

AN OVERVIEW
OF THE PENSIONS
(SUPERANNUATION FUNDS AND
RETIREMENT SCHEMES) ACT, 2004

Presented by:

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April 20, 2006

1. Prior to the passing of the Pensions (Superannuation Funds and Retirement Schemes) Act 2004 (the "Act") which came into effect on March 1 2005, there was no regime in Jamaica for regulating the administration and management of the superannuation funds and retirement schemes. Before the Act, the main requirement which superannuation funds and retirement schemes were required to satisfy in order for them to be established, was the need to secure the approval of the Commissioner of Income Taxes under section 44 or 44A of the Income Tax Act. The chief purpose of this requirement was to ensure that these funds and schemes benefited from certain income tax exemptions under the Income Tax Act.
2. Despite the fact that the Act has been in operation since March 1, 2005, many of its provisions could not be enforced by the Financial Services Commission owing to the fact that many of the provisions required matters to be prescribed, that is, made the subject of Regulations. Regulations under the Act dealing with issues relating to registration, reporting and licensing, specified pension funds and schemes, governance and investment, were passed by the Houses of Parliament this month and will become law on the date that the Regulations are gazetted.
3. The provisions of the Act and the Regulations that were passed by both Houses of Parliament this month, are aimed at (i) ensuring that pension funds are properly managed and administered by capable and competent persons in accordance with sound pension management principles and practice and (ii) granting the regulatory authority, the Financial Services Commission (the

“FSC”) the necessary powers to enable it to monitor and supervise the persons involved in the administration and management of pension funds.

4. A consequence of the Act therefore is that in addition to being familiar with the terms and conditions of the documents which govern pension and retirement schemes, that is, the Trust Deed and Plan Rules, trustees, sponsors, administrators and managers of pension funds are now required to be familiar with the provisions of the Act and any Regulations made under the Act. It is my own view however that many of the provisions of the Act and Regulations which provide expressly for actions and obligations on the part of trustees, include actions and obligations which would have come within their fiduciary duties under the common law.

5. The Act seeks to regulate all superannuation funds (SF) and retirement schemes (RS) however most of its provisions are only applicable to approved SF or RS. To that end, the Act requires all superannuation funds and retirement schemes other than specified pension funds to be registered under the Act¹. A “specified SF or RS” is defined as a SF or RS that is established by law or such other SF or RS that may be prescribed. Under the Specified Pension Fund and Specified Pension Scheme Regulations 2006, a specified pension fund or scheme is defined to include a fund or scheme which (i) has not applied for approval under section 44 or 44 A of the Income Tax Act and (ii) was established with the intention of not seeking such approval or the approval of the FSC.

¹ Section 5

6. Therefore a SF of a statutory body which is established by Regulations made pursuant to the Act which establishes that body and a SF or RS which comes within the Specified Pension Fund Specified Pension Scheme Regulations, do not need to be registered with the FSC and do not come within the definition of an approved SF or RS in the Act. It follows therefore that a consequence of the Act is a requirement now for SF or RS to not only be approved by the Taxpayer Audit and Assessment Dept but also now by the FSC.
7. An approved superannuation fund (SF) is defined in the Act as a fund *not being a specified pension fund* whereby contributions towards pensions are made by **employers** on behalf of **employees** and which is approved and registered by the FSC under the Act. An approved retirement scheme is defined as a scheme *not being a specified pension scheme*, (a) to which persons who are self employed or are not active members of an approved SF (i) make contributions towards a pension or (ii) transfer their benefits from another approved retirement scheme on being employed in another job or another SF upon being terminated from that job and (b) which is a defined contribution plan, open to residents of Jamaica and approved and registered by the FSC. Therefore an employee of a company who is an active member of a pension plan operated by the company, cannot be a member of an approved RS.
8. The provisions of the Act cover a wide range of matters including:
- a. the requirement for various players in the pensions industry to be licenced or registered with the FSC and for SF and RS to be registered by the FSC;

- b. the imposition of duties and obligations on certain of the players in the industry,
- c. empowering the FSC to exercise investigative powers and to cancel and suspend any licences or certificates of registration issued by that office,
- d. the appointment of actuaries and auditors,
- e. The amendment of the governing documents of an approved SF or RS; and
- f. the winding up of a SF and RS.

