① DLPS
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05/11/21

REPUBLIC OF KENYA

THE NATIONAL TREASURY AND PLANNING

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8/11/21

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When Replying Please Quote:

THE NATIONAL TREASURY
P.O. Box 30007 - 00100
NAIROBI

Ref: TNT/CONF 114/01 "D" (39)

2nd November, 2021

Mr. Michael Sialai, EBS
Clerk of the National Assembly
Parliament Building
NAIROBI

③ Ms. Joyce Lenaiyeni please register and ensure its tabled
HTO 9/11/2021

Dear Clerk,

RE: 1. THE RETIREMENT BENEFITS (INDIVIDUAL RETIREMENT BENEFITS SCHEMES) (AMENDMENT) REGULATIONS, 2021

2. THE RETIREMENT BENEFITS (UMBRELLA RETIREMENT BENEFITS SCHEMES) (AMENDMENT) REGULATIONS, 2021

3. THE RETIREMENT BENEFITS (OCCUPATIONAL RETIREMENT BENEFITS SCHEMES (AMENDMENT) REGULATIONS, 2021

I refer to the above captioned subject matter.

Pursuant to section 11(1) of the Statutory Instruments Act, 2013, I wish to submit the above referenced Regulations with the attendant Explanatory Memorandum for tabling before the Committee on Delegated Legislation of the National Assembly.

Yours Sincerely,

AMOS N. GATHECHA, EBS, ndc(K)
PRINCIPAL ADMINISTRATIVE SECRETARY
FOR: PRINCIPAL SECRETARY / THE NATIONAL TREASURY

Encls.

Copy to: **Mr. Nzomo Mutuku, MBS**
Chief Executive Officer
Retirement Benefits Authority
Rahimtulla Tower, Upper Hill Road
NAIROBI

THE NATIONAL ASSEMBLY
PAPERS LAID
DATE: 09 NOV 2021 DAY.
TABLED BY: Majority Whip. Hon Wangwe.
CLERK-AT THE-TABLE: B. Inzofu.

SPECIAL ISSUE

Kenya Gazette Supplement No. 148 *10th August, 2021*

(Legislative Supplement No. 61)

LEGAL NOTICE NO. 163

THE RETIREMENT BENEFITS ACT

(*No.* 3 *of* 1997)

IN EXERCISE of the powers conferred by section 55 of the Retirement Benefits Act, 1997, the Cabinet Secretary for the National Treasury and Planning makes the following Regulations—

THE RETIREMENT BENEFITS (INDIVIDUAL RETIREMENT BENEFITS SCHEMES) (AMENDMENT) REGULATIONS, 2021

1. These Regulations may be cited as the Retirement Benefits (Individual Retirement Benefits Schemes) (Amendment) Regulations, 2021. Citation.

2. Regulation 7 of the Retirement Benefits (Individual Retirement Benefits Schemes) Regulations, 2000, hereinafter referred to as the "principal Regulations", is amended by deleting paragraph (j) and substituting therefor the following new paragraph— L.N. 118/2000.

(j) immediate vesting of contributions.

3. Regulation 9 of the principal Regulations is amended by inserting the following paragraph immediately after paragraph (4)—

(4A) A trust corporation shall not appoint an administrator, fund manager, custodian or approved issuer who is related to the trust corporation by way of ownership, directorship or employment.

4. Regulation 16 of the principal Regulation is amended in paragraph (2) by deleting subparagraph (a) and substituting therefor the following new subparagraph—

(a) where a member of an occupational retirement benefits scheme leaves employment before attaining the specified retirement age and transfers his accrued retirement benefits to an individual retirement benefits scheme, that member may opt for payment of not more than fifty per cent of his total accrued benefits and the investment income that has accrued in respect of those contributions.

5. The principal Regulations are amended by deleting regulation 17 and substituting therefor the following new regulation—

17. The scheme rules shall provide that— Access to pension benefits.

(a) where an employer makes contributions on behalf of an employee, the benefits shall vest immediately;

(b) where the employee leaves employment before attaining the retirement age, that employee shall not be entitled to more than fifty per cent of his total accrued benefits and the investment income that has accrued in respect of those contributions; and

(c) where a member makes his own contributions to the scheme, the member may opt for payment of the member's total accrued benefits and the investment income that accrued in respect of those contributions.

Made on the 12th July, 2021.

UKUR YATANI,
Cabinet Secretary for the National Treasury and Planning.

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

EXPLANATORY MEMORANDUM TO THE RETIREMENT BENEFITS (INDIVIDUAL RETIREMENT BENEFIT SCHEMES) (AMENDMENT) REGULATIONS, 2021

No. …….

PART I

Name of Statutory Instrument:	The Retirement Benefits (Individual Retirement Benefit Schemes) (Amendment) Regulations, 2021
Name of the Parent Act	: The Retirement Benefits Act (No. 3 of 1997)
Enacted Pursuant to	: Section 55 of the Retirement Benefits Act
Name of the Ministry	: The National Treasury and Planning
Gazetted on	: 10th August 2021
Tabled on	:

PART II

1. **Purpose of the Statutory Instrument**
   The purpose of the instrument is to enhance governance in individual retirement benefits schemes by providing for the immediate vesting of employer contributions, safeguarding the integrity of corporate trustees, prohibiting the appointment of related-party service providers, and simplifying the provisions for retention of retirement benefits savings.

