

# **PENSION INDUSTRY DEVELOPMENT IN NIGERIA – THE THRUST OF THE PENSION REFORM ACT 2004**

BY

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## **INTRODUCTION**

So what is Pension and why such fuss concerning its provision, availability and sustainability? A simple question one might respond. Pension is the payment of a stipend to a person who has retired from active employment or business engagement. The payment is sustained by way of deductions from past entitlements or past earnings, which are saved to provide retirement benefits. Often, these deductions are tax free against income and corporation tax when specifically approved by the tax authorities. Thus, as a tax savings device, savings toward pensions is quite encouraging. Equally, since pension savings is long term, it is also useful as a macro-economic tool for national development by enabling money to be in circulation for long-term investment, which in turn promotes economic expansion. Thus pensions contributions go a long way in enhancing a country's Gross Domestic Product (GDP) and the quality of life of citizens.

Savings → Money → Borrowings → Capital → Investment → Industry → Economic Expansion → Higher GDP → Better Life → Pensions → Savings

So, if pension is such a good thing, why is it that proper attention has not been given to it over time? We are all aware of the claim that Government Pensions liability is about N2trillion ... a staggering sum to pronounce. No longer are we talking about millions or billions. Imagine if this trillion mark had been made in savings and investments, the result for economic development would have been staggering. Perhaps, rather than just concentrate attention on oil, we seem to have been wasteful in the area of pension as well as other industries that, like the groundnut pyramids and

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cocoa plantations, have disappeared. Considering the implication of savings and the importance of pensions, we begin to understand the thrust of the Pensions Reform Act 2004. Before going into the provisions of the Act, it is important to understand the laws relating to pensions prior to the new Act. History is rewarding in giving a glimpse of the past in order to better understand the future and guard against failure.

## **PRE 2004 PENSION LAWS**

Before 2004, the laws regarding pension was in two forms. Firstly, Government workers' pension was devised under the Pensions Act 1974 ("the 1974 Act"). The pension or gratuity granted to retirees was on the basis of final pay and was largely not funded.<sup>2</sup> Secondly, private workers pension was not compulsory but was encouraged as a tax savings device for employers and employees and was monitored by the Joint Tax Board under the Personal Income Tax Decree 1993, Schedule 3 thereof<sup>3</sup>. As a tax device, private employee schemes operated under rules devised by company management under trusteeship arrangements. Trustees were usually employee representatives<sup>4</sup>. The rules devised by company management were skewed in such a way that does not guarantee unbreakable savings. For example:

- Minimum ascension period, usually after three years in employment
- Graduated entitlements subject to period in employment
- Forfeiture for grave misconduct

Although sums contributed under such schemes are not returnable to the Company by the Trustees should the above events arise, the problem of continuity made it impossible to have proper retirement savings or pensions as such and contributions that were paid out were simply expended on current needs. For people retiring from established companies, the pension was good, but the majority of companies or private employers could not afford to set up meaningful schemes or any scheme for that matter. This meant that retirement was seen as a negative thing and a lot of people continued in employment longer than required by any means, including age

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<sup>2</sup> See above N1trillion liability. According to S.2 of the Pensions Act 1974, pensions and gratuity were to be charged on and paid out of the Consolidated Revenue Fund of the Federation.

<sup>3</sup> S. 20(1)(g) and Schedule 3, paragraph 23 of the Personal Income Tax Decree 1993.

<sup>4</sup> Corporate Trustees were used in few cases.

falsification. Also, the tale of woes of government workers unpaid pension made daily news, usually of a pathetic nature (people either fainting or dying on queues).

## **THE CASE FOR REFORM**

It really does not take a smart person to realize that pension or retirement benefit is good in itself. It is a vital social security net that ensures the continuing wealth of individuals and, in turn, the wealth of the nation. The Government under the current President (Olusegun Obasanjo) deemed it fit that Nigeria must progress and one way of achieving this is by ensuring an adequate social security safety net. The way to that achievement was therefore devised by setting up a Committee to look into ways of reforming the entire pensions system for workers, whether private or government. The Committee, which was headed by Mr. Fola Adeola,<sup>5</sup> made consultations and eventually submitted a bill to deal with pensions. The initial drafts showed a tilt towards funding of past government pension liabilities. Funding was expected by way of a levy on interest payments on current individual retirement savings. This was eventually resisted<sup>6</sup>. The pension was proposed as a compulsory contributory scheme, which would run independently of employers. This means that compulsory deductions would have to be made from current salaries and employers are compelled to pass these deductions to an organization or a separate entity for savings and investments towards paying retirement benefits upon actual retirement at a determined age and not just cessation of employment at any age. This was a winning model in the sense that retirement benefit contributions will not be affected by change of employment or other forms of impropriety and can finally be tailored and focused as a proper pension arrangement. The result of this is also that long term funds would be available within the economy for better planning. Though some individuals may still fall out of this evolving social security safety net, anyone employing a certain number of people is expected to provide for their retirement. It was a paternalistic arrangement and for that matter, excellent in its intentions.

