



Government Gazette

REPUBLIC OF SOUTH AFRICA

Vol. 439 Pretoria 4 January 2002 No. 22994



AIDS HELPLINE: 0800-123-22 Prevention is the cure

NOTICE 6 OF 2002

PENSION FUNDS ACT, 1956, LONG-TERM INSURANCE ACT, 1998, SHORT-TERM INSURANCE ACT, 1998.**AMENDED REQUIREMENTS IMPOSED BY THE FINANCIAL SERVICES BOARD FOR NOMINEE COMPANIES TO OPERATE IN SOUTH AFRICA.**

1. I, Jeffrey van Rooyen –

- (1) Registrar of Pension Funds;
- (2) Registrar of Long-term Insurance;
- (3) Registrar of Short-term Insurance;

hereby publish for notification under-

- (a) section 5(3) of the Pension Funds Act, 1956 (Act No. 24 of 1956);
- (b) section 34(1)(b) of the Long-term Insurance Act, 1998 (Act No. 52 of 1998);
- (c) section 33(1)(b) of the Short-term Insurance Act, 1998 (Act No. 53 of 1998);

the requirements imposed by the Financial Services Board for nominee companies to operate in South Africa as set forth in the Schedule hereto.

2. This Notice comes into operation on 1 January 2002.



J VAN ROOYEN

REQUIREMENTS IMPOSED BY THE FINANCIAL SERVICES BOARD FOR NOMINEE COMPANIES TO OPERATE IN SOUTH AFRICA

1. COMPLIANCE REQUIRED

- 1.1 Nominee companies, who want to register or hold any assets of long-term insurers, short-term insurers or pension funds, need prior written approval of the Registrar of Long-term Insurance, the Registrar of Short-term Insurance or the Registrar of Pension Funds, as the case may be.
- 1.2 Nominee companies, who want to hold clients' securities in the Share Transactions Totally Electronic (STRATE) environment, by appearing in a sub-register maintained by a Central Securities Depository Participant (CSDP), must comply with the criteria determined by the registrar.
- 1.3 These requirements are not applicable to foreign nominee companies.
- 1.4 Applications in terms of clause 1.1 and/or 1.2 above have to comply with the requirements as discussed below.
- 1.5 The registrar concerned shall for the purpose of this Notice, be in the case of long-term insurers, the Registrar of Long-term Insurance; in the case of short-term insurers, the Registrar of Short-term Insurance; in the case of pension funds, the Registrar of Pension Funds and in the case of STRATE, the Registrar referred to in the Custody and Administration of Securities Act, 85 of 1992.

2. AUTHORITY

The authority of the registrar concerned to approve nominee companies, is derived from the following legislation:

- 2.1 in the case of long-term insurers, section 34(1)(b) of the Long-term Insurance Act, 1998;
- 2.2 in the case of short-term insurers, section 33(1)(b) of the Short-term Insurance Act, 1998; and
- 2.3 in the case of pension funds, section 5(3) of the Pension Funds Act, 1956.

3. PRINCIPLES WHICH UNDERLY THE MAINTENANCE OF REGISTERS OF OWNERSHIP

- 3.1 In terms of section 91A of the Companies Act, 1973 only a central securities depository, such as STRATE Ltd, may maintain a register of ownership of uncertificated listed securities and only CSDPs may maintain a sub-register of such ownership.

- 3.2 In terms of the rules of STRATE a nominee company may not appear in a sub-register maintained by a CSDP unless the nominee company complies with the criteria determined by the registrar.
- 3.3 The nominee register (sub-sub register) is the sole record of beneficial ownership by persons reflected in the nominee register as a share certificate is no longer *prima facie* evidence of ownership in a STRATE approved listed security in terms of section 91A of the Companies Act, 1973.
- 3.4 The responsibilities of, and risks associated with operating a nominee register in this new electronic environment are therefore greater than before. Its accuracy, timeous updating, security from error or manipulation and the necessity to have real time disaster discovery are essential for anyone operating a nominee register.
- 3.5 All the necessary controls and procedures therefore need to be in place before anyone could apply in terms of these requirements and applicants would need to comply with the capital adequacy requirements as laid down by the registrar from time to time.

