**Adaptation of the ICGN Model Mandate Initiative for South Africa**
**July 2014**

---

## INTRODUCTION

The International Corporate Governance Network ('ICGN') has published suggested 'model contract terms' to be used between asset owners and their asset or fund managers (the 'ICGN Model Mandate'). The CRISA Committee instructed a legal team to review the ICGN Model Mandate for applicability in South Africa with respect to institutional investors including asset owners such as pension funds and insurance companies and specifically to providers of institutional investors such as asset managers and asset consultants. The review adapts the language for South Africa where necessary and does not extend to inserting more comprehensive language or improving language generally. Based on the legal comment the CRISA Committee has also added commentary where it is believed that it will be useful to the reader in understanding the interplay between the terms and South African legislation and regulation.

The CRISA committee would like to acknowledge the contribution of Jonathan Mort Inc and Bowman Gilfillan in producing this document.

The review refers to the following components of the South African regulatory framework: the Pension Funds Act, 1956, ('PFA'), and the regulations thereto, in particular Regulation 28 and the Conditions for Administration of Pension Funds, 2002, ('BN 24') the Financial Advisory and Intermediary Services Act, 2002 ('FAIS') and regulations and board notices promulgated there under, the Financial Institutions (Protection of Funds) Act, 2001 ('FIA'), the Collective Investment Schemes Control Act, 2002 ('CISCA'), the Securities Services Act, 2004 ('SSA'), the Code for Responsible Investing in South Africa ('CRISA'), the King Report on Governance for South Africa ('King III'), the Principles for Responsible Investment endorsed by the United Nations, UNPRI. Circulars issued by the Registrar of Pension Funds ('PF Circulars') have not been given much weight as they are not law and, with respect, do not necessarily reflect international best practice. Funds and managers sensitive to the content of PF circulars would need to include reference to the relevant circulars in their contract.

General comments are as follows:

- There are not many legal or significant obstacles to introducing contractual arrangements regarding environment, social and governance (ESG) requirements in the manner contemplated by the ICGN Model Mandate to the South African environment;

- 'This document is intended to supplement, not to replace or reproduce, such guidelines and offers clauses to reference them in management agreements as appropriate for a particular asset class. The intent is that the principles inherent in this document can be taken up and applied by clients into whatever fund management structure they have in place.'[1] [Emphasis added.]

- The clauses as they stand in the ICGN Model Mandate are minimal in terms of content or broadly stated and should therefore, ideally be expanded or clarified upon by the parties when drafting their respective agreements.

- Note that some of the clauses appear to serve no other point than to remind asset managers of their already existing duties (see for example, Clause 4).

- Note that for a fund to have some tangible contractual remedy where there is non-compliance on the part of the manager, standards from which to judge deviation from the mandate should, to the extent possible, be incorporated so that any breach, and the degree thereof, would be clearly identifiable and will provide the wronged party with a remedy where appropriate.

- The ICGN model mandate references a variety of schedules (eg. client investment policy) but does not provide best practice principles regarding the content of such schedules. In many cases where the clause imports reference to a specific schedule the success of such clause will depend on the content of the schedule. In the South African context, it may be prudent to propose model schedules where such schedules are not already regulated in order to ensure that the relevant clause achieves its desired result.

[1] See the preamble to the ICGN Model Mandate.

## CLAUSE-BY-CLAUSE COMMENTARY

The suggested changes are marked up in the original text of the ICGN Model Mandate below (by means of insertions denoted by underlined text and deletions by means), and follow the order and format of the ICGN Model Mandate. Comments appear below each clause where necessary.

## 1. PROPOSED MODEL TERMS OF HIGH-LEVEL COMMITMENT

The Manager acknowledges that it acts as a fiduciary on behalf of the Client and its investors/beneficiaries[2].

**Alternative 1:**

In carrying out its duties under this agreement, the Manager will manage the portfolio in accordance with the Client's responsible ownership policy, as attached at Schedule XX and as amended by the Client from time to time. [The Manager will also manage the portfolio in accordance with the Principles for Responsible Investment, to which the Client is a signatory.]

Alternative 2:

In carrying out its duties under this agreement, the Manager will take cognizance of the Client's responsible ownership policy, as attached at Schedule XX and as amended from time to time. [The Manager will also take cognizance of the Principles for Responsible Investment, to which the Client is a signatory.]

The Manager will not make investments which would contravene the Investment Policy Statement~~/Statement of Investment Principles~~ or would be in contravention of the restrictions on investments referred to in the Regulations governing the Client's authority.

### CRISA comment for parties to the mandate agreement:

The CRISA Committee recommends that the parties retain the clause which refers to the term “fiduciary duty” - this is a ‘minimally invasive’ approach and if it were not acceptable to a manager, it would be open to the parties to negotiate from this position. The remainder if this document provides for alternative clauses depending on whether the relationship is governed by fiduciary duty or in the alternative by contract.

[2] [Suggested alternative to the first sentence of this clause: “The Manager acknowledges that it will act in the utmost good faith and with proper care and diligence with respect to, and in the best interests of, the Client and its investors/beneficiaries”].

## 2. PROPOSED MODEL TERMS FOR ADHERENCE TO STANDARDS

The Manager will, in discharging its obligations under the Agreement, have regard to relevant industry best practice, specifically to the Principles for Responsible Investment and the standards laid out in Schedule YY. The Manager will meet the Disclosure Requirements of [CFA Institute's Asset Manager Code of Professional Conduct,] *CRISA, FAIS, the PFA and other applicable law, and will notify the Client within [5] business days of becoming aware of any actual or potential breach of any such requirement where timeframes in respect of reporting such actual or potential breach are not otherwise regulated by law.*

Proposed model terms for integration

Alternative 1 [where relations are governed by fiduciary duty]:

The Manager will ensure that its investment processes and individual decisions as relevant reflect the policies and standards set out in Schedules XX and YY *and undertakes to notify the Client within [5] business days if it experiences or perceives any difficulties with the implementation of Schedules XX and YY.* Where the Manager believes that any policies or standards conflict with one another or with the Manager's ~~fiduciary~~ legal ~~duty~~ duties, ~~to generate investment performance, whether generally or in specific circumstances~~, the Manager will consult in good faith with the Client as to which policies and standards shall and shall not be applied, *the application of which is in the Client's sole discretion.*

Alternative 2 [where relations are governed solely by contractual relationship]:

The Manager will ensure that its investment processes and individual decisions as relevant reflect the policies and standards set out in Schedules XX and *YY and undertakes to notify the Client within [5] business days if it experiences or perceives any difficulties with the implementation of Schedules XX and YY*. Where the Manager believes that any policies or standards conflict with one another or with the Manager's aim to generate investment performance, whether generally or in specific circumstances, the Manager will consult in good faith with the Client as to which policies and standards shall and shall not be applied. The Manager will have an investment process which incorporates relevant long-term factors ~~such as~~ including ESG issues consistent with the Client's responsible investment policy set forth in Schedule XX, and will establish relevant guidelines to this end. The Manager will ensure that its staff apply due care and diligence to following this process, ensure staff adhere to these guidelines, and report [at least annually] on implementation.

