

# FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT 37 OF 2002

## PENSION FUNDS ACT 1956, LONG-TERM INSURANCE ACT, 1998, SHORT-TERM INSURANCE ACT, 1998, SECURITIES SERVICES ACT, 2004 AND FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002

### REQUIREMENTS IMPOSED BY THE FINANCIAL SERVICES BOARD FOR NOMINEES TO OPERATE IN SOUTH AFRICA

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1. I, Robert James Gourlay Barrow -

- (1) Registrar of Pension Funds;
- (2) Registrar of Long-term Insurance;
- (3) Registrar of Short-term Insurance;
- (4) Registrar of Securities Services;
- (5) Registrar of Financial Services Providers;

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);
- (d) [section 36](#)(2) of the Securities Services Act, 2004 (Act No. 36 of 2004);
- (e) [Regulation 6](#)(2) and [7](#)(1) of the Regulations promulgated under the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002);

the requirements imposed by the Financial Services Board for nominees to operate in South Africa as set for the in the schedule hereto.

2. This Notice comes into operation on date of publication.

(Signed)  
RJB BARROW

### REQUIREMENTS IMPOSED BY THE FINANCIAL SERVICES BOARD (“FSB”) FOR NOMINEES TO OPERATE IN SOUTH AFRICA

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## **1. Compliance required**

- 1.1 Nominees who wish to register or hold any assets of long-term insurers, short-term insurers or pension funds, the nominee of an administrative and discretionary financial services provider who wishes to hold assets on behalf of long-term insurers, short-term insurers, pension funds or hold clients' securities in the Strate environment, or any other nominee that wishes to hold securities in terms of [Section 36\(2\)](#) of the Securities Services Act, 2004 (Act No. 36 of 2004) require the prior written approval of the Registrar of Long-term Insurance, the Registrar of Short-term Insurance, the Registrar of Pension Funds, the Registrar of Financial Services Providers or the Registrar of Securities Services, as the case may be.
- 1.2 The requirements mentioned in 1.1 are not applicable to foreign nominees holding assets on behalf of long-term insurers, short-term insurers or pension funds.
- 1.3 Any of the abovementioned Nominees, who wish to hold clients' securities in the Strate environment, by appearing in a sub-register maintained by a Participant, must, after the approval in terms of these requirements by the FSB, in addition comply with the criteria laid down by Strate.
  - 1.3.1 The criteria determined by Strate is made in terms of [Section 36](#) of the Securities Services Act, 2004 (Act No. 36 of 2004), which provides that:
    - (1) A nominee of -
      - a) an authorised user must be approved by the exchange in terms of exchange rules;
      - b) a participant, or any other Nominee who has an account with the participant, must be approved by the central securities depository in terms of depository rules;
    - (2) A nominee that is not approved as a Nominee in terms of subsection (1) must be approved by the registrar and must comply with the requirements that the registrar may prescribe for Nominees before it can function as a Nominee in terms of this Act.
    - (3) The registrar must maintain a list of all Nominees approved in terms of exchange rules or depository rules.”
  - 1.3.2 In terms of [Section 36\(1\)\(b\)](#) of the Securities Services Act, 2004 (Act No. 36 of 2004), Nominees that wish to hold clients' securities in the Strate environment must comply with rule 6.6 of the Strate Rules which provides that:

“6.6 A participant may only open a Securities Account in the name of a Nominee where:

6.6.1 the Nominee has been approved by an Exchange in terms of [section 36\(1\)\(a\)](#) of the Act;

6.6.2 the Nominee has been approved by the Registrar in terms of [section 36\(2\)](#) of the Act;

6.6.3 the Nominee is a foreign Nominee and has assured the Participant that it operates within its domestic legal framework with the appropriate regulatory approval required in its home jurisdiction; or

6.6.4 the Nominee has been approved by the CSD in accordance with the Act, Rules and Directives.”

1.3.3 In terms of Rule 6.6.4 read with the directives issued by Strate, all Nominees must comply with Directives in terms of the Nominee policy.

