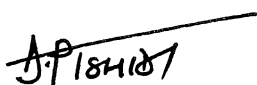


BOARD NOTICE 65 OF 2014
FINANCIAL SERVICES BOARD
COLLECTIVE INVESTMENT SCHEMES CONTROL ACT, 2002
RULES FOR THE ADMINISTRATION OF A COLLECTIVE INVESTMENT
SCHEME IN PARTICIPATION BONDS

I, Dube P Tshidi, Registrar of Collective Investment Schemes, hereby, under section 52(2) of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002), make the rules, contained in the Schedule, for the administration of a collective investment scheme in participation bonds.



D P TSHIDI

REGISTRAR OF COLLECTIVE INVESTMENT SCHEMES

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1. Definitions

In these Rules **"the Act"** means the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002), and any word or expression to which a meaning has been assigned in the Act bears the meaning so assigned to it and, unless the context otherwise indicates –

"deposit" means a deposit as defined in the Banks Act, 1990 (Act No. 94 of 1990), or in the Mutual Banks Act, 1990 (Act No. 124 of 1993);

"non-reducible participation bond" means a participation bond, other than a reducible participation bond, whose conditions regarding the repayment of the capital and the payment of interest are agreed between the manager and the mortgagor, from time to time;

"reducible participation bond" means –

- (a) a participation bond which provides for the redemption by regular annual payments, or payments at shorter intervals, of the capital amount advanced and of interest due on the amount outstanding under the bond; and
- (b) a former non-reducible participation bond which after the registration of the participation bond, has been converted by written agreement between the mortgagee and the mortgagor, to a reducible participation bond as contemplated in paragraph (a);

"scheme" means a collective investment scheme in participation bonds as defined in the Act.

2. Valuation of property and screening of borrower

Before granting a loan upon the security of a participation bond, the manager must:-

- (a) take into account the financial standing, and the ability, of the borrower to make repayments of the loan;
- (b) arrange for the immovable property to be hypothecated under the participation bond, to be valued by a person who is independent from the manager and any of the manager's associates and, in the opinion of the manager, who is competent to make such a valuation and who must, in assessing the value of the immovable property, take cognisance of the type of immovable property, its locality, its state of repair, its ability to be sold and its income producing potential; and
- (c) ensure that a documented risk management programme is in place in order to assess the value of the property. The risk management programme must stipulate that an assessment of the property is to be conducted at least once in every three years.

3. Approval of loans

(1) The Board of Directors of the manager (who may delegate this function to a committee or other suitable person) must approve all loans granted upon the security of a participation bond.

(2) The manager may not apply funds received for investment in a collective investment scheme in participation bonds for the granting of loans against security of immovable property in which:—

- (a) the manager or any of its associated companies; or
- (b) shareholders, directors or employees of the manager and any of its associated companies

has a direct or indirect interest.

4. Maximum amount of bond

(1) If a bond is a reducible mortgage bond then, subject to rule 5, no more than seventy-five percent of the value of the immovable property mortgaged or to be mortgaged under a participation bond, determined in terms of rule 2(b), may be advanced by the manager upon the security of such bond.

(2) If a bond is a non-reducible mortgage bond then, subject to rule 5, no more than sixty seven percent of the value of the immovable property mortgaged or to be mortgaged under a participation bond, determined in terms of rule 2(b), may be advanced by the manager upon the security of such bond.

(3) If there is a *pari passu* ranking charge over the immovable property mortgaged or to be mortgaged under such participation bond, the maximum amounts which may be advanced by the manager as aforesaid, must be reduced by the maximum possible indebtedness secured under the *pari passu* ranking charge.

5. Maximum amount of bond: collateral security

(1) Where the manager accepts collateral security for the debt secured under a participation bond in the form of a surety or a collateral mortgage bond ranking as first mortgages over immovable property and registered or endorsed as a participation bond, rule 4 applies to such collateral security and the manager may advance:—

- (a) in the case of a reducible participation bond, an amount not exceeding seventy-five percent; or
- (b) in the case of a non-reducible participation bond, an amount not exceeding sixty seven percent,

of the aggregate value of the immovable property mortgaged under such participation bond and the immovable property mortgaged under such surety or collateral mortgage bond, as the case may be.

(2) Where there is a *pari passu* ranking charge over the immovable property mortgaged or to be mortgaged under such surety or collateral mortgage bond, the maximum amounts as aforesaid which may be advanced by the manager must be reduced by the maximum possible indebtedness secured under such *pari passu* ranking charges.

