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THE COMMENCEMENT OF PARTICIPATION, TERMINATION AND RE-COMMENCEMENT OF PARTICIPATION OF PARTICIPATING EMPLOYERS IN UMBRELLA FUNDS

1 INTRODUCTION

- 1.1 In this Circular the registrar provides guidance to the boards of umbrella funds on the commencement, termination, and re-commencement of an employer's participation in an umbrella fund.
- 1.2 It also canvasses the erroneous 'de-registration' of the participation by employers in umbrella funds in the past and how it may be remedied.

2 BACKGROUND

- 2.1 Pension funds were originally established as stand-alone vehicles through which employers and their employees would make provision for income for the employees after they became too old or infirm to work and earn a salary.
- 2.2 Over time, however, and whether as a result of employee or employer demands, many employers have enrolled their employees in multi-employer or what have become known as 'umbrella' occupational retirement funds.

3 DIFFERENT TYPES OF UMBRELLA FUNDS

- 3.1 There is no definition for the term 'umbrella fund' in the Pension Funds Act, 1956 ('the PFA').

- 3.2 Pension and provident funds falling within the scope of the term ‘umbrella fund’ as it is commonly understood include-
- 3.2.1 funds established for the employees of employers related in some way to each other by shareholding (‘employer group funds’);
 - 3.2.2 funds established by trade unions and to which employees of a range of employers unrelated to each other by shareholding (unrelated employers) belong in terms of collective agreements (‘union funds’);
 - 3.2.3 funds established by bargaining councils and to which employees of a range of unrelated employers belong in terms of bargaining council agreements concluded between employers’ organisations and trade unions (‘bargaining council funds’);
 - 3.2.4 funds established for employees engaged in specific trades or occupations and employed by employers unrelated by shareholding (‘trades and occupations funds’);
 - 3.2.5 funds established in terms of sectoral determinations issued by the Minister of Labour in terms of the Basic Conditions of Employment Act, 2003, and to which employees of employers conducting business in specific sectors and regions are required to belong in terms of those sectoral determinations (‘sectoral funds’);
 - 3.2.6 funds established in terms of provincial ordinances or other subordinate legislation or simply by specific municipalities for the benefit of employees of municipalities and/or municipal-owned entities (‘municipal funds’); and
 - 3.2.7 funds established by financial institutions (‘commercial umbrella funds’) to which employees of unrelated employers operating in unrelated fields belong in terms of their contracts of employment.
- 3.3 Some of these umbrella funds are what are referred to as ‘**Type A**’ umbrella funds in Information Circular 7 of 2005 dated 5 December 2005, that is, umbrella funds with-
- 3.3.1 ‘general rules’ applicable to all of the members of the fund and their employers or former employers that participate in the fund (and which are usually stated to override ‘special rules’ in the event of any inconsistency between them); and
 - 3.3.2 ‘special rules’ applicable only to the employees of a specific participating

employer and which, for example, provide for –

- 3.3.2.1 criteria by which it will be determined which of the employer's employees will be and remain members of the fund in terms of their contracts of employment and/or any collective agreement binding on them;
- 3.3.2.2 the rates at which those employees and the employer must contribute to the fund;
- 3.3.2.3 the benefits that will be payable upon the permanent disablement or death before retirement ('risk benefits');
- 3.3.2.4 the deduction from the employees' or employer's contributions to the fund of –
 - 3.3.2.4.1 a share of the fund's administration costs and other specified costs, if applicable;
 - 3.3.2.4.2 if applicable, the amounts of premiums payable by the fund to the insurer which underwrites the fund's liabilities in respect of those risk benefits;
- 3.3.2.5 the choices, if any, to be given to the members in regard to the investment of the balance thereafter remaining of those contributions;
- 3.3.2.6 the retirement age of each member or each member within a category of members employed by the employer for the purposes of the rules;

amongst other things.

