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CIRCULAR PF NO. 93

This Circular replaces PF No. 93 issued September 1997

(To all self-administered funds or their administrators (where applicable) and custodian banks)

PENSION FUNDS ACT, 1956: SECTION 5(3) AND 5(4) OF THE ACT: APPROVAL OF NOMINEE COMPANIES AND PERMISSION FOR ASSETS TO BE KEPT IN THE NAME OF SUCH NOMINEE COMPANIES ON BEHALF OF PENSION FUND (POLICY FILE 12/5/1/7/1)

1. **Purpose of the Circular**

The assets of a pension fund must either be kept in the name of that fund or, if its rules so permit, in the name of an approved nominee company. The purpose of this Circular is to provide pension funds with the registrar's conditions for approving a nominee company as envisaged in section 5(3) of the Act and conditions for permitting assets to be kept in the name of such nominee company in terms of section 5(4) of the Act.

The requirements imposed by the Financial Services Board for nominee companies to operate in South Africa have been adjusted and were published in the Government Gazette, No. 22994 dated 4 January 2002, Notice 6 of 2002. The requirements are also available on the FSB website and can be found on www.fsb.co.za .

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2. **Categories of nominees**

Section 5(4) of the Act provides that the registrar may permit money and assets to be kept in the name of a nominee company on behalf of a pension fund. Section 5(3)(a) to (c) of the Act provides for the conditions in the Act pertaining to a nominee company. In paragraph (d) of this subsection, it is required that the registrar approves such a nominee company on such conditions as the registrar may impose. For the purpose of setting out the conditions for approving nominee companies and conditions for permitting assets to be kept in the names of such nominee companies on behalf of funds in terms of these sections of the Act, nominee companies are divided into two categories, namely:

(a) South African nominee companies; and
(b) Foreign nominee companies.

3. **South African approved nominee companies**

(a) According to clause 6 of the requirements for nominee companies to operate in South Africa, 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.

(b) A written agreement must be concluded between the nominee company and any client substantially in accordance with **Annexure A**. The Agreement between nominee company and client must provide for regular (not less frequent than monthly) reports by the nominee company to the client reflecting movements for the month, assets held at the closing date of the report and the market value thereof.

(c) An application by the pension fund for permission to use a nominee company to hold assets on its behalf, shall be made in writing and shall include:

(i) confirmation that the agreement is in principle the same as the agreement mentioned in paragraph 3(b) between the pension fund and the nominee company;

(ii) an exposition of the reasons why the pension fund requires the services of a nominee company and a declaration that the holding of assets in one or more approved nominee company/ies is in the best interest of the members;

(iii) reference of the particular rule of the pension fund authorising such action

4. **Approved foreign nominee companies**

Pension funds are allowed to invest in foreign assets as indicated in the Annexure to Regulation 28 and register such foreign assets, on its behalf, in the name of an approved foreign nominee company, custodian or sub-custodian. In considering the approval of such nominee company, custodian or sub-custodian, the registrar must be advised by the funds:

(a) Of the name and registered address of the head office of the foreign nominee company, custodian or sub-custodians; and the registered address in the territory where the fund's assets will be held (if different);

(b) Whether the nominee company, custodian or sub-custodian is:-

(i) A banking institution or trust company, incorporated or organised under the laws of a country other than South Africa, that is regulated as such by that country's government or an agency thereof and that has shareholders' equity in excess of $200 000 000(US $ or the equivalent of US $) as at the close of its financial year most recently completed prior to the date when the Board of the fund approved the written contract provided for in clause (4)(e)(i) of this document, and thereafter, as at the close of its financial year most recently completed prior to the date when the Board of the fund reviewed and approved the continuance of those arrangements provided for in clause 4(e)(iii) of this document; or