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<sup>5</sup> Now Chairman of the Pensions Commission under the Pension Reform Act 2004.

<sup>6</sup> The current position is that government would give a bond on past liabilities, which shall then be redeemed upon retirement (ref. S.12 (1)(a) and S.29 of the Pension Reform Act).

## **THE PENSION REFORM ACT 2004**

The Pension Reform Act ('PRA') 2004 is a beautiful piece of legislation broken into 14 parts covering the following broad areas:

- Establishment and Formation of Compulsory Retirement Savings
- Licensing and Regulation of Retirement Benefits Services Providers, i.e., the Pension Fund Administrators (PFA) and the Pension Fund Custodians (PFC)
- Monitoring of Retirement Benefits Contributions, Savings and Investments
- Accounting, Disciplinary, Dispute and Prosecution issues
- Past Pension Liabilities and sundry matters

These broad heads are interlocked and serve to ensure a virile pensions industry if the above matters are managed assiduously. These will be dealt with in a manner that, perhaps, can encourage, marketing and sales of retirement benefits plan. The starting point is the worker.

### **The Worker, The Employer and Compulsory Retirement Savings**

S. 2 of the PRA 2004 lists a three-fold objective of the Contributory Pension Scheme ("the Scheme"). The first is that every working person coming under the ambit of the Act<sup>7</sup> shall have the right to receive retirement benefit protected. Secondly, improvident individual shall be encouraged to save in order to cater for their livelihood during old age. To achieve these related objectives, the Scheme shall have uniform set of rules, regulations and standards for administration and payment of retirement benefits. These objectives are particularly important when considering the investment of contributed savings and safety of the funds.

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<sup>7</sup> S. 1(2) of the PRA 2004 provides that the scheme shall apply to persons in employment within the public sector and persons in the private sector who are in employment in an organization in which there are 5 or more employees.

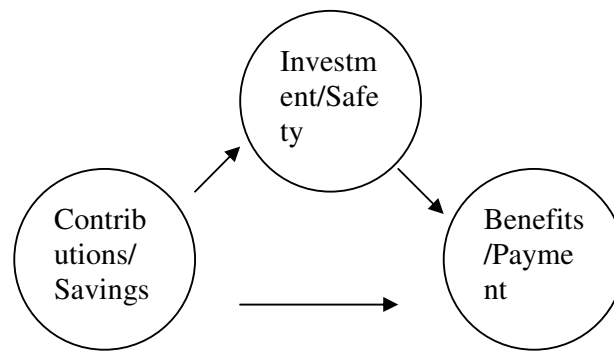


Fig 1

It is the intention of the PRA that employers shall deduct a certain percentage out of an employee's monthly emolument<sup>8</sup> and add another percentage of that emolument in making up a sum<sup>9</sup> that would be paid into a retirement savings account opened by that employee with a pension fund administrator of choice<sup>10</sup>. Employers are supposed to remit the sums into the employee's retirement savings account<sup>11</sup> within 7 days of payment of salary and failure to remit as required attracts a penalty which the Pension Commission is expected to fix but which, in any case, shall not be less than 2% of the total contribution that remains unpaid.<sup>12</sup>

Unlike the old regime, contributions will not be affected by change of employment because the retirement savings account ('RSA') remains the same throughout employment<sup>13</sup> and is within the control of the individual employee, who has the right to change the administrator of the account at least once a year<sup>14</sup>. Beyond this, the individual cannot have access to the RSA until certain circumstances occur as follows:

- Retirement due to certified ill health<sup>15</sup>
- Retirement due to obvious total or permanent disability<sup>16</sup>

<sup>8</sup> Emolument is defined as basic salary, housing allowance and transport allowance of an employee – ref. S. 102 PRA 2004.

<sup>9</sup> S.9 PRA 2004 provides for 3 levels of contributions. For Public Servants and Private Workers, the rate of contribution is 7.5% employer/7.5% employee. For the military, it is 12.5% employer/2.5% employee.

<sup>10</sup> S.11 PRA 2004

<sup>11</sup> Which is kept with a Pension Fund Custodian as defined under the PRA 2004

<sup>12</sup> S. 11(8) provides that pension contribution shall be a charge on the consolidated revenue fund of the federation.

