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LONG-TERM INSURANCE ACT, 1998: SECTION 37(2) PENSION FUNDS ACT, 1956: SECTIONS 37, 37C AND 37D: APPLICATION TO COMPULSORY ANNUITY POLICIES

This office has studied several opinions submitted to it and which question the legality of making sections 37, 37C and 37D of the Pension Funds Act applicable to those transfers of compulsory annuity policies addressed in Directive 135, issued by the Registrar of Long-term Insurance on 18 August 2000.

The legal opinion obtained by this office concurs with these opinions. Directive 135 issued

by the Registrar of Long-term Insurance has therefore been amended by deleting the reference to sections 37, 37C and 37D of the Pensions Funds Act.

Simultaneously the applicability of section 37C to transfers from a pension fund to a compulsory annuity was considered. This office holds the view that the underlying intention and principles expounded in section 37C ought to be adhered to when such transfers from previous funds are effected; and that the duty lies with Boards of Management of pension funds, when effecting such transfers, to safeguard the interests of the member's dependants through proper disclosure and by ensuring that those principles are incorporated as conditions of the annuity. Any other interpretation may result in the principles of section 37C being circumvented by the transfer of pension fund

benefits to compulsory annuities. In order to achieve the foregoing objective, Circulars PF 100 and PF 78 will in due course be revised.

Consequently any subsequent transfers in terms of section 37(2) of the Long-term Insurance Act will remain subject to the same restrictions regarding the protection of dependants as imposed by the pension fund which purchased the compulsory annuity policy in the first instance and transferee insurers must ensure that they will be able to comply with these restrictions.

An amended Directive 135 is attached hereto. Changes in-

- Clause 1.2
- Clause 2.1 (condition (iv))
- Clause 3 (final paragraph)
- Annexure 1 (paragraph 3)
- Annexure 4

were made to the enclosed Directive 135 and the Annexure thereto.

Yours sincerely

DEPUTY EXECUTIVE OFFICER

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18 August 2000 - First issued

10 January 2001- Amendment 1/2001

DIRECTIVE 135 OF 18 AUGUST 2000 – AMENDMENT 1/2001 (To all long-term insurers)

LEGAL AND ADMINISTRATIVE REQUIREMENTS FOR THE SUBSTITUTION OF CERTAIN COMPULSORY ANNUITY POLICIES: SECTION 37(2) READ WITH SECTION 3(2)(a) OF THE LONG-TERM INSURANCE ACT, 1998

1 DEFINITIONS

For the purposes of this document-

1.1 **Act** means the Long-term Insurance Act, 1998;

- 1.2 **Acompulsory annuity policy**[@] means an annuity policy that conforms to the requirements of the Registrar of Pension Funds, which is taken out by or on behalf of an individual with an insurer, as part of the benefits due to a member of a pension fund in terms of the rules of the pension fund, which rules specify that such annuity policies may not be commuted for cash and may not be assigned to any other person, as contemplated by the Pension Funds Act;
- 1.3 **Acompulsory linked annuity policy**[@] means a compulsory annuity policy in respect of which :
- a) the liability of the insurer is limited to the value of an investment account which is credited with an initial amount, nett of initial expenses, and subsequent nett investment return earned, and which is debited with annuity payments and ongoing expenses; and
 - b) the annuitant may vary the size of the annuity payments within limits determined by Practice Note RF 1/96 or Practice Notes which may replace it, issued by the South African Revenue Service.
- 1.4 **Acompulsory conventional annuity policy**[@] means a compulsory annuity policy in respect of which the liability of the insurer is the payment of a contractual periodic payment (i.e. the annuity with or without profit) for the remainder of the life of the annuitant or to one or more dependants or nominees after the death of the annuitant.
- 1.5 **Ainsurer**[@] means a person registered or deemed to be registered as a long-term insurer under the Act;
- 1.6 **Apension fund**[@] means a pension fund defined in section 1 of the Pension Funds Act;
- 1.7 **APension Funds Act**[@] means the Pension Funds Act, 1956 (Act 24 of 1956).