(ii) A majority-owned direct or indirect subsidiary of a registered bank or bank-holding company that is incorporated or organised under the laws of a country other than South Africa and that has shareholders' equity in excess of $100 000 000 (US $ or the equivalent of US $) as at the close of its financial year most recently completed prior to the dated when the Board of the fund reviewed the continuance of those arrangements provided for in clause 4(e)(i) of this document; and thereafter, as at the close of its financial year most recently completed prior to the date where the Board of the fund reviewed and approved the continuance of those arrangements provided for in clause 4(e)(iii) of this document; or

(iii) A securities depository or clearing agency, incorporated or organised under the laws of a country other than South Africa, which operates the central system for the handling of securities or equivalent book-entries in that country; or

(iv) A securities depository or clearing agency, incorporated or organised under the laws of a country other than South Africa which operates a trans national system for the central handling of securities or equivalent book-entries; or

(v) An overseas branch, or a registered South African bank incorporated outside the Republic, which entity must have an aggregate capital, surplus and undivided profits of a specified minimum amount, which shall not be less than $5 000 000(US $ or the equivalent of US $).

(c) That in respect of the selection of a particular foreign nominee company, custodian or sub-custodian, the Board of the fund has in the best interest of the fund considered :-

(i) Whether the foreign nominee company, custodian or sub-custodian has as principal object to act as representative of any person;

(ii) Whether the foreign nominee company, custodian or sub-custodian is precluded by its memorandum of association (or similar document) from incurring any liabilities other than those to persons on whose behalf it holds assets;

(iii) Whether the foreign nominee company has entered into an irrevocable agreement with another institution in terms of which such other institution has undertaken to pay all expenses of and incidental to its formation, activities, management and liquidation;

(iv) The financial strength of the foreign nominee company, custodian or sub-custodian, its general reputation and standing in the country in which it is located, its ability to provide efficiently the custodial services required and the relative cost for those services;

(v) Whether the foreign nominee company, custodian or sub-custodian would provide a level of safeguard for holding the fund's assets that is not materially different from that provided by South African approved nominee companies holding pension funds assets in South Africa.

(vi) Whether the foreign nominee company, custodian or sub-custodian has branch offices in South Africa in order to facilitate the assertion of jurisdiction over and enforcement of judgements against such nominee company, custodian or sub-custodian;

(vii) In the case of a foreign securities depository, the number of participants in and the operating history of the depository.

(d) That in respect of the selection of the particular territory where the fund's assets will be held in the best interest of the fund, within the territories "recognised by the registrar" wherein the "recognised exchanges", referred to in paragraph 4(d) of the Regulations, operate and to be published by way of notice in the Government Gazette from time to time, the Board of the fund has considered:

(i) Whether applicable foreign law would restrict the access of the fund or its approved auditors to books and records kept by an eligible foreign nominee company, custodian or sub-custodian located in that country;

(ii) Whether General Accepted Accounting Practises and audit standards comparable with those in the Republic, are prescribed in respect of such an eligible nominee company, custodian or sub-custodian;

(iii) Whether applicable foreign law would restrict the fund's ability to recover its assets in the event of the bankruptcy of an eligible foreign nominee company, custodian or sub-custodian located in that country;

(iv) Whether applicable foreign law would restrict the fund's ability to recover assets that are lost while under the control of an eligible foreign nominee company, custodian or sub-custodian located in that country;

(v) The likelihood of expropriation, nationalisation, freezing or confiscation of the fund's assets;

(vi) Whether difficulties in converting the fund's cash and other assets to the Rand are reasonably foreseeable.

(e) That the Board will, in the best interests of the fund:

(i) Approve of a written contract which will govern the manner in which such nominee company, custodian or sub-custodian will hold the fund's assets and which will provide, inter *alia*, that:

(aa) The foreign nominee company, custodian or sub-custodian must be adequately indemnified by fidelity guarantee cover and the assets it hold adequately insured in the event of loss through fire, theft and the like;

(bb) The assets held on behalf of the fund will not be subject to any right, charge, security interest, lien or claim of any kind in favour of the foreign nominee company, custodian, sub-custodian or its creditors except a claim of payment for their safe custody or administration;