<sup>13</sup> S. 13 PRA 2004 in effects means that an account with a Pension Fund Custodian cannot be changed, even if a Pension Fund Administrator can change. This is a curious provision.

<sup>14</sup> The individual does not have to adduce any reason for changing the administrator. S. 11(2).

<sup>15</sup> S. 3(2)(a) refers to mental and physical incapacity

- Early Retirement in accordance with terms and conditions of employment<sup>17</sup>
- Upon attaining the age of 50

Under these circumstances, the individual is entitled to the following scheduled benefits:

- Annuity for Life
- Insured Annuity for life
- Lump Sum and/or annuity of 50% last salary value<sup>18</sup>

The benefits are inheritable upon death of an employee<sup>19</sup> and in order to ensure adequacy of funds for sustenance of living dependants, the PRA also makes it compulsory for an employer to purchase *Life insurance* for individual employees on the basis of a value equal to total annual emolument multiplied thrice.<sup>20</sup>

The Scheme however exempts certain kinds of employees and employers as follows:

- Employers with less than 5 employees<sup>21</sup>
- Person with max of 3 years to retire from 25<sup>th</sup> June 2004 (being the commencement date of the PRA)<sup>22</sup>
- Judges<sup>23</sup>

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<sup>16</sup> S. 3(2)(b) refers to mind and bodily disability

<sup>17</sup> S. 3(2)(c) takes this as being before age 50. S. 4(2) further provides that such persons may on request withdraw a lump sum of 25% 6 months after such early retirement if another longer term employment has not been secured. One can imagine that this type would relate to sports professional or other physically based short-term occupation.

<sup>18</sup> S. 4(1) (a-c) talks about programmed withdrawals on monthly or quarterly basis offered by the PFA or a duly licensed insurance company. The lump sum under sub-paragraph c will only be paid if the amount left will be sufficient in procuring an annuity of not less than 50% value of last salary of an individual.

<sup>19</sup> S.5 provides that the RSA can be inherited upon death but payable to the direct dependants in testate or appointed administrators under probate on annuity basis - just as the retired person would have.

<sup>20</sup> S. 9(3) provided that this insurance is in addition to an employer's 7.5% pension contribution.

<sup>21</sup> S. 102 PRA 2004 unfortunately defines an "employer" as any organization or business that employs 5 persons or more. Sadly too, domestic servants are not caught within the PRA since such cannot be termed an organization or a business.

<sup>22</sup> S. 8(1) PRA 2004

<sup>23</sup> S. 8(2) PRA 2004 refers to categories of person mentioned in S. 291 of the Constitution of the Federal Republic of Nigeria 1999, which essentially covers judges. This provision invites curiosity especially as military pensions and other civil servants pensions have been brought under the Scheme.

The PRA, however, allows for voluntary contribution for such persons who may then elect to come under the Scheme<sup>24</sup>

As previously obtained for approved schemes under the Personal Income Tax Act, contributions are deductible expenses against taxation in favour of an employer<sup>25</sup> and retirement benefits are also free of tax.<sup>26</sup>

The PRA expects that existing schemes shall be transferred for administration under the Scheme established by the PRA and debts owed by employers under such schemes shall be treated as follows:

- In the case of un-funded Civil Service pensions, as a Retirement Bond<sup>27</sup> redeemable from a Retirement Benefit Bond Redemption Funds ('RBBRF') to be established by the Central Bank of Nigeria<sup>28</sup>
- In the case of Private Workers and funded Civil Service pensions, as a special debt which is specifically acknowledged by the employer and treated with the same priority as salaries.<sup>29</sup>

The intention here is possibly to prevent refusal to pay past entitlements using the excuse of a new scheme under the PRA. To buttress this point, contributions previously paid under the Nigeria Social Insurance Trust Fund ('NSITF') is also secured by bringing these under the PRA with a 5 year transitional period for transfer to pension administrators selected by individual employees. The PRA expects the NSITF to create RSAs and transfer such accounts to a custodian<sup>30</sup> under the PRA. Equally, employers who qualify to continue administering their own funds under the PRA must also transfer funds to a custodian under the PRA. Thus, all will be

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<sup>24</sup> S. 9(4) PRA 2004. Covered Persons may also make additional voluntary contributions ('AVC') under S. 9(5).

<sup>25</sup> S.10 PRA 2004

<sup>26</sup> S. 7(1) PRA 2004. However, AVCs are taxable if withdrawn before the end of 5 years from contribution date.

<sup>27</sup> S. 12(1)(a) PRA 2004.