2 APPROVAL IN TERMS OF SECTION 37(2) OF THE ACT

- 2.1 Standing approval in terms of the proviso in section 37(2) of the Act is hereby granted for the replacement of-

2.1.1 a compulsory linked annuity policy issued by one insurer with a compulsory linked annuity policy issued by another insurer; or

2.1.2 a compulsory linked annuity policy issued by one insurer with a compulsory conventional annuity policy issued by another insurer,

subject to the following conditions:-

- (i) a written agreement must be entered into between the two insurers concerned, which agreement must contain at least the information required in **Annexure 1** to this Directive;
- (ii) the policyholder of the compulsory annuity policy must be given a written statement with details of the value, the terms and the conditions applicable to the policy prior to the taking out of the replacement policy with another insurer. This statement must be in the format required in **Annexure 2** to this Directive;
- (iii) the policyholder of the compulsory annuity policy must give prior written consent to the replacement of the policy by another insurer in the format required in **Annexure 3** to this Directive;
- (iv) the new policy shall have conditions that are essentially the same as the conditions imposed by the pension fund that took out the compulsory annuity policy in the first instance;
- (v) annual reporting by the public officer of each insurer to the Registrar must be done in the format required in **Annexure 4** to this Directive;
- (vi) the remuneration of any fees charged by the transferor, transferee or any intermediary for the substitution of a compulsory annuity policy may not have the effect that the substitution value of the policy be reduced; and

- (vii) the applicable guidelines set out in this Directive must at all times be adhered to.

NB. Therefore, please note that a compulsory conventional annuity policy may not be replaced by a compulsory linked annuity policy and that any kind of fees charged for the substitution of such a policy may not be set off against the transfer value of the policy.

2.2 The Registrar may at any time-

2.2.1 revoke this standing approval, or amend any conditions subject to which it was granted, or impose new conditions; or

2.2.2 require from insurers to furnish the Registrar with information concerning any matter regarding any replacement of such a policy.

2.3 If the Registrar revokes an approval, or amends or adds conditions of approval, as contemplated in 2.2.1, this will not affect replacements already completed under this standing approval.

2.4 Insurers who make use of this standing approval, are exempted from the fee prescribed in terms of section 3(2)(b) of the Act.

GUIDELINES

3 BACKGROUND

Lately this Office has been inundated with enquiries regarding the legal and administrative requirements for the approval by the Registrar, in terms of the proviso in section 37(2) of the Act, of the substitution of insurers in respect of compulsory annuity policies. Section

37(1) of the Act requires the approval of the High Court for the transfer of business from one insurer to another. Section 37(2) of the Act excludes from this requirement a transfer of policies if A... the Registrar is satisfied that the said policyholders have been or will be made aware of the nature of such substitution and have signified or will signify their consent thereto in writing@. If the substitution is not thus approved by the Registrar, it will be deemed to be a transfer of business between the insurers concerned, which transfer will be invalid unless it was approved by the High Court.

The aim of this directive is to *inter alia* advise on the legal requirements and to advise when a transfer of business should be dealt with in terms of the Act and when in terms of the Pension Funds Act. Furthermore this Office has endeavoured to develop an administratively viable process to deal with the potential applications.

Pension funds may provide an annuity to a retiring member or to his/her dependants or nominees on the death of a member by paying the annuity directly from the pension fund, or if the rules of the pension fund so provide, the pension fund can take out a policy with an insurer in the name of either the fund or in the name of the member, a dependant or a nominee. These policies are compulsory annuity policies and may not be commuted for cash, reduced, transferred, encumbered or attached by creditors.

4 SUBSTITUTIONS OF INSURERS

The Registrar is therefore able to introduce these guidelines whereby two insurers can agree to such a substitution, with the consent of the policyholder, provided that the process of such a transaction complies with the requirements laid down by the Registrar in this Directive. Substitution will be effected when, on application by a policyholder, a certain compulsory annuity policy at one insurer is replaced by a certain compulsory annuity policy at another insurer.

Such a replacement can only take place at the request of a policyholder, where the two registered insurers involved have agreed to do such transactions in terms of this Directive

and where the policyholder has given written consent after having received the information as required by this Directive.

It should be made clear however that the Act does not compel an insurer to agree to such transfers of business should an insurer not wish to do so. It will remain the prerogative of an insurer to decide whether it wants to allow such replacements. The agreement should indicate whether an insurer will be obliged to accept all applications for the replacement of a compulsory annuity policies or not.

In order for the Registrar to gauge the efficacy with which these substitutions are made, the Registrar requires, in terms of section 4(2) of the Act, that the public officer of each insurer must certify, on an annual basis with the submission of their annual statutory returns, respectively that the substitutions have been conducted in accordance with the conditions in terms of which the approval was granted and that all policyholders of nominated policies have received replacement values which accord full recognition to their rights and reasonable benefit expectations. The format of this certificate is prescribed in **Annexure 4** to this Directive.

