obligations are also set out in the Bill.

With regard to the winding up of a prudentially regulated financial institution, no resolution, demand or other step in this regard is of any effect, without the registrar’s prior approval and no application may be made to a court (the High Court?), except by the registrar or with his approval.

Sections 28 (voluntary dissolution of a fund), 29 (winding up by the court) and 30 (special provisions relating to liquidation of funds) of the Pension Funds Act also deal with the matters dealt with in this section of the Namfisa Bill, and there is likely to be a conflict between the Namfisa Act and this section. This matter should be investigated also with reference to the other financial services laws.

### **Education Responsibility of Authority and Registrar**

An interesting new section introduced by the Bill deals with the education responsibility of the registrar and the authority. They "...must act to promote an understanding among the Namibian public of the authority's and the registrar's principal objective and the rights and responsibilities of the members of the public in relation to financial services." In this context, the "...registrar may take any steps...and other enforcement measures established by or in terms of this act, including arrangements with ...representative bodies, client and consumer bodies, or financial institutions and their representatives..."

### **Delegation of Authority and Powers**

And here is another questionable stipulation – "the chief executive officer may delegate to an employee of the authority any power conferred upon the chief executive officer or the registrar under this act, ...including any power delegated to the chief executive officer..." Doesn't that defy all conventional wisdom about delegation? How will the unsuspecting citizen be made aware what the registrar/chief executive officer has delegated to whom?

### **Preservation of Secrecy and Compliance with Directions**

The Bill furthermore contains a 'preservation of secrecy' section and a 'compliance with directions' section. Latter is also quite a tall order requiring under threat of penalty "...a person must not, without reasonable excuse, (shall I suggest that this term be defined by regulation?) fail to comply with a direction, order or requirement given to the person under a financial services law." and "...a person must not knowingly hinder or prevent compliance..."

### **False or Misleading Statements**

Please do refrain from making false or misleading statements or provide incorrect information that you know or ought reasonably to know that it is false or misleading. And don't authorize anyone else to do so.

So much for the Bill that is to amend the Namfisa Act. Our 'high level' concerns are provided right at the outset while our issue with specific clauses can be read out of the commentary on the Bill.

## **AMENDMENT TO THE PENSION FUNDS ACT**

The Bill also contains significant amendments to the various acts referred to as financial services laws, to inculcate the principles introduced by the Bill. Our commentary will be restricted to changes to the Pension Funds Act 24 of 1956 only. One of my concerns regarding the Pension Funds Act is, that there does not appear to be a correct version of

the Act as it applies to Namibia. I believe that the Act used as basis by Namfisa for drafting the amendments is incorrect and outdated. As a point in case, the Bill attempt to change references to Union to Republic of Namibia. Does anyone believe that the South African Act that we inherited with independence would have still referred to the Union in 1989? My version certainly no longer does, and it would be interesting to understand the possible implications if Namfisa is trying to amend an outdated act.

Lets now look at the sections that will be repealed:

- Section 3 dealing with the registrar’s authority to delegate any power or duty assigned to him, as this is now covered in the Namfisa Act;
- Section 14, dealing with amalgamations and transfer, as this is now covered in the Namfisa Act;
- Section 15, dealing with the submission of an annual return by every fund, as this is now covered in the Namfisa Act;
- Section 17, exempting a fund from periodic valuations under certain circumstances, presumably because this will be dealt with in a prudential standard. Where a fund is managed on pure accounting principles, we strongly argue that these should not be required to have periodic valuations done and that this be recognized in the relevant prudential standards. The same principles should be applied to funds exclusively underwritten by insurance policy/ies. These should not enjoy any special status purely because they are underwritten, as insurers these days no longer provide any guarantees or assume any responsibility for a fund’s liabilities.
- Section 18, dealing with a fund not in a sound financial condition, presumably because this will be dealt with in a prudential standard.
- Section 25, dealing with the registrar’s powers of inspection, as this is now covered in the Namfisa Act;
- Section 26, dealing with a court altering the basis of management of a fund, as this is now covered in the Namfisa Act;
- Section 29 dealing with winding up by the court, as this is now covered in the Namfisa Act;
- Section 32A dealing with certain practices or methods of conducting business prohibited, as this is now covered in the Namfisa Act;
- Section 34 dealing with the annual report by registrar, as this is now covered in the Namfisa Act;

Following are some of the other changes to the Pension Funds Act to be taken note of. The Bill introduces the definitions of ‘fund intermediary’, ‘fund adviser’, ‘market conduct standards’, ‘prudential standards’ and ‘registrar’ as per the financial services laws amendment bill, into the Pension Funds Act.

When applying for registration a fund now has to comply with the, to be regulated, prudential standards while some of the new principles in the Namfisa Act are made a requirement for registration.

Regarding matters to be included in the rules of a fund, the Bill now adds “such other matters as may be prescribed” as a general clause for what has to be included. It also

states that “if the rules of a fund are inconsistent with a financial services law, including the prudential standards, the rules are invalid to the extent of the inconsistency.” The clause allowing for the consolidation of a fund’s rules has now been scrapped. Instead the registrar may now direct the amendment of rules that do not comply with the financial services laws and may, failing compliance with an order to do so, amend the rules.

The most comprehensive amendment to the Act deals with contributions. Specific requirements are introduced with regard to information to be furnished about payments (within 15 days after the end of the month) and the depositing of contributions in respect of a fund, including a fund exclusively underwritten by insurance policies. It is specifically stated that a reduction, suspension, or discontinuation does not effect the liability to make such contribution if implemented prior to the date the relevant rule amendment takes effect. This implies that the registrar must have approved the relevant amendment before such change to the contributions becomes valid. It also now states that a fund shall “...within 60 days of the date of such person’s written request to ...” transfer his or her withdrawal benefit to another fund, “...transfer that benefit or right to the other fund in full. The transfer shall be subject to deductions in terms of section 37D and to the rules of the first fund.” General provision is made for payment of interest at “..such rate as prescribed by the Minister from time to time...” on late deposit of contributions or late transfer of a benefit to another fund.

A new section (section 13B) is introduced echoing the requirements set out in the Bill, stipulating that “...no person shall give advice or render an intermediary service to or on behalf of a pension fund, unless the person is registered as a fund adviser or fund intermediary...”.

The requirements for investigations by a valuator now make reference to the, to be regulated, prudential standards.

Investment of assets (section 19) is amended to make the measure of all good investment the, to be regulated, prudential standards. This also applies to housing loans.

Section 27 which deals with cancellation or suspension of registration has also undergone major changes. It now sets out in more detail the reasons for and the process of cancellation at the instance of the registrar only, by references also of the new concepts introduced into the Namfisa Act (e.g. integrity, prudence, professional skill, damage to the interests of financial institutions, clients or the Namibian financial system etc).

Section 28 that deals with voluntary dissolution of a fund has now been subordinated to the relevant stipulations of the Namfisa Act, and more specifically the, to be regulated, prudential standards.

Section 30 that deals makes special provisions relating to liquidation of funds has been amended to make fund members preferent creditors instead of deferred creditors as before. This section, I believe can be scrapped as there are no funds with a share capital in Namibia.