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**2 DECEMBER 2010**  
**DRAFT GOVERNMENT NOTICE (FOR PUBLIC COMMENT)**

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**NATIONAL TREASURY**

No. \_\_\_\_\_

\_\_\_\_\_ 2010

**PENSION FUNDS ACT, 1956: PUBLICATION OF PROPOSED AMENDMENT OF  
REGULATION 28 OF THE REGULATIONS MADE UNDER SECTION 36 FOR  
PUBLIC COMMENT**

I, Pravin J Gordhan, Minister of Finance, in accordance with section 40C of the Pension Funds Act, 1956 (Act No. 24 of 1956), hereby publish the proposed amendment of Regulation 28 of the Regulations made under section 36 of the Pension Funds Act and published under GNR.98 in *Government Gazette* 162 of 26 January 1962, to be made under section 36(1)(bB) and (c) of the Pension Funds Act, for public comment. An explanatory memorandum and a policy document relating to the proposed amendment are also published to inform and facilitate comments.

Given the degree of engagement that has already taken place, only comments of a technical nature are invited on the proposed amendment, and may be submitted in writing on or before Friday 28 January 2010 to:

The Chief Director of Financial Investments and Savings, c/o Linda van Zyl, Private Bag X115, Pretoria, 0001; or per facsimile to (012) 315 5206; or email to reg28@treasury.gov.za.

The draft regulation and supporting documents are also available on the National Treasury and Financial Services Board websites - [www.treasury.gov.za](http://www.treasury.gov.za) and [www.fsb.co.za](http://www.fsb.co.za).

**PRAVIN J GORDHAN**  
**MINISTER OF FINANCE**

## **SCHEDULE**

### **1. Definition**

In this Schedule, “the Regulations” means the Regulations made under section 36 of the Pension Funds Act, 1956 (Act No. 24 of 1956) and published under GNR.98 in *Government Gazette* 162 of 26 January 1962, and as amended from time to time.

### **2. Amendment of Regulation 28 of the Regulations**

Regulation 28 of the Regulations is hereby substituted for the following regulation:

**“28.**

#### **Preamble**

A fund and its agents have a fiduciary duty to act in the best interest of those for whose assets they are responsible. This duty supports the adoption of a responsible investment approach to deploying capital into markets that will earn them adequate risk adjusted returns for the fund’s member profile, liquidity needs and liabilities. Prudent investing should give appropriate consideration to any factor which may materially affect the sustainable long term performance of their investments, including those of an environmental, social and governance character. This applies across all asset classes and should promote the vested interest of the fund in a stable and transparent environment.

#### **Investments and financial management**

##### **Principles**

(1) (a) A fund must have an investment policy statement.

(b) A fund, its advisors and its trustees must at all times apply the following principles:-

(i) comply with the spirit of this regulation and not try to circumvent this regulation;

(ii) promote the education of trustees with respect to pension fund investment, governance and other related matters;

(iii) in contracting services to the fund or its trustees, consider the need to promote broad-based black economic empowerment of those providing services;

(iv) ensure that the fund's assets, including foreign assets, are appropriate for its liabilities;

(v) before making an investment into and while invested in an asset perform reasonable due diligence taking into account risks relevant to the investment including but not limited to credit, market and liquidity risks.

(vi) before making an investment into and while invested in a foreign asset, perform reasonable due diligence taking into account risks relevant to a foreign asset including but not limited to currency and country risk, and operational risk for foreign assets in unlisted equity made in the name of the fund or through a private equity fund or private equity fund of funds.

(vii) in performing the due diligence referred to in (v) and (vi), funds may use ratings issued by a recognised rating agency, but such ratings should not be relied on in isolation for risk assessment or analysis of an asset.

(viii) before making an investment into and while invested in an asset consider any factor which may materially affect the sustainable long term performance of the investment, including those of an environmental, social and governance character.

(c) A fund must address the principles in (b) in its investment policy statement.

### **Investment limits**

(2)(a) A fund may, throughout the reporting period, only invest in assets referred to in Column 1 of Table 1 to the extent to which the fair value of the investment expressed as a percentage of the aggregate fair value of the total assets of the fund does not exceed, through out the reporting period, the percentage listed in Column 2 of Table 1 in respect of such an asset.

(b) Where –

(i) a fund provides an individual member or class of members with investment returns related to a portion of the total assets of the fund, that portion of assets must throughout the reporting period comply with this regulation 28 and the distribution of assets referred to in Table 1; and

(ii) an individual member elects his or her own portion of assets after 1 March 2011, that portion need only comply whenever an election is made.