5 TRANSFERS FROM PENSION FUNDS TO INSURERS

Section 14 of the Pension Funds Act requires the approval of the Registrar of Pension Funds for the transfer of business from a registered pension fund. Circular PF 100, issued by the Registrar of Pension Funds, deals with those purchases of annuities which fall outside the scope of section 14.

If the requirements of Circular PF 100 are complied with, a pension fund may, if its rules so permit, take out a compulsory annuity policy in the name of the member, dependant or nominee without obtaining approval in terms of the Pension Funds Act or the Act.

Where, for the purpose of paying annuities to a member, a dependant or a nominee of a member, a pension fund took out an annuity policy with an insurer (the pension fund

is the owner of the policy), the need might arise to have the ownership of that policy transferred to the member, dependant or nominee.

This entails that the rights and duties of the pension fund under the policy are transferred to the member, dependant or nominee and, consequently, that the liability to pay the annuity passes from the pension fund to the insurer. This transaction constitutes a transfer of business from the pension fund to the insurer, which will not be valid unless it is approved by the Registrar of Pension Funds in terms of section 14 of the Pension Funds Act. Such a transaction does not fall outside the scope of section 14, as confirmed in paragraph 4 of Circular PF100.

Enquiries regarding the transfer of business in terms of section 14 must be addressed to the Registrar of Pension Funds, at the above address.

6 TRANSFERS BETWEEN PENSION FUNDS

Where, for the purpose of paying annuities to a member, a dependant or a nominee of a member, a pension fund took out an annuity policy with an insurer in the name of the fund (the pension fund is the owner of the policy), the need might arise to have the ownership of that policy transferred to another pension fund.

This entails that the rights and duties of the pension fund under the policy are transferred to the other pension fund, and consequently that the liability to pay the annuity passes from one pension fund to another pension fund. This transaction constitutes a transfer of business from one pension fund to another, which will not be valid unless it is approved by the Registrar of Pension Funds in terms of section 14 of the Pension Funds Act. Circular PF78, or any circular which replaces Circular PF78, sets out what documentation is required by the Registrar of Pension Funds for this purpose.

7 TRANSFER FROM AN INSURER TO A PENSION FUND

Where a compulsory annuity policy was taken out with an insurer in the name of a person other than a pension fund (a member, ex-member, a dependant or a nominee is the owner of the policy), the need might arise to have the liability to pay (provide) the annuities transferred to a pension fund. This would constitute a transfer of business from the insurer to the pension fund, which will be valid only if approved by the High Court in terms of section 37(1) of the Act.

8 GENERAL

Two additional copies of this Directive are enclosed for your auditors and statutory actuary. The attached acknowledgment of receipt, duly completed and signed by your public officer, must be returned to this Office as soon as possible.

REGISTRAR OF LONG-TERM INSURANCE

MASTER AGREEMENT

between

First insurer:.....

Domicilium of first insurer:..YYYYYYYYYYYYYYYYYYYY.....Y

and

Second insurer:.....

Domicilium of second insurer:.....YYYYYY...YYYYYYYYYYYYYYYY

for the substitution for compulsory linked annuity policies in terms of section 37(2) of the Long-term Insurance Act, 1998, as contemplated in Directive 135, issued by the Registrar of Long-Term Insurance.

Effective date of this agreement: YYYYYYYYYYYYYYYYYYYYYY.

The insurer who has issued the policy in the first place will be referred to as the transferor. The insurer who accepts the obligation for issuing a new policy will be referred to as the transferee.

The first and second insurers hereby agree that from the effective date of this agreement substitution of one insurer by the other insurer in terms of section 37(2) of the Long-Term Insurance Act, 1998, will be done only in terms of the conditional approval granted by the Registrar of Long-Term Insurance in Directive 135 of 18 August 2000, or any other Directive which may replace Directive 135.

It is agreed that:

- 1 Only compulsory linked annuity policies issued to a person by an insurer will be affected by this agreement.

- 2 Such compulsory linked annuity policy can only be substituted by another compulsory linked annuity policy or a compulsory conventional annuity policy issued in the name of the same person.
- 3 The new policy shall have conditions that are essentially the same as the conditions imposed by the pension fund that took out the compulsory annuity policy in the first instance. In particular, the compulsory annuity policy shall be non-commutable and non-assignable and will comply with the constraints attached to approvals granted by the Registrar of Pension Funds.
- 4 The full name of the pension fund which took out the original compulsory annuity policy shall be noted with the substitution of such a policy.
- 5 All statutory requirements regarding disclosure of information to a new policyholder will apply to a new policy that is issued in terms of this substitution.
- 6 No cash amount shall be payable to the policyholder as a result of the substitution.
- 7 The policyholder shall be informed, in writing, prior to the substitution of the policy in order to be able to make an informed decision. The format of the statement of information will comply with **Annexure 2** to Directive 135.
- 8 No substitution shall be effected unless the policyholder consents in writing to the substitution. The format of the written consent shall comply with **Annexure 3** to Directive 135.
- 9 The date on which the investment will be realised by the transferor insurer as well as the date on which the investment will be effected by the transferee insurer must clearly be defined and disclosed to the policyholder.
- 10 The transferor will forward all the necessary documentation regarding the substitution for the policy to the transferee within an agreed time period. The documentation shall