**CRISA comment for parties to the mandate agreement:**

There is a significant overlap between what is sought to be regulated by the CFA Code of Conduct, and relevant law (eg FAIS, regulation 28 of the PFA) in South Africa and thus the inclusion of the CFA Code of Conduct may well be to some degree superfluous. There may also be further overlaps in that the schedule may contain duties with respect to CRISA, Regulation 28 and so forth. If this is the case, the Fund may have to amend this clause accordingly. Immediate notification, to the extent possible, upon breach or impending breach of the mandate by the Manager will improve the enforceability of this clause.

In any event, Regulation 28 provides for extensive investment limitations relevant to the client's investment policy that should be adhered to by the manager.

## 3. PROPOSED MODEL TERMS FOR RISK MANAGEMENT

The Manager acknowledges that the Client is relying on the Manager's representations regarding its risk management capabilities as a material inducement to enter into this contract. The Manager's risk management practices as described in Schedule CC, including those relating to ESG and systemic concerns, are incorporated into and made a part of the Manager's ongoing obligations under this Contract.

The Manager will facilitate access by the Client to its staff and systems *to the extent that the Manager is able to do so while maintaining the confidentiality of information relating to other clients,* such that the Client can gain assurance on an ongoing basis that the Manager has appropriate risk management frameworks and processes in place to address impartially the full range of risks which may affect the value of the Portfolio and the interests of the Client's various investors/ beneficiaries.

**CRISA comments for parties to the mandate agreement:**

As this clause is quite generic, it is easily transferable as is to the South African context but would likely also require expansion on a client-by-client basis (in particular, a manager will want to specify its representations rather than leaving it open-ended).

The Client should not have any access to other clients' information as the manager is required in terms of FAIS to maintain the confidentiality of client information.[3]

Allowing a client access to the manager's systems and premises could be disruptive to the manager's operations and could give rise to additional costs which would be passed on to the client. The additional language inserted in the clause addresses confidentiality concerns that would arise should a fund be allowed to enter the manager's premises without restriction. An alternative approach to allowing client access to the manager's staff and would be to require that the manager disclose, and regularly report on its adherence to, its risk management practices with a right to the fund to carry out its own investigation if it is not satisfied. As in the case of the clauses above, the mandate should also give meaning to the content of Schedule CC to ensure substantive adherence to the principles included in the mandate. See comments to clause 7 below.

[3] See section 3(3) of the BN 80 of 8 August 2003: General Code of Conduct for Authorised Financial Services Providers and Representatives ('FSP Code of Conduct')

## 4. PROPOSED MODEL TERMS FOR INVESTMENT HORIZON

The Manager acknowledges that the risks which the Client and its investors/ beneficiaries face are not solely related to deviations from market benchmarks. The Manager acknowledges its need to consider long-term and systemic risk factors in order to manage risks which are relevant on the Client's long-term investment horizon and to the Client's fiduciary responsibilities.

**CRISA comment for parties to the mandate agreement:**

Consideration could be given to setting targets or benchmarks in the fund's investment policy statement or Schedule XX, thereby ensuring better protection is provided by way of the clause which requires the manager to follow the IPS and Schedule XX.

A long-term investment perspective is emphasised by Regulation 28 by the taking into account of long-term sustainability of investments, in particular considering the impact of ESG'. A flexible approach to investment is emphasised in the explanatory memorandum to Regulation 28:

'The Regulation does not prescribe what assets a fund should be invested in as this would counter the principles guiding a fund to act in its best interests. Instead, as already explained the Regulation requires a fund to explicitly consider its approach to ESG issues (with respect to its investments) and transformation (with respect to services provided to a fund). Moreover, economic development is more strongly supported by increased flexibility afforded to investment into private equity funds and public entity debt.'

## 5. PROPOSED MODEL TERMS FOR SYSTEMIC RESPONSIBILITY

The Manager acknowledges that both it and the Client rely on the integrity of the marketplace to generate returns for the Client's investors/beneficiaries. The Manager will play a positive role in supporting the maintenance of appropriate and fit-for-purpose market regulation and infrastructure, and will at least annually and in any event at the Client's request on no less than one month's notice, report to the Client on its activities in this regard.

**CRISA comment for parties to the mandate agreement:**

A client fund would be best advised to request references to specific examples of positive behaviour, for example commenting on draft notices and circulars or involvement on industry bodies and with industry initiatives.

The Client may provide written notice to the Manager if ~~substantial~~ activities are undertaken by the Manager or its affiliates which appear to the Client in its sole discretion to be materially adverse to the interests of the Client and its investors/beneficiaries in maintaining the integrity of the marketplace or fit-for-purpose market regulation and infrastructure ("Adverse Activities"). The Manager shall have ~~at least~~ [thirty (30)] days to respond in writing to the Client's notice. If the Client then determines, in good faith, that the Manager or its affiliates are continuing to engage in Adverse Activities, the Client may terminate this Contract ~~upon written notice and without further cause [under~~ in line with the Termination Provisions.

**CRISA comment for parties to the mandate agreement:**

This provision does not give the client any additional rights since the client's ultimate remedy is termination, which the client can invoke as of right in any event. However, it encourages dialogue between the parties. A list of defined activities could also be included (which includes specific prohibited investments relating to, eg. tobacco, child labour, any matter subject to UN embargo, nuclear, gambling) as a separate defined term in this section, in addition to the discretionary "Adverse Activities" outlined above.

## 6. PROPOSED MODEL TERMS FOR MONITORING ESG

[The Manager will have a process for monitoring current or potential investments in relation to relevant long-term factors such as ESG concerns. The Manager will ensure that its staff apply due care and diligence to applying this monitoring process, including considering the extent to which such long-term factors generate investment risks or opportunities.]

**CRISA comment for parties to the mandate agreement:**

The parties may wish to amend the bracketed language to tailor the clause to their needs. For example, these criteria may already be contained in a schedule. Alternatively, reference could be made to the investment policy instead.