4. APPLICATION PROCEDURE

- 4.1 An application for approval of a nominee company shall be lodged with the Financial Services Board ("FSB"), PO Box 35655, Menlo Park, Pretoria, 0102. The nominee company must clearly indicate whether it will participate in the STRATE environment. If the nominee company will hold assets on behalf of more than one of the aforementioned institutions, only one application needs to be lodged, although separate approvals in terms of the applicable legislation will be granted by the registrar(s) concerned should the application be successful.
- 4.2 No application for approval of a nominee company need be lodged with the FSB, if the nominee company participates in the STRATE environment but will not hold assets on behalf of a pension fund, a long-term insurer or a short-term insurer and is a subsidiary of a member of the JSE Securities Exchange South Africa (JSE) or a CSDP of STRATE, as they will be approved by the JSE and STRATE, respectively.
- 4.3 Before an application referred to in clause 4.1 is lodged, an audit certificate as specified in clause 5.3.5 should be obtained.

5. REQUIREMENTS

5.1 NOMINEE COMPANIES

For the purposes of this document, a nominee company refers to any entity that holds assets in its own name on behalf of the beneficial owner (i.e. the nominee company is not the beneficial owner of these assets).

A nominee company must -

- 5.1.1 be a registered company under the Companies Act, 1973: and

- 5.1.2 be wholly owned by a holding company; and
- 5.1.3 have adequate insurance against loss through fire, theft and the like in place for trust assets held by the nominee company as well as fidelity guarantee cover; and
- 5.1.4 conclude a written agreement with each pension fund, short-term insurer and long-term insurer whose assets it will hold and the agreement should comply with the minimum requirements as required by the registrar concerned.

5.2 HOLDING COMPANIES

The nominee company may not have a natural person as a shareholder.

5.2.1 The nominee company must be wholly owned by -

- 5.2.1.1 a long-term or short-term insurer as defined in section 1 of the Long-term Insurance Act, 1998 and section 1 of the Short-term Insurance Act, 1998, respectively; or
- 5.2.1.2 a member as defined in section 1 of the Stock Exchanges Control Act, 1985; or
- 5.2.1.3 a bank or a bank controlling company as defined in section 1(1) of the Banks Act, 1990; or
- 5.2.1.4 an investment management company as approved in terms of section 4 and section 5 of the Stock Exchanges Control Act, 1985 and the Financial Markets Control Act, 1989, respectively; or
- 5.2.1.5 an administrator registered in terms of section 13B of the Pension Funds Act, 1956 where the exclusive object of its nominee company is the holding of pension fund assets; or
- 5.2.1.6 a CSDP of a Central Securities Depository registered in terms of the Custody and Administration of Securities Act, 1992.

5.2.2 The holding company must, to the satisfaction of the Registrar concerned, demonstrate that it-

- 5.2.2.1 is fit and proper to own a nominee company for purposes of taking title of assets on behalf of long-term insurers, short-term insurers, pension funds or others and hold such assets in trust and in safe custody on their behalf; and
- 5.2.2.2 has a culture and operational structure which evidence a commitment to effective control by executive management and the board of directors over all aspects of the business of the nominee and that demonstrates a zero tolerance to management override of controls; and
- 5.2.2.3 has evidence of a commitment to the employment and retention of adequate numbers of suitably qualified personnel of integrity and the ongoing education of staff in relevant disciplines; and
- 5.2.2.4 has evidence of a documented system of internal controls which ensures that its nominee is effectively run, that the assets of clients are

- safeguarded and segregated and the records of the nominee accurately reflect the information which they purport to present; and
- 5.2.2.5 has evidence of appropriately documented procedures to exclude unauthorized access to critical systems, the thorough testing of all new proprietary systems and the continuity of operations of all critical applications of its nominee; and
 - 5.2.2.6 has adequate and prospective financial resources represented by a minimum of R3 million equity capital which shall be maintained at all times; and
 - 5.2.2.7 has an appropriate documented system of risk management to provide substantial assurance of continuity of the business of its nominee for the foreseeable future.

5.2.3 When the holding company has outsourced the control over the operation of the nominee register to another company, that outsourced company must to the satisfaction of the register concerned, demonstrate that it has met the requirements in terms of clauses 5.2.2.1 to 5.2.2.7.