2. **Legislative Context**
   The draft regulations are made pursuant to section 55 of the Retirement Benefits Act, which empowers the Cabinet Secretary to develop regulations for the better carrying out of the provisions of the Act.

3. **Policy Background**
   The purpose of the instrument is to amend the *Retirement Benefits (Individual Retirement Benefits Schemes), 2000:-*

(a) To require all scheme rules to provide for the immediate vesting of employer contributions on the employee.

Previously the regulations stipulated that scheme rules may provide the vesting formula of contributions, so long as such period is immediate in the case of members' contributions and does not exceed one year (or the term of contract if less than one year) in the case of employer contributions. This was discriminatory to members of individual schemes as employer contributions vest in members of other types of schemes once the contribution is transferred to the scheme.

(b) To prohibit appointment by corporate trustees of an administrator, fund manager, custodian, or approved issuer who is related to the trust corporation by way of ownership, directorship, or employment.

Previously, there was no legislative impediment for corporate trustees to appoint related parties to provide services to retirement benefits schemes under the trust corporation's stewardship. This may pose a conflict of interest, as the corporate trustee has a fiduciary duty towards the scheme, and the said trustee could award contracts of service to its related parties, which may not be an arms-length transaction, and it may not be in the best interests of the administered scheme.

(c) To limit the amount of accrued benefits a member is allowed to withdraw where a member leaves employment before attaining the specified early retirement age, to not more than 50% of the total accrued benefits and the investment income thereon.

Previously, it was permitted for a scheme member to withdraw up to 100% of the benefits accrued on account of the member's contribution, and 50% of the benefits accrued on account of the employer's contribution or transferred value of a defined benefits scheme.

Apart from being complicated and opaque, this provision gave rise to unequal treatment of members depending on the ratio of member-employer contribution. In the case of a 1-1 ratio, a member would be allowed to withdraw up to 75% of the total accrued benefits. That percentage is reduced if the employer contribution is more, for instance, 66.7% if the employer's contribution is double that of the member's, ignoring other conflating issues such as tax.

The proposal shall allow withdrawal of 50% of the total accrued benefits, irrespective of who contributed. It is easy to calculate, and it increases retention.

4. Guidance

Public participation was carried out in line with the Statutory Instruments Act No. 23 of 2013. Public participation was carried out as follows:

TOWN	VENUE	DATE	NO. OF PARTICIPANTS
Nairobi	Sarova Panaric Hotel (Stakeholders)	19th February 2021	54
Nairobi	Sarova Panafric Hotel	22nd and 23rd February, 2021	160
Mombasa	PrideInn Paradise Beach Resort	25th and 26th February, 2021	71
Machakos	Machakos University	25th and 26th February, 2021	85
Eldoret	Eka Hotel	25th and 26th February, 2021	133
Kisumu	Vic Hotel	1st and 2nd March, 2021	142
Kericho	Taidy's Restaurant Limited	1st and 2nd March, 2021	93
Nyeri	The White Rhino Hotel	1st and 2nd March, 2021	108
Nakuru	Eagle Palace Hotel	4th and 5th March, 2021	153
Meru	West Wind Hotel	4 and 5th March, 2021	57
Kakamega	Kakamega Golf Hotel	4th and 5th March 2021	139
TOTAL NUMBER OF PARTICIPANTS			**1195**

5. Consultation Outcome

To ensure that persons likely to be affected by the Retirement Benefits (Individual Retirement Benefits Schemes) (Amendment) Regulations, 2021 have an adequate opportunity to make representations, members of the public were invited to submit written memoranda.

There was no objection on the proposed regulations during the public participation forums held.

6. Impact

6.1 The Impact on Fundamental Rights and Freedom

The Regulations shall promote the fundamental rights of protection of the right to property by enhances governance in Individual retirement benefits schemes. The Regulations do not limit or infringe upon any right or fundamental freedom under the Bill of Rights. They enhance governance in Individual retirement benefits schemes by safeguarding the integrity of corporate trustees, prohibiting the appointment of related-party service providers, increasing the period for submitting actuarial reports for defined contribution schemes, and simplifying the provisions for retention of retirement benefits savings.

6.2 The impact on the Private Sector

The Regulations enhance governance in individual retirement benefits schemes, which may include private-sector retirement benefits schemes.

6.3 The impact on the Public Sector

The Regulations enhance governance in Individual retirement benefits schemes, which may include public sector retirement benefits schemes.

7. Monitoring and review

The National Treasury and Planning and the Retirement Benefits Authority will be responsible for monitoring and review of the implementation of the regulations in the sector by the applicable retirement benefit schemes.