<sup>28</sup> S. 29 PRA 2004. It is expected that the Federal Government shall pay 5% of the total monthly wage bill of public servants into the RBBRF for redemption obligations until the exit of the last creditor.

<sup>29</sup> S. 12(1)(b) PRA 2004.

<sup>30</sup> S. 42(6) PRA 2004. It is also an obligation of the Pension Commission to supervise the transfer of the NSITF Funds to Fund Custodian on individual account basis under the Scheme – ref. S. 42(7) PRA 2004

recouped and brought squarely within the provisions of the PRA.<sup>31</sup> As can be gleaned, there is an important separation of functions between a PFA and the PFC and it is important to know why this is particularly beneficial to workers. We must now turn to this point.

### **The Administrator, The Custodian and Long Term Funds**

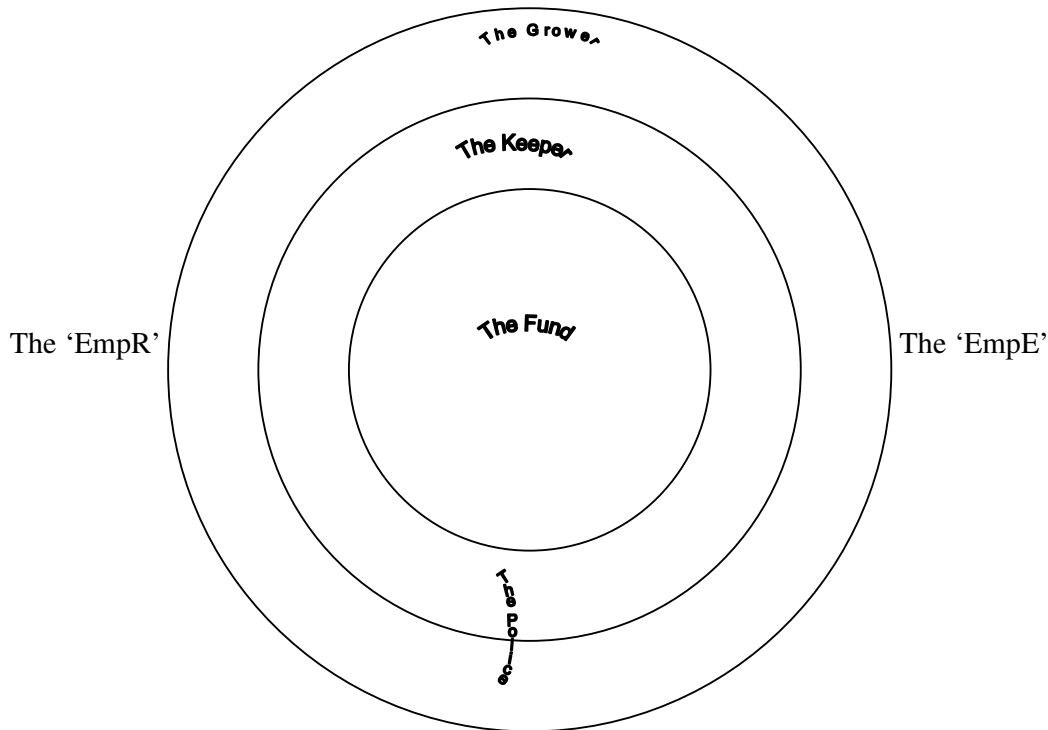


Fig 2

Keys:

*The “EmpR” means the Employer*

*The “EmpE” means the Employee*

*The “Grower” means the Pension Fund Administrator*

*The “Keeper” means the Pension Fund Custodian*

*The “Police” mean Pensions Commission and Auditors of a PFA or a PFC*

At the core of the Scheme is the Fund. To safeguard the Fund, the PRA adopted a two-tier system involving an administrator (for collection, management and

<sup>31</sup> S. 42 PRA 2004. NSITF is expected to re-establish its status as a company and then create RSA for each contributor or beneficiary of the contributions made under the NSITF Decree 1993 and such account may be transferred by such persons after a minimum of 5 years from 25<sup>th</sup> June 2004 (being the commencement date of the PRA 2004) to an administrator of choice.

investment of the Fund) and a custodian (for safe keeping and safeguarding of the Fund). The roles are specifically identified as follows:

There are four primary roles<sup>32</sup> that a Pension Fund Administrator is expected perform:

- Open RSA for all employees registered by it with a Personal Identification Number (PIN)<sup>33</sup>
- Invest and manage the Fund and assets
- Calculate annuities<sup>34</sup>
- Pay Retirement Benefits

The Custodian also has four primary roles<sup>35</sup> as follows:

- Receive and Hold the Fund upon trust for Contributors and Beneficiaries
- Settle investment transactions on behalf of the PFA
- Provide independent reports to the Pension Commission on Fund assets
- Undertake statistical analysis on the investment and returns on behalf of the Pension Commission and the PFA.

