

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: A Marais	D. Dialling No.: 012 428 8065
Our ref: 12/12/1	Fax: 012 347 0874
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(To all approved administrators, privately administered funds, liquidators and insurers who underwrite pension funds)

CIRCULAR PF NO. 128

SURPLUS SCHEMES & SURPLUS UTILISED IMPROPERLY

INTRODUCTION

1. This Circular becomes effective on the date that it is issued.
2. The recent judgment by the High Court of South Africa in the matter between the Sanlam-Pensioenfonds (Kantoorpersoneel) and the Registrar of Pension Funds refers.
3. This Circular clarifies the Registrar's position as a result of the judgment and gives guidance on the submission of surplus schemes pending the outcome of an appeal against the Court's decision.
4. The Registrar will apply for leave to appeal against the judgment in due course and in the event of such leave being granted, the judgment will be taken on appeal.
5. The Court's decision affects the provisions of sections 15B(5)(a) and 15B(6) of the Pension Funds Act, Act 24 of 1956 ("the Act"), which provide that actuarial surplus to be apportioned shall be increased by the amount of actuarial surplus utilised improperly by the employer prior to a fund's surplus apportionment date as determined in terms of subsection (6).
6. As part of the surplus exercise, the board is required to investigate instances of surplus utilised improperly in terms of section 15B(6) of the Act. This exercise should already have been completed, notwithstanding the judgment. To the extent that this exercise undertaken by the board of a fund included instances of surplus utilised improperly prior to 7 December 2001, in accordance with the Registrar's views expressed in Circular PF113, the Registrar is of the opinion that the judgment does not render such exercise unlawful or in contravention of the Act.

Board Members: Dr CDR Rustonjee (*Chairperson*) AM Sithole (*Deputy Chairperson*) BM Haworth Ms JV Mogadime
Ms LM Mojela Ms AMM Mokgabudi Prof PJ Sutherland Ms HS Wilton
Board Secretary: SB Makgalemele
Executive Officer: RJG Barrow



REGISTERED FUNDS HAVE A DUTY TO SUBMIT SURPLUS SCHEMES

7. Registered funds had to submit their surplus schemes to the Registrar within 18 months of their surplus apportionment dates. In view of the fact that all investigations into surplus utilised improperly should already have been completed, the Registrar is of the opinion that the judgment does not warrant any justification for requests for further extensions to submit schemes.
8. Accordingly, all registered funds with schemes outstanding must submit these timeously as the deadline for submission has passed.
9. In terms of section 15K of the Act, the registrar shall require the board to refer the scheme to a special ad hoc tribunal to perform the functions of the board set out in section 15B should the schemes not be submitted timeously as recently discussed with the industry.

SURPLUS SCHEMES ALREADY APPROVED BY THE REGISTRAR

10. To the extent that such a scheme included information relating to surplus utilised improperly prior to 7 December 2001, the board of the fund should engage in discussion with the employer(s) and revert to the Registrar with an indication whether or not the board or the employer requires the Registrar's decision to be set aside. This will then in due course be considered on a case by case basis, once the legal position has been clarified.

SURPLUS SCHEMES SUBMITTED AND NOT YET APPROVED BY THE REGISTRAR

11. Such schemes should not be withdrawn solely because of uncertainty relating to surplus utilised improperly prior to 7 December 2001. The board of the fund should have submitted the scheme by now and withdrawal of a scheme could potentially result in action taken in line with the provisions of section 37 of the Act.
12. To the extent that surplus schemes already submitted include surplus utilised improperly prior to 7 December 2001, the board of a fund may apply to the Registrar to amend the scheme within 30 days of the date of this Circular.
13. Such application for amendment shall be considered by the Registrar only once the outcome of the appeal is known.
14. The board of a fund may, in its own discretion, communicate the amendment of the scheme submitted to the stakeholders, pointing out that the matter is still uncertain.

SURPLUS SCHEMES NOT YET SUBMITTED TO THE REGISTRAR

15. Such schemes must be submitted forthwith in accordance with paragraph 7.
16. All registered funds that will be submitting their surplus schemes must submit an addendum with the following information in the prescribed format:
 - 16.1 Indicate whether or not the fund did conduct an investigation into surplus utilised improperly by the employer, in terms of section 15B(6) of the Act.
 - 16.2 Certify the time period in respect of which the investigation referred to in 16.1 was undertaken.
 - 16.3 Provide further details of the investigation referred to in 16.1, if applicable.
17. The addendum to the surplus scheme must be duly completed and signed.
18. The board of a fund may, in its own discretion, communicate any revision to the scheme as communicated in terms of section 15B(9)(d)(i) of the Act to stakeholders provided that the 12 week objection period in terms of section 15B(9)(e) cannot be extended.



FOR REGISTRAR OF PENSION FUNDS