## 7. PROPOSED MODEL TERMS FOR ONGOING DUE DILIGENCE

The Manager will facilitate access by the Client to its staff and systems, *to the extent that the Manager is able to do so while maintaining the confidentiality of information relating to other clients,* such that the Client can gain assurance on an ongoing basis that the Manager is appropriately implementing the Client's responsible investment policy set forth in Schedule XX, is acting consistently with the Client's investment policy statement and is monitoring key long-term risks and integrating such factors into its investment and risk management decision-making.

**CRISA comment for parties to the mandate agreement:**

The idea of providing the Client with access to do ongoing due diligence is transferable to South Africa, however, client confidentiality with respect to other clients must be maintained in terms of FAIS. The Client should not have any access to other clients' information.[4] In view of the potential costs of this, which the manager would no doubt pass on to the fund, an alternative would be to require a regular report from the Manager on its compliance with the Client's responsible investment policy etc, and require that the Manager must provide prompt responses on Client queries relating to the report, and rectify any perceived discrepancies, failing which a 'for cause' termination within an agreed upon amount of days (in terms of the Termination Provisions) may be triggered by the Client.
This clause could be combined with clause 3 above.

[4] See section 3(3) of the BN 80 of 8 August 2003: General Code of Conduct for Authorised Financial Services Providers and Representatives.

## 8. PROPOSED MODEL TERMS FOR STEWARDSHIP

The Manager will, in accordance with the policies and standards set out in Schedules XX and YY, engage in such activities as are appropriate in the circumstances to monitor and influence the management of the investee companies/underlying funds/underlying assets, where such activity is considered by the Manager to be likely to enhance the value of such securities or assets and in the best financial interests of the Client.

**CRISA comment for parties to the mandate agreement:**

This could be considered to be an extension of the 'good faith' and 'due care' components of the fiduciary duty that are imposed on the manager by FIA (see comments to clause 1 above).

## 9. ADDITIONAL CLAUSE FOR EQUITIES INVESTMENTS

In so doing, the Manager will adhere to the principles of the ICGN Statement of Principles on Institutional Shareholder Responsibilities~~/UK Stewardship Code/Eumedien best practice for engaged share ownership/ Code for Responsible Investing by Institutional Investors in South Africa/ EFAMA Code for External Governance [or local equivalent]~~. *CRISA / KING III Code on Corporate Governance.*
Additional clause depending on the extent of delegation of stewardship activities to the Manager (language used here is equity-specific but could be easily amended for relevant rights under other asset classes):
The Manager is granted authority to carry out the following rights in respect of assets held in the Portfolio: [voting/bringing forward counterproposals/proposing shareholder resolutions/calling for special audits/attending general meetings/calling an EGM/recovering the proceeds of class actions or other litigation brought by other parties/bringing class actions, derivative actions or other litigation]. An appropriate proportion of *[OR: x% of]* the costs of any such exercise of rights will be attributable to the Portfolio. The Client retains the following rights in respect of assets held in the Portfolio: [bringing class actions, derivative actions or other litigation/recovering the proceeds of class actions or other litigation brought by other parties/calling an EGM/attending general meetings/calling for special audits/proposing shareholder resolutions/ bringing forward counterproposals/ voting]. The Manager undertakes to raise with the Client situations in which the exercise of some of these rights might be appropriate, and the parties will agree on an appropriate good faith allocation of any associated costs *[OR: Split the costs according to a predefined ratio].*

**CRISA comment for parties to the mandate agreement:**

The cost-sharing arrangement should preferably be agreed to upfront, if possible. FAIS already requires financial service providers to obtain a written mandate before exercising voting rights on behalf of a fund (see comments to clause 10 below).

## 10. PROPOSED MODEL TERMS FOR VOTING

Alternative 1 [where Client or its agent has voting control]:
The Manager will enable the Client or its designated agent to direct the exercise of any voting rights attaching to the Portfolio investments.

Alternative 2 [where Manager votes according to Client guidelines]:
The Manager will procure the exercise of any voting rights attaching to the Portfolio investments in accordance with the Client's expressed voting guidelines, with a view to achieving best practice standards of corporate governance and equity stewardship and with realising the ~~aim of adding value to, the Portfolio, as well as reducing unwanted risk exposures~~ Client's investment aims as set out in the Investment Policy Statement.

Alternative 3 [where voting control delegated to Manager]:
The Manager will procure the exercise of all voting rights attached to the Portfolio investments on the Client's behalf, in accordance with the Managers' voting policy and any market-specific guidelines approved by the Client. The Client reserves the right to rescind, upon [one day's] advance written notice, the Manager's authority to make voting decisions for specific companies, issues or time periods. The Manager will use best endeavours to facilitate such Client voting decisions to be implemented. The Manager will have in place appropriate policies to manage any conflicts of interest in relation to voting matters and shall report at least quarterly on all votes involving companies where the Manager or an affiliate have a contractual relationship or other material financial interest.

**CRISA comment for parties to the mandate agreement:**

It is important to incorporate sufficient voting guidelines into an investment mandate so that institutional investors may influence companies in which they invest to improve a specific company's environmental and social performance in line with Regulation 28. The protection envisioned by this clause is consistent with 'shareholder activism' and mandate requirements already required by King III and FAIS, respectively:
King III states the following with regards to voting rights; these principles are echoed by CRISA:

'Recent experience indicates that market failures in relation to governance are, at least in part, due to an absence of active institutional investors. Institutional investors should be encouraged to vote and engage with companies, or require their agents through mandates to vote and engage. This will ensure that governance best practice principles are more consistently applied. [...]

The King Committee believes that a code should be drafted to specifically set out the expectations on institutional investors in ensuring companies apply the principles and recommended practices effectively. The code should encourage action that ensures all role players in the investment chain become aware of their duties.'
In line with the above recommendation by the King Committee, Codes of Conduct for Administrative and

Discretionary FSPs, have been published in terms of FAIS.[5] It states the following with regard to voting rights:

'An administrative FSP may not directly or indirectly without the relevant client's prior written approval [...] exercise voting rights on behalf of clients to gain control of a listed or unlisted company, except where such voting rights are exercised to protect the interests of clients on whose behalf the listed or unlisted securities involved are held, or on the instructions of such clients.'[6]

'A discretionary FSP must obtain a signed mandate from a client, before rendering any intermediary service to that client [which must] [...] stipulate whether the discretionary FSP may vote on behalf of its clients in respect of their financial products.'[7]

As regards the wording in alternative 2 we recommend cross-referencing to the investment strategy as set out in the IPS.

