FINANCIAL SERVICES BOARD

Rigel Park 446 Rigel Avenue South Erasmusrand Pretoria South Africa
PO Box 35655 Menlo Park Pretoria South Africa 0102
Tel (012) 428-8000 Fax (012) 347-0221 e-Mail info@fsb.co.za
Int +27 12 428-8000 Int +27 12 347-0221 Toll free 0800110443
Internet: http://www.fsb.co.za

Enquiries: Alta Marais D. Dialling No.: (012) 428-8065
Our ref: 12/12/1 Fax: (012) 347-8787
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CIRCULAR PF NO. 110

(To all self-administered funds, all fund administrators, and the administering insurers of funds exempted in terms of section 2(3)(a) of the Pension Funds Act, 1956)

PENSION FUNDS ACT, 1956, SECTION 13A, REGULATION 33 AND NOTICES BY THE MINISTER AND THE REGISTRAR

PURPOSE OF CIRCULAR

This circular supplements Circular PF No 108, issued in May 2001, with more detail about the practical application of section 13A.

This Circular explains the practical application of section 13A and Regulation 33 in more detail.

The Pension Funds Amendment Act, 1997 (Act No. 94 of 1997) came into effect on 2 April 2001. This inter alia amended section 13A dealing with contribution payments to pension funds.

The conditions referred to in section 13A(2)(a) were gazetted as Regulation 33 on 6 April 2001 (Govt Notice 337).

Calculation of Interest

Section 13A(7) and Regulation 33(7)

1. Interest on late payments of contributions as well as unpaid contributions is payable if payment is not received by the fund within 7 days after the end of the month for which the contribution was payable in terms of section 13A(3)(a). The interest payable is calculated from the first day of the month following that period for which the contribution was payable. The amount of the late payment and unpaid amount is determined per employer. Each participating employer, including subsidiary companies participating in the fund would be regarded as a separate employer. Interest thereon is calculated separately per period.

All references to days will be to calendar days, which include weekends. Should any of the due days fall on a weekend or a public holiday, the following working day will be regarded as the day specified in the Act and Regulations.

"Month" means a month which commences with an arbitrary date and expires on the day in the succeeding month immediately preceding the day corresponding to the date upon which the period starts *[Interpretation of Statutes by Professor GE Devenish, Juta & Co. Ltd first edition]*.

EXAMPLE

Contribution month or period commences on the 6th in terms of the fund rules.
Contributions due for the month 6 January to 5 February must be paid by 12 of February.
If the contributions are paid to the fund on 19 February.
Interest must be calculated from 6 to 18 February, both days included.

2. Interest at the prescribed annual rate, compounded daily must be paid to the fund on all late payments and unpaid amounts (Regulation 33(7)). The interest is regarded as an unpaid amount attracting further interest until date of payment as set out above. This interest is due and payable not later than two months after the month in respect of which the late payment was due. This means that in the previous example, interest for the period 6 to 18 February would be payable not later than two months after 5 February, being 5 April. If, as in the previous example, the interest on the unpaid contribution amounts to say R5 000, this interest of R5 000 will then attract further interest thereon from 19 February until the day preceding the day on which it is paid to the fund which must be by no later than two months after 5 February, namely 5 April.

Where the outstanding amount of contribution or transfer benefit is not paid within the time allowed, penalties other than late payment interest could, in terms of the rules of a particular fund, be applied (see below).

The interest on late payment of contributions constitutes investment income for the fund (Reg. 33(7)). The trustees must attempt to restore the position of the affected members to that which it would have been had the contributions been paid timeously. The rules of a fund should state clearly how the interest will be applied. If necessary, the rules of a fund should be amended to clarify the application of interest. Late payment of contributions in respect of new entrants or salary adjustments is regarded as an outstanding contribution from the date when the salary adjustment is made. If a retrospective salary adjustment is made contributions will be due from the date of the decision of the adjusted salary and not the effective date of the salary adjustment. Interest will therefore be attracted as illustrated in the following example:

EXAMPLE

August contribution paid 6 September
Amount of contribution paid R15 000
Contribution per contribution statement R15 000
AND
September contribution paid 6 October
Amount of contribution paid R25 000
Contribution per contribution statement R25 000

Even though the amount of the contribution and the amount paid is equal, the September contribution statement reveals that there were salary increases and new entrants from 1 August and that the correct contribution for August should have been R20 000 and the September contribution R20 000. This constitutes a contribution underpayment of R5 000 for August (being R20 000 minus R15 000) on which interest must be paid to the fund for the period 1 September until 5 October. The interest will then be payable on or before 6 December.