5.3 DOCUMENTATION TO BE SUBMITTED

An application for approval of a nominee company in terms of the applicable legislation administered by the FSB must be made in writing and shall include the following:

- 5.3.1 A copy of the Memorandum and Articles of Association of the nominee company which must contain the following provisions:
 - 5.3.1.1 A prohibition on the transfer of its issued shares to a natural person;
 - 5.3.1.2 A limitation on the transfer of its issued shares without the prior written consent of the Registrar(s) concerned;
 - 5.3.1.3 The sole object being to conduct the business of a nominee by taking title of assets on behalf of long-term insurers, short-term insurers, pension funds or other persons holding such assets in trust and in safe custody or electronically administer and maintain a nominee register on their behalf, and otherwise only dealing with such assets as may be instructed by its clients;
 - 5.3.1.4 A provision precluding the nominee from acquiring any interest, for its own account, in any other company or from owning a subsidiary company;
 - 5.3.1.5 A provision precluding the nominee from incurring any liability, including contingent liabilities such as suretyship or indemnification, other than the liabilities it incurs to its clients in respect of assets held on their behalf and its ordinary obligations to its holding company; and
 - 5.3.1.6 A limitation on the issuing of any unissued share capital, rights issue, issuing preference shares or debentures by the nominee without the prior approval of the Registrar(s) concerned; and

- 5.3.2 A copy of the last audited financial statements of the nominee, if it has already had a financial year end; and
- 5.3.3 A copy of the last audited financial statements of the holding company; and
- 5.3.4 A signed copy of the agreement between the holding company and the nominee company, in the prescribed format (refer **Annexure A**). Reasons must be provided for any deviation to the prescribed agreement; and
- 5.3.5 An audit certificate stating that, in the opinion of the auditor, the holding company complies with the requirements in terms of clause 5.2.2. An audit firm approved by the FSB for this purpose must issue the audit certificate. Members of the JSE and CSDP's do not need to submit the audit certificate, but must submit the letter of approval issued by the JSE or STRATE; and
- 5.3.6 Where the nominee company participates in the central securities depository environment but outsources the control of its nominee register, a signed copy of the administration and service level agreement between the nominee company, its holding company and the company providing the outsourced services. The agreement must contain at least the following provisions:
 - 5.3.6.1 Details of the responsibilities of each party involved; and
 - 5.3.6.2 A provision which states that the contract shall only be valid whilst the company providing the outsourced services is approved by the FSB, JSE or STRATE; and
 - 5.3.6.3 A provision precluding the change or cancellation of the above agreement before informing the FSB and JSE or STRATE, where applicable; and
 - 5.3.6.4 A provision allowing the nominee company or its auditors access to the records of the company providing the outsourced service to enable them to complete the audit certificate as specified in clause 5.4.1(b).

5.4 CONTINUING OBLIGATIONS OF NOMINEE COMPANIES

- 5.4.1 The approved nominee company shall submit annually:
 - (a) its audited financial statements; and
 - (b) an audit report setting forth whether any assets held on behalf of any other person in safe custody, are in possession of the nominee and properly accounted for, within six months of the financial year-end of the company to the FSB. Should the nominee company fail to submit the above and also not apply before the expiry of that period in writing for an extension of time within which to submit the statements, the FSB may withdraw its approval with immediate effect on the conditions as prescribed by the registrar concerned.
- 5.4.2 A declaration by the holding company of the nominee company in the format as specified in clause 10 must accompany the annual financial statements of the nominee company.

- 5.4.3 The FSB will retain the right to withdraw an approval at any time should the nominee company, its holding company or the company to which the control over the nominee register has been outsourced fail to comply with the FSB's requirements.
- 5.4.4 Members of the JSE, CSDP's and their nominee companies need only to comply with the requirements in terms of clause 5.4 if they hold scrip on behalf of either pension funds or long and short-term insurers.

6. REGISTER OF APPROVED NOMINEE COMPANIES

- 6.1 A register of all approved nominee companies, specifying the categories of approval, will be maintained by the FSB. This register may be accessed on the FSB website at www.fsb.co.za.
- 6.2 The JSE and STRATE must forthwith advise the FSB of any changes regarding nominee companies approved by them.