[5] BN 79 of 8 August 2003.

[6] Paragraph 3(1) (c) of the respective Codes of Conduct for Administrative and Discretionary FSPs.

[7] Paragraph 5(1) (k) of the Codes of Conduct for Administrative and Discretionary FSPs. See paragraph 5 generally for further guidance on FSP mandates.

## 11. PROPOSED MODEL TERMS FOR STOCK LENDING SCRIP LENDING

Alternative 1 [where lending is to be done by the Manager]:

Save as agreed from time to time between the Manager and the Client, the Manager may *not* enter into arrangements to lend to a third party investments and other assets or documents of title or certificates evidencing title to investments and other assets held in the Portfolio. The Manager agrees to make available to the Client a list of Portfolio investments out on loan at any given time, on the basis laid out in Schedule ZZ. The Manager agrees that the Client or its agent may from time to time provide a list of those investments or assets which shall not be lent or shall promptly be recalled if out on loan *in line with the Fund's unqualified right of recall.* No new loans will be made of these listed investments or assets, and recalls will be triggered as soon as notice is given. The Manager will consider whether it should recommend to the Client that any individual investment or asset, or class of investments or assets, should be excluded from lending activities from time to time to protect the value of the Portfolio, minimise systemic risks or exposure to other risks. The manager will comply with Board Notice 5 of 2011 which prescribes conditions for securities lending transactions.

Alternative 2 [where lending is to be done by the Client or its agent]:

The Manager shall not arrange for any Portfolio investments or documents of title or certificates evidencing title to such investments to be lent to any other person. The Client agrees to make available to the Manager a list of Portfolio investments out on loan at any given time, on the basis laid out in Schedule ZZ. The Client undertakes to consider any recommendation from the Manager that any individual investment or asset, or class of investments or assets, should be excluded from lending activities from time to time to protect the value of the Portfolio.

Additional clause where lending is done by the Manager: The Manager shall report at least quarterly on (a) holdings which were recalled for proxy voting, specifying how such votes were cast, and (b) holdings which were on loan and not voted by the Manager on matters involving approval of a merger or acquisition transaction, a contested director election, an executive remuneration issue which received a [20 percent or more] shareholder vote against the company [and (specify other key Client proxy voting issues)].

Additional clause where lending is done by the Manager: In carrying out its ~~stock~~ scrip lending activities under this agreement, the Manager will take cognizance of the International Securities Lending Association stock borrowing and lending code of practice, the ICGN Securities Lending Code of Best Practice and comply with Board Notice 5 of 2011 which prescribes conditions for securities lending transactions. This will include but not be limited to the Manager seeking to ensure that its counterparties in any stock lending transaction will not seek to vote the Portfolio securities they have been lent and to comply with all reporting requirements therein.

*CRISA comment for parties to the mandate agreement:*

Board Notice 5 already extensively regulates scrip lending. In this regard South Africa may have more regulatory protection than many other jurisdictions.

In South Africa, stock lending is referred to as 'scrip lending'. When scrip (shares) belonging to a pension fund are lent by an asset manager to a third party, a fee is paid by the borrower. It is important that an investment mandate contain a provision regulating scrip lending as asset managers in the past have engaged in scrip lending without disclosing such practice to their client and further has not disclosed the fee and paid it over to the client (the pension fund).

Because of the fee that may be charged it may be in the funds interests to allow scrip lending in respect of the large amount of idle equities that are held by funds, provided that the asset manager is mandated to engage in scrip lending only with the funds approval and the manager acts within such mandate. Further fees received by the manager on the fund's behalf would need to be appropriately disclosed to, and paid to, the fund.

CISCA contains the following provision at section 91(1) (g):

'A deed of collective investment must contain provisions regarding the limits, terms and conditions under which scrip may be lent.'

It is trite that a trustee's duties may be delegated and not abdicated. In terms of section 7C of the Pension Funds Act trustees have the duty to act with due skill, care and diligence. Nic Louw points out[8] that when it comes to scrip lending, the trustees will only be acting in compliance with these duties where:

- *'Proper contracts are drawn up that protect members' interests;*
- *Internal controls and procedures are in place before lending activities commence;*
- *There are appropriate risk-management systems and procedures;*
- *All counterparties are properly vetted and assessed for creditworthiness;*
- *Suitable collateral is provided by borrowers;*
- *Trustees are acquainted with what scrip lending entails; and*
- *International best practice is followed.'*

The Registrar, on 20 December 2011, prescribed conditions for securities lending transactions for pension funds as per Regulation 28(3) in Board Notice 5 of 2011. In broad terms it sets out various conditions with which a fund must comply when engaging in securities lending transactions. Note in particular the following provisions:

- Paragraph 2.1.3(a) provides that where the administration of a securities-lending transaction is outsourced the institution to which it is outsourced has the necessary experience and expertise to perform the required duties in a competent and responsible manner.
- Paragraph 2.1.3(b) provides that where the administration of a securities lending transaction is

[8] Nic Louw 'A script for scrip lenders' *Today's Trustee* September/October 2006.

outsourced the administrative and reporting arrangements are clearly set out and agreed to in writing. This is something which the Fund must address with the manager on a case by case basis if lending is being carried out by the manager.

- The manager is subject to various reporting requirements (for example, requirement on the manager to make available to the Fund a list of portfolio investments out on loan; at least quarterly reporting on holdings recalled for proxy voting and holdings on loan but not voted).

We have included a reference to Board Notice 5 in the clause and stipulated that the manager must comply with it. Compliance is a stronger obligation than the requirement to "take cognisance of" the relevant codes of practice.

## 12. PROPOSED MODEL TERMS FOR FEES, REMUNERATION AND CULTURE

The Manager will ensure that the pay structures of its staff align their interests appropriately with those of the Client and its investors/beneficiaries, as well as the investment time horizon of the Portfolio. The Manager will disclose how this is done and other efforts it is making to ensure that its incentive structure is appropriate for generating balanced long-term risk-adjusted investment returns.

Unless otherwise disclosed in writing, the Manager represents and warrants that at least [50%] of the compensation for each person who exercises investment authority for the Portfolio shall be tied to risk-adjusted Client returns over at least [three] years.