8. Contact

Hon. (Amb.) Ukur Yatani, EGH
Cabinet Secretary for the National Treasury and Planning
Treasury Building

September 2021

Kenya Gazette Supplement No. 150 *10th August, 2021*

(Legislative Supplement No. 63)

LEGAL NOTICE NO. 165

THE RETIREMENT BENEFITS ACT

(*No.* 3 *of* 1997)

IN EXERCISE of the powers conferred by section 55 of the Retirement Benefits Act, 1997, the Cabinet Secretary for the National Treasury and Planning makes the following Regulations—

THE RETIREMENT BENEFITS (UMBRELLA RETIREMENT BENEFITS SCHEMES) (AMENDMENT) REGULATIONS, 2021

1. These Regulations may be cited as the Retirement Benefits (Umbrella Retirement Benefits Schemes) (Amendment) Regulations, 2021. Citation

2. Regulation 12 of the Retirement Benefits (Umbrella Retirement Benefits Schemes) Regulations, 2017, in these Regulations referred to as "the principal Regulations", is amended by adding the following new paragraph immediately after paragraph (5)— L.N. 55/2017.

> (6) A trust corporation shall not appoint an administrator, fund manager, custodian or approved issuer who is related to the trust corporation by way of ownership, directorship or employment.

3. Regulation 27 of the principal Regulations is amended by deleting paragraph (a).

4. Regulation 28 of the principal Regulations is amended in paragraph (1) by deleting subparagraph (a) and substituting therefor the following new subparagraph—

(a) that member shall, upon request in writing to the trustees, opt for payment of not more than fifty per cent of his total accrued benefits and the investment income that has accrued in respect of those contributions;

Made on the 12th July, 2021.

UKUR YATANI,
Cabinet Secretary for the National Treasury and Planning.

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

EXPLANATORY MEMORANDUM TO THE RETIREMENT BENEFITS (UMBRELLA RETIREMENT BENEFIT SCHEMES) (AMENDMENT) REGULATIONS, 2021

No. …….

PART I

Name of Statutory Instrument:	The Retirement Benefits (Umbrella Retirement Benefit Schemes) (Amendment) Regulations, 2021
Name of the Parent Act	: The Retirement Benefits Act (No. 3 of 1997)
Enacted Pursuant to	: Section 55 of the Retirement Benefits Act
Name of the Ministry	: The National Treasury and Planning
Gazetted on	: 10th August 2021
Tabled on	:

PART II

1. **Purpose of the Statutory Instrument**

   The purpose of the instrument is to enhance governance in umbrella retirement benefits schemes by prohibiting the appointment of related-party service providers and simplifying the provisions for retention of retirement benefits savings.

2. **Legislative Context**

   The draft regulations are made pursuant to section 55 of the Retirement Benefits Act, which empowers the Cabinet Secretary to develop regulations for the better carrying out of the provisions of the Act.

3. **Policy Background**

   The purpose of the instrument is to amend the *Retirement Benefits (Umbrella Retirement Benefits Schemes), 2017*:-

   (a) To prohibit appointment by corporate trustees of an administrator, fund manager, custodian, or approved issuer who is related to the trust corporation by way of ownership, directorship, or employment.

Previously, there was no legislative impediment for corporate trustees to appoint related parties to provide services to retirement benefits schemes under the trust corporation's stewardship. This may pose a conflict of interest, as the corporate trustee has a fiduciary duty towards the scheme, and the said trustee could award contracts of service to its related parties, which may not be an arms-length transaction, and it may not be in the best interests of the administered scheme.

(b) To prohibit a scheme member from withdrawing from membership or withdraw his benefits from a retirement benefits scheme whilst he remains an employee of the sponsor and becomes a member of another scheme established for the benefit of employees of that sponsor.

Previously, it was permitted for a scheme member to withdraw accrued benefits where he stops being a member of a scheme and becomes a member of another scheme founded by the same employer. There was no justification for allowing a withdrawal at that stage since the employment has not been interrupted. The amendment, therefore, guards against an unnecessary erosion of retirement savings.

(c) To limit the amount of accrued benefits a member is allowed to withdraw where a member leaves employment before attaining the specified early retirement age, to not more than 50% of the total accrued benefits and the investment income thereon.

Previously, it was permitted for a scheme member to withdraw up to 50% of the benefits accrued on account of the member's contribution, and none of the benefits accrued on account of the employer's contribution.

This provision gave rise to unequal treatment of umbrella scheme members, when compared to other types of schemes such as the occupational schemes whose members were allowed to withdraw up to 100% of benefits accrued on account of their own contribution, and up to 50% of benefits accrued on account of the employer's contribution.

The proposal shall allow withdrawal of 50% of the total accrued benefits, which is a significant increase on the previous limit. It provides for treatment of umbrella schemes' members that is equal to the other types of schemes (occupational and individual).

4. Guidance

Public participation was carried out in line with the Statutory Instruments Act No. 23 of 2013. Public participation was carried out as follows:

TOWN	VENUE	DATE	NO. OF PARTICIPANTS
Nairobi	Sarova Panaric Hotel (Stakeholders)	19th February 2021	54
Nairobi	Sarova Panafric Hotel	22nd and 23rd February, 2021	160
Mombasa	PrideInn Paradise Beach Resort	25th and 26th February, 2021	71
Machakos	Machakos University	25th and 26th February, 2021	85
Eldoret	Eka Hotel	25th and 26th February, 2021	133
Kisumu	Vic Hotel	1st and 2nd March, 2021	142
Kericho	Taidy's Restaurant Limited	1st and 2nd March, 2021	93
Nyeri	The White Rhino Hotel	1st and 2nd March, 2021	108
Nakuru	Eagle Palace Hotel	4th and 5th March, 2021	153
Meru	West Wind Hotel	4 and 5th March, 2021	57
Kakamega	Kakamega Golf Hotel	4th and 5th March 2021	139
TOTAL NUMBER OF PARTICIPANTS			**1195**

5. Consultation Outcome

To ensure that persons likely to be affected by the Retirement Benefits (Umbrella Retirement Benefits Schemes) (Amendment) Regulations, 2021 have an adequate opportunity to make representations, members of the public were invited to submit written memoranda.