(cc) Beneficial ownership of the assets held on behalf of the fund must be freely transferable without the payment of money or value other than for safe custody or administration;

(dd) Adequate records will be maintained identifying the fund's assets as belonging to the fund;

(ee) The fund's approved auditors will be given access to all relevant records or confirmation of the contents of all relevant records; and (ff) The fund will receive regular reports with respect to the safekeeping of the fund's assets, including, but not necessarily limited to, notification of any transfer to or from the fund's account;

(ii) Establish a system to monitor the nominee company, foreign custody or sub-custodian arrangement to ensure compliance with the aforementioned conditions;

(iii) At least annually, review and approve the continuance of the arrangement in the best interests of the fund;

(iv) Where they have determined that a foreign nominee company, custodian or sub-custodian can no longer be considered eligible in terms of these requirements or that continuance of the arrangement would not be in the best interest of the fund, the fund must withdraw its assets from the care of that nominee company, custodian or sub-custodian as soon as reasonably practicable, and in any event within 180 days of the date when the Board of the fund made the determination.

(f) the Board of the fund has obtained the assurance of the approved auditors of the fund that the foreign nominee company arrangement will not impede any of their duties.

The determinations that the Board of a registered fund are responsible for in connection with approaching the registrar for approving a foreign nominee company arrangement, shall be made only after consideration of all matters which the board, in carrying out their fiduciary duties find relevant, including the above determinations but not necessary limited to it.

(g) Applications in respect of foreign nominees

An application by the board of a fund for the approval of a nominee company, custodian or sub-custodian to hold its assets, shall be made in writing and include:

(i) The name and registered address of the head office and the registered address of such nominee company, custodian or sub-custodian in the territory where the funds assets will be held (if different);

(ii) The nature of the nominee company, custodian or sub-custodian as indicated in paragraph 4(b);

(iii) A report that the Board considered all the issues mentioned in paragraphs 4(c) and (d) in deciding, in the best interest of the fund, on the particular nominee company, custodian or sub-custodian in the particular territory;

(iv) Confirmation that the written contract which will govern the manner in which such nominee company, custodian or sub-custodian will hold the fund's assets as envisaged in paragraph 4(e);

(v) That assurance was obtained from the approved auditors of the fund that the foreign nominee company, custodian or sub-custodian arrangement would not impede any of their duties;

(vi) Reference to the particular rule of the fund authorising such holding of assets in a foreign nominee company, custodian or sub-custodian;

(vii) An exposition of the reasons why the fund requires the services of a foreign nominee company, custodian or sub-custodian.

(h) Notices, Information required, Revocation and Amendment

Please take note that this Office:

(i) requires that funds should before entering into arrangements whereby its assets will be registered in the name of such a foreign nominee company, custodian or sub-custodian, comply with the conditions set out in this Circular. However, where funds have already entered into agreements, they must apply to this Office, without delay, for the approval of the nominee company, custodian or sub-custodian used on the basis of compliance with the conditions in this Circular. Where it is not possible, funds should inform this Office of the extent to which they might not be able to comply.

(ii) may at any time revoke this approval or amend any conditions subject to which approval was granted or impose new conditions; or

(iii) from time to time may require from funds to furnish this Office with information concerning any matter regarding the holding assets on their behalf; and

(iv) has published the first list referred to in paragraph 4(c) above in Government Gazette No. 17545 of 8 November 1996 under General Notice 1575 of 1996.

Kindly hand a copy of this Circular to the fund's auditor.

Yours faithfully

REGISTRAR OF PENSION FUNDS
Notes:

(1) Circular PF No. 92 on the topic of housing loans administration was issued to all self-administered funds or their administrators (where applicable) and the administering insurers of funds exempted in terms of section 2(3)(a) of the Act.