**CRISA comment for parties to the mandate agreement:**

In addition to the obvious transparency benefits of such a clause, the proposed model term seeks to tie compensation of investment managers to investment returns in order to incentivise managers and create aligned interests on the part of the managers and the fund. There does not seem to be any regulations in South Africa prohibiting such a remuneration clause. Managers may wish to negotiate contractual provisions which may restrict how they incentivise their staff.

## 13. PROPOSED MODEL TERMS FOR PORTFOLIO TURNOVER

The expected annual turnover for this investment strategy is expected to range between XX% and YY%, though the Client acknowledges that certain market circumstances and appropriate investment decision-making may lead it to accept a level exceeding this. The Manager will report Portfolio turnover *and associated costs* on a quarterly basis and will provide an explanation if turnover is less than XX% or exceeds YY% on an annualised basis over the quarter. The Manager will also provide an explanation if Portfolio turnover is less than XX% or exceeds YY% in a given year. The Manager may ask for a review of the expected turnover level on an annual basis.

**CRISA comment for parties to the mandate agreement:**

There are no legal prohibitions to introduce this language into asset management agreements governed by South African law. In fact, although not law, PF Circular 130, states the following in an attempt to create certainty regarding the investment expectations of the board:
'It is important that the board ensures that the mandates given to service providers clearly define the board's expectations and reporting requirements relating to the performance of the investments. The board should therefore not endorse mandates or agreements that are vague or ambiguous. Any contractual arrangement between a fund and an investment manager should set out clearly the benchmarks against which performance will be measured. Any contract should be on such terms and conditions that are acceptable to the fund, and may require independent legal advice being given to the fund in that regard.

A fund investment policy statement (IPS) should be communicated to stakeholders, and reviewed annually (when considering the financial statements) to ensure it remains appropriate in terms of the member-profile and needs of the fund.'

Regulation 28 provides that a fund must ensure that the fund's assets are appropriate for its liabilities. Regular reporting on fund turnover will allow the board to understand the changing risk profile of assets of the fund over time thereby allowing the board to monitor whether the assets are managed optimally and remain within the investment policies of the client. This is in line with the Trustees' duty to maintain proper control of the assets of the fund and the investment thereof, ensuring that adequate financial resources are available to meet the fund's commitments to its members and manage the risks to which the fund is exposed.
The increased transaction costs associated with a high turnover of assets should also be disclosed with the other relevant costs to be disclosed in terms of the fee or cost provisions of the agreement.

## 14. PROPOSED MODEL TERMS FOR TRANSPARENCY ON DEVELOPMENTS

~~Within {one week}~~The Manager must, at the earliest reasonable opportunity possible, but not exceeding one week after becoming aware of a relevant event, ~~the Manager will~~ inform the Client of any regulatory investigation or legal proceedings against the Manager, any of its key staff or ~~the~~ any fund in which the Client's assets are invested, a breach of applicable capital adequacy requirements for long term insurers or financial soundness requirements for financial service providers or the departure of any key staff, significant changes in the business structure or ownership of the Manager, material changes to the advisers or service providers to the Manager/Fund, including the auditor, administrator or any custodian or prime broker, if at any time the Client's investment becomes more than 10%, 25% or 50% of the Fund (or such other percentage amount or amounts as the Client shall from time to time specify in written notice); any sales [of more than R100, 000 per quarter] by key staff of personal investments in the Fund or any equivalent vehicle managed by the Manager, or any sales of staff shareholdings in the Manager itself, changes to the board structure or membership of any fund structure through which the Client invests, and material changes in investment approach, including but not limited to the responsible investment approach, or risk appetite over the life of the investment.

Alternative 1 [where the Manager is a public company]:
The Manager will provide the Client with its accounts immediately after they are published.

Alternative 2 [where the Manager is a private company]:
The Manager will provide the Client with its management accounts on a quarterly basis.

*CRISA comment for parties to the mandate agreement:*

This clause is easily transferable, though notification requirements from the manager's side could be viewed by the manager as onerous and pushback may well be expected from the manager when negotiating a contract that includes all the suggested reporting requirements in the ICGN Model Mandate, as adapted. While reporting and managing of the manager's activities are important functions, over-regulating managers on this point may significantly increase manager's costs, which will naturally be passed on to funds and ultimately borne by members. The purpose of this clause is to give an early warning of factors which may detrimentally affect the manager's performance. Funds must therefore balance the benefits of the early warning system against the costs arising from it and negotiate with the manager accordingly.

Note that managers are required to provide the following information to Funds in terms of The FSP Code of Conduct which states that the following information regarding the financial service provider must be provided to clients 'at the earliest reasonable opportunity':

The provider must at the earliest reasonable opportunity furnish the client with full particulars of the following information and, where such information is provided orally, must confirm such information within 30 days in writing: [9]

(a) full business and trade names, registration number (if any), postal and physical addresses, telephone and, where applicable, cellular phone number, and internet and e-mail addresses, in respect of the relevant business carried on, as well as the names and contact details of appropriate contact persons or offices;

(b) concise details of the legal and contractual status of the provider, including details as regards the relevant product supplier (or, in the case of a representative, as regards the relevant provider and product supplier), to be provided in a manner which can reasonably be expected to make it clear to the client which entity accepts responsibility for the actions of the provider or representative in the rendering of the financial service involved and the extent to which the client will have to accept such responsibility;

(c) names and contact details of the relevant compliance department or, in the case of a representative, such detail concerning the provider to which the representative is contracted;

(d) details of the financial services which the provider is authorised to provide in terms of the relevant licence and of any conditions or restrictions applicable thereto;

(e) whether the provider holds guarantees or professional indemnity or fidelity insurance cover or not.

(f) whether a representative of a provider is rendering services under supervision as defined in the determination of Fit and Proper Requirements; and

(g) the existence of a specific exemption that the Registrar may have granted to the provider with regard to any matter covered by the Act.'

Board Notice 30 of 2003 further states that information provided to a client by the financial service providers must be factually correct. It is thus important that the fund is promptly notified of any changes regarding the information it has been given. Further, a provider must have appropriate procedures and systems in place to store and retrieve such records and any other material documentation relating to the client or the financial services rendered to the client; and must ensure that they are available for inspection within seven days of the registrar's request.

An added requirement is to notify where there is a breach of capital adequacy requirements (for long term insurers – pursuant to item 2 of Schedule 3 of the Long Term Insurance Act 1998) or the financial soundness requirements of Part IX of BN106 (Determination of Fit and Proper Requirements for Financial Services Providers), as relevant.

Since all authorised financial service providers and managers of collective investment schemes in SA must, in terms of FAIS and CISCA respectively, produce audited accounts annually, alternative 1 of the accounts clause is more likely to be relevant in the South African context.