There was no objection on the proposed regulations during the public participation forums held.

6. Impact

6.1 The Impact on Fundamental Rights and Freedom

The Regulations shall promote the fundamental rights of protection of the right to property by safeguarding governance. The Regulations do not limit or infringe upon any right or fundamental freedom under the Bill of Rights. They enhances governance in umbrella retirement benefits schemes by safeguarding the integrity of corporate trustees, prohibiting the appointment of related-party service providers, and simplifying the provisions for retention of retirement benefits savings.

6.2 The impact on the Private Sector

The Regulations enhance governance in umbrella retirement benefits schemes, which may comprise private-sector retirement benefits schemes.

6.3 The impact on the Public Sector

The Regulations enhance governance in umbrella retirement benefits schemes, which may comprise public sector retirement benefits schemes.

7. Monitoring and review

The National Treasury and Planning and the Retirement Benefits Authority will be responsible for monitoring and review of the implementation of the regulations in the sector by the applicable retirement benefit schemes.

8. Contact

Hon. (Amb.) Ukur Yatani, EGH
Cabinet Secretary for the National Treasury and Planning
Treasury Building

September 2021

LEGAL NOTICE NO. 164

THE RETIREMENT BENEFITS ACT

(*No.* 3 *of* 1997)

IN EXERCISE of the powers conferred by section 55 of the Retirement Benefits Act, 1997, the Cabinet Secretary for the National Treasury and Planning makes the following Regulations—

THE RETIREMENT BENEFITS (OCCUPATIONAL RETIREMENT BENEFITS SCHEMES) (AMENDMENT) REGULATIONS, 2021

1. These Regulations may be cited as the Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations, 2021. Citation.

2. Regulation 8 of the Retirement Benefits (Occupational Retirement Benefits Schemes), 2000, in these Regulations referred to as "the principal Regulations", is amended— L.N. 119/2000.

(a) by deleting paragraph (4) and substituting therefor the following new paragraph—

(4)A trustee shall not be victimized, removed from office of trustee or discriminated against for having performed the functions of a trustee in accordance with the trust deed and rules of a Scheme or this Act without due process of the law.

(b) by inserting the following new paragraph immediately after paragraph (4)—

(4A) A trust corporation shall not appoint an administrator, fund manager, custodian or approved issuer who is related to the trust corporation by way of ownership, directorship or employment.

3. Regulation 18 of the principal Regulations is amended in paragraph (3) by deleting subparagraph (a).

4. Regulation 19 of the principal Regulations is amended in paragraph (5) by deleting subparagraph (a) and substituting therefor the following new subparagraph—

(a) where a member leaves employment before attaining the specified early retirement age, that member may opt for payment of not more than fifty per cent of his total accrued benefits and the investment income that has accrued in respect of those contributions;

5. Regulation 31(1) of the principal Regulations is amended in subparagraph (a) by deleting the words "five months" and substituting therefor the words "six months".

Made on the 12th July, 2021.

UKUR YATANI,
Cabinet Secretary for the National Treasury and Planning.

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

EXPLANATORY MEMORANDUM TO THE RETIREMENT BENEFITS (OCCUPATIONAL RETIREMENT BENEFIT SCHEMES) (AMENDMENT) REGULATIONS, 2021

No. ....

PART I

Name of Statutory Instrument:	The Retirement Benefits (Occupational Retirement Benefit Schemes) (Amendment) Regulations, 2021
Name of the Parent Act	: The Retirement Benefits Act (No. 3 of 1997)
Enacted Pursuant to	: Section 55 of the Retirement Benefits Act
Name of the Ministry	: The National Treasury and Planning
Gazetted on	: 10th August 2021
Tabled on	:

PART II

1. Purpose of the Statutory Instrument

The purpose of the instrument is to enhance governance in occupational retirement benefits schemes by safeguarding the integrity of corporate trustees, prohibiting the appointment of related-party service providers, increasing the period for submitting actuarial reports for defined contribution schemes, and simplifying the provisions for retention of retirement benefits savings.

2. Legislative Context

The draft regulations are made pursuant to section 55 of the Retirement Benefits Act, which empowers the Cabinet Secretary to develop regulations for the better carrying out of the provisions of the Act.

3. Policy Background

The purpose of the instrument is to amend the *Retirement Benefits (Occupational Retirement Benefits Schemes), 2000*:-

(a) To enhance the integrity of corporate trustees by prohibiting the victimization, removal from office, or discrimination for having performed the functions of a trustee in accordance with the trust deed and rules of a Scheme or the Retirement Benefits Act without due process of the law.

