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**GOVERNMENT NOTICE**


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

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

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

Dated this 22nd day of February, 2011

**PRAVIN J GORDHAN**  
  
**MINISTER OF FINANCE**

## SCHEDULE

### Definition

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

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

### **Amendment of regulation 28 of the Regulations**

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

#### **“28. Asset spreading requirements**

##### **Preamble**

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

##### **Definitions**

(1) In this regulation: –

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

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



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

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

**“exchange”** means: -

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

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

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

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

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

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

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

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

**“hedge fund”** means an asset: -

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

**“property company”** means a company –

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

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

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

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

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

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

### **Principles**

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

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

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

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



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

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

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

#### **Asset limits**

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

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



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

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

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

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

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

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

- (iv) item 8: Hedge funds, private equity funds and any other asset not referred to in this schedule.
- (g) The aggregate exposure to assets specified in the following items of Table 1 must not exceed 15 percent of the aggregate fair value of the total assets of a fund: -
  - (i) item 3.1(b): Preference and ordinary shares in companies, excluding shares in property companies, not listed on an exchange; and
  - (ii) item 8.1(b): Private equity funds.
- (h) The aggregate exposure by a fund to an issuer or entity by the fund specified in items 1.1 and 2.1(c) of Table 1, irrespective of the limits referred to in Column 1 of Table 1, must not exceed 25 percent of the aggregate fair value of the total assets of the fund.
- (i) The aggregate exposure to foreign assets, referred to in Column 1 of Table 1 and expressed as a percentage, must not exceed the maximum allowable amount that a fund may invest in foreign assets as determined by the South African Reserve Bank, or such other amount as may be prescribed.
- (j) Notwithstanding paragraphs (a)-(i), the limits set out in this regulation may be exceeded where the excess is due to a change in the fair value or characteristic of an asset, and not as a result of discretionary transacting either by the fund or on the fund's behalf, provided that where a fund exceeds any limit: -
  - (i) such fund must inform the Registrar without delay of the limit being exceeded, including the reasons for such excess;
  - (ii) such fund must not, for as long as the excess exists, make any further investments or contractual commitments to invest in those assets or categories of assets; and
  - (iii) the board must ensure compliance with the relevant limits within 12 months from the date of the excess arising or such other period as determined by the Registrar.

### **Look-through**

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