6. Valuation, maintenance and inspection of property

The manager must ensure that:—

- (a) every immovable property which is subject to a mortgage bond, is valued:
 - (i) at least once in every five years by the person described in rule 2(b); and
 - (ii) whenever a loan is three months in arrears; or
 - (iii) when additional amounts are advanced to a borrower; or
 - (iv) at any other time, should the manager be of the view that the value of the immovable property may be affected;
- (b) every participation bond and every surety or collateral mortgage bond, accepted by the manager as collateral security, includes a condition that the mortgagor concerned must keep the mortgaged immovable property in good order and repair and the manager must, at least once in every five years, inspect or cause every such immovable property to be inspected in order to ensure that such condition is complied with;
- (c) a documented risk management programme contemplated in rule 2(c) is in place;
- (d) the ratios of values against advances stipulated in rule 4 are maintained when the immovable property in question is valued every five years as contemplated in sub-rule (a); and
- (e) any deviation from these ratios is reported to the registrar immediately.

7. Insurance of property

The manager must take reasonable care to ensure that:–

- (a) every immovable property mortgaged under a participation bond is adequately insured by the mortgagor concerned with a short-term insurer authorised to carry on insurance business within the Republic of South Africa against the risks of fire, storm and tempest and such other risks and contingencies as the manager may from time to time consider necessary; and
- (b) the policy of insurance is ceded to the nominee company.

8. Safe custody of documentation

All documentation in respect of participation bonds and all other securities registered in the name of, ceded, pledged or delivered, to the nominee company for the purposes of the scheme, must, except when in the temporary custody of others for the purposes of the scheme, be kept in safe custody in the safes or strong-rooms of the manager or with a bank approved by the manager.

9. Offer of participatory interests

A manager may not offer, grant or hold participatory interests in a scheme, whose aggregate value exceeds the balance of the principal debt owing under all participation bonds and other permissible assets included in the scheme.

10. Disclosure of information in application form

An application form used by an investor to invest in a collective investment scheme in participation bonds must disclose at least the following information, in addition to the information contemplated in section 3 of the Act, to the extent that the information is applicable to collective investment schemes in participation bonds:-

- (a) that money invested in the scheme must remain invested in such scheme for a period of not less than five years;
- (b) that the participant's investment is secured by all the participation bonds included in the scheme and that the debt owing under such bonds is, to the extent of the participatory interest granted to such participant, a debt owing to such participant and not to the manager or the nominee company;
- (c) that neither the manager nor the nominee company guarantees the repayment of the debt;
- (d) that, upon the expiry of the five year period referred to in section 58 of the Act, the participant may withdraw his or her investment, subject to rule 22(2) and subject to the participant having given the manager written notice;

- (e) the period of the written notice referred to in rule 22(2)(b), which period shall not be more than three months;
- (f) that the participant may, within the five year period referred to in section 58 of the Act, transfer, cede or encumber his participatory interest, subject to rule 22(1);
- (g) that the interest payable by the mortgagors under participation bonds may fluctuate during the terms of such bonds and that interest payable to the participant may fluctuate;
- (h) that interest paid by mortgagors to the manager in terms of participation bonds, less the manager's administration fees, which must be determined by the manager from time to time, must be paid by the manager to the participants at intervals determined by the manager;
- (i) that the manager must, at intervals of no more than three months, furnish each participant, in writing or by electronic means, with a statement of account disclosing the amount of capital owing to the participant and indicating how the net amount of interest paid has been calculated;
- (j) such further information as the registrar may require.

11. Receipt of funds for investment in a scheme

- (a) Any money accepted or received by the manager from any person for investment in a scheme, must be kept by the manager on deposit, or in a money market portfolio of a collective investment scheme in securities, in the name of the nominee company on behalf of the person from whom it was accepted or received and such money must remain so invested until such person is granted a participatory interest in such scheme or until the money is repaid to such person.
- (b) If a participatory interest is not granted to a person referred to at sub-paragraph (a) within 60 days from the date of acceptance or

receipt of such money by the manager, or within such further period as the registrar may allow in a particular case, the manager must immediately refund such money to such person.

12. Funds received in reduction of principal debt

Any money received by the manager in reduction of the principal debt owing under a participation bond included in a scheme must be kept on deposit by the manager in the name of the nominee company on behalf of all the participants in the scheme until the money is:—

- (a) re-invested by the manager in another participation bond or bonds included in the scheme; or
- (b) repaid to the participants in the scheme: Provided that the money may not be repaid to any participant, or his successor, until the expiry of the five year period referred to in section 58 of the Act.