Previously, there was no legislative provision providing such safeguards for corporate trustees, and such trustees could only rely on contractual provisions if they were subjected to aforestated wrongful conduct.

(b) To prohibit appointment by corporate trustees of an administrator, fund manager, custodian, or approved issuer who is related to the trust corporation by way of ownership, directorship, or employment.

Previously, there was no legislative impediment for corporate trustees to appoint related parties to provide services to retirement benefits schemes under the trust corporation's stewardship. This may pose a conflict of interest, as the corporate trustee has a fiduciary duty towards the scheme, and the said trustee could award contracts of service to its related parties, which may not be an arms-length transaction, and it may not be in the best interests of the administered scheme.

(c) To prohibit a scheme member from withdrawing from membership or withdraw his benefits from a retirement benefits scheme whilst he remains an employee of the sponsor and becomes a member of another scheme established for the benefit of employees of that sponsor

Previously, it was permitted for a scheme member to withdraw accrued benefits where he stops being a member of a scheme and becomes a member of another scheme founded by the same employer. There was no justification for allowing a withdrawal at that stage since the employment has not been interrupted. The amendment, therefore, guards against an unnecessary erosion of retirement savings.

(d) To limit the amount of accrued benefits a member is allowed to withdraw where a member leaves employment before attaining the specified early retirement age, to not more than 50% of the total accrued benefits and the investment income thereon.

Previously, it was permitted for a scheme member to withdraw up to 100% of the benefits accrued on account of the member's contribution, and 50% of the benefits accrued on account of the employer's contribution.

Apart from being complicated and opaque, this provision gave rise to unequal treatment of members depending on the ratio of member-employer contribution. In the case of a 1-1 ratio, a member would be allowed to withdraw up to 75% of the total accrued benefits. That percentage is reduced if the employer contribution is more, for instance, 66.7% if the employer's contribution is double that of the member's, ignoring other conflating issues such as tax.

The proposal shall allow withdrawal of 50% of the total accrued benefits, irrespective of who contributed. It is easy to calculate, and it increases retention.

(e) To increase the amount of time within which the trustees of a defined benefit scheme must submit the actuarial valuation report following the scheme's valuation which is carried out every three years

Previously, trustees had up to 5 months within which to submit the actuarial valuation report. Actuaries argued that the time is not enough to generate a quality report as it gave insufficient time within which to consider the final year's audited accounts. The period was increased to six months to accommodate the actuaries' request for more time.

4. Guidance

Public participation was carried out in line with the Statutory Instruments Act No. 23 of 2013. Public participation was carried out as follows:

TOWN	VENUE	DATE	NO. OF PARTICIPANTS
Nairobi	Sarova Panaric Hotel (Stakeholders)	19th February 2021	54

Nairobi	Sarova Panafric Hotel	22nd and 23rd February, 2021	160
Mombasa	PrideInn Paradise Beach Resort	25th and 26th February, 2021	71
Machakos	Machakos University	25th and 26th February, 2021	85
Eldoret	Eka Hotel	25th and 26th February, 2021	133
Kisumu	Vic Hotel	1st and 2nd March, 2021	142
Kericho	Taidy's Restaurant Limited	1st and 2nd March, 2021	93
Nyeri	The White Rhino Hotel	1st and 2nd March, 2021	108
Nakuru	Eagle Palace Hotel	4th and 5th March, 2021	153
Meru	West Wind Hotel	4 and 5th March, 2021	57
Kakamega	Kakamega Golf Hotel	4th and 5th March 2021	139
TOTAL NUMBER OF PARTICIPANTS			**1195**

5. Consultation Outcome

To ensure that persons likely to be affected by the Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations, 2021 have an adequate opportunity to make representations, members of the public were invited to submit written memoranda.

There was no objection on the proposed regulations during the public participation forums held.

6. Impact

6.1 The Impact on Fundamental Rights and Freedom

The Regulations shall promote the fundamental rights of protection of the right to property by enhances governance in occupational retirement benefits schemes. The Regulations do not limit or infringe upon any right or fundamental freedom under the Bill of Rights. They enhance governance in occupational retirement benefits schemes by safeguarding the integrity of corporate trustees, prohibiting the appointment of related-party service providers, increasing the period for submitting actuarial reports for defined contribution schemes, and simplifying the provisions for retention of retirement benefits savings.

6.2 The impact on the Private Sector

The Regulations enhance governance in occupational retirement benefits schemes, which may include private-sector retirement benefits schemes.

6.3 The impact on the Public Sector

The Regulations enhance governance in occupational retirement benefits schemes, which may include public sector retirement benefits schemes.

7. Monitoring and review

The National Treasury and Planning and the Retirement Benefits Authority will be responsible for monitoring and review of the implementation of the regulations in the sector by the applicable retirement benefit schemes.

8. Contact

Hon. (Amb.) Ukur Yatani, EGH
Cabinet Secretary for the National Treasury and Planning
Treasury Building

September 2021

RBA
Retirement Benefits Authority

Our Ref: RBA/2/5/SO **April 6, 2021**

Dr. Julius Muia, Phd, CBS
The National Treasury & Planning
Treasury Building, Harambee Avenue
P.O Box 30007-00100
NAIROBI

Dear P.S.