7. PAYMENT OF FEES

The holding company who applies for approval of a nominee company to hold assets on behalf of a long-term insurer, short-term insurer or pension fund, must pay the fees as prescribed in terms of the relevant legislation.

8. EFFECTIVE DATE OF REQUIREMENTS

- 8.1 The requirements for the approval of a nominee company to operate in South Africa set out in this Notice shall apply to all new applications with immediate effect.
- 8.2 Clause 5.4 of this notice applies to nominee companies approved between 1 June 2001 and the date of publication of this Notice.
- 8.3 The requirements set out in this Notice replace the requirements in terms of which any nominee company was approved before 1 June 2001.
- 8.4 The holding company, of a nominee company approved prior to 1 June 2001, shall by not later than 31 May 2002, provide proof in writing to the satisfaction of the Registrar concerned that it complies with the requirements set out in this Notice, as read with Notice 1399 of 2001 published in Gazette, 1 June 2001.
- 8.5 The holding company of a nominee company approved before 1 June 2001, shall annually submit the required declaration, financial statements and audit report to the Registrar concerned.

9. AMENDMENT OF REQUIREMENTS

The Registrar concerned may change or amend the above requirements from time to time.

10. DECLARATION BY HOLDING COMPANY

**REPUBLIC OF SOUTH AFRICA
DECLARATION BY A PERSON ACTING AS A DIRECTOR, MANAGING EXECUTIVE
OR COMPLIANCE OFFICER OF A HOLDING COMPANY OF AN APPROVED
NOMINEE COMPANY**

1. Holding Company _____
2. Title and surname:

3. Full name(s):

4. Name of NOMINEE COMPANY in connection with which this declaration form is submitted.

5. Indicate the date on which approval was granted to the nominee company by the Financial Services Board.
Date of approval granted: _____
6. State in what capacity you are completing this form (eg. as a director, managing executive or compliance officer or a combination thereof, etc.), after being authorised by the Board of Directors of the holding company to sign this declaration.

7. I, the undersigned, hereby certify that, to the best of my knowledge, the company still complies with "The requirements imposed by the FSB for Nominee Companies to operate in SA".
8. Material change(s) to information since the last date of submission, is / are: (Indicate the effective date of the change).
9. Attach a list of all pension funds, short-term insurers and long-term insurers whose assets are being held in terms of a written agreement referred to in clause 5.1.4.

Signature of Authorised Officer_____
Date

ANNEXURE A

**MEMORANDUM OF AGREEMENT
BETWEEN A HOLDING COMPANY AND A NOMINEE COMPANY**

MEMORANDUM OF AGREEMENT made and entered into by and between

(Name of Holding Company) of

(Address of Holding Company)

(hereinafter referred to as the "Holding Company") represented herein by

in his capacity as _____

Duly authorised thereto by the Board of Directors at a meeting of the Board of Directors held on

and

(Name of Nominee Company)

of _____

(Address of Nominee Company)

(hereinafter referred to as the "Nominee Company") represented herein by

in his capacity as _____

Duly authorised thereto by the Board of Directors at a meeting of the Board of Directors held on _____

WHEREAS:

- A. The Nominee Company has as its sole object the holding of assets on behalf of -
- registered long-term insurers as envisaged by section 34(1)(b) of the Long-term Insurance Act, 1998, to the extent authorised by the Registrar; and
 - registered short-term insurers as envisaged by section 33(1)(b) of the Short-term Insurance Act, 1998, to the extent authorised by the Registrar; and
 - registered pension funds as envisaged by section 5(3) of the Pension Funds Act, 1956, to the extent authorised by the Registrar; and
 - other investors in terms of rule 6.3.2.6 of STRATE, as approved in terms of the Custody and Administration of Securities Act, 1992.
- B. The Holding Company has agreed to enter into an irrevocable agreement with the Nominee Company to enable the Nominee Company to attain its main objective.