(c) A fund must not utilise any asset to circumvent the limits as set out in this regulation and it must include and disclose the underlying assets in the item or

category in Table 1 to which the true nature of the underlying assets relate and not to the legal form to which the investment relates.

(d) Despite (c), an asset made up of underlying assets referred to in more than one category or kind of assets, where the fair value of such underlying assets comprise less than 5% of the aggregate fair value of the asset, then that asset may be deemed to be what constitutes the underlying assets' main characteristic and no further look-through applies.

(e) A fund may invest in an investment fund that is not registered and regulated as a fund by the Financial Services Board, including a hedge fund and a private equity fund, but such investment by the fund may not comprise more than 10% of the investment fund's total assets.

(f) A fund must not invest in an investment fund, including a hedge fund or private equity fund, where there is a potential of loss to the fund in excess of the funds investment into such asset.

(g) The categories or kinds of assets referred to under the following items of Table 1 must be calculated at fair value for reporting purposes and the aggregate sum of exposure of assets in these items may not exceed 30% of the aggregate fair value of the total assets:

- (i) item 2(d)(i) Other debt instruments not listed on an exchange;
- (ii) item 3.1(b) Preference and ordinary shares in companies, excluding shares in property companies, not listed on an exchange;
- (iii) item 4.1(b) Immovable property and claims secured by mortgage bonds thereon, as well as property shares, secured loans and debentures not listed on an exchange; and
- (iv) item 8. Hedge funds, private equity funds and any other asset not referred to in this schedule.

(h) The aggregate sum of exposure of assets under the following items of Table 1 may not exceed 10% of the aggregate fair value of the total assets:

- (i) item 3.1(b) Preference and ordinary shares in companies, excluding shares in property companies, not listed on an exchange;
- (ii) item 8.1(b) Private equity funds.

(i) The sum of aggregate exposure to an issuer or entity by the fund under items 1.1 (Cash Inside the Republic) and 2.1(c) (Debt instruments issued or guaranteed by a South African bank or a foreign bank), of Table 1, irrespective of the limits referred to in Column 1 of Table 1, may not exceed 25% of the aggregate fair value of the total assets.

(j) The sum of aggregate exposure to foreign assets, referred to in Column 1 of Table 1 and expressed as a percentage, may not exceed the maximum allowable amount that a pension fund may invest in foreign assets as determined in terms of an Exchange Control Circular issued by the South African Reserve Bank.

(k) Despite paragraphs (a)-(j), the limits set out in this regulation and Table 1 may be exceeded where the excess is due to an increase or decrease in the fair value of investments because of, amongst others, market movements, non-optional corporate actions and changes in the market capitalisation of a security that is listed on an exchange.

(l) Where the limits referred to in paragraphs (a)-(j) are exceeded -

- (i) a fund may not, for as long as the excess continues, make any further investments in the assets or categories of assets in respect of which the excess exists; and
- (ii) the registrar may require a fund to comply with asset limits referred to in Column 1 of Table 1 within a period of 12 months or another period determined by the registrar.

### **Securities lending**

(3) A fund may engage in securities lending subject to provisions and conditions as prescribed.

### **Derivative Instruments**

(4) A fund may invest in derivative instruments subject to provisions and conditions as prescribed.

### **Look-through**

(5) (a) In the application of this regulation with regard to the total assets of a fund, the following shall not be deemed to be an asset of the fund:-

- (i) participatory interests in a collective investment scheme, in respect of which a fund obtained a certificate issued by the auditor of the scheme that the assets of the scheme have met, throughout the reporting period, the distribution requirements of assets referred to in Table 1;
- (ii) a linked policy as defined under the Long-term Insurance Act, in respect of which a fund obtained a certificate issued by the statutory actuary of the insurer that the assets held by the insurer in respect of his net liabilities under the said policy have met, throughout the reporting period, the distribution requirements of assets referred to in Table 1;
- (iii) a long-term insurance policy, other than a policy referred to in paragraph (ii) above, that guarantees or partially guarantees policy benefits in respect of which a fund obtained a certificate from the insurer that the Registrar of Long-term Insurance is satisfied that the policy has a bona fide guarantee, and that the insurer does not have unreasonable discretion over policy benefits and complies with prudential requirements under the Long-term Insurance Act.

(b) In the case of a collective investment scheme or a long-term insurance policy in respect of which no certificate or exemption as referred to in paragraphs (a) has been obtained, the fund shall obtain a statement in writing containing particulars of the assets in the collective investment scheme or held under the long-term insurance policy, and issued by the auditor of the scheme or the statutory actuary of the insurer, as the case may be, and the fair value of such assets shall be deemed to be assets of the fund.

