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**REPORT OF THE CURATOR OF SACCAWU NATIONAL PROVIDENT FUND  
(UNDER CURATORSHIP) (“the Fund”)**

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**NATURE OF THIS REPORT**

1. This report is addressed to the Financial Services Board, and is an update of earlier reports and should be read in context of such reports. For the sake of continuity and completeness, certain of the historical background events are highlighted. Financial information is based on the financial audited statements and valuation of the Fund as at 31 December 2014. Relevant subsequent events are also reported on.

**ADMINISTRATION OF THE FUND**

2. The Fund continues to be administered under the curatorship, with the assistance of the “in house” staff of the Fund and service providers. The “in house” function of the Fund continues with a present staff compliment of 12 members.
3. Consequent upon a disciplinary hearing, which took place on 11 March 2015, the Principal Officer of the Fund was found guilty of a number of charges, which resulted in his dismissal. The Principal Officer has challenged the finding of the Chairman of the disciplinary enquiry and referred the matter to the Commission for Conciliation Mediation and Arbitration (CCMA). A CCMA convened arbitration

hearing commenced in September 2015 and has since been postponed *sine die*. It is expected that the arbitration will continue during February 2016.

4. The duties and function of the former Principal Officer continue to be undertaken by the Curator with the assistance of his staff and service providers. Old Mutual continues as administrator of the Fund in terms of Section 13B of the Pension Fund Act (the PFA). The auditors are Deloitte, the investment advisor is Dr. E Potgieter and the Fund valuer is Mr. S Basadien

## **ASSETS**

5. The assets of the Fund comprise:
  - A smoothed bonus investment policy with Old Mutual Core Growth
  - A managed fund with Prescient Investment Managers
  - A managed fund with Cadiz Investment Management
  - A managed fund with Argon Investment Management
  - A market linked investment policy
  - Unit trust with Investec
  - Managed portfolio with Investec
  - Market-linked investment policy
  - A cash deposit account
  - A private equity partnership

6. As at 31 December 2014, the value of the assets was R6 050 973 000 compared to R5 823 963 000 in the previous year. The Fund had net current liabilities of R404.5 million and unclaimed benefits of R78.5 million.
7. Final Fund bonus rates are declared monthly in advance and a final fund bonus rate adjustment is made following on actuarial valuation insofar as may be necessary. This practice results in the liabilities of the Fund corresponding closely to the market value of the assets of the Fund.

### **FINANCIAL SOUNDNESS**

8. The Fund continues to be financially sound and annual statutory valuations are undertaken to monitor financial soundness and evaluation of assets, liabilities and benefits.

### **INVESTMENT RETURN**

9. The net-of-fees investment performance of the Fund for the past year is of the order of 11.5%. The investment strategy remains conservative and targets a net return of 3.5% above inflation. This target has been comfortably exceeded over at least the past three years. The investment strategy is presently being revised.

### **MEMBERSHIP**

10. As at 31 December 2014, there were 101 809 active members in the Fund.  
There are no deferred pensioners or current pensioners. In terms of the Rules of

the Fund all benefits are paid as a cash lump sum in terms of GN18 or are used to purchase an annuity from an insurer. In terms of the Rules of the Fund, the Fund's obligations cease at retirement when benefits are payable. The total liability transferred in respect of members transferring out of the Fund during the year ending 31 December 2014 was R50.6 million. The total liability transferred in respect of members transferring into the Fund during the year ending 31 December 2014 was R9.2 million. It would appear that the reason for a substantial number of exits from the Fund can be largely attributed to contributing employer Shoprite Checkers aggressively marketing their own associated pension fund, and targeting the transfer of members in the higher earning bracket.

## **BENEFITS**

11. The Fund provides benefits on a defined contribution basis, where the benefit is equivalent to the member's individual accumulated credit. A member will receive his equitable share on exit from the Fund, which is a smoothed net fund return, which may be a smoothed return. The Group Life Assurance risk premiums of the Fund have been capped at 6.5% to avoid erosion of retirement funds.
  
12. In the event of death before retirement, a lump sum benefit equal to the sum of the member's accumulated credit and proceeds of the Group Life policy is paid. The normal retirement age varies between 60 and 65. A member may commute

for cash so much of his retirement benefit as is permitted in terms of the Income Tax Act, 1962 (Act 58 of 1962).