NOW THEREFORE THE HOLDING COMPANY AND THE NOMINEE COMPANY AGREE AS FOLLOWS:

1 Definitions

For the purpose of this Agreement, unless the context otherwise indicates –

- 1.1 "bank" shall mean a public company registered provisionally or finally in terms of the Banks Act, 1990;
- 1.2 "client" shall mean any person or body corporate who engages the services of the nominee company and who transfers, whether directly or indirectly, any money, property or marketable security to the nominee company;
- 1.3 "liability" shall include any obligation arising from an agreement to pay any money, perform any act, refrain from performing any act or endure any act, between the Nominee Company and a third party, and any conditional obligation, or deferred obligation but excludes any obligation arising from this Agreement and an obligation as would exist between a holding company and a subsidiary, as such, and also any obligation by the nominee company to its clients in respect of any money, property or marketable securities held by the nominee company on their behalf;

- 1.4 "marketable security" shall bear a meaning corresponding with the general use of the expression in financial markets and shall include (without limitation) any uncertificated securities, scrip, certificate, warrant or like instrument representing any share, stock, bond, debenture, acceptance or deposit of any company or other body corporate, and any option or right to acquire such marketable security or any instrument derived from such marketable security;
- 1.5 "money" shall mean all money accepted by the nominee company from clients and all money received by the nominee company on behalf of clients for the sole purpose of effecting instructions by clients with regard to the purchase and selling of its assets, for the collection of dividends, interest and rents relating to the assets held on behalf of clients and for the payment of expenses in respect of the maintenance thereof;
- 1.6 "property" shall mean any property whether movable or immovable, real or intangible and includes any title deed, certificate or other document relating thereto;
- 1.7 "Registrar" shall mean the Registrar as defined in the Long-term Insurance Act, 1998 or the Registrar as defined in the Short-term Insurance Act, 1998, or the Registrar as defined in the Pension Funds Act, 1956, or the Registrar as defined in the Custody and Administration of Securities Act, 1992, as the case may be.

2 Business of the Nominee Company

The business of the Nominee Company shall be to take title of property, money or marketable securities in trust for and on behalf of clients as nominee for, or representative of, such clients, and to hold and otherwise deal with such property, money or marketable securities strictly in accordance with any directions given by the respective clients from time to time to the Nominee Company.

3 Manner of dealing with assets of clients

Subject to Clause 2, the Holding company and Nominee Company undertake to deal with the assets it hold on behalf of clients as follows:

3.1 Marketable Securities

- 3.1.1 Marketable securities (which include uncertificated marketable securities) shall be registered in the name of the nominee company.
- 3.1.2 Marketable securities shall be stored and held in safe and secure custody or electronically administered and maintained and shall be protected by adequate and appropriate security and administrative systems.
- 3.1.3 The nominee company shall collect dividends and interest relating to all marketable securities held on behalf of clients, verify the calculations and timely payment thereof and convey all details of any options and rights issues to clients.

- 3.1.4 The nominee company will have no authority to exercise any voting rights attached to shares registered in the nominee company's name unless instructed to do so by its client.

3.2 Money

- 3.2.1 The Nominee Company shall open a trust account or accounts for clients with one or more banks.
- 3.2.2 The Nominee Company shall forthwith deposit in the account or accounts opened in terms of clause 3.2.1 any money which is accepted or received by it.
- 3.2.3 The Nominee Company shall deal with money so deposited in accordance with directions given to it by its clients from time to time.

3.3 Property

- 3.3.1 Immovable property shall be registered in the name of the nominee company.
- 3.3.2 Immovable property shall be managed and secured in accordance with sound property management practices in relation to the particular property concerned, and shall be maintained in a like manner.
- 3.3.3 Movable property (for purposes of a long-term insurer only) received and shall be dealt with as if it is the property of the Nominee Company and shall be kept in safe and secure custody and shall be properly maintained if necessary.
- 3.3.4 Any title deed, certificate or document pertaining to property shall be dealt with as if it were a marketable security.
- 3.3.5 The nominee company shall collect all rents relating to immovable property and pay all expenses incidental to the maintenance thereof as well as in respect of movable property held on behalf of clients, verify the calculations and timely payment thereof and convey all details of any options and rights issues to clients.

4 Records and accounting

- 4.1 The Nominee Company shall keep and maintain proper books of account and other records necessary to identify each asset of each client and to discharge its obligations to its clients.
- 4.2 The Nominee Company shall forthwith provide a client with any information reasonably required by the client concerning assets held on his or its behalf.
- 4.3 The Nominee Company shall obtain the written authority of the client prior to receiving or holding any assets on behalf of such client.