- (c)
  - (i) The certificate or statement referred to in paragraph (a)(i), (a)(ii) and (b) shall be furnished to the fund at the end of each financial year of the fund.
  - (ii) Despite subparagraph (i), if a fund is exempted under section 2(5)(a) of the Act, the certificate or statement must be issued at the end of the insurer's financial year.

(d) Any direct or indirect exposure to a foreign asset must be disclosed as a foreign asset.

(e) Any direct or indirect exposure to a hedge fund or private equity fund must be disclosed as an investment into a hedge fund or private equity fund as the case may be, and further look-through is not applicable in respect of a hedge fund or private equity fund's underlying assets.

### **Borrowing**

(6) (a) A fund may not borrow assets to make investments and must at all times maintain sufficient liquidity to meet its operating cash requirements.

(b) A fund may not borrow money other than for bridging purposes. The aggregate of any loans for bridging purposes may not, through out the reporting period, exceed 50% percent of the gross income of the fund from all sources during the preceding financial year and any loan must be repaid within 12 months of entering into that loan.

(c) A fund may not be the borrower in a loan agreement, except a money market instrument, that provides for an early settlement penalty.

(d) A fund may as collateral for the fund defaulting on a loan referred to in paragraph (b) -

- (i) cede a proportionate share of its assets to the lender; or
- (ii) grant an option to the lender to purchase a percentage of the fund's assets equal in value to the outstanding amount of the loan.

### **Exemptions**

(7) The registrar may on prior written application by a fund or in general, exempt a fund or different categories, types or kinds of funds, from any of the provisions of this regulation, subject to such conditions that the registrar may impose.

### **Definitions**

(8) In this regulation: –

“**cash**” means: -

- (i) notes and coins;
- (ii) a deposit in a South African bank or a foreign bank;



(iii) a positive net balance in a margin account with an exchange;  
and

(iv) a positive net balance in a settlement account with an exchange, operated for the buying and selling of underlying assets;

“**collective investment scheme**” has the meaning assigned to it in section 1 of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002);

“**derivative instrument**” has the meaning assigned to it in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004);

“**exchange**” has the meaning assigned to it in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004) and, for the purposes of this regulation, any other exchange that is a full member of the World Federation of Exchanges;

“**fair value**” has the meaning assigned to it in financial reporting standards and includes any other condition or provisions as may be prescribed;

“**financial reporting standards**” has the meaning assigned to it in the Companies Act, 2008 (No. 71 of 2008);

“**foreign bank**” means a bank that is not a South African bank and is domiciled, registered and supervised as a bank outside of South Africa;

“**fund of hedge funds**” means a fund that invests primarily in hedge funds;

“**fund of private equity funds**” means a fund that invests primarily in private equity funds

“**gross income of the fund**” means income of the fund before payment of management fees and administration fees.

“**hedge fund**” means a portfolio which uses any strategy or takes any position that may result in the aggregate exposure of the portfolio to that strategy or position exceeding the fair value of the portfolio at any point in time, and which strategies or positions include but are not limited to leverage and net short positions;

“**Islamic debt instrument**” means an Islamic investment instrument that is a bond based on the ownership of an underlying immovable property or a tangible asset or portfolio of immovable properties or tangible assets issued by –

- (i) the Government of the Republic;
- (ii) the South African Reserve Bank;
- (iii) any public entity listed in the Public Finance Management Act, 1999 (Act No. 1 of 1999); or
- (iv) a South African bank or a foreign bank;

that is negotiable and in respect of which the title to the underlying property or asset or portfolio of properties and assets is vested in a special purpose vehicle that derives its income from commercial activities related to that property, asset or portfolio;

**“long-term insurance policy”** has the meaning assigned to it in the Long-term Insurance Act, 1998 (Act No. 52 of 1998).

**“long-term insurer”** means a person registered or deemed to be registered as a long-term insurer in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998).

**“money market instrument”** means an instrument creating or acknowledging indebtedness and is defined as:-

- (i) *“banker’s acceptance”* means a bill as defined in the Bills of Exchange Act, 1964 (Act No. 34 of 1964), drawn on and accepted by a bank as defined in the Banks Act, 1990 (Act No. 94 of 1990), or a mutual bank as defined in the Mutual Banks Act, 1993 (Act No. 124 of 1993);
- (ii) *“bill”* means a bill as defined in the Bills of Exchange Act, 1964 (Act No. 34 of 1964)
- (iii) *“bridging bond”* means an acknowledgement of debt in which the issuer thereof undertakes to repay the debt together with interest on the maturity of the debt to the holder of the bridging bond;
- (iv) *“commercial paper”* means any negotiable acknowledgement of debt;
- (v) *“debenture”* means a debenture as defined in the Companies Act, 2008 (Act No. 71 of 2008);
- (vi) *“Islamic liquidity management financial instrument”* means a financial instrument that is issued by a South African bank or a foreign bank: –
  - (aa) that is negotiable; and
  - (bb) in respect of which the title to the underlying tangible asset or assets passes from a fund to a third party within seven business days from the date of purchase thereof, and at which purchase date the future sale price of the

tangible asset or assets is fixed despite any increase or decrease in the market value thereof;