[9] See section 5 Part IV of the BN 80 of 8 August 2003: General Code of Conduct for Authorised Financial Services Providers and Representatives

## 15. PROPOSED MODEL TERMS FOR CONFLICTS OF INTEREST

The Manager will establish and maintain a conflicts of interest policy. The current version of this policy is in Schedule AA. *Where the Manager is of the view that a conflict may arise it must at the earliest reasonable opportunity advise the Client in writing of this and of any steps it believes would be appropriate for the Manager or the Client to take to avoid or minimise the risks associated with that conflict; and take such steps as it may be instructed by the Client to take to avoid or minimise the risks associated with such a conflict.* The Manager will inform the Client of material amendments to, and waivers of, this policy from time to time, within [one month] of such event. The Manager will ensure that it adheres to this policy at all times save as provided elsewhere in this clause and, in particular, *must in good faith consider whether any act which it proposes may create a conflict between its own interests or the interests of any other of its clients and its duties towards the Client* such that it effectively identifies and manages any conflict or potential conflict. ~~s with the Manager's duty to the Client or otherwise entailing a material risk of damage to the interest of the Client or its investors/beneficiaries.~~ Where the Manager does not consider that the arrangements under its conflicts of interest policy are sufficient to manage a particular conflict, it will inform the Client of the nature of the conflict so that the parties can agree how to proceed.

**CRISA comment for parties to the mandate agreement:**

FAIS already regulates 'conflicts of interests' fairly extensively.

A 'conflict of interest', as contemplated in FAIS, means any situation in which a provider or a representative has an actual or potential interest that may, in rendering a financial service to a client, influence the objective performance of his, her or its obligations to that client; or prevent a provider or representative from rendering an unbiased and fair financial service to that client, or from acting in the interests of that client, including, but not limited to, financial interests, ownership interests and any relationship with a third party.

Existing statutory requirements should be borne in mind when negotiating further amendments to the model clause, examples of which follow below.

The FSP Code of Conduct already requires that all providers and representatives[10] at paragraphs 3(b)-(c):

'(b) a provider and a representative must avoid and where this is not possible mitigate, any conflict of interest between the provider and a client or the representative and a client;

(c) a provider or a representative must, in writing, at the earliest reasonable opportunity—

(i) disclose to a client any conflict of interest in respect of that client, including—

(aa) the measures taken, in accordance with the conflict of interest management policy of the provider referred to in section 3A (2), to avoid or mitigate the conflict;

(bb) any ownership interest or financial interest, other than an immaterial financial interest, that the

[10] As defined in section 1 of FAIS.

provider or representative may be or become eligible for;

(cc) the nature of any relationship or arrangement with a third party that gives rise to a conflict of interest, in sufficient detail to a client to enable the client to understand the exact nature of the relationship or arrangement and the conflict of interest; and

(ii) inform a client of the conflict of interest management policy referred to in section 3A (2) and how it may be accessed.

Paragraph 3A of the FSP Code of Conduct further already provides that FSPs must adopt a conflict of interest policy that complies with FAIS, which must be regularly monitored and reviewed:

'(2)(*a*) Every provider, other than a representative, must adopt, maintain and implement a conflict of interest management policy that complies with the provisions of the Act.

(b) A conflict of interest management policy must—

(i) provide for the management of conflicts of interest as defined in section 1 [of FAIS], and—

(*aa*) mechanisms for the identification of conflicts of interest;

(*bb*) measures for the avoidance of conflicts of interest, and where avoidance is not possible, the reasons therefore and the measures for the mitigation of such conflicts of interest;

(*cc*) measures for the disclosure of conflicts of interest;

(*dd*) processes, procedures and internal controls to facilitate compliance with the policy; and

(*ee*) consequences of non-compliance with the policy by the provider's employees and representatives; and

(ii) specify the type of and the basis on which a representative will qualify for a financial interest that the provider will offer a representative and motivate how that financial interest complies with section 3A (1) (*b*);

(iii) include a list of all its associates;

(v) include the names of any third parties in which the provider hold an ownership interest;

(vi) include the names of any third parties that holds an ownership interest in the provider; and

(vii) include the nature and extent of the ownership interest referred to in subparagraph (v) and (vi); and

(viii) be drafted in an easily comprehensible form and manner.

(*c*) A conflict of interest management policy must be adopted by the sole proprietor of a provider, the board of directors of a provider or, in the case where a provider is not a company, the governing body of the provider.

(*d*) A provider must ensure that its employees, representatives and, where appropriate, associates are aware of the contents of its conflict of interest management policy and provide for appropriate training and educational material in this regard.

(*e*) A provider must continuously monitor compliance with its conflict of interest management policy and annually conduct a review of the policy.

(*f*) A provider must publish its conflict of interest management policy in appropriate media and ensure that it is easily accessible for public inspection at all reasonable times.

(3) A provider or representative may not avoid, limit or circumvent or attempt to avoid, limit or circumvent compliance with this section through an associate or an arrangement involving an associate.

(4) (*a*) A compliance officer or, where the provider need not, in terms of the Act, have a compliance officer, the provider, must include a report on the provider's conflict of interest management policy in compliance reports submitted to the Registrar under the Act.

(b) The report referred to in paragraph (*a*) must report on at least the implementation, monitoring and compliance with, and the accessibility of the conflict of interest management policy.'

The FSP Code of Conduct further provides that a financial services provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.

In line with this it was held in *Transvaal Cold Storage v Palmer*[11] that:

"The principal [in this case, the fund] bargains for the disinterested skill, diligence and zeal of the agent for his own exclusive benefit, confident he will act with a sole regard for the interests of the principal…He must, while holding the position of trust and confidence, prefer the interests of his principal even to his own in a case of conflict, and to his skill, diligence and zeal must be added the utmost good faith"

Further, section 13B of the PFA states that an administrator contemplated in subsection (1) must -

'(a) endeavour to avoid conflict between the interests of the administrator and the duties owed to the fund, and any conflict of interest or potential conflict of interest must be disclosed by the administrator to the board setting out full particulars of how such conflict will be managed.'

Although the wording is not inconsistent with South African legislation, it has been strengthened to make it clear that the manager will be aware of, and if appropriate manage, potential as well as actual conflicts of interest and to require it to take certain actions where a conflict has arisen or may arise. If the manager's conflicts policy deals with these issues, the additional wording is not strictly necessary.

[11] 1904 TS 4.