13. Registers to be kept by manager

(1) The manager must keep a Register of Bonds and a Register of Participatory Interests, which must include the following information:—

- (a) Register of Bonds
 - (i) particulars of all participation bonds included in the scheme;
 - (ii) the balances owing under the bonds from time to time;
 - (iii) the names of the mortgagors; and
 - (iv) a description of the properties so bonded.
- (b) Register of Participatory Interests
 - (i) the names of participants in the scheme;
 - (ii) the extent of their participatory interests from time to time; and
 - (iii) the date of each investment by such participants.

(2) The register of bonds must be available for inspection by any person with a legitimate interest in the information, free of charge, at the registered office of the manager during the normal business hours of the manager.

(3) The register of participatory interests must be available for inspection by the registrar or any person with a legitimate interest in the information.

14. Power of manager to exercise and enforce rights of participants under participation bonds

(1) The manager may in its discretion, but subject to the provisions of sections 4(1) and 4(2) of the Act, exercise and enforce through and in the name of the nominee company, on behalf of the participants, any or all of the rights of the participants under any participation bond included in such scheme and, without affecting the generality of the foregoing, may:—

- (a) grant any consent in any case where the consent of a mortgagee, a legal holder of a bond or a holder of a bond is required in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937);
- (b) institute any legal proceedings in respect of the participation bond and any security collateral thereto, in particular to recover any amount owing, and sell the immovable property mortgaged under the participation bond and under any security collateral thereto in execution of any judgement obtained;
- (c) grant to the mortgagor under the participation bond extension of time to pay the mortgage debt or interest thereon;
- (d) subject to rules 4 and 5, grant re-advances to the mortgagor under the participation bond or grant any additional advance upon the security of a *pari passu* participation bond, at such rate of interest and upon such terms of repayment as the manager may deem fit;
- (e) agree to change the rate of interest payable under the participation bond and to amend any other conditions thereof; and
- (f) receive notice from or give notice to the mortgagor under the participation bond for the repayment of the whole or any portion of the debt secured under the participation bond.

(2) When an immovable property is sold in execution as contemplated in sub paragraph (1)(b) and the price fetched is not sufficient to cover the amount

outstanding on the participation bond plus the foreclosure costs, the following shall apply:-

- (a) if the manager reasonably believes that the price fetched represents the realistic open market value of the property it:
 - (i) shall not prevent the property from being sold to the highest bidder;
 - (ii) shall deal with the amount realised after deduction of foreclosure costs in terms of Rule 12;
 - (iii) may pursue action against the mortgagor under the participation bond or any other party who may be held liable, for recovery of any loss suffered by the scheme;
- (b) alternatively to (a) if the manager reasonably believes that the price fetched does not represent the realistic open-market value of the immovable property:
 - (i) the manager must buy-in the immovable property and at its cost cause it to be registered in the name of the nominee company;
 - (ii) the nominee company shall hold the immovable property in lieu of the participation bond as nominee for or representative of the participants;
 - (iii) the manager shall receive any income derived from the immovable property and shall bear all expenses, rates and taxes relating to the immovable property;;
 - (iv) the manager shall take care that the property is adequately insured while held by the nominee company, Rule 7 finding application with the necessary changes;
 - (v) the immovable property shall be disposed of as soon as practically feasible, considering the interests of the participants: provided that the holding of the property beyond twelve months will require the Registrar's consent;
 - (vi) the proceeds of the disposal of the immovable property after deduction of

- (aa) any outstanding legal costs consequent upon the foreclosure proceedings and costs of transfer of the immovable property to the nominee company;
 - (bb) sales commission payable in respect of the disposal in terms of sub-paragraph (v); and
 - (cc) any deficit arising from the holding of the property as envisaged by sub-paragraph (iii);
- shall be for the credit of the scheme;
- (vii) any loss arising from the buying in, holding or and disposal of the immovable property shall be dealt with in terms of Rule 17: provided that the manager may pursue action against the former mortgagor under the participation bond for the recovery of any such loss;
- (c) the manager must file financial reports with the registrar on a quarterly basis giving an update on the matters set out in sub-paragraphs (a) or (b), as the case may be, and indicating the manager's plan to safeguard the interests of participants. .

15. Rights of participants: recovery of debts

Notwithstanding rule 14 a participant may, in respect of a participation bond, instruct the manager to take all the necessary steps, through and in the name of the nominee company, to recover from the mortgagor such portion of the principal debt as is necessary to repay, in full, the participatory interest of such participant in such bond: Provided that a participant may only so instruct the manager if the mortgagor has failed to comply with the conditions of the bond.