1.4 Applications in terms of clause 1.1 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, in the case of discretionary and administrative financial services providers, the Registrar of Financial Services Providers; and in the case of any other Nominee seeking approval in terms of [Section 36\(2\)](#) of the Securities Services Act, 2004 (Act No. 36 of 2004) the Registrar of Securities Services.

## **2. Authority**

The authority of the Registrar concerned to approve Nominees 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 (Act No. 52 of 1998);

2.2 in the case of short-term insurers, [section 33\(1\)\(b\)](#) of the Short-term Insurance Act, 1998 (Act No. 53 of 1998);

2.3 in the case of pension funds, [section 5\(3\)](#) of the Pension Funds Act, 1956 (Act No. 24 of 1956);

2.4 in the case of Administrative and Discretionary Financial Services Providers (FSP's) [Regulations 7\(1\)](#) and [6\(2\)](#) respectively of the Regulations promulgated under the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); and

2.5 in the case of other Nominees, in terms of [Section 36\(2\)](#) of the Securities Services Act, 2004 (Act No. 36 of 2004).

### **3. Principles which underly the maintenance of registers of ownership of securities**

3.1 In terms of [section 91A](#) of the Companies Act, 1973 (Act No. 61 of 1973) only a central securities depository, such as Strate Ltd, may maintain a register of ownership of uncertificated securities and only Participants may maintain a sub-register of such ownership.

3.2 In terms of the Rules of Strate, a Nominee may not appear in a sub-register maintained by a Participant unless such Nominee complies with the criteria determined by the Controlling Body.

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 eligible security in terms of [section 91A](#) of the Companies Act, 1973 (Act No. 61 of 1973).

3.4 Nominees that wish to operate in the Strate environment should refer to the Strate Nominee Directive for guidance.

### **4. Application procedure**

4.1 An application for approval of a Nominee shall be lodged with the FSB, PO Box 35655, Menlo Park, Pretoria, 0102 for the attention of the FAIS Department. The Nominee must clearly indicate whether it intends to participate in the Strate environment. If the Nominee will hold assets on behalf of more than one of the aforementioned financial 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 needs to be lodged with the FSB, if the Nominee 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, or if the Nominee of a discretionary or administrative FSP will not hold assets on behalf of a pension fund, long-term insurer, or short-term insurer and will not hold clients' securities in a Strate environment.

4.3 No application for approval of a Nominee needs to be lodged with the FSB if an entity is a subsidiary of an authorised user of the JSE Limited, BESA or a Participant of Strate, as such Nominees will be approved by the JSE, BESA and Strate, respectively.

### **5. Requirements**

#### **5.1 Nominees**

In terms of the Securities Services Act, 2004 (Act No. 36 of 2004), a Nominee means “a person that acts as the registered holder of securities or an interest in securities on behalf of other persons”.

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

A Nominee must -

- 5.1.1 be a registered company under the Companies Act, 1973, (Act No. 61 of 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 other disasters in place for trust assets held by the nominee as well as fidelity guarantee cover. (It is the responsibility of the holding company to put this in place); 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
- 5.2.1 The Nominee may not have a natural person as a shareholder. The Nominee 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 (Act No. 52 of 1998) and [section 1](#) of the Short-term Insurance Act, 1998 (Act No. 53 of 1998) respectively; or
    - 5.2.1.2 an authorised user in terms of the [Securities Services Act, 2004](#) (Act No. 36 of 2004); or
    - 5.2.1.3 a bank or a bank controlling company as defined in [section 1](#)(1) of the Banks Act, 1990 (Act No. 94 of 1990); or
    - 5.2.1.4 a discretionary or administrative FSP as approved in terms of [section 7](#) of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); or
    - 5.2.1.5 an administrator registered in terms of [section 13B](#) of the Pension Funds Act, 1956 (Act No. 24 of 1956) where the exclusive object of its Nominee is the holding of pension fund assets; or
    - 5.2.1.6 a participant of a Central Securities Depository licensed in terms of the [Securities Services Act, 2004](#) (Act No. 36 of 2004); or
    - 5.2.1.7 a central securities depository licensed in terms of the [Securities Services Act, 2004](#) (Act No. 36 of 2004); or
    - 5.2.1.8 an exchange licensed in terms of the [Securities Services Act, 2004](#) (Act No. 36 of 2004).
  - 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 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 unauthorised access to critical systems, the thorough testing of all new proprietary systems and the continuity of operations of all critical applications of its Nominee, including disaster recovery and a business continuity plan; 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 Registrar, demonstrate that it has met the requirements in terms of clauses 5.2.2.1 to 5.2.2.7.
- 5.2.4 When the maintenance of the register has been outsourced, the Nominee has the obligation to advise the clients of the outsourcing arrangement.