The functions of the PFAs and the PFCs interlock and act as a grid against financial impropriety. Thus, even though the PFA opens the account, it does not have access to the money except for purposes of investment, which asset representation must still be kept with the custodian, who settles payment and other transactions made on particular investment undertaking. The money is also not controlled by the PFC, who must act upon the instructions of the PFA and cannot treat funds with it as mere cash savings. Since both parties assume joint trust positions, an incidence of financial

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<sup>32</sup> There are other related statutory business functions such as maintaining books of account, provide regular information on investment strategy and market yields, grant customer service support. S.45 PRA 2004

<sup>33</sup> The RSA is kept with the custodian and the PIN enables the Fund to be tracked easily since the PRA expects an employee to keep one account throughout working life. Perhaps, PFAs would have to come to an agreement on Uniform PIN system that would enable ease of transfers.

<sup>34</sup> S.71 PRA 2004 provides that anyone who has contributed for a certain number of years be entitled to a guaranteed minimum pension as may be specified by the Commission. Thus the importance of actuarial calculation at outset is of utmost importance for a successful pension administration.

<sup>35</sup> There are other secondary administrative roles such as notifying delays in receipt of contributions into the RSA and executing proxies in relation to investments made by the PFA. S. 47 PRA 2004.

imprudence is reduced but cannot be totaled ruled out<sup>36</sup>. Thus, to ensure that those who undertake the business of pension administration and custodianship are not shenanigans, the PRA provided for certain business entry/licensing qualifications as follows:

The business of pension administration<sup>37</sup> is open to the following:

- An incorporated organization<sup>38</sup>
- The organization must have a minimum of N150m paid up capital<sup>39</sup>
- The organization must have and maintain professional managers of pension fund and retirement benefits with good track record
- The organization must not engage other business in addition to the pension business (save if it is a life assurance company duly licensed by the National Insurance Commission<sup>40</sup>)

The business of pension custodian<sup>41</sup> is open to the following:

- An incorporated organization duly licensed as a financial institution<sup>42</sup>
- The organization must have a minimum net worth of N5b free of losses or be a subsidiary of an organization with such net worth
- The organization must have a balance sheet size of at least N125b
- The organization must have good track record and must not have record of financial distress or mismanagement.

The stringent condition being imposed on PFC is understandable considering the role of the safe keeper that is assumed. This role is further emphasized by a further

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<sup>36</sup> In fact, both PFA and PFC have a duty to report on incidences of fraud, forgery and theft occurring within the organization and of any staff dismissed on the ground of fraud. Ref. S. 61 PRA 2004. The Pension Commission then maintains a list of such persons, who cannot be employed unless with the approval of the Pension Commission. It is difficult to imagine if such permission can ever be given. Ref. S. 63 PRA 2004.

<sup>37</sup> S. 50 PRA 2004

<sup>38</sup> This excludes professional firms or individual administrators

<sup>39</sup> The Pension Commission has the discretion of increasing capital as time demands. Project experience however indicates that the successful management of pensions is IT driven and this is highly capital intensive and would require sums in the region of N350m and above.

<sup>40</sup> S. 50(4) PRA 2004

<sup>41</sup> S. 51 PRA 2004

<sup>42</sup> A financial institution could be a bank, a discount house, or other entities described as such under the Banks and Other Financial Institutions Decree 1991

condition providing that a PFC must issue a *guarantee* to the full sum (cash) and value of the pension fund and assets in its custody.<sup>43</sup> Thus, any conversion by fraud, forgery or theft<sup>44</sup> or any other unexplainable or unforeseen incidence of loss that cannot be attributed to the PFA must be made good by the PFC.

To maintain appropriate public vigilance, the Pension Commission intends to publish a list of licensed administrators and custodians at the end of each calendar year<sup>45</sup>. To enable proper monitoring, PFAs and PFCs are expected to make regular accounting returns to the Pension Commission<sup>46</sup>. The need to secure the Fund is such that external auditors also have an element of trust imposed on them in their reporting and cannot just audit and present management accounts. The element of “fair view” is thus replaced by a fiduciary responsibility to the Pension Commission on the Fund. Thus an auditor must report the following<sup>47</sup>:

- Observations of imminent financial collapse of a PFA or PFC
- Observations of imprudent investment decisions, which has led or is likely to lead to material diminishment of net assets of a PFA or PFC
- Observation of weak accounting or internal control systems of a PFA or PFC
- Observation of misleading returns to the Pension Commission
- Observation of impressions of fraud committed or likelihood of fraud being committed by any director and/or officers of a PFA or PFC
- Observation of incompetence on the part of the directors or senior management of a PFA of PFC especially as regards prudence, safety and soundness of investment decision.