include a copy of the statement of information as supplied to the policyholder, as well as a copy of the consent of the policyholder for the substitution of the policy.

- 11 The transferee shall issue a policy to the policyholder. (Refer to clause 3 above)
- 12 Both the transferor and the transferee shall retain copies of the information supplied by them and the consent given by the policyholder, which shall be available to the Registrar of Long-term Insurance and the Ombudsman for Long-term Insurance, on request.
- 13 The public officers of the transferor and transferee must issue a certificate in the format of **Annexure 4**, together with each annual statutory return stating that substitutions have been conducted in terms of the conditional approval granted by the Registrar of Long-term Insurance in terms of this Directive and that all policyholders that substituted their policies received transfer values which accord full recognition to their rights and reasonable benefit expectations.

SIGNED:

On behalf of the first insurer:.....Capacity:.....

Print name:.....Date:.....

On behalf of the second insurer:.....Capacity:.....

Print name:Date:.....

(Authorisation of signatures must be attached to agreement i.e. copy of Resolution passed at a Board meeting)

Format of written information to be given to a policyholder by the transferor and transferee insurers in terms of section 37(2) of the Long-term Insurance Act, 1998, prior to the substitution of the policy taking place

1 The transferor insurer must give the policyholder the following details-

- 1.1 Name of transferor insurer and the policy number(s) of the nominated policy(ies) to be substituted.
- 1.2 The anniversary date of the original policy issued by the transferor.
- 1.3 The amount of the annuity last paid by the transferor prior to the application being received, the date of the payment and the percentage opted as annuity payment of the capital invested at the time. (Refer to limits determined by Practice Note RF 1/96 or Practice Notes which may replace it, issued by the South African Revenue Service)
- 1.4 The actual Rand amount of the full benefit in the investment account or unit values of the compulsory linked annuity policy prior to the substitution. State the date on which the value is so determined.
- 1.5 The date on which the investment will be realised as well as the date on which the transfer of the money will be effected must be defined. Should the realisation of the investments take place after the consent from the policyholder was received, the policyholder must be informed that the transfer values will be re-calculated as at that other date. The risks involved, namely that the values calculated on the two dates, can differ, must be explained.
- 1.6 The actual Rand amount of any fees or penalties levied by the transferor in connection with the substitution. Indicate who will be responsible to pay these expenses. **Please take note that any kind of fees charged for the substitution of such a policy may not be set off against the transfer value of the policy.**

- 1.7 Where assets are transferred rather than an amount in cash, the assets should be identified to the member as well as the fair value and market value of such assets. Indicate the date on which the values of the assets to be transferred are calculated. Also see par.1.4.
- 1.8 Mention that the compulsory annuity policy may not be commuted for cash and that the full amount of the investment account should be invested by the transferee insurer.
- 1.9 Provide the name of the pension fund of which the policyholder was a member.
- 1.10 Any terms and conditions attached to the nominated compulsory annuity policy issued by the transferor which will be carried across to the transferee. (Such terms and conditions could have been mandated by the rules of the pension fund)
- 1.11 Provide information on the arrangements between insurers regarding the payment of any annuity payments made after the policyholder consented to the substitution, but prior to the substitution actually taking place. Also address the arrangements regarding the investment return earned over the corresponding period.
- 1.12 Explain tax implication for policyholder with regard to the transfer.

SIGNED:

On behalf of the transferor insurer:.....Capacity:.....

Print name:..... Date:.....

(Authorisation of signatures must be attached to this document i.e. copy of Resolution passed at a Board meeting)

CONFIRMATION BY POLICYHOLDER:

I,[name and surname of policyholder / person authorised by a pension fund (name pension fund)] have received the above information from the transferor insurer and I have noted the contents of this document.

Signature.....Date:.....

