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BOARD NOTICE

NOTICE 56 OF 2015

FINANCIAL SERVICES BOARD

FINANCIAL INSTITUTIONS (PROTECTION OF FUNDS)

ACT 28 OF 2001

GUIDELINES ON THE CONDUCT OF CURATORS

I, Dube Phineas Tshidi, the Registrar, under section 5(6) of the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001) ("the Act"), hereby prescribe guidelines in accordance with which a curator appointed under section 5 of that Act must act, as set out in the Schedule.

Section 5(6) was amended through the Financial Services Laws General Amendment Act, 2013 (Act No. 45 of 2013) to allow for the registrar to prescribe guidelines in accordance with which curators appointed under the section must act.



DP TSHIDI

REGISTRAR

6 March 2015

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1. Definitions

In these Guidelines, “**the Act**” means Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001) and any word or expression in these Guidelines has the same meaning as that assigned thereto in the Act; and

“**advocate**” means an advocate of the High Court admitted in terms of the Admissions of Advocates Act, 1964 (Act No. 74 of 1964);

“**attorney**” means any person admitted to practise as an attorney in the Republic in terms of the Attorneys Act, 1979 (Act No. 53 of 1979);

“**auditor**” means an auditor registered in terms of the Auditing Profession Act, 2005 (Act No. 26 of 2005);

“**Auditor-General**” means the Auditor-General contemplated in the Public Audit Act, 2004 (Act No. 25 of 2004);

“**business interest**” means holding any position or interest in a business as a director, officer, employee or otherwise, regardless of compensation;

“**compensation relationship**” includes the receipt or expectation to receive any remuneration or consideration, such as a consulting fee, salary, rent or a gift;

“**conflict of interest**” includes a conflict in a business interest, financial interest or personal interest;

“**curator**” means a curator appointed in terms of section 5 of the Act;

“**curator’s firm**” means a firm of attorneys or auditors or any other firm that conducts forensic investigations, in which a curator has a substantial direct or indirect business or financial interest, or with which the curator is financially associated;

“**financial interest**” means an investment beneficial interest in, or a compensation relationship with, an institution;

“**forensic investigation**” means an investigation into the business of an institution with the object of expressing an opinion or making a finding as to the compliance by the institution or those responsible for all or some of that business on behalf, or for the benefit, of the institution, with any law or governance, accounting, valuation or other applicable standard of best practice;

“**independent firm**” means a firm of attorneys or auditors or a firm that conducts forensic investigations, other than a curator’s firm;

“**institution**” means an ‘institution’ as defined in the Act, the business of which has been placed under curatorship in terms of the Act;

“**investor**” means the user of a ‘financial service’ as defined in the Financial Services Board Act, 1990 (Act No. 97 of 1990);

“**legal proceeding**” means a notice of motion, rule *nisi*, summons and any document whereby legal proceedings are commenced or advanced in a court of law;

“**personal interest**” includes a situation where a spouse, partner, dependent child or any other family member of a curator may personally benefit from actions taken by the curator; and

“**web site**” means a web site as defined in section 1 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

2. Purpose of Guidelines

These Guidelines are intended to-

- (a) provide guidance to curators with regard to the exercise of their functions so as to promote the proper fulfilment of the duties imposed and the exercise of powers conferred upon curators; and
- (b) facilitate the effective supervision of curators by the registrar in the best interest of the financial sector and investors.

3. General duties of curator

(1) Where a curator is appointed by a court in terms of section 5(1) of the Act, the powers and duties of the curator are set out in the Court Order in accordance with section 5(5).

(2) Where a curator is appointed by the registrar by agreement with the institution in terms of section 5(10) of the Act, the powers and duties of the curator are set out in the letter of appointment in accordance with section 5(11).

(3) A curator, when exercising the powers and carrying out the duties set out in the Court Order contemplated in section 5(5) or in the letter of appointment contemplated in section 5(11) of the Act, must-

- (a) at all times exercise the powers and carry out the duties honestly, fairly, with due care, skill and diligence and in the best interest of the institution and investors;
- (b) with regard to the funds of, or managed or under the control of, the institution, observe the utmost good faith and exercise proper care and diligence; and
- (c) exercise independent judgment and objectivity in decision-making.