An auditor who does not provide such report to the Pension Commission either deliberately or negligently is guilty of an offence and liable to a fine of N10m and/or 3 years imprisonment for its partner or principal officer.

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<sup>43</sup> S.52 (1)(d) PRA 2004

<sup>44</sup> S. 61 PRA 2004 requires PFA and PFC to return monthly reports of incidences of fraud, forgery or theft within the organization. Failure to do so attracts a minimum fine of N10m by the organization and N5m by its director of officer, which may be in addition to a jail term of 3years.

<sup>45</sup> S. 55 PRA 2004

<sup>46</sup> S.56 and 57 PRA 2004. These returns are quite standard and requires that audited accounts must be submitted 120 days (i.e., 4 months) from end of fiscal year and must be published in 2 daily newspaper and exhibited 30 days after approval in its offices throughout the year.

<sup>47</sup> S. 58 PRA 2004

The Policing role of auditors and that of the Pensions Commission is symbiotic and all goes to ensure the safety of the Fund. In determining the safety of the Fund, the type and method of investment adopted by a PFA is of utmost importance and deserves particular attention.

### **Investment of Pension Fund and Security**

If we refer to the earlier illustration (fig1) showing the relationship between pension contributions and payment of benefits, we would have observed that the main point is safety. It is the intention of the PRA that pension contributions be invested by a PFA with the objective of safety and maintenance of fair returns<sup>48</sup> Safety here ties in with the safety of the principal contribution which must be sufficient to provide guaranteed minimum pension after a certain number of years of contribution<sup>49</sup> and the requirement of guarantee by PFCs against incidence of losses not attributable to the acts of a PFA<sup>50</sup>. Against this guarantee structure, certain prudential guidelines are also laid down for a PFA in undertaking investments of the pension fund. Primarily, pension fund assets may be invested in the following categories of investment<sup>51</sup>:

- Federal Government Bonds, Treasury Bills and related securities
- Quoted Bonds and debt instruments
- Quoted stocks and shares
- Bank deposits and securities
- Quoted closed end Funds or hybrid investments
- Quoted unitized investments
- Real Estate investments
- Investment prescribed by the Pension Commission

Certain investments are not permitted<sup>52</sup> and these are:

- Own Shares or Securities
- Affiliates Shares or Securities

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<sup>48</sup> S. 72 PRA 2004

<sup>49</sup> See note 32 above

<sup>50</sup> See note 41 above

<sup>51</sup> S. 73(1) PRA. Investments in foreign currencies may also be permitted by the Pension Commission subject to CBN rules – ref. 74(2) PRA 2004.

<sup>52</sup> S. 75 PRA 2004

Equally, fund assets cannot be sold to nor purchased by, nor loaned to any one directly or indirectly connected with a PFA or PFC whether by familiar or business relationship<sup>53</sup>

The need for safety is emphasized in determining the quality of the instrument to invest in and a PFA is expected to adopt a risk management profile<sup>54</sup> in making investment decision and must have due regard to rating guides issued by risk rating companies registered under the Investment and Securities Act 1999.<sup>55</sup> The penalty for flouting prudential guidelines is stiff. An offending PFA shall pay N500, 000 per day of non-compliance and shall forfeit profit from such unauthorized investments<sup>56</sup> and any loss from such investment shall equally be made good by the PFA.

In order to ensure compliance and minimize the incidence of loss, a PFA is expected to have committees that shall deal with risk management and investment strategy issues<sup>57</sup>. The headship of a PFA is also of particular importance. The Pension Commission must approve anyone appointed as the Chief Executive Officer.

The Risk Management Committee is expected to do the following:

- Determine the risk profile of investment portfolio
- Create reserves<sup>58</sup> for risk adjustments in case of deviation
- Ensure adequate internal control measures and procedures
- Other matters as directed by the Board of Directors of the PFA

The Investment Strategy Committee is expected to do the following:

- Formulate strategies for compliance with prudential guidelines

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<sup>53</sup> S. 76 PRA 2004. The Pension Commission may also prescribe additional restrictions with the object of protecting the interest of the beneficiaries of the RSA.

<sup>54</sup> S. 66 provides that a PFA must have a Risk Management Committee and an Investment Strategy Committee.

<sup>55</sup> A notable example of such risk rating is that undertaken by the firm of Agosto & co.