3.4 Other umbrella funds are what are known as '**Type B**' umbrella funds in Information Circular 7 of 2005, that is, umbrella funds with only 'general rules' which are applicable to all members of the fund and their current and/or former employers that participate in the fund.

3.5 Most union, bargaining council, sectoral funds and municipal funds are 'Type B' umbrella funds.

4 **REGULATORY REQUIREMENTS FOR UMBRELLA FUNDS**

4.1 Pension Funds Act (PFA) regulation 30(2) provides that

The rules of a pension fund shall furthermore not be inconsistent with the Act and these regulations, and shall also, subject to sub-regulation (3), provide for the following matters:

- (a) ...
- (t) a specific indication of the participation in the pension fund so as to differentiate between pension funds established for the benefit of-
 - (i) employees of a principal employer and its subsidiaries;
 - (ii) employees of various employers that do not fall within the ambit of subparagraph (i) above; and
 - (iii) persons not referred to in either subparagraph (i) or (ii) above;

4.2 Regulation 30(2)(t) does not distinguish between types of umbrella funds other than 'employer-group' umbrella funds and others.

4.3 However, it is necessary for the fund, its members and the registrar to know the identities of the employers that participate in each fund and, in relation to each such employer, the identities of the person(s) referred to in paragraph 4.3.2. because-

4.3.1 the rules of the fund are its constitution;

4.3.2 in terms of section 13A of the PFA-

4.3.2.1 the employer of each member of the fund is required to pay to the fund any contribution which, in terms of the rules, is to be deducted from the remuneration of the member and any contribution for which the employer is liable in terms of the rules of the fund;

4.3.2.2 if the employer-

4.3.2.2.1 is a company, each director regularly involved in its overall financial affairs;

4.3.2.2.2 is a close corporation, each member who controls or is regularly involved in its overall financial affairs;

4.3.2.2.3 is not a company or close corporation, each person who, alone or together with others, acts as its directing mind and will or is regularly involved in the management of the employer's overall financial affairs,

may be held personally liable for the payment of those contributions if and to the extent that the employer fails to comply with its obligations in terms of section 13A;

4.3.3 if he or she does not, then, in terms of section 37(1) of the PFA, he or she will

be guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years or to both; and

- 4.3.4 if, when a fund is liquidated, it is not valuation-exempt and it is underfunded, the employer may be liable in terms of section 30(3) of the PFA to pay to the fund an amount equal to the amount of the shortfall in the amount held by the fund to provide for minimum benefits then payable to the members of the fund employed by that employer,
- 4.4 A unique reference number is allocated to each employer in the registrar's database of participating employers in umbrella funds for regulatory and administrative purposes. Umbrella funds and their administrators should confirm from time to time the details of the employers participating in their funds on the official FSB website (www.fsb.co.za) to ensure that the registrar's records accurately reflect the details of each umbrella fund's participating employers.
- 4.5 Since subsection (6) was inserted in section 12 of the PFA with effect on 28 February 2014, the registrar is entitled to require a fund to submit to him such additional information in relation to an amendment to the rules of the fund for which the registrar's approval has been requested as the registrar may deem necessary. If the fund fails to furnish that information to the registrar within 180 days after it has been requested, its application for the approval of the rule amendment will lapse.

5 COMMENCEMENT OF PARTICIPATION OF AN EMPLOYER IN AN UMBRELLA FUND

- 5.1 It is important to distinguish between-
 - 5.1.1 the registration of a pension fund in terms of section 4 of the PFA;¹ and
 - 5.1.2 the commencement of participation of an employer in an umbrella fund.
- 5.2 The standalone funds and umbrella funds must be registered or provisionally registered in terms of section 4 of the PFA before they may commence pension fund business. This section only applies to the registration of pension funds and not to participating employers in an umbrella fund. Furthermore, there is no provision in sections 27, 28 or 29 of the PFA for the 'de-registration' of an employer's participation in a fund when that participation comes to an end.
- 5.3 The manner in which a participating employer commences its participation in an umbrella fund depends on whether it is a Type A or Type B umbrella fund. Both processes do however have a similarity in that the umbrella fund's registered rules

¹ Section 4(1) of the PFA requires every pension fund, prior to commencing pension fund business, to apply to the registrar for registration under the PFA and the registrar may provisionally or finally register a fund in terms of s 4 of the PFA.

must provide for the circumstances in which an employer's participation in the fund will commence.