RE: BUDGET MEMORANDUM PROPOSALS FOR FY 2021/2022

The Retirement Benefits Authority has made proposals to amend the legal framework to facilitate harmony and consistency within the Retirement Benefits Sector in line with global best practices. The policy proposals were subjected to stakeholder and public consultations and participation across the country.

The purpose of this letter therefore, is to submit the Authority's Budget Memorandum for consideration during the budget process for the Fiscal Year 2021/2022.

Yours Sincerely

NZOMO MUTUKU, MBS
CHIEF EXECUTIVE OFFICER

Encl. Budget Memorandum Copy

RETIREMENT BENEFITS AUTHORITY

MEMORANDUM TO
THE NATIONAL TREASURY
FOR FY 2021/2022 ANNUAL BUDGET

Table of Contents

RETIREMENT BENEFITS AUTHORITY

BUDGET MEMORANDUM 2021-2022

Introduction

The preparation of the Budget Memorandum 2021-2022 commenced with a call for proposals from stakeholders in the retirement benefits industry. The proposals received were reviewed through an internal interrogation process that resulted in classification of the proposals into four categories including; Adopted, not adopted, deferred and proposal requiring administrative action. The categorized policy proposals were then presented to Stakeholders for feedback and buy in.

Subsequently, the adopted policy proposals were taken through public participation exercise as per the Statutory Instruments Act. The public participation covered various towns where majority of the schemes are located including; Nairobi, Mackakos, Kisumu, Kakamega, Nyeri, Meru, Eldoret, Kericho, Nakuru and Mombasa.

The proposals received support from a majority of members of the public who attended the public participation fora and provided comments as per attached matrix **(Appendix 1)**. The proposals have taken into account the Government's Big 4 Agenda, findings of research papers undertaken by the Authority and the current best global practices in the industry.

There are nineteen (19) proposals for forwarding to the National Treasury for consideration in the Fiscal Year 2021/2022 Budget. The proposals have specific amendments to the Retirement Benefits Act and Regulations. Other amendments touch on Income Tax Act.

The proposals are:

1. ***Regulation of Post-Retirement Medical Funds Established Outside Retirement Benefit Schemes.***

Issue

Regulations 14 and 19 of the Occupational Retirement Benefit Schemes (ORBS) Regulations was amended in 2016 through a Legal Notice 101. It required schemes to introduce provisions to allow members to make additional voluntary contributions to a medical fund to be accessed at retirement or transfer a portion of retirement benefits to medical insurance provider where a member has been unable to build a post-retirement medical fund from additional contributions. The Individual and Umbrella regulations have subsequently been amended to provide the same to its members.

However, the amendment excluded the post-retirement medical funds established under irrevocable trust by employers and service providers outside a retirement benefits scheme. These post-retirement medical funds are popularly known as "Stand-Alone Post-Retirement Medical Funds (SPRFMF's)". The SPRMFs and Umbrella Post-Retirement Medical Funds (UPRMFs) therefore remain unregulated. They negatively expose members' funds.

Proposal

There is need to amend the Retirement Benefits Act to allow the Authority to formulate regulations for registration and regulation of stand-alone and umbrella post-retirement medical funds. The funds can be established under irrevocable trust or written law for operations of post-retirement medical cover. In order to develop regulations for registration of stand-alone and umbrella post-retirement medical funds, there is need to include in the Retirement

Benefits Act and regulations the definition of retirement benefits scheme to include post-retirement medical fund and also provide a definition for it.

The proposal is to insert new provisions in the manner proposed below:

i. **Amend section 2 of the Retirement Benefits Act on the definition of retirement benefits scheme to include post-retirement medical fund as follows;**

*"retirement benefits scheme means any scheme or arrangement (other than a contract for life assurance) whether established by a written law for the time being in force or by any other instrument, under which persons are entitled to benefits in the form of payments **or post-retirement medical cover,** determined by age, length of service, amount of earnings or otherwise and payable primarily upon retirement, or upon death, termination of service, or upon the occurrence of such other event as may be specified in such written law or other instrument"*

ii. **Definition of post-retirement medical fund**

"post-retirement medical fund means a fund established within a scheme to which contributions are made and from which the costs of medical benefits can be met as shall be determined in accordance with the medical fund rules"

The proposal will enable RBA oversee the accumulation of contributions and management of the fund whereas the payments phase will be through medical services providers overseen by the Insurance Regulatory Authority.

Recommendation

The Authority therefore recommends that Stand-alone Post-Retirement Medical Funds be regulated to enhance confidence in the sector and ensure members are covered in retirement.

2. *Preservation of Benefits*

Issue

The main objective of saving for retirement is to accumulate savings to be used in retirement. However, the current regulations allow members of retirement benefits schemes to partially access their benefits before reaching retirement age. Under the occupational regulations when members they exit the scheme by changing jobs or leaving employment they access 50% employers' and 100% employees' contributions in a defined contribution scheme. In a defined benefit scheme a member accesses 50% of the accrued benefits.