<sup>56</sup> This creates an agency/principal relationship as per profiteering on a good but risky investment.

<sup>57</sup> S. 66 PRA 2004,ibid.

<sup>58</sup> Equally, under S. 69 PRA 2004, a PFA is expected to create a contingency fund which shall be maintained from the statutory reserve fund into which shall be credited annually 12.5% of the net profit after tax to meet claims for which the Pension Commission has rendered it liable.

- Determine portfolio mix consistent with risk profile and allowing optimal yield
- Evaluate value of portfolios per day
- Review performance of investments on periodic basis
- Other matters as directed by the Board of Directors of the PFA

To ensure that the guidelines are followed, a PFA is expected to have a compliance officer, who shall report to the CEO and shall be the liaison officer with the Pension Commission on matters of compliance with the provisions of the PRA.

After all said and done, all income from investments must be distributed to RSA holders net of “clearly defined and reasonable fees, charges, costs and expenses<sup>59</sup>” incurred by the PFA. Thus, charges not disclosed at outset or other hidden charges cannot be passed to RSA holders<sup>60</sup>. This ensures transparent dealings to be made and enhances value, safety and security of pension funds.

With the reporting, accounting, financial provisions, it is heartwarming to imagine the dramatic effect the pension reforms could have on the economy and the standard of life of the average worker if it is well monitored and supervised in accordance with the true intents of the PRA. It is to this aspect we must now turn. In a business for profit, how can the safety of funds be ensured such that benefits payable in an average of 25 years post work life will be received by contributors and not, as it were, disappear into thin air?

### **The Procurator, the Police and Benefits Entitlement**

Fig 2 above illustrates the cross line indicating the policing functions of certain agencies. At the foundation level are two procurators (i.e., persons employed as financial agents), the auditor and the compliance officer. At the structural level is the Pension Commission exercising powers of licensing, control, supervision, correction and punishment. The Board and Management of the Pension Commission are constituted in such a manner that permits proper representation of stakeholders<sup>61</sup>. The

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<sup>59</sup> S. 70(1) PRA 2004

<sup>60</sup> According to S. 70(2) marketing documents must be clear in statements being made and must not be misleading in material information.

<sup>61</sup> S. 16 PRA 2004

most important aspect of the powers of the Pension Commission is its power of supervision and examination. The PRA provides that PFAs and PFCs shall submit themselves for annual inspection or examination.<sup>62</sup> The Pension Commission exercises these powers through examiners appointed by it.<sup>63</sup> Such examiners have powers to do the following:

- Inspect, examine or investigate the books, activities and affairs of employers, PFA, PFC and other persons having any dealings with pension funds<sup>64</sup>
- Verify and check balances in RSA and the records of deposit made to date
- Verify investments made by a PFA with pensions contributions
- Request information relating to regulatory compliance

In addition to the routine supervision, the Pension Commission may order special examination under the following circumstances<sup>65</sup>:

- Public Interest<sup>66</sup>
- Following acts detrimental to interest of beneficiaries of RSA
- Insolvency<sup>67</sup>
- Infringement of regulatory guidelines
- Upon own application
- Upon application by a beneficiary of a RSA or any client of a PFA
- Relational application (PFA qua PFC, PFC qua PFA)

An examiners report is issued to the PFA or PFC at the end of each exercise and such report is required to be tabled before the board of directors of such organization within 30 days. The board must then convene an extra-ordinary meeting to consider the report and submit reactions and proposals for implementation to the Pension

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<sup>62</sup> S. 79(1) PRA 2004. Under S. 79(2), the Pension Commission may also evoke powers of inspection, examination and investigation at any time.

<sup>63</sup> S. 80 PRA 2004.

<sup>64</sup> S. 81(1) PRA 2004. The examiners must be allowed access at all times during working hours and must conduct themselves in a business like manner – ref. S. 81(2) PRA 2004.

<sup>65</sup> S. 83 PRA 2004. An examiner's request must be answered – ref. S.84 PRA 2004. Failure to do so is considered an offence that may attract a maximum fine of N200, 000 or 3 years imprisonment or both on concurrent sentence basis for each act of infringement or falsehood. If the offending act is not corrected, then the fine increases to N100, 000 for every day the offence continues – ref. S.90 PRA 2004

<sup>66</sup> Public interest is a very wide ambiguous term that can allow exercise of statutory powers if not properly balanced between the interests of the complainant with that of the offending party.

<sup>67</sup> Where there are insufficient assets to cover pension liabilities.

Commission. Failure to do so attracts a fine of N500, 000 per day and if infringement continues unabated after 30 days, the license or certificate of registration of may be suspended.