4. Conflict of interest

(1) A curator may not have a conflict of interest-

- (a) between the curator's interest and those of the institution or investors;
- (b) in any transaction or agreement relating to the business of the institution or the exercise of the functions of the curator.

(2) A curator must report any conflict of interest that the curator becomes aware of, to the registrar without delay.

5. Investors

(1) A curator must maintain updated contact details of investors.

(2) A curator must keep the body of investors informed of the affairs of the curatorship by informing them when reports as envisaged in paragraphs 7 and 8 of these Guidelines are available on the web site of the curator or that of the registrar; provided that the curator must timeously respond to individual enquiries from investors regarding their specific interests not dealt with in the reports.

(3) Information contained in a report to the registrar may for purposes of publication on the web site, with the registrar's consent, be limited or omitted if publication of the information may prejudice legal or criminal proceedings against any person.

(4) The curator may, subject to subparagraph (5), publish on the curator's web site such information as may be of interest to investors as was not specifically dealt with in the reports referred to in subparagraph (2).

(5) A curator must preserve, or aid in preserving, the confidentiality of information obtained in the performance of the curator's functions, except-

- (a) to the extent that a court of law may order disclosure;
- (b) for the purposes of legal proceedings; or
- (c) insofar as disclosure may be necessary to perform the functions of a curator, including the need to communicate relevant information to investors.

6. Statutory requirements and record keeping

(1) A curator must ensure that all accounting and other statutory requirements pertaining to the institution are complied with, including-

- (a) the keeping of proper accounting and financial records;
- (b) the preparation and auditing of financial statements;
- (c) the submission of prescribed reports and returns to the registrar and other applicable authorities.

(2) A curator must keep records and minutes of all formal meetings held during the course of the curatorship.

(3) A curator must ensure the safekeeping of all records and documents of the institution or investors and may not destroy any record or document without the prior written approval of the registrar.

(4) Despite the provisions of subparagraphs (1), (2) and (3), the curator may on good cause apply to the registrar to be exempted or partially exempted from compliance with this paragraph; provided that in the case of subparagraph (1), the registrar is empowered by the applicable legislation to grant such exemption.

7. Reporting to the registrar

(1) A curator must regularly report, and in writing, to the registrar, including upon the registrar's request, on all curatorship activities, in particular-

- (a) the initiation, defence or settlement of legal proceedings, indicating in respect of each matter-
 - (i) who the attorneys of record for the parties are or were;
 - (ii) the fees incurred in respect of the curator's attorneys of record;
 - (iii) the legal disbursements incurred in respect of counsel and other service providers;

- (iv) whether or not litigation has been concluded;
- (v) in the case of concluded litigation, the outcome of the litigation;
- (vi) the amount recovered on taxation of legal costs;
- (b) the conclusion of a significant agreement, including an agreement relating to the disposal of assets done in accordance with the terms of the Court Order or the letter of appointment;
- (c) the continued adherence, or otherwise, by the institution to any statutory requirements;
- (d) any significant obstacles encountered in performing the curator's functions;
- (e) factors causing delays in progressing the curatorship;
- (f) any irregularity uncovered that may require regulatory action or the referral of a matter for criminal prosecution;
- (g) an overview of assets disposed of or alienated and how the proceeds will be distributed;
- (h) any matter which may require relief or sanction from the court;
- (i) the costs of the curatorship in accordance with paragraph 10 of these Guidelines; and
- (j) any recommendation as to how the continuation of the curatorship should be dealt with further.

(2) A curator must provide the report contemplated in subparagraph (1) at intervals and in the manner determined by the registrar if not determined by the order of court (where applicable).

8. Reporting to Court

(1) In the case of a curatorship ordered by Court, the curator must report to the Court in accordance with the terms of the initial and any subsequent Court Order.

(2) A copy of the report must be served on the registrar who must set the matter down for consideration of the report on the date provided for in the Court Order or if no date has been provided, as soon as possible.

(3) The curator's report only becomes public on the matter being called in Court.

9. Legal proceedings and forensic investigations conducted by curator

(1) Legal proceedings to be instituted or defended by a curator or any forensic investigation to be conducted with respect to the institution must be entrusted to an independent firm appointed by the curator, subject to the approval of the registrar.

(2) Despite subparagraph (1), a curator may apply to the registrar for authorisation to utilise the curator's firm for the purpose of instituting or defending legal proceedings, or for conducting a forensic or other investigation in relation to the institution or its business.