On the other hand, Regulation 28(1) of the Umbrella Regulations states:

(1) *Where a member leaves employment but* ***before attaining the specified early retirement age*** *—*

(a) *that a member shall, upon request in writing to the trustees,* ***be entitled to payment of all the member's contribution to the scheme;***

A plain reading of the two provisions means that if a member leaves service before the specified early retirement age in an occupational scheme; they are allowed to access 50% employer contributions while a member leaving service in an Umbrella Scheme under the same circumstances is disallowed.

Proposal

The proposal is to amend the umbrella, occupational and individual retirement benefits regulations to provide that: -

1) In Occupational and Umbrella schemes, a member be allowed to access 50% of accrued benefits and interest.
2) In Individual schemes, a member be allowed to access 50% of accrued benefits where an employer is contributing or 100% where it is only the member contributing

The proposal is in line with the NSSF Act Sec. 36 and Public Service Superannuation Act Sec. 26 that have set direction on the issue of preservation of retirement benefits in both private and public sectors. Therefore, there is need for a member to have adequate benefits in retirement.

Recommendation

The Occupational and Umbrella schemes regulations be amended to provide that a member be allowed to access 50% of accrued benefits and interest and the Individual schemes regulations be amended to provide a member be allowed to access 50% of accrued benefits where an employer is contributing or 100% where it is only the member contributing.

3. ***Extension of Timeline for Submission of Actuarial Report***

Issue

Regulation 31 of Occupational Regulations require defined benefits schemes to be valued by an actuary at least once every three years and a copy of the valuation report be submitted to the authority within five months from the financial year end of a scheme.

Given the complexity of actuarial valuation and the process needed for the trustee and the sponsor to complete the valuation, the five-month period provided has proven to be inadequate to submit a quality and accurate report based on recent audited accounts. This will also ensure that members receive the correct valuation, their benefits and adequate funding of the scheme is done by the employer.

Proposal

The Authority proposes to amend Regulation 31 of Retirement Benefits (Occupational) Regulations to extend the submission period from five months to six months after the scheme's financial year ends.

Recommendation

The Authority recommends adoption of the proposal as the six months' period will accord actuaries sufficient time to undertake quality work and the scheme to submit a valuation report to the Authority.

4. ***Clarity under Regulation 18(3) of the Occupational Regulations.***

Issue

Regulation 18(3) provides:

(3) *The scheme rules shall provide that a member of the scheme shall not be permitted to withdraw from membership or withdraw his benefits from the scheme whilst he remains an employee of the sponsor unless –*

(a) *he becomes a member of another scheme established for the benefit of employees of that sponsor; or*

(b) *he attains the retirement age provided for in the scheme rules.*

The plain reading of this regulation specifically part (a); it seems to imply that a member who is changing scheme courtesy of the sponsor establishing a new one (like for instance changing from DB to DC) can be allowed to withdraw their membership or benefits while still in service of the same Sponsor.

Proposal

The Authority proposes that;

(i) Regulation 18(3) (a) of Retirement Benefits (Occupational) Regulations be deleted

(ii) Regulation 27(a) of Retirement Benefits (Umbrella) Regulations also be deleted.

Recommendation

The Authority recommends deletion of the regulations to address some of the contentious issues that arise when a scheme closes and another is registered with a different name by the same sponsor. There is no vacuum when a Sponsor is changing schemes from a defined benefit to a defined contribution.

5. *Clarity under Regulation 27 (c) of the Umbrella Regulations.*

Issue

Regulation 27 (c) of the Umbrella Regulations provides; -

A member of the scheme shall not be permitted to withdraw from membership or withdraw his benefits from the scheme whilst he remains an employee of the employer unless he –

(c) has need related to personal aptitude for which the trustees have given approval and obtained prior written consent of the Authority.

Part (c) of the Regulation is very confusing. It has never been clear what is personal aptitude and who determines what it includes. The same leeway is also not given to members under the Occupational Regulations. Personal aptitude in this case can be interpreted differently by boards of trustees. It therefore, can be adversely used to create leakages through early withdrawals of accrued benefits defeating the main goal of a pension scheme which is to accumulate savings as a means of livelihood in retirement.

Proposal

The Authority proposes to delete Regulation 27(c) of the Umbrella Regulations

Recommendation

Personal aptitude provision be deleted as the retirement benefits arrangement in Kenya do not provide for personal aptitude which is a leakage in the accumulation of retirement benefits. Personal aptitude can be catered for under other arrangements like Saccos, Chamas, etc.

6. ***Deeds of Adherence by Employers Participating in Umbrella Schemes and Individual Pension Plans (IPPS)***

Issue

The Authority's mandate includes amongst others;

i. To regulate and supervise the establishment and management of retirement benefits schemes;
ii. To protect the interests of members and sponsors of retirement benefits sector;

To fulfil the said mandate, there is need for the authority to receive trust deeds and rules or deeds of adherence establishing a scheme. However, currently there is no requirement for Umbrella Schemes and IPPs to submit to the Authority deed of adherence when participating employers subscribe to an existing scheme. This creates a challenge for instance when there is non-compliance and the authority is required to intervene in the case of unremitted contributions. The authority may not be able to pursue the respective employers who have not remitted contributions since the deed of adherence has not been submitted.

Proposal

1. The Retirement Benefits (Umbrella) Regulations be amended to require Umbrella schemes to submit deeds of adherence by participating employers to the Authority.