(2) This Circular, with Annexure A to C, can also be found in the Index of Circulars (12/12/1) on the Financial Services Board Internet Site: http://www.fsb.co.za

Contact information/departments
Retirement Funds and Friendly Societies

ANNEXURE

(Specimen)

MEMORANDUM OF AGREEMENT

BETWEEN NOMINEE COMPANY AND CLIENT

MEMORANDUM OF AGREEMENT made and entered into by and between ....(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 ....

and

....(Name of Client)

of ....(Address of the Client)

(hereinafter referred to as the "Client")

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 clients, including registered pension funds, as envisaged by section 5 of the Pension Funds Act, 1956, to the extent authorised by the Registrar; and

B. The Nominee Company has as one if its objects to hold assets on behalf of registered pension funds as envisaged by section 5 of the Pension Funds Act, 1956 to the extent authorised by the Registrar;

C. The Client wishes to make use of the services of the nominee company as set out in this agreement;

D. The Financial Services Board dictates that the Nominee Company and the Client enter into and agreement;

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

1. **Definitions**

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

1.1	"Registrar"	shall mean the Registrar as defined in the Pension Funds Act, 1956;
1.2	"Deposit taking institution"	shall mean a public company registered provisionally or finally in terms of the Banks Act, 1990;
1.3	"money"	shall mean all money accepted by the nominee company from the client and all money received by the nominee company on behalf of client;
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 script, 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 "immovable property" shall include shares in a "property company" as defined in paragraph (4)(f) of Regulation 28 made under the Pension Funds Act, 1956;

2. Business of the nominee company

The business of the nominee company shall be to take title of immovable 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 immovable 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 nominee company undertakes to deal with the assets it holds on behalf of clients as follows:

3.1 Money

3.1.1 The nominee company shall open an account or accounts in its name with .... Bank.

3.1.2 The nominee company shall forthwith deposit in the account or accounts opened in terms of clause 3.1.1 any money which is accepted or received by it in terms hereof.

3.1.3 The nominee company shall deal with money so deposited in accordance with written directions given to it by the client from time to time.

3.2 Immovable Property

3.2.1 Immovable property shall be registered in the name of the nominee company.

3.2.2 Any title deed, certificate or document pertaining to property shall be dealt with as if it were a marketable security.

3.3 **Marketable Securities**

3.3.1 Marketable securities shall be registered in the name of the nominee company.

3.3.2 Marketable securities shall be stored and held in safe and secure custody and shall be protected by adequate and appropriate security and administrative systems.

3.3.3 The nominee company shall collect dividends and interest relating to all marketable securities held on behalf of the client, verify the calculations and timeous payment thereof and convey all details of any options and rights issues to the client.

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 all its other obligations to its clients.

4.2 The nominee company shall forthwith provide the client with any information reasonably required by the client concerning assets held on its behalf.

4.3 The nominee company shall account on monthly intervals to the client on assets held by it on the clients behalf and shall include in such accounting all movements and changes occurred in the holding concerned, since the date on which the holding commenced or the immediately prior accounting, as the case may be.

5. **Amendments to this Agreement**

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

6. **Utmost Good faith**

The nominee company shall at all times act and display towards the client 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 the client.

7. **Commencement**

This Agreement shall commence on ....…………………………….........

8. **Consideration**

No consideration shall be payable to the nominee company by the client. Charges levied in respect of the services contemplated by the Agreement will be agreed upon between the client and the holding company of the nominee company.

9. **Cancellation or Termination**

The parties shall be entitled to cancel this agreement after having given seven day's notice in writing, provided that a copy of such notice shall be sent to the Financial Services Board.

THUS DONE AND SIGNED AT ....………………………...

this ....…………………….... day of ……………….............................. 20……....

AS WITNESSES:

1. ...……………………………….................. ……………...............................

(Insert name of nominee company)

DIRECTOR

2. ....……………………………….........

THUS DONE AND SIGNED AT ....………………………...........

this ....……………………... day of ...……….............................. 20………..

AS WITNESSES:

1. ……………………………….......................... ..……………….............................

(Insert name of pension fund)

PRINCIPAL OFFICER

2. ....…………………………………...