## **6. Documentation to be submitted**

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

- 6.1 A copy of the Memorandum and Articles of Association of the Nominee which must contain the following provisions:
  - 6.1.1 A prohibition on the transfer of its issued shares to a natural person;
  - 6.1.2 A limitation on the transfer of its issued shares without the prior written consent of the Registrar;
  - 6.1.3 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, discretionary and administrative FSP's 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 deal with such assets as may be instructed by its clients;

- 6.1.4 A provision precluding the Nominee from acquiring any interest, for its own account, in any other company or from owning a subsidiary company;
- 6.1.5 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
- 6.1.6 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; and
- 6.2. A copy of the last audited financial statements of the Nominee, if it has already had a financial year end; and
- 6.3 A copy of the last audited financial statements of the holding company; and
- 6.4 A signed copy of the agreement between the holding company and the Nominee, in the prescribed format (refer [Annexure A](#)). Reasons must be provided for any deviation to the prescribed agreement.

## **7. Continuing obligations of nominees**

- 7.1 The approved Nominee shall submit annually:
  - 7.1.1 its audited financial statements; and
  - 7.1.2 an audit report within six months of the financial year-end of the company to the FSB 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.

Should the Nominee 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.

- 7.2 A declaration by the holding company of the Nominee in the format as specified in [clause 12](#) must accompany the annual financial statements of the Nominee.
- 7.3 The FSB will retain the right to withdraw an approval at any time should the Nominee, its holding company or the company to which the control over the Nominee register has been outsourced fail to comply with the FSB and Strate requirements.
- 7.4 Members of the JSE, BESA, Participants and their Nominees need only to comply with clause 7 of the requirements imposed by the FSB for Nominees to operate in South Africa if they hold securities on behalf of either pension funds or long and short-term insurers.

## **8. Register of approved nominees**

- 8.1 A register of all approved Nominees, 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](http://www.fsb.co.za).

8.2 The JSE, BESA and Strate must forthwith advise the FSB of any changes regarding Nominees approved by them.

**9. Payment of fees**

The holding company who applies for approval of a Nominee to hold assets on behalf of a long-term insurer, short-term insurer, and pension fund, or Nominee of a discretionary and administrative FSP to hold assets on behalf of a long-term insurer, short-term insurer, pension fund, or operate in the Strate environment must pay the fees as prescribed in terms of the relevant legislation.

**10. Effective date of requirements**

10.1 The requirements for the approval of a Nominee to operate in South Africa set out in this Notice shall apply to all new applications with immediate effect. Nominees affected by the requirements and who are not approved yet, have 6 months from the date of publication of this Board Notice to comply.

10.2 The requirements set out in this Notice replace the requirements in terms of which any Nominee was approved before 1 January 2002.

**11. Amendment of requirements**

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

**12. Declaration by holding company**

[Click here to see abovementioned image on page 12](#)

**ANNEXURE A**

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

**REQUIREMENTS IMPOSED BY THE FINANCIAL SERVICES BOARD FOR  
NOMINEES TO OPERATE IN SOUTH AFRICA**

**APPLICATION FOR APPROVAL**