16. Rights of participants: legal proceedings

A participant may not take any action, legal or otherwise, in his or her own name to enforce the rights held by the participant in any participation bond included in a scheme.

17. Duty of participants to refund legal costs not recovered

Where any proceedings are instituted by or through and in the name of the nominee company in respect of a participation bond included in a scheme, the participants in that scheme may be required to refund to the nominee company, or the manager, as

the case may be, pro rata any of the costs of the proceedings that may not be recovered by the nominee company or the manager from the mortgagor.

18. Assets of nominee company not included in a scheme

The rights of a participant in the participation bonds included in a scheme are limited to his or her rights in respect of the bonds and any collateral security relating thereto and do not extend to other property or securities registered in the name of the nominee company or to any other assets of the nominee company not included in the scheme.

19. Distribution of funds received in reduction of principal debt

(1) Subject to sub-rule (2), the manager is not be obliged to distribute any payment made in reduction of the principal debt owing by a mortgagor under a particular participation bond amongst all the participants in the scheme proportionate to their participatory interests in the scheme, but may in its sole discretion allocate such payment to any one or more of the participants.

(2) Any payment received by the manager as a result of legal proceedings taken against the mortgagor under a participation bond for the recovery of the amount due under such bond or a payment which:-

- (a) represents a dividend received from the trustee, executor, liquidator or business rescue practitioner of the mortgagor, or
- (b) is a payment received in terms of a compromise between the mortgagor and his creditors,

is the property of the participants in the scheme in which such bond is included to the extent of their respective participatory interests and must be allocated by the manager to the said participants proportionately to the extent of their participatory interests in the scheme.

(3) The manager must, subject to rule 12, immediately credit the proceeds of any participation bond repaid, whether in whole or in part, and any payment allocated in terms of sub-rule (1) or (2) to the account of the participant entitled to the payment and must thereafter deal with such payments in accordance with the instructions of such participant.

20. Payment of interest to participants

Every participation bond must provide that the mortgagor must pay interest on the principal debt secured by such bond to the manager as agreed upon by the manager and mortgagor. Such interest, less the manager's administration fee and such other fees and charges as imposed and determined by the manager from time to time must within thirty days after the date on which interest payments have been received from the mortgagor, be paid by the manager to participants.

21. Statements of account

The manager must furnish, in writing or by electronic means, each participant with a statement of account, at intervals of no more than three months, disclosing the amount of capital owing to the participant concerned and indicating how the net amount of interest paid has been calculated.

22. Cession, transfer or encumbering of participatory interest and withdrawal of investment

(1) A participant may transfer, cede or encumber part or the whole of his or her participatory interest without the consent of any of the mortgagors concerned provided that:—

- (a) the manager is not obliged to note a cession, transfer or encumbrance unless informed in writing thereof and the fees and charges as may be determined by the manager have been paid by such participant or his or her successor;
- (b) a cession, transfer or encumbrance is only enforceable against the manager if the manager has confirmed in writing that the cession, transfer or encumbrance has been noted and that the fees and charges referred to in sub-paragraph (a) have been paid in full; and
- (c) the manager may refuse to note such cession, transfer or encumbrance if the participatory interest is ceded or transferred to, or encumbered in favour of, more than one person with the result that the extent of any participatory interest held by a person is less than

the minimum investment determined by the manager from time to time.

(2) A participant may, upon the expiry of the five year period referred to in section 58 of the Act, withdraw part or the whole of the funds invested by him or her in a scheme, if:-

- (a) the manager has consented to the withdrawal, which consent may not be unreasonably withheld, provided that where the manager withholds consent, the manager must provide reasons in writing for withholding the consent;
- (b) the participant has given the manager written notice, the period of which must be determined by the manager and disclosed in the application form, of his or her intention to withdraw such investment; and
- (c) the participant has paid such reasonable fees and charges as the manager may impose.

23. Insurance

The manager must hold adequate insurance against losses resulting from the negligence, dishonesty or fraud of all persons (including valuers and directors) engaged by the manager and the nominee company for the purpose of the scheme.

24. Appointment of new manager

The manager may, on not less than six months written notice to the registrar and all participants in the scheme, appoint a new manager, subject to:-

- (a) the consent of the registrar and the participants holding a majority in value of the participatory interests in all participation bonds included in the scheme. If the participants holding a majority in value of the participatory interests in all participation bonds do not indicate their consent in writing on or before the date determined, then the registrar's consent to the appointment of a new manager will suffice; and

- (b) the new manager entering into an agreement with the nominee company in terms of paragraph (c) of the definition of "nominee company" in section 52 of the Act.