Registration and Licensing

9. Section 5 (1) of the Act prohibits any person from (i) operating SF or RS or (ii) acting as trustees of a SF or RS, unless the fund/scheme and the trustees are registered under the Act. The only exception to this provision is a specified SF or RS and the trustees of such a fund or scheme. A SF that is established by statute or within the Specified Fund and Specified Scheme Regulations and the trustees of such funds, do not need to be registered with the FSC.
10. The Act² mandates the trustees of all SF and RS excluding a specified pension fund or scheme, to designate an administrator and investment manager of their SF and RS within 30 days of the appointed day (March 1, 2005) or within 14 days after the

² Section 10

termination or resignation of an administrator or manager³. Notice of such designation is to be given to the FSC within 14 days of the designation. Section 10 of the Act expressly provides that the same entity can be an administrator or manager.

11. Section 5 also prohibits persons from (i) administering or (ii) managing an approved SF and RS unless they are **licensed** as administrators and investment managers respectively, under the Act. An administrator is defined in the Act as **a company** licensed under the Act to administer a SF or RS, whilst an investment manager is defined as a **company** licensed under the Act to invest and manage the assets of a SF or RS.

12. The Act and the Registration, Licensing and Reporting Regulations 2006 that were recently passed by the Houses of Parliament, set out the conditions and procedures to be satisfied, when for applying for the registration of pension funds and trustees and the licensing of investment managers and administrators.

Registration of Funds and Schemes

13. The conditions that are required to be met in order for a SF to be registered by the FSC are set out in section 13 of the Act. Important conditions to be noted here are that:

- a. The fund is established in connection with a trade or undertaking carried on in Jamaica and is a bona fide SF established under an irrevocable trust,
- b. The pension benefit derived from a sponsor's contribution shall be paid to a member only on retirement or to a spouse,

³ Section 10

- beneficiary or legal personal representative of a deceased member,
- c. The ordinary annual contribution to be made by the sponsor in relation to a member does not exceed 10% of the member's annual salary or wages, unless such payment does not meet the minimum funding and solvency requirements,
 - d. Provision is made for contributions deducted from the salaries of employees to be paid over to the manager within 1 week of the end of the month in which they were deducted,
 - e. Yearly contributions to the fund by a member do not exceed 10% of his annual salary,
 - f. The fund satisfies certain prescribed minimum and solvency requirements,
 - g. The fund satisfies prescribed investment criteria,
 - h. lump sum payments are made (i) of a specified sum on the death of an employee (ii) of the member's contributions where his employment is terminated otherwise than by death or retirement or (iii) of a specified sum if he retires,
 - i. provision is made for a member to have recourse to the FSC where he is of the opinion that his benefits are being jeopardized,
 - j. The fund provides for member nominated trustees on such terms as is prescribed,
 - k. Provision is made for information to be given to members.

Registration of Trustees, Administrators and Managers

14. Sections 7, 8 and 9 of the Act set out the conditions that need to be satisfied in order for the FSC to grant a licence to administrators and managers and to register trustees. These conditions include a fit a proper test for (i) trustees who are individuals and (ii) in the case of administrators and managers

body corporate trustees, the members of the Board of the applicant and the applicant's manager, assistant manager, secretary and the person designated as the responsible officer of the company..