3. Regulation 33 (2)(i)(cc) deems a discrepancy of less than 2.5 % not to constitute a contravention of the regulation (see below). For purposes of calculating the 2.5%, the amount of the contribution received relative to the expected contribution must be calculated per pay point or participating employer (where contributions are received from the participating employer which does not have any other pay points).

In terms of section 33 the registrar may at the request of the fund, extend certain periods set out in section 13A.

EXAMPLE

One participating employer has three pay points relating to branches. The monthly contribution from pay point "A" is 5% short in terms of the (correct) data supplied. Overall the employer's contribution is only 1% short. There is a duty to report to members, related to pay point "A".

There are two employers contributing monthly to the fund. Employer A is 5% short for one month, relative to (correct) data supplied. It is not possible to isolate the particular employees in respect of whom contributions may have been short paid. Employer B overpays by 2%. Overall for both employers the discrepancy on total contribution is only 1%. The board must instruct the monitoring person to inform members employed by employer A of the shortfall in contribution payments for the month.

4. The Minister prescribes the interest rate on late/underpayments by Notice in the *Gazette*. The current rate (Notice 1099 of 9 November 2001) is the same as the maximum annual finance charge rate under section 2 (1) of the Usury Act. This is presently 23 % per annum in respect of amounts not exceeding R10 000 and 20 % per annum in respect of amounts exceeding R10 000.

These prescribed maximum finance charges are amended from time to time and it is the responsibility of the fund to establish when these rates are amended.

EXAMPLE

Fund has two participating employers.

Employer A: Contribution due = R8 000 (i.e less than R10 000).
Paid late.
Interest charged at 22 % (prescribed rate at 8 January 2004)

Employer B: Contribution due = R12 000 (i.e exceeds R10 000).

Paid late.
Interest charged at 19 % (prescribed rate at 8 January 2004)

5. The provision for interest on late payments and outstanding amounts became effective on 2 November 2001. Interest will therefore accrue from 2 November 2001 in respect of any unpaid amount due to the fund as contemplated by section 13A(7) and regulation 33(7).

EXAMPLES

- **Contribution for September 2001**.
  Contributions must be paid to the fund not later than 7 October 2001.
  Contribution paid 10 November 2001.
  Interest calculated from 2 November 2001 until 9 November 2001.
  Other penalties set out in the rules of a fund may also apply.
  Interest payable by no later than 30 November 2001.

- **Contribution for October 2001** as well as contributions outstanding from March 2001.
  October contributions must be paid to the fund not later than 7 November 2001.
  Contributions for March 2001 to September 2001 still outstanding.
  All outstanding contributions paid on 10 November 2001.
  Interest on the total of the outstanding contributions will be calculated from 2 to 9 November 2001 (both dates included).
  The interest calculated above will be payable by no later than:
  - 31 December 2001 for October 2001 contributions;
  - 30 November 2001 for September 2001 contributions; and
  - the interest on the total of the outstanding contributions from March to August 2001 will be payable immediately.

6. **REPORTING**

Sections 13A (2) and (6), Regulations 33 (1) to (6) and (8).

6.1 The initial contribution statement had to be furnished by 3 October 2001 for funds established on or before 31 August 2001 (Regulation 33(8). For every fund established thereafter, such initial contribution statements have to be furnished within 15 days after the end of the period in respect of which the first contribution is paid (section 13A(2)).

Subsequent contribution statements shall be furnished to the fund within fifteen days after the end of the month or period in respect of which contributions are payable.

EXAMPLE
Fund commenced 1 January 2001. Contribution periods run from 1st of month to end (30th/31st) of the month. Initial statement due 3 October in respect of August contributions, Subsequent statement due 15 October for September contributions. Thereafter monthly by the 15th

6.2 The responsible person should report to the monitoring person:

- outstanding contributions - within 22 days ; and
- non-transmission of data or irreconcilability of contributions with data - within 30 days

from the end of the month or period in respect of which the contributions and data were due (Regulation 33(2)).

6.3 The monitoring person shall within 7 days after the receipt of the report set out in paragraph 6.2 above, report the failure to comply with section 13A(2)(b) and (3)(a) to the board.

6.4 The board must instruct the monitoring person to inform those members of the fund in respect of whom the contributions are outstanding (section 13A(3) and regulation 33(4)). The board has the discretion as to when this report must be made. However, the board members have a fiduciary duty to ensure that such report is made within a reasonable period.