5.4 The commencement of an employer's participation in a Type A umbrella fund

5.4.1 A new employer commences its participation in a Type A umbrella fund when the registrar, acting in terms of section 12 of the PFA, approves the amendment of the rules of the fund by the addition to them of the special rules applicable to the employer and the members of the fund employed by it

5.4.2 The registrar will record in the FSB database the name of the new employer participating in the Type A umbrella fund and the commencement date of the employer's participation in the fund. In order to keep accurate records of participating employers in an umbrella fund the fund will be asked to submit to the registrar the applicable information referred to in paragraph 5.6 below.

5.5 The commencement of an employer's participation in a Type B umbrella fund

5.5.1 An employer commences participation in a Type B umbrella fund when it complies with the requirements for participation in terms of the rules of the fund and with effect from the date contemplated in those rules.

5.5.2 If the rules of a fund limit eligibility for membership to employees of employers specifically identified in the rules, and so membership of the fund for employees of a new participating employer requires an amendment to the rules of the fund, then the employer's participation will commence when the registrar, acting in terms of section 12 of the PFA, approves the amendment of the rules of the fund.

5.5.3 The registrar will record in the FSB database the name of the new employer participating in the Type B umbrella fund and the commencement date of the employer's participation in the fund. In order to keep accurate records of participating employers in an umbrella fund the fund will be asked to submit to the registrar the applicable information referred to in paragraph 5.6 below.

5.6 Intention to ask umbrella funds for information in terms of section 24 of the PFA

The registrar will shortly be directing a request to each registered umbrella fund in terms of section 24 of the PFA that it furnish to the registrar –

5.6.1 within 60 days of the date of the request, in relation to each participating employer as at the fund's most recent financial year-end; and

5.6.2 within 60 days of the date on which an employer commences participation in

the fund in the future;

5.6.3 within 60 days of the date on which an employer's participation in the fund terminates in the future,

an affidavit deposed to by the chairperson of the fund in which he or she provides the following information in relation to each of its participating employers:

5.6.4 its registered name and, if applicable, its trading name;

5.6.5 its registration number (if applicable);

5.6.6 its registered address;

5.6.7 the date on which its participation in the fund commenced;

5.6.8 whether the employer's participation is authorized by the rules as currently registered or whether application will be made for the amendment of those rules to provide for the employer's participation;

5.6.9 the number of members of the fund employed by the employer as at the most recent financial year end of the fund;

5.6.10 if the employer's participation in the fund commenced on a date after the fund's most recent financial year end, the number of members employed by the employer on commencement of its participation;

5.6.11 the name, identity number and designation of the person(s) contemplated in section 13A(8)(a);

5.6.12 if the employer's participation in the fund has terminated-

5.6.12.1 the date on which its participation in the fund terminated; and

5.6.12.2 whether, on the date on which its participation terminated, any contributions payable by it to the fund in terms of the rules remained unpaid and, if so,

5.6.12.3 the aggregate amount of those arrear contributions; and

5.6.12.4 what steps, if any, the fund has taken and/or intends to take to recover those arrear contributions; and

5.6.12.5 whether the fund's liabilities in respect of that part of its business that relates to the members and, if applicable, former members, employed or previously employed by the participating employer are provided for in full and, if not, what steps, if any, the fund has taken and/or intends to take to address the shortfall.