## 16. PROPOSED MODEL TERMS FOR COMMISSION

The Manager will act in good faith and with due diligence and care [pursuant to its fiduciary duties] in the selection and use of all dealers and brokers appointed pursuant to this IMA and agreeing relevant terms on behalf of the Client. The Manager will actively consider whether any payments made are appropriately in the Client's interests. The Manager's policy regarding its dealing arrangements and choice of brokers is disclosed as Schedule BB. In effecting transactions for the Portfolio, the Manager will at all times comply with this policy, and comply with any applicable obligations regarding best execution in terms of FAIS, the PFA and regulations and notices published thereunder and other applicable law.~~[relevant regulator's] rules. The Manager will also comply with applicable requirements regarding soft commission under [relevant regulator's] rul~~es. *Any interest accruing to the fund's portfolio must be paid to the fund after any fees owing to the Manager have been deducted.*

The Manager acknowledges the Client's determination that it is in the interests of the Client's investors/beneficiaries to allocate commission payments towards research on long-term, ESG and systemic investment or risk issues relevant to management of the Portfolio under the Client's responsible investment policy set forth in Schedule XX. The Manager shall ensure that at least [5]% of Portfolio commissions allocated to research are paid to acquire quality research that reflects an enhanced analytics evaluation of long-term, ESG and systemic investment or risk issues. The Manager shall report at least quarterly on research expenditures.

**CRISA comment for parties to the mandate agreement:**

The good faith and related duties of FSPs are already outlined in FAIS.

The FSP Code of Conduct states that where a service provider renders a service to a client adequate information must be made available to a client, which information must include:

'As regards all amounts, sums, values, charges, fees, remuneration, or monetary obligations mentioned or referred to therein and payable to the product supplier or the provider, be reflected in specific monetary terms: provided that where any such amount, sum, value, charge, fee, remuneration or monetary obligation is not reasonably pre-determinable, its basis of calculation must be adequately described.'[12]

FAIS and the Code of Conduct for Administrative and Discretionary FSP's, published there under, states the following:

'An administrative FSP must obtain a signed mandate from a client, before rendering any intermediary

[12] See section 3(1)(vii) Part II of the BN 80 of 8 August 2003: General Code of Conduct for Authorised Financial Services Providers and Representatives

service to that client.[13] The mandate must comply with the following minimum requirements in respect of fees:

[the mandate should] stipulate separately in respect of the administrative FSP and the other FSP (if any), the total fees and benefits to be received by each in respect of a client's financial products, whether by way of a deduction from the financial product or not, including –

(i) the initial fees or costs;

(ii) ongoing fees or costs;

(iii) any other benefit, fees or costs, whether in cash or kind;

(iv) costs (if any) to have the financial products registered in the name of the client or in the name of the nominee company of another administrative FSP at the request of the client or at termination;

(v) any fees or costs that will be levied on additional investment in or purchase of the same financial product; and

(g) the signatures of the client, as well as the other FSP, where applicable.'

And, with respect to discretionary FSPs, states that:[14]

'A discretionary FSP must obtain a signed mandate from a client, before rendering any intermediary service to that client which must stipulate:[15]

- the basis on which, the manner in which and the intervals at which the client will remunerate the discretionary FSP for the rendering of intermediary services on the client's behalf: Provided that for the purposes of this paragraph it shall be deemed that the basis of the remuneration has not been stipulated if the remuneration must be calculated with reference to a source outside the mandate or if it is placed within the discretion of any person;[16]

- whether the discretionary FSP receives commission, incentives, fee reductions or rebates from an administrative FSP or product supplier for placing a client's funds with them.'[17]

The FSP Code of Conduct states at paragraph 7(1)(c)(vi):[18]

'Subject to the provisions of this Code, a provider other than a direct marketer, must in particular, at the earliest reasonable opportunity, provide, where applicable, full and appropriate information of the following: the nature, extent and frequency of any incentive, remuneration, consideration, commission, fee or brokerages ("valuable consideration"), which will or may become payable to the provider, directly or

[13] See Chapter 1, section 5.1 of the BN 79 of 8 August 2003: Codes of Conduct for Administrative and Discretionary FSPs
[14] See Chapter 1, section 5.2 (f)-(g) Part II of the BN 79 of 8 August 2003
[15] See Chapter 2, section 5.1 Part II of the BN 79 of 8 August 2003
[16] See Chapter 2, section 5.1 (g) Part II of the BN 79 of 8 August 2003
[17] See Chapter 2, section 5.1 (h) Part II of the BN 79 of 8 August 2003
[18] BN 80 of 8 August 2003

indirectly, by any product supplier or any person other than the client, or for which the provider may become eligible, as a result of rendering of the financial service, as well as the identity of the product supplier or other person providing or offering the valuable consideration: Provided that where the maximum amount or rate of such valuable consideration is prescribed by any law, the provider may elect to disclose either the actual amount applicable or such prescribed maximum amount or rate.'

More detailed guidance on the disclosure of soft commissions should be considered given the paucity of statutory protection of funds in South Africa in this regard relative to many other common law jurisdictions. The FSB has stated that it intends to address the issue, but there is currently no legislation or regulatory guidance specifically relating to it.

Research on ESG related issues could potentially be justified in the context of Regulation 28. Regulation 28 specifies that prudent investing should give appropriate consideration to any factor, including factors of an environmental, social and governance character. It is thus seemingly necessary that research would need to be conducted to ensure the prudence of investments in ESG initiatives. Such research is also important to monitor market related ESG trends and would be important to update the fund's socially responsible investment policy which needs to be communicated to members.

## 17. PROPOSED MODEL TERMS FOR COUNTERPARTIES

The Manager will act in good faith and with reasonable skill and care [pursuant to its fiduciary duties] in its choice and use of counterparties in accordance with procedures previously disclosed to the Client. The Manager will monitor its counterparties on an ongoing basis and manage the Portfolio's overall exposure to any one counterparty such that risks of default or failure are appropriately controlled. The Manager will disclose on a [quarterly] basis the range of counterparties used during the quarter, the maximum and average exposures to each counterparty and the existing exposures at the end of the quarter. Such disclosures shall not in any way constitute a waiver of or consent to the Manager's exercise of its obligations.

**CRISA comment for parties to the mandate agreement:**

The good faith and related duties of FSPs are already outlined in FAIS. Counterparty risk is essentially the risk that a trading partner may fail or not perform in terms of the contract, exposing investments to unwanted risk. The value of any security held will always be dependent upon or derived from the fluctuating value of one or more underlying assets. The derivative agreement itself is merely a contract between two or more parties whereby the security holder attempts to manage their exposure to credit risk.