(3) An application by the curator under subparagraph (2) must set out all material aspects justifying the use of the curator's firm instead of an independent firm.

(4) The registrar may -

(a) in exceptional circumstances but subject to subparagraph (5), grant the application contemplated in subparagraph (2) with regard to all legal proceedings or forensic investigations during the curatorship, or relating to specific legal proceedings or an investigation only;

(b) impose any condition to which the approval is subject.

(5) Despite any provision of these Guidelines, the following legal proceedings or investigations may not be undertaken by the curator's firm:

(a) those instituted against the curator in which the conduct or integrity of the curator is, or may be, an issue;

(b) an application to set aside or alter any decision made, or any action taken, by the curator with regard to any matter arising from, or in connection with, the control and management of the business of the institution;

(c) an application to cancel the appointment of a curator as envisaged in section 5(9) of the Act; or

(d) any other legal proceedings or forensic investigation as may from time to time be determined by the registrar and communicated to the curator in writing.

10. Remuneration of curators

(1) The basis for a curator's remuneration shall be determined-

(a) by the Court Order contemplated in section 5(5) of the Act; or

(b) by the appointment letter contemplated in section 5(11) of the Act.

(2) Where the curator is-

(a) an auditor, the remuneration shall be based on the Auditor-General's tariff for outsourced arrangements;

(b) an advocate or attorney, the fee should be reasonable and in accordance with the norms of the legal profession as agreed between the registrar and the curator; or

(c) any other person, the fee must be reasonable and fixed by agreement between such person and the registrar,

provided that in the case of subparagraphs (a) and (b) the remuneration may be limited to a fixed amount or other reasonable amount as agreed between the curator and the registrar.

(3) (a) Where the institution does not have or control sufficient financial resources to cover the curator's remuneration, a curator may propose to the registrar a different basis for remuneration, including an arrangement whereby the curator will be entitled to a percentage of assets added to the estate of the institution or to the curatorship from time to time, but where the curator will not charge fees or disbursements in relation to the curatorship if no assets are so added.

(b) Any such arrangement proposed by a curator must be-

- (i) sanctioned in terms of an order of court as contemplated in section 5(5)(c) of the Act; or
- (ii) in the case of a curatorship under section 5(10) agreed to by the institution;

and may, in both instances, be made subject to a limitation.

11. Statements of accounts and invoices

(1) A curator must-

- (a) on a continual basis maintain statements of account for fees in respect of services rendered and disbursements incurred for and related to the curatorship;
- (b) periodically submit the statements of account in the format determined by the registrar for approval by the registrar prior to recovery of the fees or expenses from the institution or assets of investors, as the case may be.

(2) A statement of account must be accompanied by a full narrative of the services rendered supported by proof of disbursements and payments to other service providers as well as the time spent on the execution of the curator's functions.

(3) Payment to the curator may not be made directly from funds realised by the liquidation of assets, such funds must first be paid into the bank account held in the name of the curatorship.

(4) Payment to other service providers may not be made unless pursuant to an invoice approved by the curator and, in case of a joint curatorship, approved by all the curators.

(5) Advance payments must be dealt with as such in the accounting records and not as partial payments on invoices; provided that all advance payments must be approved by the registrar.

12. Settlement of legal proceedings

The curator may not take any decision regarding the settlement of legal proceedings except with the approval of the registrar, which approval must be in writing either upon the granting thereof or in confirmation of any earlier verbal approval.

13. Joint curatorship

- (1) Where more than one curator has been appointed--
- (a) the curators may decide on a work division between them and in such case must inform the registrar of the work division;
 - (b) the curators must hold regular and at least quarterly meetings which must be properly minuted, in which all material aspects of the curatorship are discussed;
 - (c) all formal reports, statements of account or other formal communication with the registrar must be signed by all the curators, except where a curator is temporarily unavailable and this requirement will unduly delay the progress of the curatorship.
- (2) Despite subparagraph (1)(a), curators are jointly responsible for the curatorship.

14. Transitional arrangements

Any legal proceedings instituted or defended or forensic investigations commenced, prior to the commencement of these Guidelines, and for which the curator's firm is utilised, may be concluded by the curator's firm.

14. Short title and commencement

These Guidelines are called the Guidelines on the Conduct of Curators and come into operation on publication.

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