6 THE TERMINATION OF AN EMPLOYER'S PARTICIPATION IN AN UMBRELLA FUND

6.1 If the rules require partial liquidation

6.1.1 Section 28(1) of the PFA expressly provides for partial liquidations of umbrella funds in circumstances where an employer ceases to participate in a fund, provided the rules of the fund make provision for it. The relevant provisions in section 28(1) provide as follows as regards the partial liquidation of an employer in an umbrella fund:

6.1.1.1 a registered fund may be terminated or dissolved in part, in the circumstances specified for that purpose in its rules and in the manner provided for in those rules; and

6.1.1.2 in such an event the assets of the fund attributable to the members connected to the participating employer whose withdrawal from the fund caused the partial termination will be distributed in the manner provided by the rules.

6.1.2 Section 28(4) of the PFA then says that a liquidator appointed to deal with the partial liquidation of the fund on the termination of an employer's participation in it must prepare and submit to the registrar a preliminary liquidation and distribution account in which is reflected full recognition of-

6.1.2.1 the rights and reasonable benefit expectations of the persons concerned;

6.1.2.2 additional benefits the payment of which by the fund has become established practice; and

6.1.2.3 the payment of minimum benefits in terms of section 14A.

6.1.3 Additional requirements in respect of those accounts have been prescribed by the registrar in Directive 4.²

² Board Notice 75 of 2009 Directive PF 4: Section 28, Voluntary dissolution or partial dissolution of a fund, issued 8 June 2009, Government Gazette no. 32328 of 18 June 2009.

- 6.1.4 The detailed liquidation procedure is outlined in section 28 of the PFA read with directive 4 and the liquidator must adhere to these requirements.
- 6.1.5 Section 28(17) of the PFA authorizes the registrar to prescribe the circumstances in which, and the conditions subject to which, a fund may be exempted from the provisions of section 28. Those prescribed conditions appear in Directive 4.
- 6.1.6 At the conclusion of the partial liquidation of a fund-
 - 6.1.6.1 if the rules of the fund include special rules applicable to the members of the employer which has ceased to participate in the fund, the fund must by resolution adopt an amendment to the rules for the deletion of those special rules and, within 60 days of the date on which the partial liquidation of the fund was finalized, apply to the registrar for his approval of that rule amendment in terms of section 12 of the PFA;
 - 6.1.6.2 if the rules of the fund do not include such special rules, but their wording will nonetheless indicate the continued participation in the fund of the employer unless they are amended, the fund must adopt such amendment of its rules as may be required to ensure that they reflect the true position and, within 60 days of the date on which the partial liquidation of the fund was finalized, apply to the registrar for his approval of that rule amendment in terms of section 12 of the PFA; and
 - 6.1.6.3 regardless of whether any such amendment is necessary, the registrar will alter his records to reflect the termination of the employer's participation in the fund.
- 6.1.7 Section 29 of the PFA, which provides for the compulsory winding-up of the whole or any part of the business of a fund in terms of an order of court, is also applicable to the winding up of any part of a fund's business such as that relating to members employed by specific participating employers. As the registrar has seldom needed to apply to court for such a winding up order, no guidance in regards to such circumstances is provided in this circular.
- 6.2 **If the rules of the fund do not require its partial liquidation on the termination of an employer's participation in it**
 - 6.2.1 Past terminations of employer participation
 - 6.2.1.1 If, when the participation of an employer in a fund terminated with effect on a date before the date of publication of thisCircular,

6.2.1.1.1 the rules of the fund included special rules applicable to the members of the employer which has ceased to participate in the fund, the fund must by resolution adopt an amendment to the rules for the deletion of those special rules; or

6.2.1.1.2 the rules of the fund did not include such special rules, but their wording nonetheless indicated the continued participation in the fund of the employer, the fund must adopt such amendment of its rules as may be required to ensure that they reflect the true position,

and apply to the registrar for his approval of that rule amendment in terms of section 12 of the PFA without further delay.

6.2.1.2 The registrar will not approve the rule amendment unless

6.2.1.2.1 the fund has furnished to the registrar an affidavit deposed to by the chairperson of the fund in which it provides the information contemplated paragraph 5.6.12 of this Circular; and

6.2.1.2.2 on the basis of that information, the registrar is satisfied that the rights and obligations of the employer and the fund in respect of the persons who had been members of the fund by virtue of the employer's participation have been fulfilled and that the amendment is accordingly not inconsistent with the PFA.