15. The criteria for the fit and proper test to be satisfied by persons applying for licenses to be administrators and investment managers and to be registered as trustees under the Act, are similar to those applicable to persons who are required to be licensed as dealers and investment advisors under the Securities Act. The fit and proper criteria are that:
- a. the person has not been found guilty of committing an offence involving dishonesty and is not an undischarged bankrupt,
 - b. the person's employment record does not give the FSC reasonable cause to believe he had been involved in an act involving impropriety in the handling of monies,
 - c. the person in the opinion of the FSC is of sound probity is able to exercise competence, diligence and sound judgment. In this regard the FSC can take account of any evidence that (i) the person was engaged in business practice appearing to the FSC to be deceitful or oppressive or otherwise improper or (ii) contravened any provision in an enactment designed to protect the public against financial loss due to dishonesty, incompetence or malpractice.
 - d. the person is not incapacitated by reason of mental disability.

16. In addition to the above, the members of the Board, managers and responsible officer of administrators and corporate trustees are required to establish that they have knowledge and experience in the business of SF and RS.
17. In addition to satisfying the fit and proper test criteria referred to above, an investment manager is also required to establish to the FSC that:
- a. it has the prescribed capital base,
 - b. it adheres to standards of sound business and financial practices in its operations,
 - c. its affairs are managed by qualified and capable persons,
 - d. the persons employed to deal with the funds are qualified and experienced the management or investment of assets of those funds,
 - e. it is licensed as a dealer under the Securities Act. An exception has however been made to this requirement by the Act to Amend the Pensions (Superannuation Funds and Retirement Schemes) Act 2006 which was passed by both Houses this month following on successful lobbying on behalf of self-administered SFs. As a result of this Act an investment manager (i) that is owned or controlled by a sponsor or the trustees of an approved SF or RS or (ii) whose investment business activities are carried out exclusively in relation to the assets of a fund or any other SF

established in relation to the employees of the sponsor or a company affiliated with the sponsor, does not need to be the holder of a dealers licence in order to be registered under the Act.

18. The FSC has the discretion to refuse to grant licences or to register persons or SF or RS. However where it does this, it is required to inform the applicant of its decision in writing stating the reasons for its refusal.

19. Any person who is refused a licence or registration can appeal to the Appeal Tribunal established under the FSC Act for redress⁴. The procedure for appeal is set out in section 39 of the Act.

20. The FSC is required to issue certificates of registration where a SF has been registered⁵ and licences to managers and administrators that have been licensed under the Act. Registration fees and licence fees are required to be paid in respect of SF and RS, trustees, administrators and Managers, during the period that the licences or registration as the case may be, remains in force⁶. Sponsors and administrators and managers of approved SF and RS are also required to display the certificate and licence at their places of business.⁷

Responsible Officer

21. As is the case with other legislation such as tax statutes and the Securities Act, which impose obligations on body corporates,

⁴ Section 39

⁵ Section 14

⁶ Sections 8(3) 9(2) and 15(2).

⁷ Sections 15 and 16

there is a requirement in the Act for the administrators, investment managers and trustees that are body corporates to appoint a responsible officer for the company.⁸ This person is stated in the Act to be “*answerable for doing all such acts, matters and things required*” for the general administration of the fund in the case of administrators and the general management of the fund in the case of investment managers. The duties of this person include ensuring that the provisions of the Act and the Regulations are complied with, (ii) reporting to the FSC on matters relating to compliance and (iii) making payment of all fees payable under the Act by the body corporate.

22. The Act requires responsible officers to be registered with the FSC within 30 days of the date of their appointment. If no person is named as the responsible officer by the body corporate, the FSC is obliged to register the managing director or other person in charge of the affairs of the body corporate, as the responsible officer for the company.

Appointment of Actuaries and Auditors

23. Section 12 of the Act prohibits a person who is a related party to an approved SF or RS from being appointed as an actuary or auditor of an approved SF or RS, without the prior approval of the FSC. The term related party is defined and includes a member, the administrator, the trustees, the investment manager and the sponsor, a director officer or employee of the sponsor, administrator, trustee or manager.