Powers are, however, ineffective unless infringement of regulatory provisions are met with appropriate sanctions and the PRA 2004 appears quite broad and stiff in terms of penalties for infractions, misconducts and acts of dishonesty. Apart from specific penalties already discussed, there is an omnibus penalty clause permitting imposition of a maximum fine of N250, 000 or one year imprisonment or both<sup>68</sup>. In addition, the Pension Commission may ask that a particular officer or director be removed from office. In determining infractions, the law intends to catch not only the organization, but also any director who had knowledge or should have had knowledge and fails to exercise due diligence in ensuring compliance.<sup>69</sup> However, there are other incidences that are not of a criminal nature and the PRA 2004 also appears to have restated dispute resolution methods, which invariably must form part of the pension contract with prospective RSA holders.

### **Final Word on Safety and Consumer Protection**

As earlier stated, marketing and contractual documents must not contain false or misleading information<sup>70</sup>. Where, however, a RSA holder or a beneficiary feels aggrieved by a decision made by the PFA, the aggrieved party may request the Pension Commission to review such decision to ensure that it was made in accordance with the provisions of the PRA or regulations.<sup>71</sup> If the party is dissatisfied with the decision of the Pension Commission, such party may call for arbitration<sup>72</sup> or refer the matter to the Investment and Securities Tribunal<sup>73</sup>. Any award given by these constituted bodies is considered binding on the parties and is enforceable in the Federal High Court.

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<sup>68</sup> S. 85 PRA 2004

<sup>69</sup> S. 89 PRA 2004

<sup>70</sup> S. 70(2) PRA 2004. *ibid.*

<sup>71</sup> S. 92 PRA 2004. Such dispute must be disposed within 3 months from the date of referral.

<sup>72</sup> S. 93 PRA 2004. Arbitration must be in accordance with the Arbitration and Conciliation Act

<sup>73</sup> This is the tribunal established by the Securities and Exchange Commission under the Investment and Securities Act 1999.

Pension funds are also ring fenced against creditors in liquidation proceedings with a PFC<sup>74</sup> and, in such cases, the Pension Commission will give an order for the funds to be transferred to another PFC<sup>75</sup>

## **Conclusion**

The intention of this article is to emphasize the thrust of the PRA 2004 as being the provision of retirement benefits, which by logical progression shows that such benefit plan must not be sold as personal investment schemes with attendant risk factors that may defeat the objectives of reform. Thus one must conclude with a definitional statement from the PRA itself, which holds the Pension Fund as:

“An investment fund within the Pension Scheme which is intended to accumulate during an individual working life from contributions and investment income, with the *intention of providing income in retirement* from purchase of an annuity or in the form of a programmed withdrawal, with the possible option of an additional tax free cash lump sum being paid to the individual”<sup>76</sup>

The mode is safety of contributions, prudential investments, guaranteed pension.

## **A marketing appraisal**

A PFA would be able to offer various Benefits Plans ranging from:

- Secured income plans
- Personal equity plans
- Deferred Annuity plans
- Deposit Administration plans
- Mutual Funds Schemes
- Unit Trust Schemes

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<sup>74</sup> S. 98 PRA 2004.

<sup>75</sup> S. 54(6)(b) PRA 2004. Liquidation proceeding is itself grounds for revocation of license under S. 54 PRA 2004, *ibid*.

<sup>76</sup> S. 102 PRA 2004. *ibid*. Emphasis mine.

A RSA holder should be able to choose within a range of plans without compromising on security and further information can be obtained from professional investment advisers, retirement benefits consultants or financial consultants as the case may be.

### **POST SCRIPT**

- The Pensions Guidelines for transitional arrangement was issued on 31 December 2004. The following were highlighted
- Employers are required to open temporary retirement savings account for each employee.
- Accrued and past benefits are to be credited to the Account. Defined benefit schemes were given 90days (i.e., up till March end) to have the schemes actuarially valued and converted to the contributory scheme.
- Employers could, as a recruitment perquisite, opt to pay the employees portion of the contribution.
- Funds with NSITF shall remain with the PFA of NSITF for not less than 5years from commencement of the Act, after which beneficiary is free to move to another PFA.
- Circulars out on government schemes which allows the Accountant General of the Federation to transfer pensions contributions direct into an holding account by CBN pending the licensing of PFAs. Profile of each government employees must be submitted to the NPC in specified format (hopefully to prevent inclusion of “ghost” workers) and will enforce the crediting of contributions to employee’s PFA of choice.
- PFAs cannot combine with any other business and there are restrictions on shares transfer of above 5%.

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