



Retirement Fund Solutions



News from Namfisa

Namfisa issues revised draft amendments to regulation 1, 26, 27, 28 and 29 (key changes underlined, where relevant, or discussed where necessary)

Regulation 1 is to be amended by insertion of definitions of 'Long-term Insurance Act', 'Public Accountants and Auditors Act' and 'Stock Exchanges Control Act'.

Our comment:

These definitions are relevant in particular to regulation 28 and 29, dealing with fund investments generally and investment in unlisted equities in particular.

Regulation 26(1) is to be amended to the extent of raising the penalty for failure "...to make or to transmit or deposit a scheme, report, account, statement, other document or information within the time prescribed by ... the Act or the Regulations or within any extended period allowed by the Registrar in terms of section 24 [sect 24 deals with enquiries by the Registrar] and 33(1) [sect 33 deals with the extension of certain periods by the Registrar]..." from N\$ 10 per day to N\$ 500 per day.

Our comment:

The Registrar's current position is not to grant extension for the submission of annual financial statements. This regulation, however, makes provision for extension being granted. Any unreasonable refusal to grant extension can be challenged as administrative injustice.

Besides the above penalties set by regulation, section 37 provides for the following statutory penalties upon conviction for contravention or failure to comply with –

- appointment of auditor, appointment of valuator, timely payment of contributions, providing copies of documents to members to which members are entitled (rules, financial statements, actuarial valuation report, statements by fund concerning the fund's assets and liabilities in lieu of valuation report, a scheme that has been made to bring the fund into a financially sound condition): a fine not exceeding N\$ 200.
- making a return or to transmitting or depositing a scheme, report, account, statement or other document, or with provisions relating to investment in an employer or participating employer, provisions with regard to housing loans, provisions with regard to a loan to a member or to a company (or its subsidiary company) controlled by a member or an officer of the fund, or with conditions prescribed by the Minister with regard to investment in unlisted investments: a fine not exceeding N\$ 500.
- a request by the Registrar for assistance or to furnish information or produce documents or accounts or refusal to do so, or induce or attempt to induce a person to become a member of or to contribute to a fund not registered in terms of the Act: a fine not exceeding N\$ 1,000.

- provisions defining the type of business a pension fund may undertake or carrying on business of a pension fund or using the designation of 'pension fund' without being registered in terms of the Act or doing any type of business that was prohibited by the Registrar by notice in the Gazette after 21 days of such notice (provisions for objections exist), or with a directive to rectify any practice or method of conducting business within 60 days or such longer period directed: a fine of N\$ 1,000 or, if offender is an individual, imprisonment not exceeding 12 months, or both.

Regulation 26(2) is to be introduced, which provides for a penalty of N\$ 1,000 per day for contravention or failure of a person to comply with any provision of regulation 28.

Our comment:

This is a new penal provision. Interestingly, it may not necessarily be imposed upon a contravening fund but also on any other person although it is only the fund required to comply with the Act. Perhaps Namfisa can clarify what the intention of this particular wording is.

Regulation 27 is to be amended by setting the interest rate on direct pension fund loans at BON's repo rate plus 4%, currently 10% p.a.

Our comment:

Hitherto the interest rate was set at 16% since 1 August 1989. Employers whose fund offers direct loans need to ensure that salary deductions for employees' housing loan repayments are adjusted in future whenever the repo rate is adjusted by BON. The same applies to administrators whose clients offer such loans.

Regulation 28 is to be amended by the following key changes:

- A definition of 'domestic asset' is introduced, covering credit balances held with banks in Namibia, government bonds, bonds of SOE's, local and regional authorities, corporate bonds, property in Namibia and shares in Namibian listed companies, including foreign companies if they are listed on a Namibian stock exchange, or any other asset designated as such by the Minister.

Our comment:

This definition appears to include corporate bonds of foreign companies as 'domestic asset'. The annexure to the regulation restricts the investment in such bonds to 50% and requires approval of the country in which the entity is situated. It does not include loans to member, investments in the business of a participating employer, or any asset not listed in the Annexure (e.g. gold coins/bars, works of art) unless such assets are designated a 'domestic asset' by the Minister by notice in the Gazette. It appears that these issues may have to be reconsidered by Namfisa.

- The definition of 'linked policy' is removed.
- A definition of 'foreign asset' is introduced, covering all assets that are not 'domestic assets'.

Our comment:

The Annexure to the regulation only lists a limited number of assets in which a fund may invest. True Namibian assets may fall into the category of 'foreign asset' purely because of this, unless the asset is

designated 'domestic asset' by the Minister by notice in the Gazette. Some of these are listed in our comment on the definition of 'domestic asset' above.

- A definition of 'market value' is introduced, setting out how different asset classes are to be valued. Assets quoted on a Namibian stock exchange or one in the common monetary area is to be valued based on the price listed on that exchange within a period of 3 months prior to valuation and subject to defined adjustments for interest and dividend accruals.

For other assets the principle of 'willing buyer, willing seller' upon an 'arms-length' sale in Namibia is to be applied and, in the case of fixed property, the true purchase price is to be applied where such purchase took place not more than six months before valuation.

Our comment:

For any assets held outside the common monetary area, can the principle of 'willing buyer, willing seller' upon an 'arms-length' sale in Namibia be applied, or does this definition in fact preclude any such investment?

- A definition of 'state owned enterprise' (SOE) is introduced.
- Maximum investment in property (sub max 25%), shares (sub max 75%), other claims against natural persons/companies (sub max 25%) and other assets (sub max 2.5%) is 95%.

Our comment:

This maximum implies that a minimum of 5% less the investment in unlisted investments (min 1.75% and max 3.5%) must be invested in banks, building societies, Post Office Savings Bank, Government bonds, bonds of SOE's, local authorities, regional councils, Registrar approved Namibian corporate bonds or Registrar approved foreign bonds. It is also noteworthy that the previous sub maximum in shares is lifted once again from 65% to 75%.

- The previous reference to unlisted investments and the limits and conditions for investing in such investments, is removed from this regulation.

However, the requirement to invest a minimum of 1.75% and a maximum of 3.5% of total fund assets in unlisted investments remains in place. This is to be attained within a period of 12 months of publication of the relevant notice.

Our comment:

On many previous occasions we have raised the concern about the implication of enforcing any minimum investment in specific asset classes for funds offering member choice. Such minimum militates against a member choice to reduce his or her investment risk and volatility, often just prior to retirement and at a time where the member cannot afford any volatility. The procedure for exemption may be too onerous to be an option. It is to be hoped that the Minister will consider blanket exemption to such funds so that it becomes unnecessary for such funds to apply for exemption.

- The staggered time scale for reducing the maximum investment in shares in dual listed foreign incorporated companies is now linked to the date of publication of the relevant government notice. The final maximum investment in such shares will be 10% and has to be attained within 66 months of publication of the relevant notice. Any investment in dual listed shares in foreign companies, acquired on a Namibian stock exchange, in excess of the maximum is to be regarded as a foreign asset.

- Funds must within 90 days of each calendar quarter report on their investment holdings in such format as the Registrar may determine.

Our comment:

Currently funds only report on their investment holdings annually. Asset managers are required to report quarterly, and their reports would cover the assets of not only pension funds but also of insurance companies but would exclude any direct investment by a fund such as direct housing loans, credit balances with financial institutions, direct property investments etc. These direct holding are minimal in the context of the industry as a whole. For funds to now report quarterly will provide a marginally more accurate picture, not without substantial additional costs though. Cognisance now also has to be given to the penalty of N\$ 1,000 per day of failing to comply with any of the provisions of regulation 28.

- The concepts of 'linked policies' and 'not linked policies' is discarded. All policies are now considered not to be an asset of the fund. Policies issued to 'privately administered funds' are not subject to the requirement that the insurer must report on these in terms of regulation 15 of the Long-term Insurance Act while policies issued to so-called 'insured funds' are subject to that requirement.

Our comment:

Presumably insurance companies will be required to report on their assets in terms of regulation 15 of the Long-term Insurance Act. It seems though that the assets underlying policies issued to 'privately administered funds' can be aggregated by the insurer for the purpose of regulation 15 (the equivalent of regulation 28). This means that individual 'privately administered funds' may not need to comply. This creates uneven playing fields for 'privately administered funds' between assets administered by insurance companies and those held either directly or managed on their behalf by unit trusts. Furthermore any discrepancy between the provision of regulation 28 and regulation 15 of the Long-term Insurance Act must be avoided at all costs, failing which opportunities for 'arbitrage' would be created.

- An investment in a Namibian unit trust is now given proper recognition and the 'see-through principle' is introduced.
- Exemption from the provisions of the regulation may be granted by the Registrar, after having obtained approval from the Minister.

Our comment:

This new requirement of obtaining Minister approval is likely to introduce significant inflexibility and red-tape into our industry. Does the Registrar want to be shielded by the Minister from applications for exemption or does the Minister have any preconceived ideas about when exemptions may be granted to which the Registrar is not privy?

- The annexure to the regulation prescribing certain limits contains a few surprises.
 - Previously a fund could invest 100% of its assets in credit balances with local financial institutions. This has been reduced to 95%, a minimum of 1.75% to be invested in unlisted investments.

Our comment:

Funds offering members investment choice primarily for the purpose of members' reducing any risk of volatility and negative investment returns, to the extent of being fully invested in cash, will now be faced with the problem that the lowest risk portfolio still has to hold a minimum of 1.75% in unlisted investments and another 3.25% in any of the other asset classes.

On many previous occasions we have raised the concern about the implication of enforcing any minimum investment in specific asset classes for funds offering member choice. Such minimum militates against a member choice to reduce his or her investment risk and volatility, often just prior to retirement and at a time where the member cannot afford any volatility. The procedure for exemption may be too onerous to be an option. It is to be hoped that the Minister will consider blanket exemption to such funds so that it becomes unnecessary for such funds to apply for exemption.

- The limit on investment government bonds has been raised from 50% to 95%.
- The limit on investment in property has once again been raised from 20% to 25%.
- The limit on investment in unlisted investments of 3.5% has now (correctly) been brought into the annexure.
- The limit on investment in smaller companies listed on a Namibian stock exchange is amended from 5% on companies with a market cap of less than N\$ 1bn, to 5% on companies with a market cap of less than 500 million, and 10% on companies with a higher market cap.
- The previous rather confusing reference to unit trusts as an asset class is removed and the underlying assets are now to be analysed in accordance with the key set by the annexure.
- The annexure contains no limit for an investment in direct housing loans to members or in moneys in hand, but with the minimum investment required in unlisted investments, this would imply an effective maximum of 98.25% in such assets.

Our comment:

The annexure does not recognise fairly commonly held alternative assets such as EFT's, derivatives or structured products unless such assets are designated by the Minister by notice in the Gazette.

Regulation 28 Conclusion

The draft revised regulation represents a substantial improvement from its predecessor and has removed most of the previous ambiguities and serious drafting errors. It does give rise to a few serious concerns as elaborated in 'our comments' above. We trust that Namfisa and the Ministry will consider and heed our concerns and will still be prepared to discuss and negotiate the content of this regulation before its finalisation.

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