If the non-compliance reported to the board concerned, a matter other than the failure to pay the full contribution to the fund as required in terms of section 13A(3) of the Act and where a good reason exists, the board may delay the reporting of the matter to the affected members until the following month. If, at the end of that month, the non-compliance has not been rectified, the board must instruct the monitoring person to bring such failure to the attention of the members.

The monitoring person's report on non-compliance need only be sent to the affected members, provided that these members can be identified failing which the report must be sent to all the member.

Thus, if there are several pay points making contributions to a fund, but only one pay point defaults, the monitoring person need only advise the members affected by the defaulting pay point.

7. Regulation 33 (5) requires that where failure to transmit contributions by the deadline has continued for 90 days, the monitoring person must report the matter to the Directorate of Public Prosecutions within a further 14 days after the end of the 90 day period. The monitoring person must advise the Registrar accordingly.

The 90 day period applies to "any failure" to transmit contributions within the seven day deadline period.

The 90-day period commences on the expiry of the seven day period. Therefore, if the full contribution due in respect of a particular month has not been paid within 97 days of the end of that month, the monitoring person must report the matter to the Directorate of Public Prosecutions within a further 14 days. The proposed procedure for such reporting is outlined below. Note that the Registrar only has to be advised of such report and does not, unless he specifically requests, require a copy thereof.

8. The proposed procedure for reporting the matter to the Directorate of Public Prosecutions

8.1 The monitoring person must report the matter to the Director of Public Prosecutions. It is further recommended that the monitoring person of the fund also report the contravention of section 13A, with specific reference to the employer in default, to the South African Police Service at the commercial branch nearest to the fund's registered address. A docket will be opened and a case number issued.

8.2 The investigative officer will also report the matter to the Director of Public Prosecutions in the specific area for investigation. This process will be investigated and monitored by the office of the Director of Public Prosecutions.

8.3 The following information has to be submitted when the case is reported:

- An affidavit by the monitoring person of the fund. (See **Attachment A or B**, whichever is applicable);
- Certificate from the Registrar of Companies providing details of the directors of the company in default. This is required in terms of section 212 of the Criminal Procedure Act, Act No. 51 of 1977.

9. Transfer of Benefits

Section 13 A(5) and Regulation 33 (7)

9.1 Section 13A (5) requires a fund to transfer a benefit (on termination of membership) in respect of a member to another fund in which the member is eligible to participate within 60 days of the member's written request to the fund. The transferor fund may apply to the Registrar to extend this period for a longer period if it is likely that the 60 day period will be exceeded.
The Registrar will consider such applications on a case-by-case basis. Should he find the reasons to be valid, the period will be extended for such a period as approved by the Registrar.

The 60 day period commences on the date of receipt by the fund of the member's written instruction to transfer his/her benefit.

9.2 Section 13A(7) states that interest is payable on the value of any withdrawal benefit where a transfer benefit (withdrawal benefit) has not been transferred within 60 days. The Minister prescribes the interest rate on late transfer of benefits by Notice in the *Gazette* (refer paragraph 4 above). The current rate (Notice 1099 of 9 November 2001) is the same as the maximum annual finance charge rate under section 2 (1) of the Usury Act (section 13A(5)). Interest on late payment of transfer benefits is payable on all transfers, except for benefits transferred or paid in terms of section 14, 28 and 29 of the Pension Funds Act.

9.3 Depending on the rules of a fund, penalties may be determined in addition to late payment interest.

9.4 The interest payable forms part of the investment income of the transferee fund (Regulation 33(7)). On transfer of the benefit, the interest added to the benefit will be subject to Retirement Fund Tax in the hands of the transferee fund, and should form part of the member's transfer value.

The Board of Management of the Fund should consider possible rule amendments to deal with situations where both penalty and late payment interest may apply in respect of transfers of benefits to other funds.

10. Other Penalties

The following penalties will apply in addition to interest on late payment:

- Anyone found guilty of contravening or failing to comply with section 13A, will be liable upon conviction to a maximum fine of R2000 per offence (section 37).
- Employers have a duty to pay contributions and supply information to a fund within the specified periods;
- Responsible persons and monitoring persons must make certain reports; and
- Boards of management have to take certain decisions and issue instructions.
- Any failure could constitute an offence in terms of section 37.
- A penalty of R50 per day may be imposed for failure to make returns, or transmit reports, statements or other documents within the prescribed periods (section 37(2) and regulation 26). The employer, responsible person, monitoring person and board members could incur such penalty for failure to submit data or reports, as the case may be.

11. Prosecutions

A number of company directors have recently been prosecuted successfully for failing to comply with the provisions of section 13A and the rules of a fund. More cases are pending.
The employer, responsible person, monitoring person and board members should ensure full compliance with section 13A.