This clause seeks to increase transparency so the fund can better understand and monitor the risks of derivative transactions. Monitoring investments and risks to which investments may potentially be exposed to is further in line with the trustees' duty to maintain proper control over investments and fund assets.
PF Circular 133, pursuant to Regulation 28, although not enforceable, contains the following guidelines for trustees regarding investment in derivative instruments:
Where an investment policy of a fund allows for the investment in derivative investments, trustees should ensure that –

- investment mandates are in place and reviewed regularly and that such mandates are in compliance with the conditions set out in the same circular for investment in derivative instruments;
- actual investments are monitored for adherence to the investment mandate and mandate drift is managed; and
- risks including counterparty risk relating to investment in derivatives are understood and managed adequately.

There is no reason not to include this model term in an investment mandate. It expands upon PF Circular 133 creating further checks and balances. There may however be cost implications in detailed disclosure requirements. This clause should be in line with the fund's investment policy.

## 18. PROPOSED MODEL TERMS FOR REPORTING

In addition to reporting requirements set forth elsewhere, the Manager will supply quarterly reports, covering the reporting period, within [*90*] *d*ays after fiscal-quarter end, including:

Standards and High Level Commitment

- compliance with the policies and standards set out in Schedules XX and ~~, including any instances where those policies and standards were set aside in order to achieve investment objectives;
- governance structures at the fund manager and an explanation for any non-appliance of relevant best practice standards;

Systemic Risk

- key actions carried out to support the maintenance of fit-for-purpose regulation and market infrastructure for the Portfolio investments and risk exposures;

Monitoring

- the key material ESG concerns associated with Portfolio investments and an explanation how the Manager has sought to identify, monitor and manage them;

Stewardship, voting and stock lending

- a brief summary of the reporting period stewardship activities, including evidence of the effectiveness of those activities;
- full disclosure of voting activities over the reporting period, including an explanation of any exercises of discretion under the Manager's or Client's voting guidelines and conflicts of interest;
- the revenue from ~~stock~~ scrip lending activities, a list of any Portfolio investments excluded from lending activities during the reporting period and management of stock lending proxy voting considerations, including disclosure of any controversial votes where stock on loan was not recalled,

Turnover

- the turnover in the portfolio for the reporting period and an explanation if the turnover is outside the expected turnover range for the period,

Developments and conflicts

- any changes to governance, ownership or structure of the Manager, or in its investment approach or risk appetite,
- any regulatory investigation or legal proceedings against the Manager, any key staff or the Fund,
- any changes in staff ownership in the Fund or any equivalent vehicle managed by the Manager or changes in staff ownership in the Manager itself,
- regular financial accounts of the Manager, either [if Manager is public] after their publication or [if Manager is private] [quarterly] management accounts
- any changes in or waivers of the Manager's conflicts of interest policy, and
- any additional conflicts which have arisen over the reporting period

Commission and counterparties

- the payments made under the commission policy, highlighting any deviations from the policy, and
- the range of counterparties used during the reporting period, the maximum and rage exposures to each counterparty and the existing exposures at the end of the reporting period.

**CRISA comment for parties to the mandate agreement:**

Reporting systems and provisions for non-compliance with the mandate are important for trustees to maintain control over their fiduciary duties with regards to the investment of fund assets. The suggested timeframe is consistent with the quarterly non-compliance reporting required in terms of Regulation 28.

Regulation 28 further provides that a fund must at all times understand the changing risk profile of assets of the fund over time, taking into account comprehensive risk analysis, including but not limited to credit, market, liquidity and operational risk. It is thus important that any investment mandate contain a provision relating to the manager's duty to report to the fund on any changes to the investment approach or any other relevant events that may influence the risk profile of the investment.

Further, PF 130 provides as guidance that the risk management in a fund is a vital component of the governance of the fund and thus every fund should have in place a risk management policy which identifies, assesses and monitors risks including investment risks.

Section 16 of FAIS states that a code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions, that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied and that for those purposes authorised financial services providers, and their representatives, are obliged by the provisions of such code to act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry. The Code of Conduct for Administrative and Discretionary FSP's published under FAIS states the following:

An administrative FSP must-

Render to the client, on request and in a comprehensible and timely manner, any reasonable information regarding the financial products of the client and market practices and the risks inherent in the different markets and products concerned

Duties of discretionary FSP

A discretionary FSP must –

(a) provide to the client, on request in a comprehensible and timely manner, any reasonable information regarding the financial products of the client, market practices and the risks inherent in the different markets and products;

(b) prior to entering into a written or electronic mandate with the client –

(i) obtain information with regard to the client's financial circumstances, needs and objectives and such information that is necessary to enable the FSP to render suitable intermediary services to the client;

(ii) identify the financial products that best suit the client's objectives, risk profile and needs, subject to the limitations and restrictions imposed on the FSP by its licence issued under the Act. And further that a provider must have appropriate procedures and systems in place to-

- record such verbal and written communication relating to a financial service rendered to a client as are contemplated in the Act, this Code or any other Code drafted in terms of section 15 of the Act;
- store and retrieve such records and any other material documentation relating to the client or
- financial service rendered to the client; and
- keep such client records and documentation safe from destruction.

The FSP Code of Conduct provides that all such records must be kept for a period of five years after termination of the mandate, to the knowledge of the provider, of the product concerned or, in any other case, after the rendering of the financial service concerned. Providers are not required to keep the records themselves but must ensure that they are available for inspection within seven days of the registrar's request.

As stated above, stringent reporting requirements can place a heavy administrative and financial burden on asset managers. However, when considering the relationship between asset managers and pension funds as their clients, it is important to consider the fiduciary duties held by the trustees of those funds to act with proper care and due diligence when managing fund assets. Though trustees instruct specialists to invest fund assets it is important that they do not abdicate control completely. The suggested reporting requirements make sense provided the costs involved are justifiable. This will have to be determined by the relevant fund and asset manager on a case by case basis.

*The information contained in this document is of a general nature and is not intended to address the circumstances of any particular individual or entity. The views and opinions contained in this document are that of the CRISA committee and do not constitute legal doctrine. Although every endeavour is made to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. The Institute of Directors in Southern Africa shall not be liable to any loss or damage whether direct, indirect and consequential or otherwise which may be suffered, arising from any cause in connection with anything done or not done pursuant to the information presented herein.*