2. Amend the Individual Retirement Benefits Regulations as follows;
    i. Regulation 2 of the Individual Regulations be amended by inserting the following new definition in proper alphabetical sequence; -

"deed of adherence" means an instrument in writing between an employer, the trustees and the sponsor in which the employer irrevocably undertakes and binds itself to the trusts of the scheme upon which the sponsor and the trustees in reliance thereto have without other conditions admitted the employer to join and participate in the provision of retirement benefits to its employees on the terms expressed in the scheme rules;

ii. Regulation 7 of the Individual Regulations be amended by inserting the following paragraph immediately after paragraph (f)-

Provided that where an employer is contributing for the employees, they shall execute a deed of adherence and submit to the Authority. For the case of deed of adherence that have been signed, the schemes will be required to submit within 30 days.

Recommendation

In order to monitor and enforce remittance of contributions and safeguard the interests of members in Umbrella and Individual retirement benefits schemes, it is important for the schemes to submit deed of adherence for participating employers. This will assist in collation of data and statistics of members participating in Umbrella and Individual schemes to safeguard their interest.

7. ***Winding-Up of Schemes***

Issue

The Authority has observed that occupational schemes that seek voluntary winding up sometimes take unnecessarily long to liquidate. This happens regardless of the boards of trustees having full information on all assets on all assets and liabilities of the scheme. There has been no time limit provided for voluntary winding up of schemes. This has now become necessary to expedite the process of voluntary liquidation.

Proposal

Retirement Benefits Authority (minimum funding level and winding up) Regulations be amended to incorporate the voluntary winding up period be limited to three years. Any further extension shall be approved by the Authority.

Amendment of Regulation 7 will provide for the winding up to be completed within a period of three years and in the event of an extension, it be approved by the Authority.

Recommendation

The voluntary winding up is supposed to be completed within a shorter period as compared to statutory winding up since trustees have full information on all assets and liabilities of the scheme.

Therefore, the Authority recommends a period of three years within which the liquidation exercise should be completed and any further extension be approved by the Authority for a maximum of one year.

8. ***Clarity and harmonisation of Regulation 7 (j) and 17 of Individual retirement benefits regulations on payment of retirement of a disabled member and vesting of benefits.***

Issue

The heading at 17 is reading "retirement of a disabled member" while the paragraph is on vesting of benefits.

Regulation 7 (j) provides for vesting of benefits of one year for employer's contributions and immediate for a member contribution.

17(a) provides for vesting of benefits of one year for employer's contributions

The vesting period for contributions in a registered retirement benefits scheme is immediate hence the need to harmonise the two clauses.

Proposal

The Authority proposes that;

i) The heading on Regulation 17 of individual retirement benefits scheme be amended to read "vesting of benefits."

ii) The Authority proposes that vesting periods in Regulation 7(j) and 17(a) be amended to immediate.

Recommendation

The Authority recommends harmonisation of vesting period on access of employer benefits in Occupational, Umbrella and IPP arrangements to immediate.

9. *Registration of Corporate Trustee/Stricter Requirements on who can act as Corporate Trustee*

Issue

The Act provides for the definition of a trust corporation and the requirement to have capital of not less than Kes10 million. The corporate trustee provides essential trustee services to Individual retirement benefit schemes and Income Drawdown as required by retirement benefits legislation. Other than the capitalization requirement and the need to observe other regulations pertaining to individual trustees, they have no requirement for registration. In addition, the corporate trustee may appoint a single individual to run the affairs of a scheme which is not a good governance practise for a scheme.

However, the corporate trustees have no registration requirement by the Authority despite the role they play in the management of retirement benefits schemes.

Proposal

i) Amendment to the Retirement Benefits Act.

The Authority proposes to introduce a requirement for corporate trustees to be registered and file returns under the retirement benefits act as follows;

a) *Amend sec. 23(1) of the Retirement Benefits Act to include corporate trustee*

b) *Introduce a new Sec. 26A Under the Retirement Benefits Act on requirements of corporate trustee for registration as follows;*

Requirements for registration of a Corporate Trustee

No applicant for registration as a Corporate Trustee shall be registered unless such applicant; -

1) is a limited liability company incorporated under the Companies Act (No. 17 of 2015) which is for the time being empowered (by or under any written law, its charter, memorandum of association, deed of settlement or other instrument constituting it or defining its powers) to mainly undertake trusts:
2) has such minimum paid up share capital as may, from time to time, be prescribed;
3) is capable of meeting the obligations to members and sponsors specified in the scheme rules;
4) has the professional and technical capacity and adequate operational systems to perform its functions;
5) has never been a Corporate Trustee of any scheme fund which has been either deregistered, wound up or placed under an interim administrator due to any fault, either fully or partially, of the Corporate Trustee
6) has never been involved in the management or administration of a scheme which was deregistered for any failure on the part of the management or the administration thereof;
7) has in its Board of Directors and top management such number of persons as may be prescribed who are academically and professionally qualified in matters relating to administration of schemes, insurance, law, accounting, actuarial science, economics, banking, finance or investment of scheme funds;
8) ~~is undergoing liquidation;~~
9) meets such additional requirements as may, from time to time, be prescribed.