- (vii) "*land bank bill*" means a bill or note as defined in the Bills of Exchange Act, 1964, drawn, accepted or issued by the Land and Agricultural Bank of South Africa;
- (viii) "*national housing bill*" means a bill or note as defined in the Bills of Exchange Act, 1964, drawn, accepted or issued by the National Housing Board;
- (ix) "*negotiable certificate of deposit*" means a certificate of deposit issued by a South African bank or a foreign bank and payable to order or to bearer;
- (x) "*parastatal bill*" means a bill or note as defined in the Bills of Exchange Act, 1964, drawn, accepted or issued by a parastatal;
- (xi) "*promissory note*" means a promissory note as defined in the Bills of Exchange Act, 1964;
- (xii) "*trade bill*" or "*trade note*" means a bill or note as defined in the Bills of Exchange Act, 1964, drawn, accepted or issued to provide for the payment for goods;
- (xiii) "*treasury bill*" means a bill drawn by the Government on the Treasury calling on the latter to pay a sum certain in money to a specified person or his order or to bearer, on demand or on a certain specified future date;

**“PostBank”** means the SA Post Office Limited established pursuant to section 3 the Post Office Act, 1958 (Act No. 44 of 1958);

**“prescribed”** means as prescribed by the registrar, in consultation with the Minister;

**“private equity fund”** means a managed pool of capital that:

- (i) has as its business the making of investments primarily in unlisted companies to earn income and capital gains; and
- (ii) is not offered to the public as contemplated in the Companies Act, 2008 (No. 71 of 2008);

**“property company”** means a company –

- (i) of which 75% or more of the market value of its assets consists of immovable property, irrespective of whether such property is held directly by the company as registered owner, indirectly

- through ownership of the shares or the exercise of control over the company that is the registered owner of the property; or
- (ii) of which 75% or more of its income is derived from investments in immovable property, or from an investment in a company of which 75% or more of the income of that company is derived from investments in immovable property;

**“recognised credit rating agency”** means a credit rating agency as prescribed;

**“reporting period”** means the financial year determined in the rules of a fund; and

**“South African bank”** means a bank or branch as defined in and registered under the Banks Act, 1990 (Act No. 94 of 1990), a mutual bank as defined and registered under in the Mutual Banks Act, 1993 (Act No. 124 of 1993), a cooperative bank as defined in the Cooperative Banks Act, 2007 (Act No. 40 of 2007), or the PostBank.

**TABLE 1**

|      |   | Column 1   | Column 2   |   |
|------|---|--|--|---|
| Item | Categories or kinds of assets   |  | Maximum percentage of aggregate fair value of total assets of fund |   |
|      |   |  | Per issuer/entity, as applicable, unless otherwise stated          | For all issuers/entities  |
| 1.   | CASH  |  |  |   |
| 1.1  | Inside the Republic   |  | 25%  | 100%  |
| 1.2  | Foreign assets  |  | 5%   | An amount as prescribed   |
| 2.   | DEBT INSTRUMENTS, INCLUDING MONEY MARKET INSTRUMENTS AND ISLAMIC DEBT INSTRUMENTS |  |  | 100% for debt instrument issued by or guaranteed by the Republic, otherwise 75% |
| 2.1  | Inside the Republic and foreign assets  |  |  |   |
|      | (a)   | Debt instruments issued by, and loans to, the government of the Republic, or any bond or loan guaranteed by the Republic |  | 100%  |
|      | (b)   | Debt instruments issued or guaranteed by the government of a foreign country   | 10%  | An amount as prescribed   |
|      | (c)   | Debt instruments issued or guaranteed by a South African bank against its balance sheet:-                                |  | 75%   |
|      | (i)   | with a market capitalisation of R20 billion or more, or an amount or conditions as prescribed                            | 25%  |   |
|      | (ii)  | with a market cap of between R2 billion and R20 billion, or an amount or conditions as prescribed                        | 15%  |   |
|      | (iii)   | with a market capitalisation of less than R2 billion, or an amount or conditions as prescribed                           | 10%  |   |

