

FINANCIAL SERVICES BOARD

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(To all approved administrators, privately administered funds and insurers who underwrite pension funds)

CIRCULAR PF NO. 129

PROCEEDS OF THE INVESTIGATION INTO SECRET PROFITS MADE BY A SERVICE PROVIDER OF A FUND

1. As mentioned in a General Circular issued by this Office on 24 March 2006, service providers (including administrators) to retirement funds are required to observe the utmost good faith, to exercise proper care and diligence, to refrain from gaining directly or indirectly improper advantage for themselves to the prejudice of their principals (the pension funds concerned) and to avoid conflicts of interest. Service providers stand in a relationship of trust vis-à-vis the pension funds in which they are involved. As mentioned in the abovementioned Circular, there are a number of ways in which a service provider can make a secret profit, for instance by way of bulking client funds, receiving a commission for the placing of insurance, scrip lending fees etc. and all such secret profits should have been investigated and be paid back to the relevant fund.
2. The Registrar expects any service provider who made a secret profit to voluntarily refund those profits to the pension funds concerned, together with interest on the amounts so retained. In the absence of compelling reasons to the contrary, a failure to do so would reflect negatively on the fit and proper requirements of the service provider concerned.

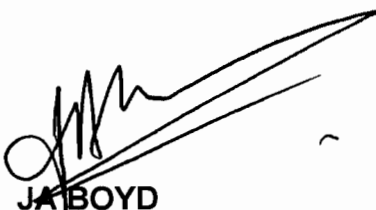
3. Boards of funds are expected to engage in negotiation with the relevant service providers to ensure that secret profits are recovered for the benefit of the fund and its members. The board must be satisfied that:

- 3.1 such secret profits have been calculated accurately;
- 3.2 such proceeds are received by the fund; and
- 3.3 once received, be applied in a fair and equitable manner.

A failure by the board to adhere to the aforesaid will in itself amount to a contravention of the duties imposed on them in terms of sections 7B and 7D of the Act.

4. It has come to the attention of the Registrar that certain service providers have proposed to funds to have their actions in respect of secret profits ratified retrospectively. From a regulatory perspective, such action will not regularise the conduct of the service provider and could affect the Registrar's view as to whether the service provider meets the fit and proper requirements.
5. Boards should be aware of their duties and responsibilities in considering any such proposal. Boards that are called upon to retrospectively ratify the actions of their service provider retrospectively should be aware of the possibility that board members themselves could be held personally liable for failing to act with due care, diligence and good faith or for failing to act in the best interest of all of the fund's members and beneficiaries. Boards are once again referred to the requirements as per sections 7B and 7D of the Act as well as adjudicator's determination in the case of MES V A v Art Medical Equipment Pension Fund where the board member was held personally liable for the payment of the death benefit concerned.

Yours sincerely



JA BOYD
DEPUTY EXECUTIVE OFFICER AND
DEPUTY REGISTRAR OF PENSION FUNDS