⁸ Section 11

24. Notice of the appointment of the actuary and auditor together with details of the qualifications and work experience of the actuary, are required to be submitted by the trustees to the FSC within 14 days of the appointment. Upon reviewing these details the FSC is empowered to make a determination as to whether or not the person appointed is "a suitable person." In the event such a determination is made, the FSC is required to notify the trustees of its decision, the reasons for the decision and inform them of their right to appeal under section 39 of the Act. Where such notification has been made by the FSC the employment of the auditor or actuary has to be terminated unless an appeal is filed.

Functions and Powers of the FSC

25. The FSC is under the Act given the function of:
- a. Supervising the operations and administration of SF and RS,
 - b. Registering SF and RS,
 - c. Registering trustees and responsible officers; and
 - d. licensing administrators and investment managers.
26. The FSC is empowered under the Act to:
- a. Refuse to register SFs RS' and trustees which do not satisfy the conditions and criteria set out in the Act and the Regulations,
 - b. Undertake such investigations as are necessary to ensure that the Act and the Regulations are being complied with,
 - c. Issue directions to be complied with by sponsors, trustees, administrators and managers in respect of the performance of their obligations in respect of approved SF and RS,
 - d. Issue warnings to, or suspend or cancel the registration of a responsible officer where that officer has failed to carry out

his duties under the Act⁹. Notice of any such action by the FSC is required to be given to the administrator, manager or trustee, who is required to terminate the person's appointment as responsible officer where the FSC has notified it of the cancellation of his registration.

- e. Suspend any licences or registration granted under the Act where it is satisfied that an administrator, investment manager or trustee is in breach of any of the provisions of the Act or Regulations. Section 17 of the Act expressly provides that prior to taking any action to suspend a licence, the FSC must notify the relevant person of its intention to suspend the licence or registration and in such notice state (i) the reasons for the proposed suspension and the right of appeal under section 39, (ii) require the persons to remedy the breach within a specified timeframe and (iii) specify a timeframe within which the person may make oral representations regarding the proposed suspension to the FSC.
- f. Cancel licences in certain specified instances but only after the offenders have been notified of this intention. These instances include, where:
 - i. The licence or registration was procured as a result of a mis- representation or false representation which is material or inconsequence of incorrect information supplied willfully,
 - ii. Any of the persons who is required to satisfy a fit and proper criteria no longer satisfies such a test and has not been removed from office,

⁹ Section 11(7)

- iii. There is unreasonable delay in the payment of a pension or other pension benefit,
- iv. The administrator trustee or manager is carrying on business otherwise than in accordance with sound pension principles and practice,
- v. 30 days have elapsed since the date when the administrator, manager or trustees were required to provide information to the FSC and has without reasonable excuse failed to provide such information duly and satisfactorily,
- vi. The administrator, manager or trustee has been found guilty of fraudulent or dishonest practice,
- vii. The administrator, manager trustee has contravened any of the provisions of the Act or Regulations,
- viii. A breach which resulted in suspension of a licence or registration has not been remedied within the period specified.

As is the case with the suspension of any licence, the FSC is required to notify the person in writing of the proposed cancellation stating the reasons therefore and the right of appeal under section 39 of the Act.

- g. proceed to suspend or cancel a registration or licence without the need for prior notice¹⁰ where (i) the person having been notified of the FSC's intention to cancel or suspend and the right of appeal under section 39, fails to lodge an appeal or withdraws the appeal or (ii) where the result of the appeal is the confirmation of the FSC's decision.

¹⁰ Section 19

In this event, the FSC is required to notify the person of the cancellation or registration¹¹,

- h. Cancel a registration or licence without notice where¹²:
 - i. the administrator investment manager or trustee has not carried on business in Jamaica in the capacity for which it is registered or licensed, within 1 or more years of such registration
 - ii. Upon the resignation of a trustee,
 - iii. If the administrator or trustee requests.
- i. Issue a written request to an administrator, manager sponsor or trustee for it to furnish information to the FSC relating to any matter in connection with an approved SF or RS,
- j. Investigate the activities of an approved SF or RS where it appears to the FSC that¹³:
 - i. the fund or scheme does not meet the prescribed funding or solvency requirements,
 - ii. The trustees fail to provide information to the FSC within 1 month of the date the request was made by the FSC,
 - iii. The investigation should be carried out based on the information in the possession of the FSC.
- k. Investigate the activities of an administrator, manager, trustee or sponsor of an approved SF or RS,
- l. Authorize persons to carry out an investigation on its behalf,
- m. Recover the costs of any investigation as a civil debt in a Resident Magistrate (RM) Court where the investigation