4.4 The Nominee Company shall account regularly to its clients on assets held by it on their behalf and shall include in such accounting all movements and changes in the holding concerned occurred since the date on which the holding commenced or the immediately prior accounting date, as the case may be.

5 Liabilities

The Nominee Company shall not out of its own volition incur any liability of whatsoever nature, but excluding liabilities arising from acts performed in carrying out its objectives as set out in its Memorandum and Articles of Association, or arising from this Agreement, or arising from its status as a subsidiary, as such, of the Holding Company.

6 Obligations of the Holding Company

In consideration of the services to be undertaken from time to time by the Nominee Company, the Holding Company irrevocably undertakes and binds itself:

- 6.1 to pay all expenses of and incidental to the formation of the Nominee Company;
- 6.2 to pay the salaries of the secretary and staff of the Nominee Company and all directors' fees;
- 6.3 to provide, free of charge, the office accommodation, furniture, equipment and stationary necessary for the due carrying on of the business of the Nominee Company;
- 6.4 to pay all the other overhead, working and administrative expenses of the Nominee Company of whatsoever nature and kind, including any interest on bank overdrafts incurred on overnight clearance of cheques;
- 6.5 to pay any insurance premiums payable by the Nominee Company in respect of any policy of insurance effected by the Nominee Company;
- 6.6 to pay all the liquidation expenses of the Nominee Company of whatsoever nature and kind, in the event of the winding up of the Nominee Company;
- 6.7 to indemnify every director, managing director, agent, auditor, secretary and every officer for the time being of the Nominee Company out of the assets of the Holding Company against any liability incurred by any such person in defending any proceedings, whether civil or criminal, in which judgement is given in such person's favour, or in which he is acquitted, or in connection with any application under section 248 of the Companies Act, 1973 (Act No. 61 of 1973), in which relief is granted to him by any Court;
- 6.8 not to dispose of the shares it holds in the Nominee Company to any person without the prior written approval of the Registrar concerned;

- 6.9 to indemnify every client of the Nominee Company and against any loss sustained in consequence of a breach by the Nominee Company of its agreement with a client;
- 6.10 to guarantee the due performance of the obligations of the Nominee Company to its clients; and
- 6.11 to indemnify the Nominee Company against any liability incurred in respect of any act or omission by the Nominee Company's directors, employees, agents, servants or contractors.

7. Amendments to this Agreement

This Agreement shall not be altered or amended without the prior written approval of the Registrar concerned.

8. Cancellation or Termination

8.1 This agreement is entered into on the basis that it is irrevocable and it is explicitly agreed that neither party shall have the right to cancel this agreement unilaterally or in consequence of a breach thereof by the other party.

8.2 Notwithstanding the provisions of 8.1 above, this agreement may be terminated if-

- 8.2.1 the Holding Company is provisionally or finally liquidated, or;
- 8.2.2 the performance of the terms of this agreement become objectively impossible by reason of vis maior, legislative changes or any similar event, or;
- 8.2.3 the Nominee Company has no further obligation of any nature to a client and such fact is certified by its Auditor, or;
- 8.2.4 the Registrar concerned consents thereto on good cause shown by the parties jointly.

8.3 The Holding Company and the Nominee Company shall, if this agreement is terminated by joint action, or where one of them gives written notice of intention to terminate to the other both, forthwith advise the Registrar concerned thereof in writing, and provide him with reasons therefor.

9. Cession

The Nominee Company undertakes not to cede any of its rights under this agreement to anyone.

10. Utmost Good faith

The Nominee Company shall at all times act and display towards its clients the utmost good faith as between principal and agent in all its actions and disclosures concerning the assets it holds for and on behalf of its clients.

11. Commencement

This Agreement shall commence on _____

12. Costs

The costs of this Agreement shall be borne by the Holding Company.

THUS DONE AND SIGNED AT _____

this _____ day of _____ 20 _____

(Insert name of Holding Company)

DIRECTOR

AS WITNESSES:

1. _____

2. _____

THUS DONE AND SIGNED AT _____

this _____ day of _____ 20 _____

(Insert name of Nominee Company)

DIRECTOR

AS WITNESSES:

1. _____

2. _____