Yours faithfully

J.P ISHIDI

REGISTRAR OF PENSION FUNDS

ANNEXURE A

AFFIDAVIT

I, the undersigned

………………………………………………… **(ID ……………)**

do hereby state under oath as follows:

1 I am the monitoring person of the ……………… Fund (the "Fund") situated at ………………………………………… (postal address PO Box ……………………) and my telephone number at this address is ……………………

2 The contents of this affidavit is both true and correct, and unless otherwise indicated fall within my personal knowledge and belief.

3 I became monitoring person of the above mentioned Fund on ……….. As part of my functions I monitored the receipt of contributions to the Fund from various participating employers.

4 In terms of …….. of the rules of the Fund, the employees listed in **Annexure 1** ("Employees") were obliged to join the Fund. Rule …… of the Fund provides that the employees must contribute …..% of their salary per month to the Fund and their employer, ……………………………………, must contribute at ……..% per month for each of these members.

5 In terms of rule ……. of the rules of the Fund, …………….. is bound to pay contributions over to the Fund within 7 days after the end of each month. This is in accordance with the provisions of section 13A of the Pension Funds Act, Act No 24 of 1956 ("Act").

6 In terms of rule ……………, the aforementioned employees of …………. may not withdraw from the Fund whilst being employed by ………………. In terms of section 13 of the Pension Funds Act the rules of the Fund are binding on the Fund and it's members.

7 ………………… has failed to pay over the contributions deducted from the Employees from ………………………… to …………………… in accordance with the provisions of section 13A of the Act. In order to protect the interest of the Employees, I reported to the Registrar of Pension Funds, and the Employees on an ongoing basis. Extensive proof of correspondence with the above-mentioned entities is on record at my office and has been handed to ………………………………. of the Financial Services Board.

8 Apart from the above, the officers of the Fund have also instituted civil action against …………………………… for the recovery of the arrear contributions due to the Fund by the Employees and …………………... Thus far the Fund has recovered the outstanding contributions for the period …………………….. to ……………………

9 According to the Fund's records, ... is still in arrear with contributions due to the Fund for the months of .... (refer **Annexure ....**). .... has been notified of the illegal nature of its actions but has failed to respond.

I know and understand the contents of this affidavit. I have no objection to taking the prescribed oath and consider the oath to be binding on my conscience.

Signed at .... on this the .... day of .... 2........

MONITORING PERSON

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was sworn to before me and the deponent's signature was placed thereon in my presence at .... on ....

COMMISSIONER OF OATHS (ex officio)

ANNEXURE B

AFFIDAVIT

I, the undersigned

....

do hereby state under oath as follows:

1 I am the monitoring person of the .... Fund, situated at ...., and my telephone number at this address is ....

2 The contents of this affidavit is both true and correct, and unless otherwise indicated fall within my personal knowledge and belief.

3 As part of my functions I monitor the receipt of contributions to the Fund from various participating employers into this umbrella fund. I am obliged to see that the provisions of section 13A of the Pension Funds Act is adhered to as well as regulation 33 of the Pension Funds Act.

4 The Fund is called .... Fund. The participating employer, ... started participating in the Fund on the .... is situated at .... and their postal address is .... Their telephone number is: ....

5 The employees listed in **Annexure 1** were obliged to join the Fund and contribute at .....% of their salary per month to the Fund. The employer had to contribute at ....% per month for each of these members. In terms of the rules of the Fund the aforementioned employees may not withdraw from the Fund whilst being employed by the employer. A copy of the special rules of the Fund is attached as **Annexure 2**. In terms of section 13A of the Pension Funds Act the rules of the Fund is binding on the Fund and it's members.

6 In terms of the rules of the Fund and section 13A of the Pension Funds Act the employer is bound to pay contributions over to the Fund within 7 days after the end of each month. This is in accordance with the provisions of section 13A of the Pension Funds Act, Act No 24 of 1956.

7 .... contravened section 13A of the Pension Funds Act by failing to pay contributions due to the Fund for the month of .... Their contributions for .... were due on the .... Attached as **Annexure 3** a copy of the Fund statement as on ....

8 .... is the responsible person at .... in her in her capacity as .... of the company. I request further investigation into this matter.

I know and understand the contents of this affidavit. I have no objection to taking the prescribed oath and consider the oath to be binding on my conscience.

Signed at .... on this the .... Day of .... 20...........

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was sworn to before me and the deponent's signature was placed thereon in my presence at .... on .... 20.......

MONITORING PERSON

COMMISSIONER OF OATHS (ex officio)