¹¹ Section 19

¹² Section 20

¹³ Section 23.

reveals that a breach of the Act or Regulations has been committed.

27. As part of its efforts to conduct an investigation the FSC or an Investigator which it appoints, is empowered to (i) request an administrator, trustee or manager to produce books, accounts documents or statistics of an approved SF or RS for inspection, (ii) examine on oath or affirmation in relation to the business of the SF or RS any person who is or has been the auditor, actuary or responsible officer, trustee or member of the SF or RS¹⁴.
28. The Act also provides for warrants to be issued by a RM to facilitate the searching of premises for information which has not been produced in compliance with any request made by the FSC under the Act.
29. Upon the completion of investigations, the FSC is required to provide a report to the trustees summarizing its conclusions and may also issue directions to the trustees, sponsor, administrator or manager regarding the conduct of the business of the fund or scheme. A direction shall have a lifespan of 12 months however the FSC is empowered to issue further directions to such persons.

Amendment to the Plan Documents

30. Section 35 outlines the steps that are to be taken where the trustees intend to amend the Trust Deed and Rules governing an approved SF or RS. Members are required to be notified of the amendments and to approve such amendments, prior to their

¹⁴ Section 24

taking effect. After the approval of the member has been obtained the approval of the FSC is also required in order for such amendments to be effected. Section 35(3) further provides that the trustees are not to submit amendments to the FSC for approval unless:

- a. In the case of prescribed amendments¹⁵ at least 50% of **the members** plus one
- b. In any other case at least 50% of the **voting members** of the SF or RS plus one

signify their approval in the prescribed manner. A voting member is one who attends a meeting of an approved SF or RS and is entitled to vote at the meeting or a member voting by proxy at the meeting.

31. The Commission has the power to either approve or refuse the amendments.

32. The Act expressly provides¹⁶ that the above requirements for amendments will not be required in respect of amendments to the Deeds and Rules of a SF or RF which will need to be done pursuant to the Act or Regulations.

Reports to the FSC

33. Trustees are required to file a Certified Financial Return to the FSC annually and other prescribed reports. Likewise

¹⁵ These are now set out in the Pensions (Superannuation Funds and Retirement Schemes) Governance Regulations 2006

¹⁶ Section 35(6)

administrators and managers are required to file prescribed reports to the FSC.¹⁷

Confidentiality

34. The Act imposes obligations on persons who have control of, or are in possession of information, records books relating to SF and RS and officers of the FSC to whom such information is provided pursuant to the Act, to keep them confidential.

Recourse for Grievances

35. Members of a SF or RS who are of the view that their interests in an approved SF or RS are being jeopardized have the right to inform the FSC of this, stating the manner in which their interests are being jeopardized. In such an event the FSC is required to make an enquiry into the matters and provide information to the member¹⁸.

36. Any manager, administrator, trustee, sponsor or responsible officer who is aggrieved by the decision, ruling, directive, or action of the FSC can in writing appeal the FSC's decision or action to the Appeals Tribunal¹⁹.

Termination and Winding up of the Plan

37. An important change under the new regime is that SF and RS that are being wound up must notify and seek the prior approval of the FSC prior to proceeding to implement such a course of action. The effect of the provisions of sections 27(13) and (14) of the Act is that this requirement applies to all superannuation funds whether or not they have been approved by

¹⁷ Section 37. See also Governance Regulations

¹⁸ Section 38

¹⁹ Section 39

the FSC. Therefore any fund that was being wound up prior to April 2006 when the Regulations were passed, is required to secure the approval of the FSC prior to proceeding with the winding up.