25. Termination of scheme

The manager may terminate the scheme at any time provided that not less than six months written notice must be given to all participants and to the registrar, specifying the date of such termination. From the date of such written notice the manager may not accept monies for investment in participation bonds in the scheme to be terminated.

26. Duty of manager upon termination of scheme

Upon the termination of the scheme, the manager must:-

- (a) subject to their respective terms and conditions, call in all participation bonds included in such scheme and pay out participants to the extent of their participatory interest provided that, with the consent of the registrar and all participants, the manager may cause the nominee company to cede any such bond, or all such bonds, to the participants to the extent of their respective rights to and interest in such bond or all such bonds; and
- (b) withdraw all deposits and pay out the money so withdrawn to the participants entitled thereto.

27. Amalgamation and cession of rights or take-over of nominee

company

- (1) Despite these rules the manager may, after having obtained the written consent of the registrar, authorise the nominee company to:-
 - (a) amalgamate with; or
 - (b) cede any rights of the said nominee company under any participation bond registered in its name to; or
 - (c) take over any rights under any participation bond from, any other nominee company, which has been approved by the registrar.

(2) The manager and the nominee companies which are parties to an amalgamation, cession, transfer or take-over in terms of sub-rule (1) must ensure that:—

- (a) any surety mortgage bond, collateral security or any cash pertaining to a participation bond which is ceded or transferred, is ceded or transferred with the participation bond concerned to the nominee company taking over the rights under such participation bond in order to vest in such nominee company the rights and obligations referred to in the Act; and
- (b) in the case of an amalgamation, or in the case of a cession of the rights under all the participation bonds included in a scheme, any cash is transferred to the nominee company taking over the rights under such participation bonds, in order to vest in such nominee company the rights and obligations referred to in the Act.

28. Notices

(1) Any notice, statement of account or other document required to be served on a participant shall be deemed to have been duly served if sent by post to or delivered at his or her address as stated on the application form, or at such other address as notified in writing by the participant to the manager from time to time, and be deemed to have been served four days after the same was posted or delivered. In proving such service it shall be sufficient to prove that the envelope or wrapper containing the notice was posted.

(2) Any notice sent to a participant by means of a facsimile shall be deemed to have been served on the date of facsimile transmission.

(3) Any notice may be sent electronically if so requested by a participant, and shall be deemed to have been served on the same day it was sent.

(4) Any notice or document sent by post to or delivered at the participant's address referred to in sub-rule (1), sent per facsimile in terms of sub-rule (2) or sent electronically in terms of sub-rule (3) shall, notwithstanding that such participant is deceased, insolvent, or under any other legal disability, and whether

or not the manager has notice of his or her death, insolvency or other disability, be deemed to have been duly served, and such service shall be deemed a sufficient service on all persons who have an interest in the participatory interests of the participant concerned.

(5) The unintended omission to give notice to a participant, or the non-receipt of any notice by any participant, does not give rise to any claim by such participant against the scheme or the manager, and does not invalidate anything done pursuant to or in terms of such notice.

29. Electronic and telephonic transacting

(1) The manager may allow for transacting via electronic and telephonic means, subject to sub-rules (2) and (3) and the consent of the participant or a prospective participant.

(2) If the participant consents to electronic or telephonic transacting, the participant must be fully apprised in the initial application form used for electronic and telephonic transacting and in all application forms posted on the manager's website, of the conditions of electronic and telephonic transacting.

(3) Such application forms must at least provide for -

- (a) the procedure to effect electronic or telephonic transacting and the costs involved;
- (b) the procedure for registration of an electronic or telephonic transaction;
- (c) the legal implications of such a transaction for the participant;
- (d) all disclaimers by the manager;
- (e) any limitation of liability afforded to the manager;
- (f) the security risks and risk of interception inherent to electronic and telephonic transacting;
- (g) related precautionary or security measures;

- (h) confirmation to participants that telephone calls are recorded and that such records are retained for a period of five years;
- (i) confirmation by the manager that its website complies with relevant legislative requirements applicable in the Republic;
- (j) a warning that taxation of other jurisdictions is not taken into account;
- (k) a warning that information contained on the website does not constitute advice.

(4) The terms and conditions under which electronic or telephonic transacting is done must be displayed on screen or verbally communicated, as the case may be.

30. Rules are binding

These rules are binding on the manager, the nominee company, participants and their successors in title.

31. Repeal and commencement

- (1) Notice GN 577 of 28 February 2003 as published in *Government Gazette* 24984 is hereby repealed.
- (2) This Notice comes into effect on 1 July 2014.