6.2.1.3 On approval of the rule amendment, the registrar will amend his records to reflect the termination of the employer's participation in the fund and the date on which its participation terminated.

6.2.1.4 If, when the participation of an employer in a fund terminated with effect on a date before the date of publication of this Circular, the rules of the fund were not required to be amended to reflect the termination of the employer's participation, the registrar nonetheless, and acting in terms of section 24, will require the fund to furnish to him an affidavit deposed to by the chairperson of the fund in which it provides the information contemplated paragraph 5.6.12 of this.

6.2.1.5 If, on the basis of that information, the registrar is satisfied that the

rights and obligations of the employer and the fund in respect of the persons who had been members of the fund by virtue of the employer's participation have been fulfilled, he will amend his records to reflect the termination of the employer's participation in the fund and the date on which its participation terminated.

6.2.2 Future terminations of employer participation

6.2.2.1 If, when the participation of an employer in a fund terminates with effect on a date on or after the date of publication of this Circular-

6.2.2.1.1 the rules of the fund include special rules applicable to the members of the employer which has ceased to participate in the fund, the fund must by resolution adopt an amendment to the rules for the deletion of those special rules; or

6.2.2.1.2 the rules of the fund do not include such special rules, but their wording nonetheless indicates the continued participation in the fund of the employer, the fund must adopt such amendment of its rules as may be required to ensure that they reflect the true position,

and, within 180 days of the date of publication of this Circular, apply to the registrar for his approval of that rule amendment in terms of section 12 of the PFA.

6.2.2.2 The registrar will not approve the rule amendment unless

6.2.2.2.1 the fund has furnished to the registrar an affidavit deposed to by the chairperson of the fund in which it provides the information contemplated paragraph 5.6.12 of this; and

6.2.2.2.2 on the basis of that information, the registrar is satisfied that the rights and obligations of the employer and the fund in respect of the persons who had been members of the fund by virtue of the employer's participation have been fulfilled and that the amendment is accordingly not inconsistent with the PFA.

6.2.2.3 If, when the participation of an employer in a fund terminates with effect on a date on or after the date of publication of this Circular, the rules of the fund are not required to be amended to reflect the

termination of the employer's participation, the registrar nonetheless, and acting in terms of section 24, will require the fund to furnish to him an affidavit deposed to by the chairperson of the fund in which it provides the information contemplated paragraph 5.6.12 of this Circular.

6.2.2.4 If, on the basis of that information, the registrar is satisfied that the rights and obligations of the employer and the fund in respect of the persons who had been members of the fund by virtue of the employer's participation have been fulfilled, he will amend his records to reflect the termination of the employer's participation in the fund and the date on which its participation terminated.

7 THE ERRONEOUS 'DE-REGISTRATIONS' OF EMPLOYER PARTICIPATIONS IN UMBRELLA FUNDS IN THE PAST

7.1 As a matter of past practice, and at the request of an umbrella fund, the registrar has 'de-registered' the participation of an employer in the umbrella fund by altering his records to reflect the cessation of the employer's participation.

7.2 There have been cases in which the registrar's records were altered in this way although the information on which he relied for the purpose has later been found to have been incorrect in that the employer has continued to participate in the fund in that the fund has continued to receive from it contributions in respect of its employees who are members of the fund and to pay benefits to such members when they have accrued.

7.3 As mentioned in paragraph 5.2 above, there is no provision in sections 27, 28 or 29 of the PFA for the 'de-registration' of an employer's participation in a fund when that participation comes to an end.

7.4 If, at the request of an umbrella fund, the registrar has altered his records to reflect the cessation of an employer's participation in that fund and it then becomes apparent that its participation has not in fact ceased, then the manner in which its status as a participating employer may be rectified will depend on the circumstances in which the alteration of the registrar's records took place.

7.5 If the registrar's records were altered to reflect the cessation of the employer's participation at the conclusion of the partial liquidation of the fund, that is, the winding up of that part of the business of the fund that related to the members employed or formerly employed by the participating employer, that partial liquidation cannot be reversed other than in terms of an order granted by a court or the FSB appeal board, as applicable.

7.6 Type A umbrella fund

- 7.6.1 If the fund is a Type A umbrella fund and the rules of the fund were amended by the deletion of the special rules applicable to the employer and the fund's members employed by that employer, and the amendment of the rules was approved by the registrar, the umbrella fund must adopt another rule amendment providing for the reinsertion of the special rules into its rules and must apply to the registrar's approval of that amendment. Provided that the registrar is satisfied that the explanation given for the previous amendment is reasonable, the amendment may be made with retrospective effect to the date of the previous amendment so that, for the purposes of the rules, there will have been no interruption in the employer's participation in the fund.
- 7.6.2 If the fund is a Type A umbrella fund and the rules of the fund were not amended by the deletion of those special rules, then, for the purposes of the rules, the employer's participation has not ceased. The umbrella fund must write to the fund explaining why it had previously asked for the registrar's records to be changed to reflect the termination of the employer's participation and asking that the registrar's records be changed again to reflect the employer's continued status as a participating employer in the fund.

7.7 Type B umbrella fund

- 7.7.1 If the fund is a Type B umbrella fund but its rules were amended in such a manner as to result in the termination of the employer's participation in the fund for the purposes of its rules, the umbrella fund must adopt another rule amendment with effect from the effective date of the previous one and providing for the continued participation by the employer in the fund. The fund must then apply to the registrar for his approval of the latter amendment.
- 7.7.2 If the fund is a Type B umbrella fund and
- 7.7.2.1 its rules explicitly provided for that employer's participation in the fund and so were required to be amended to reflect the termination of its participation; and
- 7.7.2.2 its rules were not so amended,
- then, for the purposes of the rules, the employer's participation has not ceased.
- 7.7.3 The umbrella fund must write to the registrar requesting that the registrar's records be changed again to reflect the employer's continued status as a participating employer in the fund. That request must be accompanied by an affidavit by the chairperson of the fund in which he or she-

- 7.7.3.1 confirms that the participating employer has not in fact ceased to participate in the fund either before or after the date on which registrar altered his records to reflect the cessation of its participation;
 - 7.7.3.2 reports any change in the name and/or registered address of the employer since that date;
 - 7.7.3.3 confirms that all contributions payable to the fund by the participating employer in terms of its rules after that date have been paid;
 - 7.7.3.4 confirms that any benefits payable by the fund after that date to persons or the dependants and/or nominees of persons who were members of the fund because they were employed by the employer have been paid;
 - 7.7.3.5 describes the fund's investment activities, membership changes and expenses incurred in relation to the conduct of that part of the fund's business that related to the employer and the members employed and/or formerly employed by it from the date of its purported termination of participation to the date of the affidavit;
 - 7.7.3.6 describes the circumstances in which any liabilities relating to that business have been transferred from the fund to another fund or entity after that date, if any, and explains why those liabilities were transferred;
 - 7.7.3.7 identifies the person by whom the registrar had been previously asked to alter his records to reflect the termination of the employer's participation in the fund;
 - 7.7.3.8 explains why that request was made and why it should not have been made; and
 - 7.7.3.9 describes what measures the fund will adopt to minimize the risk that such errors will recur in the future.
- 7.8 If any of this information is not within the personal knowledge of the deponent, it must be confirmed in one or more supporting affidavits by one or more persons with personal knowledge of the facts.
- 7.9 Once the registrar is satisfied with the information provided by the principal officer and the chairperson, the records of the registrar will be altered to reflect that the employer has re-commenced its participation in the umbrella fund.

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DEPUTY REGISTRAR OF PENSION FUNDS