38. The Act provides for an approved SF or RS being wound up either :

a. by a Court on the petition of the FSC or the trustees, or

b. Voluntarily by the trustees pursuant to the winding up provisions in the Trust Deed and Rules of the plan.

39. A petition to wind up an approved SF or RS can only be presented with the leave of the court²⁰. Section 27(6) requires the FSC to be party to any proceedings commenced to wind up an approved SF or RS. The members are required to be given notice of and the reasons for the winding up the fund, by the FSC and the Trustees, prior to filing a petition to wind up the SF or RS.

40. Where Trustees are the persons seeking to petition the Court to wind up a fund, they are required to give the FSC 90 days notice of their intention to take such a step, seek the FSC's prior approval and to serve a copy of the petition on the FSC.

41. Section 31 provides for the manner in which the assets in the SF or RS are to be distributed. The section specifies the order of priority of payment of the debts of the fund by the Trustees. It is important to note that if the order of priority set out here conflicts with the terms of the Trust Deed or Rules, the provisions of the Act will prevail.

²⁰ Section 27(5)

42. Where a surplus exists in the SF or RS after the payment of debts in accordance with section 31, the trustees are requested under section 32, to have the surplus verified by an actuary, and to forward such verification along with a scheme of distribution of the surplus to the FSC for approval. The FSC is given the power not only to examine the scheme of distribution, but to also make amendments to such a scheme after consultation with the trustees.

Penalties for breach

43. Penalties for breaches under the Act are set out in sections 43 to 49 of the Act. These provisions have been amended by the Bill to amend the Act which was passed this month, to remove any criminal penalties (that is, the liability on summary conviction to the payment of a fine or imprisonment), being imposed on trustees for breaches of the provisions of the Act. Criminal penalties however remain for managers, administrators and sponsors.
44. Some of the breaches which render these persons liable on summary conviction before a RM, for monetary fines include:
- a. A failure by a person who performs duties as administrator and manager to be licensed under the Act.
 - b. A failure by a sponsor of a SF or RS to register the fund or scheme under the Act,
 - c. A failure by a manager, administrator or responsible officer to make returns to the FSC in the time required under the Act or Regulations,
 - d. A failure by a sponsor to pay to the manager contributions deducted from the salaries of employees, within 14 days

- week of the end of the month in which the deductions were made,
- e. A failure on the part of a manager, sponsor or administrators to furnish information to the FSC within the time required or to keep records required to be kept under the Act or Regulations.
 - f. A failure on the part of any administrator, sponsor or manager to give a member any information or record required to be given under the Act or the Regulations
45. The fines under the Act range from \$500,000 to \$5,000,000.
46. Some of the breaches which expose persons liable on summary conviction before a RM to either a fine **or imprisonment** at the discretion of the RM include:
- a. The obstruction by a person of any person in exercise of the right of entry or seizure conferred by a warrant issued under the Act,
 - b. A breach of the obligation of secrecy/confidentiality under the Act,
 - c. Where an administrator, manager or responsible officer knowingly files an incorrect return to the FSC,
 - d. Where a person commits an offence under the Act where no penalty is provided.
47. The periods of imprisonment which the RM has the discretion to impose range from 1 year to 3 years.

Abolition of the Rule against Perpetuities.

48. The Act in keeping with the recommendation that was made by the Privy Council in **Joy Charlton & Ors v Air Jamaica**

Pension Fund, has abolished the applicability of the rule against perpetuities to all SF, retrospectively.

Conclusion

49. The passing of the Act completes one of the objectives of the policy makers to comprehensively regulate the financial services industry. The Act and Regulations have been long in coming but its provisions if complied with and properly enforced, should ensure that (i) the interests of the beneficiaries of SF and RS are safeguarded and (ii) SF and RS are administered prudently and in accordance with sound pension principles.