|            |   |   |      |            |
|------------|---|---|------|------------|
|            | (d)   | Debt instruments issued or guaranteed by a wholly owned state owned entity, provincial government or local government in the Republic.            | 5%   | 25%        |
|            | (e)   | Other debt instruments  |      | 25%        |
|            | (i)   | Listed on an exchange   | 5%   | 25%        |
|            | (ii)  | Not listed on an exchange   | 5%   | 15%        |
| <b>3.</b>  | <b>EQUITIES</b>                               |   |      | <b>75%</b> |
| <b>3.1</b> | <b>Inside the Republic and foreign assets</b> |   |      |            |
|            | (a)   | Preference and ordinary shares in companies, excluding shares in property companies, listed on an exchange: -                                     |      | 75%        |
|            | (i)   | with a market capitalisation of R20 billion or more, or an amount or conditions as prescribed   | 15%  |            |
|            | (ii)  | with a market capitalisation of between R2 billion and R20 billion, or an amount or conditions as prescribed                                      | 10%  |            |
|            | (iii)   | With a market capitalisation of less than R2 billion, or an amount or conditions as prescribed  | 5%   |            |
|            | (b)   | Preference and ordinary shares in companies, excluding shares in property companies, not listed on an exchange                                    |      | 10%        |
|            | (i)   | Incorporated in the Republic  | 2.5% | 10%        |
|            | (ii)  | Not incorporated in the Republic  | 2.5% | 5%         |
| <b>4.</b>  | <b>IMMOVABLE PROPERTY</b>                     |   |      | <b>25%</b> |
| <b>4.1</b> | <b>Inside the Republic and foreign assets</b> |   |      |            |
|            | (a)   | Preference and ordinary shares in property companies, or units in a Collective Investment Scheme in Property, listed on an exchange:-             |      | 25%        |
|            | (i)   | with a market capitalisation of R10 billion or more, or an amount or conditions as prescribed   | 15%  |            |
|            | (ii)  | with a market capitalisation of between R3 billion and R10 billion, or an amount or conditions as prescribed                                      | 10%  |            |
|            | (iii)   | with a market capitalisation of less than R3 billion, or an amount or conditions as prescribed  | 5%   |            |
|            | (b)   | Immovable property and claims secured by mortgage bonds thereon, preference and ordinary shares in property companies not listed on the exchange, | 5%   | 15%        |

|            |   |   |                       |            |
|------------|---|---|-----------------------|------------|
|            |   | secured loans and debentures  |                       |            |
| <b>5.</b>  | <b>COMMODITIES</b>  |   |                       | <b>10%</b> |
| <b>5.1</b> | Inside the Republic and foreign assets  |   |                       |            |
|            | (a)   | Kruger Rands and other commodities listed on an exchange, including exchange traded commodities       |                       |            |
| <b>6.</b>  | <b>INVESTMENTS IN THE BUSINESS OF A PARTICIPATING EMPLOYER INSIDE THE REPUBLIC IN TERMS OF: -</b> |   |                       |            |
|            | (a)   | section 19(4) of the Pension Funds Act  |                       | <b>10%</b> |
|            | (b)   | To the extent it has been allowed by an exemption in terms of section 19(4A) of the Pension Funds Act |                       | <b>5%</b>  |
| <b>7.</b>  | <b>HOUSING LOANS GRANTED TO MEMBERS IN ACCORDANCE WITH THE PROVISIONS OF SECTION 19(5)</b>        |   |                       | <b>95%</b> |
|            | (a)   | Loan granted to member by the fund  |                       | <b>5%</b>  |
|            | (b)   | Guarantee given by the fund for a housing loan given to member by a South African bank                |                       | <b>95%</b> |
| <b>8.</b>  | <b>HEDGE FUNDS, PRIVATE EQUITY FUNDS AND ANY OTHER ASSET NOT REFERRED TO IN THIS SCHEDULE</b>     |   |                       | <b>15%</b> |
| <b>8.1</b> | Inside the Republic and foreign assets  |   |                       |            |
|            | (a)   | Hedge funds   |                       | <b>10%</b> |
|            | (i)   | Fund of hedge funds   | <b>5%, per fund</b>   |            |
|            | (ii)  | Hedge funds   | <b>2.5%, per fund</b> |            |
|            | (b)   | Private equity funds  |                       | <b>10%</b> |
|            | (i)   | Fund of private equity funds  | <b>5%, per fund</b>   |            |
|            | (ii)  | Private equity funds  | <b>2.5%, per fund</b> |            |
|            | (c)   | Other assets not referred to in this schedule and excluding a hedge fund or private equity fund       | <b>2.5%</b>           | <b>5%</b>  |