The risk premiums that applied during the valuation period were as per the table below:

<b>TYPE OF INSURANCE</b>	<b>LEVEL OF COVER</b>	<b>PREMIUM RATE</b>
Group Life Assurance	4 times Annual Salary	3.00%
	Every Non-core multiple	0.77%
Lump Sum Disability Benefits	Every Non-core multiple	0.21%
Spouses Cover		0.65%
Funeral Cover	Scale of benefits offering R15 500 for members and R15 000 for spouses	R19.80 per member per month

## **CONTRIBUTIONS**

13. The employer contribution rate is a minimum of 6.5% up to a maximum of 10% and the employer's contribution is a minimum of 6.5% up to a maximum of 20.8%

## **FINANCIAL STATEMENTS AND ACCOUNTING**

14. The Fund continues to maintain proper financial records and accounts. The benefits administrator, Old Mutual maintains records of contributions received and expenditure, the most significant being the payments of benefits. The Curator and his staff have regular meetings with Old Mutual and the auditors, Deloitte.

15. All financial statements are up to date and the audit for the period ending 31 December 2014 was submitted to FSB before the due date of 30 June 2015.

## **HOUSING LOANS**

16. The Fund continues to guarantee housing loans to members which are made through financial institutions. At present the value of outstanding loans amounts to R251 million, the Curator having approved 13106 housing loans since his appointment.

## **SECTION 37 (C) RESOLUTIONS AND DISTRIBUTION OF FUNDS**

17. The SACCAWU National Beneficiary Fund and the SACCAWU National Trust are administered by Fairheads of Cape Town and the Curator serves as Chairman on the boards of these Funds. Resolutions in terms of Section 37 (C) are processed regularly. This function of making decisions for the purpose of Section 37 (C) determinations is in many respects a subjective and challenging task. The Curator is reliant upon information and investigations conducted by the

Fund's "in-house" team. Information is sourced nation-wide and in many respects from rural areas often necessitating travel to such areas to conduct on site investigations and to obtain documentation in support of dependency claims.

## **PENDING LITIGATION**

### **Absa Litigation**

18. The Fund's counter-claim against ABSA, for a refund of installments paid, which was not specifically dealt with by the Supreme Court of Appeal, was subsequently.

### **Merit Litigation**

19. The Fund's claim against Merit Assets Managers was postponed and a trial date is still awaited. At the commencement of the trial the opposition by Merit to a consequential amendment will have to be determined which may have an impact upon the ability for the trial to proceed immediately after the disposal of the interlocutory issue.

### **SACCAWU Investment Holdings (In Liquidation) (S.I.H) Litigation**

20. Extensive reporting on the long history of the Union delaying this claim is of record. The manner in which the Union conducted itself in frustrating this and other Fund claims, such as the claim against Standard Bank, remains an obstacle in affording the Union access to the Fund through Board participation.

21. Notwithstanding the judgment of the Honourable Bertelsmann J, and the criticisms of the learned judge as to the conduct of the Union, the obstructive conduct of the Union continued culminating in the most recent hearing before the South Gauteng High Court of this claim being for repayment of millions of Rands unlawfully extricated by the Union from the Fund prior to curatorship. The hearing was delayed for more than 5 years due to “spoiling tactics” employed by the Union, but ultimately judgment was obtained against the Union on 2 February 2014 in respect of the Fund’s claims.

22. Despite an unequivocal finding as to the dishonesty of the Union and lack of bona fide defense, the process was further frustrated by the Union failing to make payment. An application for leave to appeal the judgment of the Court a quo was dismissed with costs. Unrelenting, the Union applied to the Supreme Court of Appeal and having suffered the same fate as in the lower court, an application was made to the Constitutional Court which also failed in January 2015.

23. With total disregard for the judgment against it, the Union still did not make payment, necessitating the issue of a writ of attachment of its assets, but the only moveable assets found and which was attached, had a value of only R50 000, therefore necessitating attachment of its bank account. The issue of notice in terms of Section 345 of the Companies Act was issued but also ignored. Only when the prospect of a liquidation of the Union presented itself,

and the Union was unable to conduct business due to its bank account having been attached. I was approached by an outside party with a plea not to proceed with liquidation. In the circumstances, a repayment plan was agreed upon whereby R4 million from the attached bank account was released to the Fund to be followed by monthly installments of R500 000 (five hundred thousand Rand), with a lump sum payment of R5 million in October 2015. To date, the installments have been paid in terms of the settlement agreement.

### **Irregularities**

24. Various incidents of fraud continue to be investigated. It was recently uncovered that a scheme whereby long outstanding unclaimed benefits, colloquially referred to as "cold files", were fraudulently accessed. Typically, the perpetrator/s would unlawfully access information from a "cold file"; cause a bank account to be opened in the name of a nominated beneficiary; cause a false identity document to be created in the name of such a beneficiary and submit a claim to the Fund pretending to be the genuine beneficiary. This seems to be a common practice conducted by fraudsters and syndicates operating in the pension fund industry. Forensic investigations from outside service providers as well as the office of the Curator are being conducted and the matter has been reported to the South African Police Services. Other irregularities are also under investigation, the details of which are confidential.

### General Litigation

25. The Fund is involved in a number of actions whereby recoveries are being made in terms of Section 13 of the Pension Fund Act against participating employers. The Fund is also involved in a number of potential litigious issues arising from complaints and the intervention of the office of the Pension Fund Adjudicator.

### **CONTINUATION OF CURATORSHIP**

26. The continuation of the Fund was fully ventilated in an application brought by the Financial Services Board to the High Court during 2012. The court in essence directed that the curatorship of the Fund should continue, the court having taken into account the involvement and the past conduct of the South African Commercial Catering and Allied Workers Union ("the Union"). The court expressed its reservation as to the future role of the Union with the Fund having regard to its obstructive conduct in its involvement prior to and after curatorship of the Fund. This judgment and the strong views expressed by the learned Judge did apparently not deter the Union having regard to the subsequent events involving the Standard Bank litigation and the SIH claim.

27. I highlight certain aspects of the judgment of Bertelsmann J below:

***"41. The curator takes issue with the applicant and argues that it is clear from the attitude adopted by the Union and COSATU that the raids that were aimed at the Fund's assets will not cease, but***

*will be resumed once the trustees are appointed. The pending litigation will, in his view, furthermore be prejudiced if the Union-appointed trustees were to be pressurized by the Union to do the latter's bidding.*

**42.** *Neither in the affidavits nor in argument did the Union suggest that it appreciated that the previous Board had been guilty of misconduct. No undertaking was given or envisaged that the Union would in future desist from attempts to influence the trustees appointed by it to secure investments of Fund assets in a fashion that might expose the Fund to unusual risks, arising from the intention to aid the Union rather than to advance the interests of the Fund's members. On the contrary, it is clear that SACCAWU is of the opinion that it is entitled to control the Fund and to use to use the Fund's assets to benefit itself.*

**43.** *There are repeated references in the papers to the fact that the UNION experiences financial problems. Whether this is correct or not need not be decided. The suggestion of financial distress highlights the danger, however, of the temptation that a multi-billion Rand Fund presents to a Union that might experience a shortage in its cash flow.*

...

45. *Given the history and the Union's unwillingness to undertake not to pressurize the trustees appointed by SACCAWU, the apprehension expressed by the curator that the inappropriate attempts to lay the Union's hand on the Fund's assets in the past may be repeated once the trustees are appointed has not been dispelled.*
46. *If there is no guarantee that the Union trustees will be able to go about their business free from inappropriate interference, the continuing litigation between the curator and Union entities, or individuals and institutions associated with Union business, must become a matter of concern. There appears to be good reason for the curator's suspicion that his attempts to bring the litigation to finality in the Fund's favour may be obstructed by the Union and trustees appointed by the latter.*
- ...
48. *The applicant's proposals, if implemented, would bring about little if any advantage other than the termination of the curatorship, but would introduce potential conflict and detriment by exposing the Fund and its suggested management to possible attempts to divert assets in an inappropriate fashion toward*

***Union interests; to dispute and deadlock and to obstacles placed in the way of litigation that might impact negatively on Union interests. In this connection it must be recorded that no facts have been advanced that would justify any need to obtain a second opinion regarding the curator's professional view that the litigation should be continued to finality."***

28. I have extensively reported on the conflicting interests of the Union and its disregard for the interests of the Fund members. The remarks made by the learned Judge Bertelsmann endorses this sentiment. The interests of the Union with reference to the need to ultimately wind-down the activities of the curatorship toward successful self-governance, requires to be balanced against the interests of all stakeholders. The mechanism for the transitional process (once the pending litigation and new investigation into irregularities has been completed) which could achieve the stated objectives, requires further consideration particularly given the fact the Union has continued to withhold its cooperation. The SIH settlement reached with the Union provided that the Union would render assistance and cooperation to the Fund, with particular regard to the outstanding litigation and any other claims. It is the intention of the Curator to fully evaluate any positive role that the Union might have with regard to the interests of the Fund, and in this regard engage the Union in discussions.

29. I reiterate that which I have previously stated and reported on in the April 2012 court application, which extensively dealt with the continuation of the Fund under curatorship and the continuing difficulties with the Union. The frustration of the curatorship with particular regard to the litigation demonstrates that the interests of the Fund members are considered by the Union as secondary to that of the Union. It is on record that the Union considers that it owns the Fund and can utilize pension monies for its own purposes.

30. A prime purpose of the curatorship order was to afford the court the final say as to the future of the Fund based on recommendations of the curator after full investigation. What has taken place with regard to the conduct of the Union in effectively causing the Fund to be placed under curatorship as having been responsible for causing losses to the Fund to the extent of hundreds of millions of Rands (taking into account litigation involving Standard Bank, ABSA, Merit and SIH). The reintroduction of the Union into a governing position with regard to the Fund should not be permitted. The rules of the Fund should be amended to protect the members from the Union exercising its influence over the Fund.

31. The FSB as a regulatory body is legally competent to evoke a number of measures e.g. such as envisaged in terms of Section 26 of the Pension Funds Act by amending the rules of the Fund, to preclude any persons or entities holding positions of influence or control over the Fund to its prejudice,

particularly apposite where there is a history and stated intention to do so under the false banner that the Union owns the Fund.

32. I draw attention to earlier reports indicating that more than three years ago there were at least 30,000 non-union members in the Fund, hence the Fund cannot be construed as a fully-fledged "Union Fund".

33. Proper succession planning and transitional management should be implemented on completion of the pending litigation and investigation into recent fraudulent activities and what appears to be "identity theft", whereby persons unknown or syndicates have fraudulently accessed member records for the purpose of processing unlawful claims. The need for succession planning is critical. Individuals should be trained and be familiar with the Fund before they can serve as Board members which will ensure continuity of the structures and processes put in place during the curatorship, and in this regard to avoid the consequences of summary termination of the day to day control and supervision over the administrative processes of the Fund.

34. A dedicated knowledge and understanding of the Fund's business processes is essential in order to combat what appears to be constant attempts of fraud and dissipation of its assets. In this Fund, millions of Rands are processed on a daily basis requiring meticulous scrutiny and control. Any new board or management would have to be introduced to these processes and would have to be trained in

order to provide continuity. These processes are presently managed under stewardship of the Curator, his staff and service providers such as Old Mutual. Regrettably, the delegation of duties to former Principal Officers whom have served prior to, and post-curatorship, has in the long term proved to be problematic, resulting in summary dismissal of these Principal Officers.

35. The preservation and conclusion of the litigation is critical which was developed over several years under the curator's guidance and control. Any break in continuity of the litigation and making of recoveries would have the risk of causing financial prejudice to the Fund. Strategies have been devised in order to compensate for the unwillingness of the Union to render its cooperation. It is essential that the SIH settlement undertakings by the Union to pay back the judgment debt be monitored and acted upon if the settlement agreement is not complied with.

36. The Honourable Bashall AJ in the ABSA litigation handed down a judgment in favour of the Fund, resulting in a significant pension fund law landmark decision, and dealing with the manner in which the rules of the Fund were disregarded by the Union and its associates in the process of procuring benefits for the Union at the expense of the Fund. These are considerations to be borne in mind in determining the way forward for this Fund.

37. It would thus be contrary to the purpose and spirit of the PF Act and the curatorship application to place too much emphasis on the duration of the curatorship compared to the mere desire to bring it to an end because of the aspirations of the Union and Cosatu. Such an approach would merely sanction the sentiment expressed by Cosatu at the Ninth National Congress of Cosatu

## **RECOMMENDATION**

38. I have made a number of recommendations from time to time. The present status of the Fund necessitates me to provide updated recommendations for the future of the Fund, namely:

38.1 The curator should be permitted to continue to bring the pending litigation to finality in line with the views expressed in the judgment and order of Bertelsmann J dated 16 April 2012;

38.2 The present investigation into recent irregularities and fraud should continue to be investigated by the curator's office, Old Mutual (its administrator), and independent forensic investigators

38.3 That the curator continues to take charge of the functions of the office of the recently dismissed Principal Officer, with a view to normalizing affairs and ultimately sourcing and appointing a suitable replacement Principal Officer,

38.4 That once that which is contained in paragraphs 35.1, 35.2 and 35.3 has been completed, the curator should interact with the Registrar of Pension Funds in determining a suitable and appropriate basis for the Fund to continue once out of curatorship, and with this in mind, to:

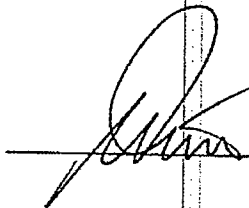
38.4.1 to report on the need for determining a transitional period required to bring the Fund out of curatorship;

38.4.2 to evaluate and report on the “in-house” department of the Fund, the day-to-day administrative functions of the Fund, such as the processing of Section 37(C) resolutions, beneficiary trusts administration, home loans, Section 13 and 14 issues, unclaimed benefits investments and general financial matters and accounting;

38.4.3 to report on the status of the Fund, its management and administration under curatorship;

38.4.4 to recommend any amendment to the Fund Rules;

- 38.4.5 to make recommendations as to the constitution of and the appointment of a board of trustees incorporating a time line for the discontinuance of the curatorship;
- 38.4.6 to report on any role that the Union should or should not have in the management and control of the Fund;
- 38.4.7 to evaluate and report on the prosecution of those responsible for unlawful conduct, relating to the business of the Fund resulting in the Fund being placed under curatorship;



A L Mostert  
CURATOR  
31 OCTOBER 2015