2 The transferee insurer must give the policyholder the following details-

- 2.1 Name of transferor and policy number of policy issued by transferor.
- 2.2 Provide the name of the pension fund of which the policyholder was a member. Also state that the anniversary date of the substituted policy shall remain the same as the original policy issued by the transferor insurer.
- 2.3 Any terms and conditions attached to the nominated compulsory annuity policy to be transferred from the transferor which will be carried across to the new policy to be issued by transferee. (Such terms and conditions could have been mandated by the rules of the pension fund)
- 2.4 The estimated amount of the transfer value and the date on which it is expected to be paid over by the transferor.
- 2.5 The type of annuity purchased from transferee e.g. a compulsory linked annuity policy or a compulsory conventional annuity policy. Explain the nature of the type of policy.
- 2.6 The estimated amount of the annuity payable and the date from which it will be paid.
- 2.7 Mention the portfolio of investment in the case of the new policy being a compulsory linked annuity policy or the prospects for future growth in the case of the new policy being a compulsory conventional annuity policy.
- 2.8 Explain the risks involved, namely that if the actual amount received by the transferee differ from the estimated transfer value, the final amount of the annuity may also differ.
- 2.9 The Rand amount of any commission or other remuneration payable to the intermediary who advises the transferring policyholder, if any. Mention who will be responsible for the payment of these expenses. **Please take note that any kind of fees charged for the substitution of such a policy may not be set off against the transfer value of the policy.**

2.10 Provide information on the arrangements between insurers regarding the payment of any annuity payments made after the policyholder consented to the substitution, but prior to the substitution actually taking place. Also address the arrangements regarding the investment return earned over the corresponding period.

2.11 Explain tax implication for policyholder with regard to the substitution.

SIGNED:

On behalf of the transferee insurer:.....Capacity:.....

Print name:..... Date:.....

(Authorisation of signatures must be attached to this document i.e. copy of Resolution passed at a Board meeting)

CONFIRMATION BY POLICYHOLDER:

I,[name and surname of policyholder / person authorised by a pension fund (name pension fund)] have received the above information from the transferee insurer and I have noted the contents of this document.

Signature.....Date:.....

Format of written consent to be given by the policyholder in terms of section 37(2) of the Long-term Insurance Act, 1998

I.....(policyholder-s name and surname / person authorised by pension fund - mention pension funds= name) hereby confirm that I have received written particulars on all the information that, according to Directive 135 issued by the Registrar of Long-term Insurance, must be given to the policyholder in order to satisfy the Registrar that I, the policyholder has been made aware of the substitution of the policy and I am aware of the nature and the terms of the substitution of the compulsory annuity policy, issued by (transferor insurer-s name) by the compulsory annuity policy to be issued by(transferee insurer-s name) and I consent to such substitution.

I have taken note that the final value of the investments of my policy to be substituted, may differ from the amounts quoted.

(Once the Policyholders Protection Rules have been introduced the client will also have to confirm that he/she received a copy of the Statutory Notice which must be issued to a new policyholder)

However, I want to qualify the above statement as follows-

.....
.....
.....

Signed: (Policyholder)

Print name

Date :

Annual Certificate issued by the Public Officers of the Transferee and Transferor Insurers

(To be completed in duplicate)

LONG-TERM INSURANCE ACT 1998: SECTION 37(2)
STANDING APPROVAL GRANTED IN DIRECTIVE 135

ANNUAL CERTIFICATE OF COMPLIANCE BY THE PUBLIC OFFICER IN TERMS OF THE
CONDITIONAL APPROVAL GRANTED BY THE REGISTRAR OF LONG-TERM INSURANCE
TO SUBSTITUTE CERTAIN COMPULSORY ANNUITY POLICIES

The Registrar of Long-term Insurance
P O Box 35655
Menlo Park
0102
PRETORIA

NAME OF LONG-TERM INSURER:.....

FINANCIAL YEAR END (PERIOD UNDER REVIEW):

I, YYYYYYYYYYYYYY.., **public officer** of the abovementioned insurer certify that all substitutions of compulsory annuity policies from this company by any other insurer, and from other insurance companies to this company, have been conducted in accordance with the conditions attached to the approval granted by the Registrar of Long-term Insurance in terms of section 37(2) of the Long-term Insurance Act, 1998, in Directive 135.

All policyholders of the abovementioned insurer whose compulsory annuity policies were transferred, received substitution values which accord full recognition to their rights and reasonable benefit expectations.

All policyholders of substituted policies gave their written consent after receiving written disclosure in accordance with the conditions attached to the standing approval granted. The abovementioned insurer has retained copies of the policyholders= consent documents.

Signed: (Public Officer)

Print name:

Date: