

**NON-BANK FINANCIAL INSTITUTIONS REGULATORY
AUTHORITY ACT, 2006**



No. 2

of 2007

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**FIRST SCHEDULE
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An Act to provide for the regulation of non-bank financial institutions for the purpose of enhancing the safety and soundness of non-bank financial institutions, setting high standards of conduct of business by non-bank financial institutions, improving the fairness, efficiency and orderliness of the non-bank financial sector and the stability of the financial system and reducing and deterring financial crime and for purposes incidental thereto and connected therewith

Date of assent: 23rd January, 2007

Date of commencement: On Notice

ENACTED by the Parliament of Botswana.

PART I — Preliminary

1. This Act may be cited as the Non-Bank Financial Institutions Regulatory Authority Act, 2006 and shall come into operation on such date as the Minister may by order appoint.

Short title and commencement

2. In this Act, unless the context otherwise requires —
“administrator”, in relation to a pension or provident fund, means a person who provides administration or similar services to the fund;
“asset manager” means a person who, under an agreement with another person, applies assets of the other person by way of investment, whether the asset manager makes those investments in its own name or not but does not include a custodian or a trustee;

Interpretation

“bank” means —

- (a) a bank licensed in terms of the Banking Act;
- (b) the Botswana Savings Bank;
- (c) the National Development Bank;

Cap. 46:04

Cap. 74:05

Cap. 56:03

“Board” means the Board of the Regulatory Authority established under section 11;

“central securities depository” means a facility for the deposit, clearing or settlement of securities transactions, whether physically, electronically or otherwise;

“Chairperson” means the person appointed as Chairperson in terms of section 11(3) (c);

“Chief Executive Officer” means the person appointed as Chief Executive Officer in terms of section 12 (1);

“Code of Conduct” means a code formulated in terms of section 39;

“collective investment undertaking” has the meaning assigned to it under the Collective Investment Undertakings Act;

Cap. 56:09

“controller”, of a non-bank financial institution, has the meaning assigned to it under section 4;

“custodian” means a person who holds property of another person for safe-keeping;

“Deputy Chairperson” means the person appointed as Deputy Chairperson in terms of section 11(4);

“Director”, in relation to a body corporate, means each of the following —

- (a) a person who is appointed to a position of director;
- (b) a person who is appointed to a position of alternate director and is acting in that capacity;

(c) a person who, although not appointed to a position of director or alternate director, acts as a director;

(d) a person in accordance with whose instructions or wishes the directors of the body corporate are accustomed to act;

but paragraph (d) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the body corporate;

"financial crime" means any of the following —

(a) a criminal offence (whether or not arising under this Act) that involves fraud or dishonesty relating to a non-bank financial institution;

(b) financing or facilitating a criminal offence (whether or not it arises under this Act) relating to a non-bank financial institution;

(c) dealing with the proceeds of a criminal offence (whether or not it arises under this Act, whether or not related to non-bank financial institution and whether or not the Proceeds of Serious Crime Act, applies in relation to the matter);

(d) the offence of money laundering in terms of section 14 of the Proceeds of Serious Crime Act;

(e) financing of terrorist activity in any place;

"financial group" means a group of companies under common control comprised one or more prudentially regulated non-banking financial institutions and their subsidiaries;

"financial report", in relation to a financial year, means the report prepared for the year in terms of section 32(1) (a);

"financial services" means services relating to financial matters;

"financial services law" means any of the following —

(a) this Act;

(b) the Insurance Industry Act;

(c) the International Insurance Act, 2005;

(d) the Pension and Provident Funds Act;

(e) the Botswana Stock Exchange Act;

(f) the Collective Investment Undertakings Act;

(g) Part XVI of the Income Tax Act, so far as it relates to non-bank financial institutions;

(h) a law that declares itself to be a financial services law for the purposes of this definition;

(i) a law prescribed for the purposes of this definition;
and includes the prudential rules;

"financial year" means a period of 12 months starting on 1 April;

"finance or leasing company" means a body corporate that provides loans, advances or leasing products, but does not include a bank or a deposit-taking institution;

Cap. 08:03

Cap. 46:01

No. 5 of 2005

Cap. 27:03

Cap. 56:08

Cap. 56:09

“friendly society” means an association of persons established with no share capital for the purpose of aiding members of the association or their dependants, being an association that does not employ a person whose main occupation is canvassing for members of, or collecting contributions or subscriptions for, the association;

“insurance agent” means a person who solicits applications for insurance or collecting premiums for an insurer;

“insurer” means a person who undertakes liabilities by way of insurance (including general insurance, life insurance and re-insurance), whether or not as a member of an association of underwriters, and includes a person operating a medical aid fund;

“insurance broker” means a person who arranges insurance otherwise than as agent of the insurer;

“international insurance firm” has the meaning assigned to it in the International Insurance Act, 2005;

No. 5 of 2005

“investment adviser” means a person who gives other persons investment advice or recommendations (including about holding and disposing of investments) in relation to securities or other assets;

“investigator” means each of the following —

(a) an employee of the Regulatory Authority appointed in terms of section 54 as an investigator;

(b) a person appointed in terms of section 19 (b) to conduct an examination or investigation under this Act;

“licence” means —

(a) a licence issued in terms of this Act; or

(b) a licence, registration or other permission issued in terms of another financial services law;

“manager”, in relation to a non-bank financial institution, includes an employee of the institution who exercises managerial functions in relation to the institution;

“management company”, for a collective investment undertaking, has the meaning assigned to it in the Collective Investment Undertakings Act;

Cap. 56:09

“medical aid fund” means a scheme that provides cover for financial or other assistance to persons in connection with prescribed medical services;

“member” means a member of the Board;

“member of the insurance industry” means an insurance surveyor, a risk manager, a loss assessor, a loss adjuster or a claims settlement agent;

“micro lender” means a person who advances loans to persons, where the loans do not exceed the prescribed amount, but does not include a person licensed in terms of the Banking Act or the Building Societies Act;

Cap. 46:04

Cap. 42:03

“non-bank financial institution” means any of the following —

(a) an asset manager;

(b) an administrator of a pension or provident fund;

(c) a person operating a central securities depository;

(d) a collective investment undertaking that is an investment company with variable capital;

- (e) a person operating a collective investment undertaking other than one described in paragraph (d);
- (f) a custodian;
- (g) a finance or leasing company;
- (h) a friendly society;
- (i) an insurance agent;
- (j) an insurance broker;
- (k) an insurer;
- (l) an international insurance firm;
- (m) an investment adviser;
- (n) a management company for a collective investment undertaking;
- (o) a member of the insurance industry;
- (p) a micro lender;
- (q) a pension or provident fund;
- (r) a securities dealer;
- (s) the operator of a securities exchange;
- (t) a trustee of a collective investment undertaking or a pension or provident fund;
- (u) a financial group;
- (v) a person prescribed for the purposes of this definition; and includes such an institution that provides financial services to persons outside Botswana;

Cap. 27:03

“pension or provident fund scheme” means a fund as defined in the Pension and Provident Funds Act;

“principal officer”, of a non-bank financial institution, means the person responsible for the daily management of the principal office in Botswana of the institution;

“prudentially regulated non-bank financial institution” means an institution declared as such under section 49;

“prudential rule” means a rule made in terms of section 50;

“records” of a non-bank financial institution means documents and information used in the ordinary course of the business of the institution, whether in written form or kept on microfilm, magnetic tape or any other form of mechanical or electronic medium;

“Regulatory Authority” means the Non-Bank Financial Institutions Regulatory Authority established under section 6;

“securities” means each of the following —

- (a) shares in, or debentures of, a company, a corporation or an unincorporated body;
- (b) stocks, bonds, certificates of deposit or depository receipts or treasury bills issued or proposed to be issued by a government;
- (c) rights, options or interests in respect of securities referred to in paragraph (a) or (b);
- (d) interests in a collective investment undertaking;
- (e) interests and instruments prescribed for the purposes of this definition;
- (f) derivatives;

“securities dealer” means any of the following —

- (a) a stockbroker as defined in the Botswana Stock Exchange Act;
- (b) a person who buys or sells securities on behalf of other persons;
- (c) a person who regularly buys or sells securities on his own behalf otherwise than through a licensed securities dealer;

Cap. 56:08

“securities exchange” means a market, exchange, place or facility that provides for bringing together, on a regular basis, buyers and sellers of securities to negotiate or conclude sales of securities;

“self-regulatory organization” means a body declared to be a self-regulatory organization in terms of subsection 58 (1);

“self-regulatory organization arrangements” means arrangements described in subsection 58 (2);

“statutory manager”, for a prudentially regulated non-bank financial institution, means a person appointed as statutory manager in terms of section 73 for the institution;

“supervisory levy” means a levy imposed by regulations made under section 23;

“tax certificate” means a certificate in terms of section 138 (2) of the Income Tax Act;

Cap. 52:01

“Tribunal” means the Tribunal established under section 85;

“trustee” means —

- (a) a collective investment undertaking that is a unit trust in relation to a person acting as trustee of the trust; and
- (b) in relation to a pension or provident fund, a person acting as a trustee of the fund.

3. For the purposes of a financial services law, the question whether a body corporate is a subsidiary of another body corporate shall be determined in accordance with the Companies Act, 2003 as if both bodies corporate were companies for the purposes of that Act.

Subsidiaries

No. 32 of 2004

4. (1) For the purposes of a financial services law, each of the following is a controller of a person (in this section called “the relevant person”) —

Controllers

- (a) a person who is in a position to control or exert significant influence over the business or financial operations of the relevant person;
- (b) if the relevant person is a body corporate —
 - (i) a director or member of the governing body of the body corporate;
 - (ii) a person that has the power to appoint a person to be a director or member of the governing body of the body corporate;
 - (iii) a person whose consent is needed for the appointment of a person as a director of the body corporate;
 - (iv) a person that holds at least 20 per cent of the shares of the body corporate;
 - (v) a person that has the power to control at least 20 per cent of the voting rights attached to shares or other securities of the body corporate;
 - (vi) a person that holds rights in relation to the body corporate that, if exercised, would result in that person holding at least 20 per cent of the shares of the body corporate; or that person having the power to control at least 20 per cent of the voting rights attached to shares or other securities of the body corporate;

(c) if the relevant person is a subsidiary of another person, a person that is a controller of the other body;

(d) if the relevant person is a prudentially regulated non-bank financial institution, a person declared by the Regulatory Authority in terms of subsection (3) to be a controller of the institution;

but a Minister or the Regulatory Authority, in that capacity, is not a controller of a relevant person.

(2) Prudential rules may modify subsection (1) (b) (iv), (v) or (vi) by substituting a lower percentage for 20 per cent, either generally or in a class of cases specified in the rules.

(3) The Regulatory Authority may declare in writing that a specified person is or is not a controller of a prudentially regulated non-bank financial institution, and notice of such declaration shall be given to the person so declared.

(4) The Regulatory Authority shall not make a declaration in terms of subsection (3) that a person is a controller of a prudentially regulated non-bank financial institution unless —

(a) the person has been given notice of the proposed declaration and a reasonable opportunity to make representations to the Regulatory Authority about the matter; and

(b) the Regulatory Authority is satisfied that the person is in a position to control or exert significant influence over the business or financial operations of the institution.

Republic, etc. to be bound

5. This Act and the financial services laws bind the Republic and the Government.

PART II — *Non-Bank Financial Institutions Regulatory Authority*

Establishment, objects and constitution of Non-Bank Financial Institutions Regulatory Authority

Establishment of Regulatory Authority

6. (1) There is hereby established a Regulatory Authority, to be called the Non-Bank Financial Institutions Regulatory Authority.

(2) The Regulatory Authority is a body corporate with perpetual succession and a common seal, capable of suing and being sued in its own name and, subject to the provisions of this Act, of performing such acts as bodies corporate may by law perform.

Functions of Regulatory Authority

7. The Regulatory Authority has the following functions —

(a) the functions conferred by this Act and by the other financial services laws;

(b) the functions of regulatory authority in terms of the other financial services laws;

(c) the function of advising the Minister on matters related to non-bank financial institutions and financial services, whether of its own accord or at the request of the Minister;

(d) such other functions as are conferred on it by law.

8. The principal object of the Regulatory Authority is to regulate and supervise non-bank financial institutions so as to foster the —

- (a) safety and soundness of non-bank financial institutions;
- (b) highest standards of conduct of business by non-bank financial institutions;
- (c) fairness, efficiency and orderliness of the non-bank financial sector;
- (d) stability of the financial system; and
- (e) reduction and deterrence of financial crime.

Principal
objects of
Regulatory
Authority

9. If the Regulatory Authority believes that a prudentially regulated non-bank financial institution is financially unsound and the situation may impair the stability of the financial system or the safety and soundness of financial institutions generally the Regulatory Authority shall report the matter to the Bank of Botswana and the Minister.

Regulatory
Authority to
report on non-
bank financial
institutions

10. (1) If, after consultation with the Regulatory Authority, the Minister is of the opinion that the policies being pursued by the Regulatory Authority are not adequate for, or conducive to, the achievement of the objects of the Regulatory Authority as set out in section 8, the Minister may, by directive, determine the policy to be adopted by the Regulatory Authority.

Policy
directions by
Minister

(2) The Regulatory Authority shall give effect to the notified policy while the directive remains in force.

(3) A directive issued in terms of subsection (1) shall be published in the Gazette within 7 days after it is given to the Regulatory Authority.

The Board and staff of the Regulatory Authority

11. (1) There shall be a Board of the Regulatory Authority.

The Board

(2) Subject to this Act, the Board shall be responsible for the policy and general administration of the Regulatory Authority, and may exercise all the powers of the Regulatory Authority.

(3) The Board shall consist of —

- (a) the Governor of the Bank of Botswana;
- (b) the Permanent Secretary of the Ministry responsible for finance; and
- (c) four other persons appointed by the Minister, one of whom shall be appointed by the Minister to be Chairperson of the Regulatory Authority.

(4) The Board shall appoint, from the members appointed in terms of subsection (3) (c), a member to be Deputy Chairperson.

(5) The performance of the Regulatory Authority's functions and the exercise of its powers shall not be affected by a vacancy in the office of a member.

Appointment of
Chief Executive
Officer

12. (1) The Minister shall appoint, on the recommendation of the Board, the Chief Executive Officer of the Regulatory Authority.

(2) While holding office, the Chief Executive Officer shall devote the whole of his or her professional services to the Regulatory Authority and shall not, without the written approval of the Minister, receive any salary or supplement to salary from any source other than the Regulatory Authority, or occupy any other office or employment, whether remunerated or not, except as a nominee of the Regulatory Authority.

(3) Subsection (2) does not prevent the Chief Executive Officer from serving as a member of a board, committee or Regulatory Authority established by Government, or holding office as a member of the board of any other body, or an international financial organization, of which Botswana is a member.

(4) Subject to this Act, the terms and conditions on which the Chief Executive Officer holds office are to be as determined by the Board.

Period of
office

13. (1) The member referred to in section 11 (3) (c) shall hold office for the period specified in the instrument of his or her appointment, which shall not be more than 5 years.

(2) If otherwise qualified, a member is eligible for reappointment.

Qualifications

14. (1) The Minister shall not appoint a person to be a member unless satisfied that the person is qualified for appointment by virtue of his or her knowledge of, or experience in, one or more of the following fields —

- (a) business;
- (b) financial markets;
- (c) financial products and financial services;
- (d) financial, commercial or business law;
- (e) economics;
- (f) accounting.

(2) A person is not capable of being appointed a member if the person —

- (a) is a member of the National Assembly; or
- (b) is a director, secretary or executive officer of a non-bank financial institution;
- (c) whether in Botswana or in another jurisdiction, has been convicted of an offence for which he or she could have been sentenced to imprisonment without the option of a fine, or an offence involving dishonesty;
- (d) whether under the law of Botswana or of another jurisdiction, is insolvent or bankrupt and has not been rehabilitated;
- (e) is disqualified or suspended (other than at his or her own request) by a competent authority from practising a profession on the ground of misconduct; or
- (f) is disqualified from acting as a director or executive officer of a body corporate under a law relating to corporations or to the provision of financial services, whether in Botswana or in another jurisdiction.

Resignation

15. (1) The Chairperson and Deputy Chairperson may resign office by giving at least three months' notice in writing to the Minister.

(2) Other members referred to in section 11 (3) (c) may resign office by giving at least one month's written notice to the Minister.

16. (1) The appointment of a member immediately terminates if the member —

Termination
of appoint-
ment

- (a) becomes a member of the National Assembly;
- (b) becomes a director, secretary or executive officer of a non-bank financial institution;
- (c) is convicted of an offence in Botswana or in other jurisdiction for which he or she could have been sentenced to imprisonment without the option of a fine, or an offence involving dishonesty;
- (d) becomes insolvent or is declared bankrupt and has not been rehabilitated;
- (e) is disqualified or suspended (other than at his or her own request) by a competent authority from practising a profession on the ground of misconduct; or
- (f) is disqualified in Botswana from acting as a director or executive officer of a body corporate under a law relating to corporations or to the provision of financial services.

(2) The Minister may terminate a member's appointment on the ground that the member —

- (a) has ceased to be fit and proper person to be a member;
- (b) is suffering from a mental or physical condition such that he or she cannot properly carry out the duties of the office;
- (c) has failed, without leave of the Regulatory Authority, to attend more than three consecutive meetings of the Regulatory Authority;
- (d) has been disqualified from acting as a director or executive officer of a body corporate under a law relating to corporations or to the provision of financial services, either in Botswana or elsewhere;
- (e) is convicted of an offence outside Botswana for which he or she could have been sentenced to imprisonment without the option of a fine, or an offence involving dishonesty;
- (f) is declared bankrupt under a law of a place outside Botswana and has not been rehabilitated;
- (g) is disqualified outside Botswana from acting as a director or executive officer of a body corporate under a law relating to corporations or to the provision of financial services; or
- (h) has failed to comply with the Code of Conduct in a material particular.

17. Members shall be paid such remuneration and allowances as may be determined by the Minister.

Remuneration

18. (1) The Board shall hold at least nine meetings in each financial year, and such other meetings as are necessary for the efficient performance and exercise of its functions and powers.

Meetings

(2) At a meeting of the Board, four members shall constitute a quorum.

(3) At a meeting of the Board if —

- (a) the Chairperson is present—the Chairperson is to preside;
- (b) the Chairperson is not present but the Deputy Chairperson is present—the Deputy Chairperson is to preside; and

(c) neither the Chairperson nor the Deputy Chairperson is present—
the members present shall elect one of their number to preside.

(4) A question arising at a Board meeting is to be determined by a majority of the votes of the members present and voting.

(5) The person presiding at a Board meeting has a deliberative vote and, if necessary, also has a casting vote.

(6) Subject to this Act, the Board may regulate proceedings at its meetings as it considers appropriate.

Staff, etc.

19. The Regulatory Authority may, on terms it thinks fit —

(a) employ or engage staff; and

(b) engage other people to provide advice to it or perform functions or services for it.

Declaration
of interests

20. (1) Each member shall disclose in writing to each other member all interests that the member has that could conflict with the proper performance of the functions of the member's office, whether the interests were acquired before or after appointment.

(2) A disclosure in terms of subsection (1) shall be given as soon as practicable after the member becomes aware of the interest.

(3) The Regulatory Authority shall record all disclosures in terms of this section.

(4) A member who has an interest that could conflict with the proper performance of the functions of his or her office in relation to a particular matter shall not perform functions in relation to the matter unless —

(a) the member has complied with subsection (1) in relation to the interest; and

(b) each of the other members has consented to the member's performing those functions in relation to the matter despite the potential conflict of interest.

(5) For the purposes of subsections (1) and (4), it does not matter whether the interest is direct, indirect, pecuniary or non-pecuniary, nor when the interest was acquired.

(6) For the purposes of this section, if —

(a) a related party of a member has an interest; and

(b) if the member had the interest, it could conflict with the proper performance of the functions of the member's office,
the member is taken to have the interest, and this section applies accordingly.

(7) In subsection (6) —

“related party” of a member means any of the following —

(a) a spouse or a relative of the member;

(b) a person in accordance with whose directions, instructions or wishes the member is accustomed to act or is under an obligation, formal or informal, to act;

(c) a person who is accustomed to act, or is under an obligation, whether formal or informal, to act, in accordance with the directions, instructions or wishes of the member;

- (d) a company of which the member is a director or executive officer, and a subsidiary of such a company;
 - (e) a company of which the member, or a spouse or relative of the director, is a director or executive officer;
 - (f) a company of which the member, or a spouse or relative of the member, is a controller;
 - (g) if the directors of a company accustomed to act, or under obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the member—the company;
 - (h) if the member and another person are parties to a contract, arrangement or understanding —
 - (i) to acquire, hold, sell or otherwise deal in securities in concert; or
 - (ii) to exercise voting rights in a specified company in concert, the other party to the contract, arrangement or understanding.
- (8) The Regulatory Authority shall take reasonable steps to ensure that its employees, and other persons performing or exercising functions or powers of the Regulatory Authority under financial services laws, make proper and adequate disclosure of their interests.

Financial and accountability provisions

21. The funds of the Regulatory Authority shall consist of —

- (a) supervisory levies imposed on financial institutions in terms of section 23, and interest in respect of unpaid supervisory levies;
- (b) money raised as fees and charges, and interest from unpaid fees and charges, in respect of services rendered by the Regulatory Authority in performing its functions under a financial services law;
- (c) money paid in respect of civil penalties imposed by the Regulatory Authority under this Act;
- (d) money borrowed by the Regulatory Authority in terms of section 27;
- (e) money paid to the Regulatory Authority as a donation or bequest;
- (f) money appropriated for the purposes of the Regulatory Authority from the Consolidated Fund; and
- (g) money accruing to the Regulatory Authority from any other source.

Money of the
Regulatory
Authority

22. (1) For each financial year, the Regulatory Authority shall prepare —

- (a) annual estimates of its expenditure; and
- (b) a proposal for supervisory levies for the financial year.

Annual
estimates and
levy structure

(2) An annual estimate of the Regulatory Authority's expenditure for a financial year shall include provision for a reserve of not more than 10 per cent of the total expenditure provided for in the estimate.

(3) The Regulatory Authority must, at least two months before the start of a financial year, publish draft annual estimates and proposal for supervisory levies for the financial year in a way that the Regulatory Authority considers will bring them to the attention of non-bank financial institutions generally, and call for submissions on the draft estimates.

(4) The Regulatory Authority must, at least two months before the start of a financial year and having regard to any submissions received as mentioned in subsection (3), submit annual estimates of its expenditure to the Minister for approval and a recommendation for supervisory levies for the financial year.

(5) The Regulatory Authority shall not make expenditures in relation to a financial year in excess of the total expenditures provided for in the annual estimates for the year approved by the Minister, unless the Minister approves the additional expenditure.

Supervisory
levies

23. (1) The Minister shall, for each financial year, on the recommendation of the Regulatory Authority, make regulations for or with respect to the imposition and collection of supervisory levies.

(2) The regulations shall set out the basis of calculation of supervisory levies for a financial year.

(3) Different bases of calculation, and different rates of supervisory levy, may be prescribed for different classes of non-bank financial institutions.

(4) For the purposes of calculating the rates of supervisory levy for a class of non-bank financial institutions, supervisory levies for a financial year may be worked out on the basis of a set rate per P1,000 of assets under management by an institution as at the end of the previous financial year, as disclosed in annual return lodged by the institution for the previous financial year.

(5) The regulations may include provision for imposing interest on unpaid supervisory levy, and for imposing penalty levy for cases where a misstatement or other non-compliance by a non-bank financial institution leads to an under-collection of supervisory levy.

Fees and
charges

24. (1) The Minister may by regulations impose fees and charges for licences and renewals of licences, and for other services provided by the Regulatory Authority.

(2) Different rates of fees may be imposed for different classes of non-bank financial services, and different classes of licence or service in performing its functions under a financial services law.

Supervisory
levy, fees and
charges, debts
to Regulatory
Authority

25. Supervisory levy, penalty levy and fees and charges are a debt due to the Regulatory Authority and may be recovered by action in a court of competent jurisdiction.

Waiver of
levies or fees

26. The Regulatory Authority may, on application, waive payment of some or all of a supervisory levy, penalty levy or a fee.

Borrowings

27. The Regulatory Authority may borrow money from the Bank of Botswana, or from a bank, but only —

(a) to cover a short-term cash flow shortfall within the annual estimates for the year approved by the Minister in terms of section 22; or

(b) with the Minister's approval.

Advances
from
Government

28. The Minister may, out of money appropriated for the purpose, make advances to the Regulatory Authority, and may enter into agreements with the Regulatory Authority for the repayment, on terms satisfactory to the Minister, of amount so advanced.

29. (1) The Regulatory Authority shall establish an account, to be called the Levies Account.

Levies
Account

(2) The following shall be paid into the Levies Account —

(a) money paid to the Regulatory Authority as supervisory levies, fees or charges;

(b) money received by the Regulatory Authority as interest or profits from the investment of money standing to the credit of the Levies Account;

(c) money paid to the Regulatory Authority for the purposes of the Regulatory Authority.

(3) Money standing to the credit of the Levies Account is to be applied for the following purposes —

(a) meeting the expenses of the Regulatory Authority incurred in performing its functions; and

(b) making investments authorized in terms of this Act.

30. Money standing to the credit of the Levies Account but not immediately required may be invested in commercial bank deposits or in securities issued or guaranteed by the Government, as the Regulatory Authority may determine.

Investments

Financial accounting

31. (1) The Regulatory Authority shall keep written financial records that —

Record keeping

(a) correctly record and explain the transactions, financial position and performance of the Regulatory Authority; and

(b) will enable a true and fair financial report about the Regulatory Authority to be prepared and audited.

(2) The records shall be kept for at least 7 years after the date of the transactions to which they relate.

(3) The records shall be kept in English.

(4) The records may be kept electronically, but shall be able to be readily produced in hard copy.

32. (1) The Regulatory Authority shall prepare, for each financial year —

Financial
statements
and annual
report

(a) a financial report that consists of —

(i) balance sheets, profit and loss accounts and the other financial statements for the year, as required by applicable accounting standards; and

(ii) notes to the financial statements, as required by applicable accounting standards; and

(b) an annual report.

(2) The financial report shall include all information necessary to give a true and fair view of the financial position and performance of the Regulatory Authority.

(3) The annual report for a financial year shall report on the Regulatory Authority's operations and affairs during the year.

(4) Without limiting what is to be included in the report, it shall include —

- (a) a discussion of the performance of the non-bank financial sector over the year, and an account of the way in which the Regulatory Authority has performed its functions under financial services laws;
- (b) details of any significant changes in the state of the affairs of the Regulatory Authority during the financial year;
- (c) details of any matter or circumstance that has arisen since the end of the year that has significantly affected, or may significantly affect the operations of the Regulatory Authority in future financial years; and
- (d) information about material contraventions of the Code of Conduct during the financial year.

Financial reports to be audited

33. (1) The Regulatory Authority shall cause the financial report for a financial year to be audited by an auditor appointed by the Regulatory Authority and approved by the Minister, and shall obtain the auditor's report.

(2) For the purposes of the audit, the auditor —

- (a) has a right of access at all reasonable times to the Regulatory Authority's records; and
- (b) may require any member or employee of the Regulatory Authority to provide information, explanations or other assistance.

(3) A person who fails or refuses to comply with a reasonable requirement in terms of subsection (2) (b) commits an offence and on conviction is liable to a fine not exceeding P10,000 or to imprisonment for a term not exceeding 12 months, or to both.

(4) The auditor shall audit the financial report and report to the Regulatory Authority whether, in his or her opinion, the financial report is in accordance with this Act, including, in particular, whether it gives a true and fair view of the state of the affairs of the Regulatory Authority as at the end of the financial year to which it relates, and where the auditor is not of that opinion, the report shall state the reason.

Financial report and annual report to be given to Minister

34. (1) The Regulatory Authority shall, within six months after the end of a financial year or such longer period as the Minister may approve, give the Minister a copy of the financial report and the annual report for the financial year, and of the auditor's report on the financial report.

(2) As soon as practicable after the reports have been given to the Minister, they shall be laid before the National Assembly.

(3) As soon as practicable after the reports are laid before the National Assembly, the Regulatory Authority shall cause copies of them to be published in a newspaper of general circulation and to be made available to non-bank financial services institutions.

Reporting to National Assembly and industry

35. (1) The Regulatory Authority shall, through the Minister, comply with any request by the National Assembly or a committee of the National Assembly for information relating to the performance of its functions.

(2) The Chairperson and the Chief Executive Officer shall, as soon as practicable after the Regulatory Authority's annual report has been laid before the National Assembly, make copies of the report available to non-bank financial institutions, and make arrangements to attend such conferences or meetings with non-bank financial institutions as in their view will enable non-bank financial institutions generally to consider the report and question them about the Regulatory Authority's intended activities in the financial year after the year to which the report relates.

36. The Auditor General shall, if the Minister so directs, examine and report on the accounts of the Regulatory Authority on any aspects of its operations, and the Regulatory Authority shall give the Auditor General all necessary facilities for that purpose.

Auditor
General may
examine
Regulatory
Authority

Other provisions

37. None of the following —

(a) the Regulatory Authority;

(b) a member or employee of the Regulatory Authority;

shall be liable for any loss sustained by or damage caused to any person as a result of anything done or omitted by them in the performance in good faith of their powers, functions and duties in connection with the exercise of powers or the performance of functions under a financial services law.

Protection of
Regulatory
Authority,
officers, etc.

38. (1) In this section —

“officer” means a person who is or has been a member or employee of the Regulatory Authority or a person engaged by the Regulatory Authority in terms of section 19 (b).

Secrecy

(2) An officer who discloses to any person any information (orally or in writing) relating to the affairs of any non-bank financial institution, or any other person, that the officer has acquired in the performance of his or her duties or the exercise of his or her functions as such commits an offence and on conviction is liable to a fine not exceeding P30,000 or to imprisonment for a term not exceeding 3 years, or to both.

(3) Subsection (2) does not prevent —

(a) disclosure of a summary or collection of information that is prepared so that information relating to any particular person cannot be found out from it;

(b) disclosure of the name of a licensed non-bank financial institution;

(c) disclosure of the addresses at which licensed non-bank financial institutions carry on business;

(d) disclosure of any other information reasonably necessary to enable members of the public to contact non-bank financial institutions; or

(e) disclosure of information to the Commissioner General of Taxes.

(4) It is a defence to a charge in terms of subsection (2) that —

(a) the disclosure was for the purposes and in the course of the exercise of the officer's duties or the performance of the officer's functions under a financial services law;

- (b) the disclosure was made to or with the consent of the non-bank financial institution or the person concerned;
- (c) the disclosure was made in accordance with a lawful requirement of a court of competent jurisdiction;
- (d) the disclosure was authorized by a financial services law;
- (e) the disclosure was required by another law; or
- (f) the disclosure was authorized by regulations made for the purposes of this section.

(5) Every person appointed under or employed in carrying out the provisions of this Act, except the Minister, shall make an oath or declaration of secrecy in the manner and form prescribed.

Code of
conduct

39. (1) The Regulatory Authority shall formulate a Code of Conduct, to apply to the members and employees of the Regulatory Authority.

(2) The Code of Conduct shall be consistent with this Act and other financial services laws, and shall make provision for at least the following matters —

- (a) use and disclosure of information by members and employees of the Regulatory Authority;
- (b) reducing or eliminating improper influence on the Regulatory Authority and on members and employees of the Regulatory Authority in carrying out their functions under financial services laws;
- (c) trading in and ownership of securities or other financial instruments by members and employees of the Regulatory Authority;
- (d) conflicts of interest;
- (e) receiving, keeping, holding and reporting gifts of any description by members and employees of the Regulatory Authority.

(3) The Regulatory Authority shall review the Code of Conduct at least once a year.

(4) A member or employee of the Regulatory Authority shall not contravene the Code of Conduct.

(5) Contravention of the Code of Conduct is not of itself an offence, but (without limiting any other law) —

- (a) a contravention of the Code of Conduct by a member may be evidence that the member is not fit and proper to be a member; and
- (b) an employee of the Regulatory Authority who contravenes the Code of Conduct commits a breach of his or her contract of service with the Regulatory Authority.

Arrangements
with other
agencies

40. (1) In carrying out its functions under financial services laws, the Regulatory Authority shall consult with the Bank of Botswana and other agencies of the Government that have functions related to the regulation or supervision of financial services, taxation, social security or the financial system.

(2) The Regulatory Authority may enter into arrangements with the Bank of Botswana and other agencies of the Government that have functions related to the regulation or supervision of financial services, taxation, social security or the financial system.

(3) Without limiting what those arrangements may deal with, they may make provision for —

- (a) the exchange of information between the Regulatory Authority and the other agencies, with due regard for the need to protect appropriately personal information about persons;
- (b) consultation between the Regulatory Authority and the other agencies;
- (c) enforcement of financial services laws and assistance with enforcement of other laws; and
- (d) the conduct of examinations and investigations on a joint basis.

(4) The Regulatory Authority may enter into similar arrangements with organizations outside Botswana in carrying out its regulatory and supervisory functions under financial services laws.

41. (1) The Board may delegate any of its functions or powers under this Act (other than this power of delegation) to —

Delegations

- (a) a member;
- (b) an employee of the Regulatory Authority;
- (c) an employee of the Bank of Botswana;
- (d) an investigator; or
- (e) a self-regulatory organization.

(2) In performing or exercising a delegated function or power, the delegate shall comply with directions given by the person delegating the function or power.

(3) A delegation in terms of this section may be subject to conditions specified in the instrument of delegation.

(4) A delegated power or function shall be exercised or performed in accordance with the instrument of delegation.

(5) A delegation may be varied or revoked at will and does not prevent the Board from exercising the delegated power or performing the delegated function.

PART III — *Licensing of non-bank financial institutions*

42. (1) A person who carries on a business as a non-bank financial institution otherwise than in accordance with a licence commits an offence and on conviction is liable to a fine not exceeding P2, 500 for each day on which the offence occurs or continues to occur or to imprisonment for a period not exceeding 5 years, or to both.

Non-bank
financial
institutions to
be licensed

(2) For the purposes of, but without limiting, subsection (1), carrying on a business as a non-bank financial institution includes carrying on such a business by providing financial services to a person outside Botswana.

43. (1) The Regulatory Authority may, on application made as prescribed, accompanied by such documents and statements as are prescribed and as the Regulatory Authority directs, grant a person a licence as a non-bank financial institution of a kind specified in the licence.

Licensing

(2) The Regulatory Authority may require an applicant for a licence to give it further information in connection with the application.

(3) The Regulatory Authority is not bound to deal further with the application until the requirement is satisfied.

(4) The Regulatory Authority shall not grant an application for a licence unless satisfied that the applicant —

- (a) will carry on the activities to be covered by the licence with integrity, prudence and professional skill;
- (b) will maintain a sound financial position and not cause or promote instability in the financial system; and
- (c) otherwise meets and will continue to meet the requirements of the financial services laws.

(5) The Regulatory Authority may impose conditions on a licence.

(6) A financial services law may prescribe additional criteria for granting licences.

Period of
licence

44. Regulations shall be made providing for the duration, expiration, renewal and revocation of licences issued under this Act.

Display of
licence

45. (1) If the Regulatory Authority grants an application for a licence, it shall issue the licence to the applicant.

(2) The Regulatory Authority shall publish notice of the grant of a licence in the Gazette.

(3) A licensed non-bank financial institution shall prominently display a copy of its licence at its offices in Botswana.

(4) A licensed non-bank financial institution that contravenes subsection (3) shall be liable to a civil penalty not exceeding P5,000 to be imposed by the Regulatory Authority.

Variation,
suspension or
cancellation
of licence on
request

46. The Regulatory Authority may, on written request by a licensed non-bank financial institution, by notice to the institution —

- (a) vary the conditions of the institution's licence (including by imposing additional conditions);
- (b) suspend the institution's licence for the period specified in the notice; or
- (c) cancel the institution's licence.

Variation,
suspension
and cancella-
tion of licence

47. (1) This section applies if it appears to the Regulatory Authority that a licensed non-bank financial institution —

- (a) is not carrying on, or is likely not to carry on, the business for which it is licensed with integrity, prudence and professional skill;
- (b) is in an unsound financial position or is likely to become in an unsound financial position;
- (c) is causing or promoting instability in the financial system, or is likely to do so;
- (d) is not complying or is likely not to comply with a financial services law;
- (e) is or is likely to be involved in financial crime;
- (f) has failed to submit reports as required under section 52; or
- (g) has failed to pay a civil penalty imposed by the Regulatory Authority under this Act.

(2) If this section applies, the Regulatory Authority may, by notice to the licensed non-bank financial institution —

- (a) vary the institution's licence —
 - (i) restricting the activities that can be carried on in terms of the licence; or
 - (ii) including further conditions on the licence;
- (b) suspend the institution's licence for the period specified in the notice; or
- (c) cancel the institution's licence.

(3) A financial services law may prescribe additional criteria for variation, cancellation or suspension of licences.

(4) The Regulatory Authority shall not act in terms of subsection (2) in relation to a licensed non-bank financial institution unless —

- (a) the Regulatory Authority has given the institution written notice of the proposed action, setting out the reasons for the proposed action and stating that the institution has a specified period (at least 21 days) to make representations to the Regulatory Authority about the matter; and
- (b) the Regulatory Authority has taken into account any representations made by or for the institution within that period.

(5) The Regulatory Authority may suspend the licence of a licensed non-bank financial institution without giving a notice in terms of subsection (4) if satisfied on reasonable grounds that it is necessary to do so to prevent or mitigate damage to the interests of non-bank financial institutions, clients of non-bank financial institutions or the financial system, but the Regulatory Authority shall —

- (a) give the institution the notice as soon as practicable;
- (b) give the institution the opportunity mentioned in subsection (4) (a); and
- (c) having considered any representations made by or for the institution, determine whether the suspension should be confirmed.

48. (1) The Regulatory Authority may, by notice in the Gazette —

- (a) exempt a person wholly or partly, as specified in the notice, from this Part; or
- (b) declare that this Part applies in relation to a person as modified in the declaration.

(2) An exemption or declaration may —

- (a) apply generally or to a specified case or class of cases; or
- (b) apply unconditionally or subject to specified conditions.

Exemptions
from and
modifications of
this Part

PART IV — *Supervision and regulation of non-bank financial institutions*

49. (1) The non-bank financial institutions referred to in subsection (2) are declared to be prudentially regulated non-bank financial institutions, and accordingly the provisions of section 50 and prudential rules made thereunder shall have effect in relation to such prudentially regulated financial institutions.

Prudentially
regulated
non-bank
financial
institutions

(2) The following are prudentially regulated non-bank financial institutions —

- (a) an asset manager;
- (b) a person operating a central securities depository;
- (c) a collective investment undertaking that is an investment company with variable capital;
- (d) a person operating a collective investment undertaking other than one described in paragraph (c);
- (e) a custodian;
- (f) an insurer;
- (g) a pension or provident fund;
- (h) a securities dealer;
- (i) the operator of a securities exchange;
- (j) a trustee of a collective investment undertaking or a pension or provident fund;
- (k) pension fund administrator;
- (l) finance and leasing company;
- (m) insurance agent;
- (n) insurance broker;
- (o) international insurance firm;
- (p) investment adviser;
- (q) management company for a collective investment undertaking;
- (r) micro lender.

(3) Without prejudice to the preceding provisions of this section, regulations may declare other non-bank financial institutions to be prudentially regulated non-bank financial institutions, and the provisions of section 50 and prudential rules made thereunder shall have effect in relation to such institutions.

Prudential Rules

Prudential
rules

50. (1) The Regulatory Authority may make and publish rules imposing requirements with respect to —

- (a) the conduct of the affairs of prudentially regulated non-bank financial institutions, or of the affairs of financial groups, with a view to ensuring that the prudentially regulated financial institutions or the groups (as the case requires) maintain a sound financial position and do not cause or promote instability in the financial system; or
- (b) the conduct of the affairs of prudentially regulated non-bank financial institutions with integrity, prudence and professional skill.

(2) Without limiting what a prudential rule may deal with, a prudential rule may impose requirements with respect to any of the following —

- (a) fit and proper person requirements for controllers and managers of prudentially regulated non-bank financial institutions;
- (b) the governance of non-bank prudentially regulated financial institutions;

- (c) capital and liquidity requirements;
 - (d) valuation requirements and methods;
 - (e) standards of business conduct;
 - (f) requirements for controllers of non-bank financial institutions;
 - (g) the use by non-bank financial institutions of financial instruments (including derivatives) and off balance sheet transactions;
 - (h) insurance and, in the case of insurers, re-insurance arrangements;
 - (i) outsourcing;
 - (j) how prudentially regulated non-bank financial institutions manage risks associated with their businesses.
- (3) The Regulatory Authority shall not make a prudential rule unless —
- (a) either —
 - (i) a draft of the rule has been published in a way that the Regulatory Authority considers will bring it to the attention of prudentially regulated non-bank financial institutions to which it will apply;
 - (ii) those institutions have had at least 90 days after that publication to make representations about the matter to the Regulatory Authority; and
 - (iii) the Regulatory Authority had regard to those representations in deciding whether to make the rule; or
 - (b) the Regulatory Authority considers on reasonable grounds that it is necessary to make the rule urgently.
- (4) A prudential rule made in terms of paragraph (b) of subsection (3) ceases to have effect at the end of 90 days after it is made, but this subsection does not prevent the Regulatory Authority from acting in terms of that paragraph again.
- (5) Subsections (3) and (4) apply in respect of modifications of prudential rules.

Information, reports, etc.

51. The Regulatory Authority may at any time give a written direction to a licensed non-bank financial institution requiring it to give information to the Regulatory Authority relevant to the performance of the Regulatory Authority's functions under a financial services law.

Information to
be given to
Regulatory
Authority

52. (1) The Minister may make regulations that impose requirements on any of the following —

Reporting

- (a) a non-bank financial institution;
- (b) an affiliate of a non-bank financial institution;
- (c) a person who is or has at any time been a director or manager of a non-bank financial institution;
- (d) a person who is or has at any time been an auditor of a non-bank financial institution;
- (e) in the case of a pension or provident fund or an insurer, an actuary or auditor for the fund or the insurer;

(f) a controller of a non-bank financial institution; to make reports to the Regulatory Authority, and to give information or documents to the Regulatory Authority, in connection with the Regulatory Authority's performing its functions under a financial services law.

(2) Without limiting subsection (1), the regulations may do any of the following —

- (a) require the lodgement of periodic and other returns;
- (b) require changes in management and control of non-bank financial institutions to be reported to the Regulatory Authority;
- (c) require financial difficulties or suspected financial difficulties in non-bank financial institutions to be reported to the Regulatory Authority;
- (d) require contraventions or suspected contraventions of financial service laws in relation to non-bank financial institutions to be reported to the Regulatory Authority.

(3) A person who refuses or fails to comply with regulations made for the purposes of this section shall be liable to a civil penalty not exceeding P50,000 to be imposed by the Regulatory Authority.

(4) A person who reports to the Regulatory Authority —

- (a) financial difficulties or suspected financial difficulties in a non-bank financial institution;
- (b) a breach or suspected breach of a financial services law in relation to a non-bank financial institution;
- (c) the involvement or suspected involvement of a non-bank financial institution in financial crime,

whether or not the report is required by law, shall not be liable for damages or other sanction in relation to a loss caused by the report unless it is established that the report was made in bad faith.

(5) A person who subjects another person (in this subsection called a "reporter") to any prejudice in his or her employment, or penalizes a reporter in any way, on the ground that the reporter made a report of a kind mentioned in subsection (4), even if the report was not required by law, commits an offence and on conviction is liable to a fine not exceeding P10,000.

Directions

Power to give directions

53. (1) If it appears to the Regulatory Authority that —

- (a) a non-bank financial institution has contravened a financial services law;
- (b) a non-bank financial institution is likely to contravene a financial services law;
- (c) a non-bank financial institution is conducting its affairs in an improper or in a financially unsound way;
- (d) a non-bank financial institution is causing or promoting instability in the financial system, or is likely to do so;
- (e) a non-bank financial institution is involved in financial crime; or

(f) the direction is necessary to protect the interests of clients of a non-bank financial institution,

the Regulatory Authority may give the non-bank financial institution a written direction as to the way in which the affairs of the institution are to be conducted.

(2) Without limiting subsection (1), a direction may require a non-bank financial institution to do any of the following —

(a) to comply with the whole or a specified part of a financial services law;

(b) to cause a person (such as an auditor) chosen by the Regulatory Authority to audit the records of the institution, at the expense of the institution, and give the report to the Regulatory Authority;

(c) to ensure that a specified director or employee of the institution does not take part in the management or conduct of the business of the institution except as permitted by the Regulatory Authority;

(d) to appoint a specified person or persons to a specified office (including the office of director) of the institution for a period specified in the direction;

(e) to remove an auditor or actuary of the institution from office;

(f) not to borrow a specified amount, or any amount;

(g) not to pay a dividend;

(h) not to pay or transfer an amount to a person, or create an obligation (contingent or otherwise) to do so;

(i) not to undertake a financial obligation (contingent or otherwise) on behalf of another person;

(j) to take any other action the Regulatory Authority considers necessary or desirable to deal with the case in the interests of the institution, the clients of the financial institution or the financial system.

(3) A direction may include a direction to remove a director or officer of the non-bank financial institution from office but only if the Regulatory Authority is satisfied that —

(a) either—

(i) the institution has contravened a financial services law or been involved in financial crime; and

(ii) the director or officer was knowingly concerned in the contravention of the financial crime; or

(b) the director or officer has contravened a financial services law or has been knowingly concerned in financial crime (whether or not related to the institution).

(4) A direction in terms of subsection (2) not to pay or transfer an amount does not apply to the payment or transfer of money under an order of a court or a process of execution.

(5) A direction may specify the time by which, or period during which, it is to be complied with.

(6) A non-bank financial institution that has been given a direction in terms of this section has power to comply with it despite anything in its memorandum or articles of association or regulations, and despite any contract or arrangement to which it is a party.

(7) A direction in terms of this section is not a ground on which a person may terminate, repudiate or cancel a contract with the non-bank financial institution, accelerate a debt under such a contract or close out a transaction with the institution, despite any provision to the contrary in any document.

(8) The High Court may, on application by a party to a contract mentioned in subsection (7) (other than the non-bank financial institution), make an order relating to the effect of the direction on the contract.

(9) Without limiting what the order may do, the order may require the non-bank financial institution —

(a) to perform its obligations under the contract; or

(b) to compensate the applicant, as specified in the order;

but may not require a person to take action that would contravene the direction.

(10) The Regulatory Authority may revoke a direction at any time, by written notice to the non-bank financial institution concerned.

Inspections and investigations

Appointment
of inspectors
and
investigators

54. (1) The Regulatory Authority may, by instrument in writing, appoint a person to be an inspector or an investigator.

(2) The Regulatory Authority shall provide to each inspector and investigator an identity card approved by the Regulatory Authority.

(3) An inspector or investigator, when exercising a power conferred by this Act, shall, on reasonable demand, produce his or her identity card for inspection, but failure to do so does not make the exercise of the power invalid.

Routine
inspections of
licensed non-
bank financial
institutions

55. (1) An inspector may at any time inspect the affairs or any part of the affairs of a person who is, or at any time has been, a licensed non-bank financial institution to check whether the institution —

(a) is complying or has complied with the financial services laws and the conditions of its licence;

(b) satisfies criteria or standards set out in or made under a financial services law; or

(c) is or has been involved in financial crime.

(2) For the purpose of such an inspection —

(a) the inspector may enter any premises used or apparently used by the licensed non-bank financial institution for business purposes, at any reasonable time; and

(b) inspect and make copies, or take extracts from, any relevant records, documents or things in those premises.

(3) A licensed non-bank financial institution, and its directors, officers and employees, shall afford an inspector full and free access to the premises, records and documents of the institution as are relevant to the inspection.

(4) A person who, without reasonable excuse, contravenes subsection (3) shall be liable to a civil penalty not exceeding P2,500 for each day on which the contravention occurs or continues to occur to be imposed by the Regulatory Authority.

56. (1) This section applies if an investigator —

- (a) has reasonable grounds to believe that —
 - (i) an offence under a financial services law has been or may have been committed; or
 - (ii) a licensed non-bank financial institution is not complying with, or has not complied with, a financial services law; and
- (b) suspects on reasonable grounds that a person (the “relevant person”) has in its possession or under its control anything that may afford evidence relevant to the matter (the “relevant evidence”).

(2) For the purpose of investigating the offence or suspected offence, the investigator may do any of the following —

- (a) subject to subsection (6), enter any premises used or apparently used by the licensed non-bank financial institution for business purposes, at any reasonable time and search for any record, document or other thing that the investigator considers may be relevant to the inspection;
- (b) inspect and make copies, or take extracts from, and where necessary in an appropriate case to take possession of, such records, documents or things;
- (c) give a direction (orally or in writing) to the licensed non-bank financial institution, to a director or employee of the institution, or to the relevant person, to produce the relevant evidence to the investigator as specified in the direction;
- (d) give a direction (oral or written) to a relevant person to do any of the following —
 - (i) produce to the investigator, at a reasonable time and place specified in the direction, any relevant evidence;
 - (ii) give the investigator explanations or further information about the relevant evidence;
 - (iii) attend before the investigator at a reasonable time and place specified by the authorized person, and answer under oath questions relating to the matter.

(3) A licensed non-bank financial institution, and its directors, officers and employees, shall afford an inspector full and free access to the premises, records and documents of the institution as are relevant to an investigation under this section.

(4) A person who, without reasonable excuse, refuses or fails to comply with a direction in terms of subsection (2) shall be liable to a civil penalty not exceeding P2,500 for each day on which the refusal or failure to comply occurs or continues to occur to be imposed by the Regulatory Authority.

- (5) A person who, without reasonable excuse, says anything in answering a question put to the person by an investigator in terms of this section —
- (a) that the person knows to be false or misleading in a material particular; or
 - (b) reckless as to whether it is false or misleading in a material particular; commits an offence and on conviction is liable to a fine not exceeding P50,000 or to imprisonment for a period not exceeding 5 years, or to both.
- (6) An investigator shall not enter premises in terms of subsection (2) (a) unless —
- (a) with the consent of the person apparently in charge of the premises at the time of entry; or
 - (b) in accordance with a warrant under subsection (7); or
 - (c) in an emergency, under subsection (9).
- (7) A warrant for the purposes of this section is a warrant issued by a magistrate on application by an investigator.
- (8) A magistrate shall not issue a warrant under this section unless satisfied that this section applies to the case, as provided in subsection (1).
- (9) An investigator may enter premises and exercise powers under this section without the consent mentioned in subsection (6) (a) or a warrant only if there are reasonable grounds to suspect that it is necessary to do so to prevent loss or destruction of, or damage to, relevant evidence.
57. An inspector or investigator acting in terms of section 55 or 56 has all the powers and protections of a Commissioner in terms of the Commissions of Inquiry Act.

Investigator's
powers
Cap. 05:02

Self-regulatory organizations

Self-
regulatory
organizations

58. (1) The Minister may by order, on the recommendation of the Regulatory Authority, declare a person or body that has functions in relation to a class of non-bank financial institutions to be a self-regulatory organization for the purposes of this Act.
- (2) The Minister shall not make a declaration in terms of subsection (1) unless the Regulatory Authority has entered into arrangements with the person or body for the performance by the person or body of regulatory or supervisory functions in relation to the class of non-bank financial institutions.
- (3) The arrangements may, if the Regulatory Authority considers it appropriate, involve the delegation of the Regulatory Authority's powers under financial services laws to the self-regulatory organization.
- (4) The arrangements shall provide for —
- (a) the supervision by the Regulatory Authority of the self-regulatory organization's performance of regulatory or supervisory functions by the self-regulatory organization;
 - (b) the approval by the Regulatory Authority of any rules, and amendments of rules, of the self-regulatory organization for or with respect to the matters for which the self-regulatory organization has regulatory or supervisory functions, including such functions as delegate of the Regulatory Authority;

- (c) the variation or termination of the arrangements where the Regulatory Authority is not satisfied that the self-regulatory organization is performing, or is able to perform, regulatory or supervisory functions to the satisfaction of the Regulatory Authority.

59. (1) A self-regulatory organization may make rules, not inconsistent with the financial services laws, for or with respect to any matters for which the self-regulatory organization has regulatory or supervisory functions, including such functions as delegate of the Regulatory Authority.

Rules of self-regulatory organizations

(2) Rules made in terms of subsection (1), and amendments of such rules, are of no effect unless approved by the Regulatory Authority.

60. A self-regulatory organization shall not make a decision under its rules that adversely affects the rights of a person unless —

Due process by self-regulatory organizations

- (a) the self-regulatory organization has given the person an opportunity to make representations to it about the matter; or
(b) the self-regulatory organization considers on reasonable grounds that delay in making the decision will prejudicially affect the protection of investors and consumers of securities services.

61. A self-regulatory organization shall notify the Regulatory Authority, as prescribed, as soon as practicable after a person is appointed a director or executive of the organization.

Reporting by self-regulatory organizations

62. (1) The Regulatory Authority may recommend to the Minister the revocation of a declaration in terms of subsection 58 (1) at any time, but shall not do so unless the Regulatory Authority has notified the self-regulatory organization of its intention and the reasons for the Regulatory Authority's action, and given the organization at least 14 days to make representations to the Regulatory Authority about the matter.

Termination of arrangements and revocation of declaration

(2) The revocation of a declaration does not affect a right of a person to apply to the Tribunal in terms of section 85 for a review of a decision or action.

(3) In a case mentioned in subsection (2), the Tribunal shall send a copy of the application to the Regulatory Authority, which is entitled to be a party to the review proceedings in the Tribunal.

63. Notwithstanding anything in the Companies Act, 2003 an amendment to the memorandum or articles of association, or other constituent documents, of a self-regulatory organization is of no effect unless approved by the Regulatory Authority.

Amendments to self-regulatory organizations' constitutions Act No. 32 of 2004

64. None of the following —

- (a) a self-regulatory organization;
(b) a director, executive or employee of a self-regulatory organization;
(c) a member of a committee of a self-regulatory organization;
shall be liable for any loss sustained by or damage caused to any person as a result of anything done or omitted by them in the performance in good faith of their powers, functions and duties in connection with the regulatory or supervisory functions the self-regulatory organization performs as self-regulatory organization, including those delegated to it by the Regulatory Authority.

Protections for self-regulatory organizations, etc.

Controllers of prudentially regulated non-bank financial institutions

Controllers of prudentially regulated non-bank financial institutions

65. (1) If a person takes a step intending thereby to become a controller of a prudentially regulated non-bank financial institution, then, unless the Regulatory Authority has approved the person's becoming a controller of the institution, the person shall be liable to a civil penalty not exceeding P10,000 to be imposed by the Regulatory Authority.

(2) If —

(a) a person is a controller of a prudentially regulated non-bank financial institution by virtue of the degree of voting power a person has or controls in relation to the institution; and

(b) the person takes a step as a result of which the degree of voting power it controls varies by more than the percentage specified in the prudential rules; then, unless the Regulatory Authority has approved the variation, the person shall be liable to a civil penalty not exceeding P10,000 to be imposed by the Regulatory Authority.

(3) If —

(a) a person becomes or ceases to be a controller of a prudentially regulated non-bank financial institution; and

(b) at the end of 14 days after the event, the change has not been reported to the Regulatory Authority in accordance with the regulations; the person shall be liable to a civil penalty not exceeding P10,000 to be imposed by the Regulatory Authority.

(4) If —

(a) a person is a controller of a prudentially regulated non-bank financial institution by virtue of the degree of voting power in relation to the non-bank financial institution that it has or controls;

(b) the degree of voting power in relation to the non-bank financial institution that it has or controls varies by more than the amount prescribed by the prudential rules; and

(c) at the end of 14 days after the event, the variation has not been reported to the Regulatory Authority in accordance with the regulations; the person, and the prudentially regulated non-bank financial institution, each shall be liable to a civil penalty not exceeding P10,000 to be imposed by the Regulatory Authority.

(5) A variation mentioned in subsection (2) or (4) may be either by way of increase or decrease in the percentage of voting power the person has or controls.

(6) A prudentially regulated non-banking financial institution that permits a variation with respect to the position of a controller as mentioned in subsections (2), (3) or (4) without the approval of the Regulatory Authority shall be liable to a civil penalty not exceeding P50,000 to be imposed by the Regulatory Authority.

PART V — *Regulating market practices of non-bank financial institutions*

66. (1) This Part applies in addition to other laws.

Operation of
this Part with
other laws

(2) If a provision of this Part, or of regulations made in terms of this Part, is inconsistent with a provision of another law, the provision of this Part prevails to the extent of the inconsistency.

67. (1) A person shall not engage in conduct that is misleading or deceptive or is likely to mislead or deceive in relation to financial services, including financial services provided by another person.

Prohibition of
false and
misleading
statements

(2) Without limiting subsection (1), a person shall not —

- (a) falsely represent that a financial service is of a particular standard, quality, value or grade;
- (b) falsely represent that a particular person has agreed to acquire a specified financial service;
- (c) represent that financial services have sponsorship, approval, performance characteristics, uses or benefits they do not have;
- (d) represent that the person has, in relation to financial services, a sponsorship, approval or affiliation it does not have;
- (e) make a false or misleading representation with respect to the price of financial services;
- (f) make a false or misleading representation concerning the need for specified financial services; or
- (g) make a false or misleading representation concerning the existence, exclusion or effect of a condition, warranty, guarantee, right or remedy in relation to financial services.

(3) A person who contravenes subsection (1) shall be liable to a civil penalty not exceeding P20,000 to be imposed by the Regulatory Authority.

68. (1) The Regulatory Authority may, by notice in the Gazette, determine that a specified practice in relation to financial services is an unfair practice.

Unfair practices

(2) Before making a determination in terms of subsection (1), the Regulatory Authority shall consult any advisory committee established under a relevant financial services law, unless the Regulatory Authority is satisfied that it is necessary to make the determination urgently to protect the interests of clients and potential clients of the non-bank financial institutions concerned.

(3) A determination in terms of subsection (1) may relate to specified financial services or to financial services of a specified kind.

(4) A non-bank financial institution that engages in an unfair practice in relation to a financial service shall be liable to a civil penalty not exceeding P20,000 to be imposed by the Regulatory Authority.

Disclosure of information

69. (1) The Minister may by regulations impose requirements with respect to —

- (a) the disclosure of information to clients or other persons about financial services; and
- (b) reports to be made to the Regulatory Authority about financial institutions or financial services.

(2) A person who contravenes regulations made for the purposes of subsection (1) commits an offence and on conviction is liable to a fine not exceeding P50,000 or to imprisonment for a period not exceeding 5 years, or to both.

Part VI— Amalgamations of, transfers of business of, statutory management of and winding up of prudentially regulated non-bank financial institutions

Compromises and arrangements and transfers of business

Compromises and arrangements involving prudentially regulated non-bank financial institutions
No. 32 of 2004

70. (1) In this section —
“compromise or arrangement” means —

- (a) a compromise or arrangement in relation to a prudentially regulated non-bank financial institution, being a compromise or arrangement of a kind described in sections 232 and 234 of the Companies Act, 2003; and
- (b) any other arrangement (however described) for the amalgamation of a prudentially regulated non-bank financial institution with one or more other bodies corporate or the reconstruction of a prudentially regulated non-bank financial institution.

(2) Each prudentially regulated non-bank financial institution concerned in a proposed compromise or arrangements shall ensure that a copy of —

- (a) all applications to a court; and
- (b) all documents to be given to members or creditors of the bodies corporate involved, either in relation to a meeting of members or creditors or otherwise;

are given to the Regulatory Authority before the application is made or the documents are sent to the members or creditors.

(3) The Regulatory Authority is entitled to be heard in any proceeding in a court in relation to a compromise or arrangement.

(4) A court shall not make an order in terms of section 232 or 234 of the Companies Act, 2003, or any order to a similar effect, in relation to a compromise or arrangement unless the Regulatory Authority has approved the compromise or arrangement in writing.

(5) Subsection (4) does not apply to an interlocutory or similar order.

(6) Regulations may make further provision about compromises and arrangements.

71. (1) None of the business of a prudentially regulated financial institution, being business in respect of which it is licensed, may be transferred to another person or amalgamated with the business of another person except under a scheme for the transfer or amalgamation that has been approved by the Regulatory Authority.

Transfers of business of prudentially regulated non-bank financial institutions

(2) A purported transfer or amalgamation contrary to subsection (1) is void.

72. If there is an inconsistency between a provision of section 70 or 71 and the Companies Act, 2003, the provisions of section 70 or 71 prevail to the extent of the inconsistency.

Sections 70 and 71 prevail over Companies Act No. 32 of 2004

Statutory management

73. (1) The High Court may, on application, appoint a person to be the statutory manager of a prudentially regulated non-bank financial institution.

Appointment of statutory managers

(2) The application may only be made by the Regulatory Authority or with the Regulatory Authority's written consent.

(3) The High Court may only make the appointment —

(a) if satisfied that the institution requested the appointment; or

(b) if it appears to the Court that the institution —

(i) is not complying with a financial services law;

(ii) is or is likely to be in an unsound financial position; or

(iii) is or may be involved in financial crime;

and the Court considers it in the interests of the clients of the institution or the financial system to make the appointment.

(4) Subject to subsection (5) the Regulatory Authority may appoint a person to be the statutory manager of a prudentially regulated non-bank financial institution but only if it appears to the Regulatory Authority that —

(a) the institution —

(i) is not complying with a financial services law;

(ii) is or is likely to be in an unsound financial position; or

(iii) is or may be involved in financial crime; and

(b) it is necessary to appoint a statutory manager urgently to protect —

(i) the interests of the clients of the institution;

(ii) the stability, fairness, efficiency and orderliness of the financial system; or

(iii) the safety and soundness of financial institutions.

(5) An appointment in terms of subsection (4) takes effect immediately, but the Regulatory Authority shall, as soon as practicable after the appointment and in any event within five business days after the appointment, apply to the High Court for an order confirming the appointment.

(6) On the application, the High Court shall, by order, confirm the appointment unless satisfied that the Regulatory Authority was not entitled to make the appointment, or that the grounds for making the appointment no longer exist.

(7) On an application in terms of this section, the High Court may also make further ancillary orders, including as to costs, as is just.

74. (1) A person is not to be appointed or hold office as a statutory manager of a prudentially regulated non-bank financial institution unless the Regulatory Authority has approved the person as the statutory manager of the institution.

(2) The statutory manager of a prudentially regulated non-bank financial institution shall —

- (a) manage the affairs of the institution to the exclusion of its directors and other managers;
- (b) have power to repudiate a contract to which the institution is a party, but only if the statutory manager considers the contract detrimental to the interests of clients of the institution; and
- (c) be entitled to receive such remuneration from the institution as the High Court orders.

(3) A repudiation of a contract in terms of paragraph (b) of subsection (2) does not affect any rights of the parties that have accrued before the repudiation.

(4) The statutory manager of a prudentially regulated non-bank financial institution shall manage the affairs of the institution with the greatest economy possible compatible with efficiency and, as soon as practicable, shall report to the Regulatory Authority —

- (a) what steps should be taken to ensure that the institution —
 - (i) complies with the financial services laws; or
 - (ii) will be financially sound; or
 - (iii) will not be involved in financial crime;
- (b) if the statutory manager considers that it is not practicable to take steps as mentioned in paragraph (a) —
 - (i) whether steps should be taken to transfer the business of the institution to another appropriate person and, if so, to whom and on what terms; and
 - (ii) whether the institution should be wound up.

(5) The statutory manager of a prudentially regulated non-bank financial institution shall comply with written directions from the Regulatory Authority in relation to his or her functions.

(6) The statutory manager of a prudentially regulated non-bank financial institution may apply to the High Court at any time for directions.

(7) The Regulatory Authority may at any time remove a statutory manager from office, and appoint a replacement, for whom the Regulatory Authority shall apply to court for an order confirming the appointment in terms of section 73 (5).

(8) The statutory manager of a prudentially regulated non-bank financial institution is not liable for a loss that the institution suffers unless it is established that the loss was caused by the statutory manager's fraud, dishonesty, negligence or wilful failure to comply with the law.

75. If a statutory manager is appointed to a prudentially regulated non-bank financial institution, the Regulatory Authority shall ensure that such a statutory manager remains appointed until the earlier of the times when —

Termination of
statutory
management

- (a) the Regulatory Authority is satisfied that the grounds for making the appointment no longer exist;
- (b) the Regulatory Authority applies for the institution to be wound up on the basis that it considers that the institution is insolvent and is unlikely to return to solvency within a reasonable time.

Winding up

76. (1) A resolution, demand or other step to wind up a prudentially regulated non-bank financial institution is of no effect unless the Regulatory Authority has approved of such action.

Winding up
prudentially
regulated non-
bank financial
institutions

(2) The Regulatory Authority may apply to the Court for an order that a prudentially regulated non-bank financial institution be wound up if —

- (a) a statutory manager has been appointed to the institution; and
- (b) the Regulatory Authority is satisfied that the institution is insolvent and cannot be restored to solvency within a reasonable period.

(3) An application to a court for the winding up of a prudentially regulated non-bank financial institution (whether under the Companies Act, 2003 or under another law) is not to be made except by the Regulatory Authority or with its approval.

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(4) The Regulatory Authority shall not give approval in terms of subsection (3) unless —

- (a) the regulated non-bank financial institution's licence has been or is to be revoked; or
- (b) the Regulatory Authority is satisfied that adequate provision has been made to protect the interests of the clients of the institution.

PART VII — Enforcement of financial services laws

77. (1) The Regulatory Authority may accept a written undertaking from a person in connection with a matter in relation to which the Regulatory Authority has a function under a financial services law.

Enforceable
undertakings

(2) The person may withdraw or vary the undertaking at any time, but only with the Regulatory Authority's consent.

(3) If the Regulatory Authority considers that the person has breached the undertaking, the Regulatory Authority may apply to the High Court for an order in terms of subsection (4).

(4) If the High Court is satisfied that the person has breached the undertaking, the Court may make all or any of the following orders —

- (a) an order directing the person to comply with the undertaking;
- (b) an order directing the person to do a specified act, or refrain from doing a specified act, for one or more of the following purposes —

- (i) to remedy the effects of the breach; or
- (ii) to compensate persons who have suffered loss because of the breach; or
- (iii) to ensure that the person does not commit further breaches of the undertaking or of a financial services law;
- (c) any other order that the Court considers appropriate.
- (5) The Regulatory Authority shall make a copy of the undertaking available to any person who asks for it.
- (6) The Regulatory Authority shall delete from the copy information that the person who gave the undertaking has asked not to be released, but only if the Regulatory Authority is satisfied that the information —
 - (a) is confidential information that has a commercial value that would be diminished if it were to be released generally;
 - (b) should not be disclosed because it would be against the public interest to do so; or
 - (c) consists of personal details of an individual.
- (7) If information has been deleted from a copy of an undertaking in terms of subsection (5), the copy shall include a note stating that the information has been deleted.

78. (1) A person who suffers loss as a consequence of a contravention of a financial services law by another person (in this section called a “claimant”) may recover the amount of the loss by action in a court against —

- (a) the other person; and
 - (b) any person who was knowingly involved in the contravention.
- (2) The Regulatory Authority may institute an action of a kind mentioned in subsection (1) on behalf of one or more claimants (in this section referred to as “representative action”) if in its opinion it is proper to do so.
- (3) In a representative action, the court may make any appropriate order for the conduct of the action, including orders —
- (a) for advertising the institution of the action;
 - (b) for the identification of claimants; and
 - (c) in respect of claimants who do not wish to pursue their claims through the action.
- (4) If—
- (a) the Regulatory Authority institutes a representative action in respect of a loss suffered by a claimant; and
 - (b) the claimant, either before or after the representative action is instituted but before it is determined, institutes an action in terms of this section in respect of the same loss,
- the claimant is not entitled to recover in the representative action, and the court may make any appropriate order for the conduct of the relevant actions.
- (5) The Regulatory Authority has the conduct of a representative action to the exclusion of the claimants concerned, and may withdraw, abandon or compromise the action, but an agreement or compromise of the action is subject to the approval of the court.

(6) In a representative action, if the court orders the payment of compensation, it may, in addition, if the court thinks fit, order a defendant to pay —

(a) a penalty for punitive purposes not exceeding ten times the amount of the profit or gain that may have accrued to the defendant by the contravention; and

(b) interest on any amount ordered to be paid.

(7) A judgment in a representative action binds all claimants other than —

(a) those that the court has by order excluded from the action (in terms of subsection (3) (c) or otherwise); and

(b) claimants mentioned in subsection (4).

(8) Any amount recovered by the Regulatory Authority in a representative action shall be deposited into a specially designated account established by the Regulatory Authority with the Bank of Botswana, and thereupon —

(a) the Regulatory Authority is, as a first charge against the account, entitled to reimbursement of all expenses reasonably incurred in bringing the representative action and in administering the distributions made in terms of this subsection;

(b) the Regulatory Authority shall take reasonable steps to identify claimants and determine the amount of their losses in connection with the contravention, including publishing the order of the court; and

(c) the balance of the amount recovered, after making provision for expenses mentioned in paragraph (a), (“distributable balance”) shall be distributed among the claimants so that each claimant is paid the amount worked out using the formula:

$$\frac{\text{amount of the claimant's loss}}{\text{total amount of all claimants' losses}} \times \text{distributable balance}$$

(9) A person knowingly involved in the contravention concerned is not entitled to a distribution in terms of subsection (8).

(10) Distributions may be paid in stages.

(11) The surplus of the distributable balance not paid at the end of three years after the first payment in terms of subsection (8) becomes funds of the Regulatory Authority.

79. (1) If the Regulatory Authority is satisfied on reasonable grounds that a person has contravened a financial services law for which a civil penalty is to be imposed by the Regulatory Authority, the Regulatory Authority may give the person a notice doing one or more of the following—

(a) giving the person a written warning;

(b) directing the person to do a specified act, or refrain from doing a specified act, for one or more of the following purposes —

(i) to remedy the effects of the contravention;

(ii) to compensate persons who have suffered loss because of the contravention;

(iii) to ensure that the person does not commit further contraventions of financial services laws;

(c) imposing a civil penalty as stipulated in the provision contravened.

(2) Without limiting subsection (1) (b), a direction may require the establishment of compliance programs, corrective advertising or (in the case of a direction to a non-bank financial institution) changes in the management of the institution.

(3) Before taking action in terms of subsection (1), the Regulatory Authority shall give the person written notice of the proposed action, specifying the grounds for it and the facts supporting those grounds, and allowing 21 days after the notice is given for the person to ask for a hearing on the matter.

(4) If the person requests a hearing on the matter, the Regulatory Authority shall hold a hearing before taking the action, and such hearing shall be held in private unless the person consents to the hearing being held in public.

(5) A person to whom a notice in terms of subsection (1) has been given who fails or refuses to comply with the direction commits an offence and on conviction is liable to a fine not exceeding P50,000 or to imprisonment for a term not exceeding 5 years, or to both.

(6) A civil penalty imposed under this Act is recoverable as a fine imposed by a court under section 303 (1) to (4) (inclusive) of the Criminal Procedure and Evidence Act, and an affidavit sworn by a member or employee of the Regulatory Authority is sufficient proof of the lawful imposition of the monetary penalty to enable a court to issue a warrant under that section, but no warrant is to be issued until any review under Part IX in relation to the matter has been disposed of or the time for applying for such a review has expired.

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Powers of
High Court

80. (1) Where a person is engaged, or proposes to engage, in conduct in contravention of a financial services law, the High Court may, on application by the Regulatory Authority or a person authorized by the Regulatory Authority, make orders for the purposes of enforcing the financial services law.

(2) Without limiting subsection (1), an order may direct the person to do a specified act, or refrain from doing a specified act, for one or more of the following purposes—

(a) to remedy the effects of the contravention;

(b) to preserve the assets of a relevant financial institution;

(c) to compensate persons who have suffered loss because of the contravention;

(d) to ensure that the person does not commit further contraventions of financial services laws.

(3) The Court may make an interim order pending the determination of an application, but the Regulatory Authority is not to be required, as a condition of the making of an interim order, to give an undertaking as to damages.

- (4) The power of the Court under this section may be exercised —
 - (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
 - (b) whether or not the person has previously engaged in conduct of that kind.
- (5) This section is in addition to any other power of the High Court.
- 81.** (1) The Regulatory Authority may, by notice in the Gazette —
 - (a) exempt a non-bank financial institution wholly or partly, as specified in the notice, from a financial services law; or
 - (b) declare that a financial services law applies in relation to a non-bank financial institution as modified in the declaration.
- (2) An exemption or declaration may —
 - (a) apply generally or to a specified case or class of cases; or
 - (b) apply unconditionally or subject to specified conditions.

Exemptions and modifications of financial services laws for non-bank financial institutions

PART VIII — Powers relating to the International Financial Services Centre

82. This Part applies to a non-bank financial institution that has applied for, or has been issued with, a tax certificate.

Application of Part

83. (1) A non-bank financial institution shall comply with the conditions, if any, imposed on its tax certificate.

Enforcement of IFSC rules

(2) The functions and powers of the Regulatory Authority in relation to a non-bank financial institution to which this Part applies may be performed and exercised for the purpose of enforcing Part XVI of the Income Tax Act.

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84. (1) The Regulatory Authority may, if it is satisfied that —

- (a) a non-bank financial institution has failed or refused to comply with the conditions imposed on its tax certificate; or
- (b) grounds exist for the revocation of a licence granted to a non-bank financial institution under a financial services law,

recommend to the Minister that the institution's tax certificate be revoked.

Power to recommend revocation of tax certificate

(2) The Regulatory Authority shall not act in terms of subsection (1) in relation to a non-bank financial institution unless —

- (a) the Regulatory Authority has given the institution written notice of the proposed action, setting out the reasons for the proposed action and stating that the institution has a specified period (within 21 days) to make representations to the Regulatory Authority about the matter; and
- (b) the Regulatory Authority has taken into account any representations made by or for the institution within that period.

PART IX — *Review of decisions*

The Tribunal

Establishment
of Tribunal

85. (1) There shall be established a Tribunal which shall be responsible for reviewing decisions made by the Regulatory Authority or self-regulatory organizations under this Act.

(2) Regulations may provide for the constitution, composition and jurisdiction of the Tribunal.

Review of
decisions

86. Every decision of the Regulatory Authority, or of a self regulatory organization, made in terms of sections 4(3), 43, 45, 46, 53, 62 and 84 may be subject to a review by the Tribunal.

Application
for review of
decisions

87. (1) A person aggrieved by, or whose interests are affected by, a decision referred to in section 86 may apply to the Tribunal for a review of the decision.

(2) An application to the Tribunal for a review of a decision shall be made within 28 days of the making of the decision.

(3) The Tribunal may, on application extend that period, either before or after it has ended, and may do so in terms it thinks proper.

Implementa-
tion of
decisions
pending
review

88. An application for a review of a decision shall not affect the operation of the decision but the Tribunal may, on application, suspend the operation of the decision as specified by, and on terms determined by, the Tribunal.

PART X — *Miscellaneous*

Advisory
bodies

89. The Minister may, on the recommendation of the Regulatory Authority, by order, establish advisory bodies to assist it in the performance of its functions under this Act.

Requirement
to answer
questions

90. A person who, without reasonable excuse, fails to answer a question put to the person by the Regulatory Authority or an investigator in the performance of functions under a financial services law shall be liable to a civil penalty not exceeding P10,000 to be imposed by the Regulatory Authority.

Requirement
to comply
with directions

91. A person who, without reasonable excuse, fails to comply with a direction, order or requirement given to the person under a financial services law shall be liable to a civil penalty not exceeding P20,000 to be imposed by the Regulatory Authority.

False and
misleading
statements to
Regulatory
Authority

92. (1) A person who —

(a) makes a statement to the Regulatory Authority;

(b) gives information to the Regulatory Authority;

(c) authorizes another person to make a statement to the Regulatory Authority, or give information to the Regulatory Authority; or

(d) in connection with an application for a licence, omits to state any thing, knowing that, because of the omission, the statement, information or application is misleading in a material respect shall be liable to a civil penalty not exceeding P30,000 to be imposed by the Regulatory Authority.

93. A person who, for any purpose connected with a financial services law —

- (a) knowingly makes a false statement; or
 - (b) produces or gives, or causes or knowingly allows to be produced or given, a document that the person knows or ought reasonably to have known to be false in a material particular,
- shall be liable to a civil penalty not exceeding P30,000 to be imposed by the Regulatory Authority.

False statements

94. (1) A person who is required under a financial services law to answer a question or produce a document or thing is not excused from the requirement because compliance may tend to incriminate him or her.

Self incrimination not a reasonable excuse

(2) However, if the person objects on that ground to complying, the answer, document or other thing given in compliance with the requirement is not admissible against him or her in a prosecution for an offence (except a prosecution for an offence of failing or refusing to comply with the requirement, or giving false or misleading information in purported compliance with the requirement).

95. A person who does any of the following —

- (a) not being licensed as a non-bank financial institution—describes or holds himself or herself out as so licensed;
- (b) not being licensed as a non-bank financial institution of a particular kind—describes or holds himself or herself out as being a non-bank financial institution of that kind;
- (c) permits another person to do anything mentioned in paragraph (a) or (b),

Offence of holding out as licensed, etc.

commits an offence and on conviction is liable to a fine not exceeding P10,000 or to imprisonment for a period not exceeding 2 years, or to both.

96. A person who destroys, falsifies, conceals or disposes of, or causes or permits the destruction, falsification, concealment or disposal of, a document or thing that the person knows or ought reasonably to have known is relevant to the performance or exercise of the Regulatory Authority's functions or powers commits an offence and on conviction is liable to a fine not exceeding P50,000 or to imprisonment for a period not exceeding 5 years, or to both.

Destruction of documents

97. A person who, without lawful excuse, obstructs or hinders —

- (a) the Regulatory Authority;
- (b) a member or employee of the Regulatory Authority; or
- (c) an investigator or statutory manager,

Hindering Regulatory Authority, etc.

in exercising powers or performing functions under a financial services law commits an offence and on conviction is liable to a fine not exceeding P50,000 or to imprisonment for a period not exceeding 5 years, or to both.

98. A person who knowingly hinders or prevents compliance with a direction, order or requirement given under a financial services law commits an offence and on conviction is liable to a fine not exceeding P50,000 or to imprisonment for a period not exceeding 5 years, or to both.

Preventing compliance

Extension of time

99. The Regulatory Authority may, on application, extend any time for compliance with, or a period prescribed by, a provision of a financial services law, and may do so before or after the time for compliance or the period prescribed has passed.

Evidence

100. A statement in writing signed by the Chief Executive Officer —
(a) that a specified person was or was not, at a specified time, licensed;
or
(b) that a specified person was or was not, at a specified time, an investigator;

is admissible in evidence of the facts and matters stated in the certificate and, unless the contrary is established, is conclusive as to those facts and matters.

Conduct of directors, servants and agents

101. (1) Where it is necessary to establish, for the purposes of a financial services law, the state of mind of a body corporate in relation to particular conduct, it is sufficient to show that —

(a) the conduct was engaged in by a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; and
(b) the director, employee or agent had the state of mind.

(2) A reference in subsection (1) to the state of mind of a person includes a reference to —

(a) the knowledge, intention, opinion, belief or purpose of the person; and
(b) the person's reasons for the intention, opinion, belief or purpose.

(3) A reference in this section to engaging in conduct includes a reference to failing or refusing to engage in conduct.

Liability of directors, etc.

102. Where an offence against a provision of this Act is committed by a body corporate, each director of the body corporate also commits the offence and on conviction is liable to the same penalty unless the director establishes that he or she took reasonable precautions and exercised due diligence to avoid the commission of the offence.

Offence committed partly within and partly beyond Botswana

103. When an act that, if wholly done within Botswana, would be an offence against a financial services law, is done partly within and partly beyond Botswana, every person who within Botswana does any part of such act may be tried and punished under the financial services law in the same manner as if such act had been done wholly within Botswana.

Penalties for bodies corporate

104. Where a body corporate is convicted of an offence against a financial services law, the court may, if the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to 10 times the amount of the maximum pecuniary penalty that could be imposed by the court on an individual convicted of the same offence.

Regulations

105. (1) The Minister may by statutory instrument make regulations providing for any matter which under this Act is to be provided for by regulations or is to be prescribed or which, in the Minister's opinion, is necessary or convenient to be prescribed for the better carrying out of the objects and purposes of this Act or to give force or effect to its provisions or for its better administration.

(2) Regulations made in terms of subsection (1) may provide for any of the following —

- (a) the form of any document referred to in this Act and the way in which it is to be prepared, executed, registered, transmitted or delivered;
- (b) fees to be charged in respect of any act, matter or thing to be done by or in relation to the Regulatory Authority;
- (c) matters to be included in the document submitted with an application for a licence and procedures for considering those applications;
- (d) the appointment of an actuary or auditor for a non-bank financial institution;
- (e) reports to the Regulatory Authority or to the non-bank financial institution by an actuary or auditor;
- (f) the submission to the Regulatory Authority of financial statements, reports, statistics, accounts and other documents.

PART XI — *Transitional and consequential provisions*

106. (1) A person who was licensed or registered in terms of a financial services law immediately before Part III commences shall be taken to be licensed in terms of this Act, on the same terms, the licence terminating —

- (a) at the end of 12 months after Part III commences; or
- (b) if, but for this Act, the licence would terminate on an earlier day, on that earlier day.

(2) Subsection (1) does not apply in respect of provisional registration as a pension or provident fund under the Pension and Provident Funds Act.

(3) If —

- (a) a person resident in Botswana is lawfully carrying on an activity immediately before Part III commences;
- (b) the person was not, at that time, required to be licensed or registered under a financial services law other than this Act in relation to carrying on the activity; and
- (c) the person applies for a licence within 6 months after Part III commences;

section 42 does not prevent the person from carrying on the activity until the application is finally determined.

107. In consequence of the provisions of this Act, the Acts specified in the Schedules hereto are amended as set out in those Schedules.

Existing
licences and
registrations
preserved

Cap. 27:03

Repeals and
amendments

FIRST SCHEDULE

(Amendments to Bank of Botswana Act (Cap. 55:01))

Cap. 55:01

1. The Bank of Botswana Act is amended in section 45 thereof by substituting for subsection (1) of that section, the following new subsections —

“(1) This Part shall apply to a company which has applied for or been issued with a tax certificate (hereinafter referred to as “the tax certificate”) in accordance with section 138(2) of the Income Tax Act.

(1A) This Part does not apply to a non-bank financial institution licensed in terms of the Non-Bank Financial Institutions Regulatory Authority Act, 2006, and does not affect any powers granted to the Bank in relation to banks and other companies.”.

SECOND SCHEDULE

(Amendments to Botswana Stock Exchange Act (Cap. 56:08))

1. Section 2 of the Botswana Stock Exchange Act (in this Schedule called “the Act”) is amended —

(a) by deleting the definition of “inspector”; and

(b) by substituting for the definition of “Registrar” the following new definition—

“‘Registrar’ means the Regulatory Authority established under the Non-Bank Financial Institutions Regulatory Authority Act, 2006;”.

2. (1) The Act is amended by omitting “Minister” and “Minister’s” (wherever occurring, except in sections 5 and 12) and substituting “Regulatory Authority” and “Regulatory Authority’s” respectively.

(2) The Act is amended by omitting all references to registration as a stockbroker (however expressed) and substituting references to licensing as a stockbroker (expressed in a similar way).

3. Section 5 of the Act is amended —

(a) by substituting for paragraph (a) of subsection (1) thereof, the following —

“(a) three members appointed by the Minister on the recommendation of the Regulatory Authority; and”; and

(b) by substituting for the words “The Minister may appoint any person, other than the Registrar, to the Committee as an alternate to an appointed Committee member” which appear in subsection (2) thereof, the following, “The Minister may, on the recommendation of the Regulatory Authority, appoint any person, other than a member of the Non-Bank Financial Institutions Regulatory Authority, to the Committee as an alternate to an appointed Committee member”.

4. Section 11 of the Act is amended by substituting for subsection (1) thereof, the following new subsections —

“Regulatory Authority may direct Committee and Committee member to vacate office, etc

11. (1) The Regulatory Authority may, by written notice to the Committee and the Committee member, direct a Committee member to vacate his or her office, but only if the Regulatory Authority is satisfied that the Committee member—

- (a) is not fit and proper to be a Committee member; or
- (b) is mentally or physically incapable of performing the duties of the office efficiently.

(1A) Part IX of the Non-Bank Financial Institutions Regulatory Authority Act, 2006 applies in relation to a decision of the Regulatory Authority under this section as if it were a decision under section 53(2) (c) of that Act.”

5. Section 12 of the Act is amended by substituting for paragraph (a) of subsection (1) the following —

“(a) the Minister shall, in the case of an appointed Committee member, on the recommendation of the Regulatory Authority, appoint a person; or”.

6. Section 15 of the Act is amended by substituting for the words “with the terms of this Act” appearing in subsection (1) (f) thereof, the words “with the terms of this Act or the Non-Bank Financial Institutions Regulatory Authority Act, 2006”.

7. Part III of the Act is repealed.

8. Section 32 of the Act is amended by repealing subsection (1).

9. Section 33 of the Act is amended by repealing subsections (2) and (3).

10. Part XI of the Act is amended by substituting for that Part, the following —

“PART XI — *Powers to suspend the Exchange*

65. The Minister may —

(a) upon a request made by the Committee, or contained in a resolution passed by a majority of registered stock-brokers holding not less than three-quarters of the total number of proprietary rights issued by the Exchange; or

(b) of its own motion, where it considers that special circumstances requiring the suspension of the operation of the Exchange exist and after consultation with the Committee;

suspend the operation of the Exchange for a period not exceeding one month at any one time.”.

Minister may suspend operation of exchange

THIRD SCHEDULE

*(Amendments to Collective Investment Undertakings Act
(Cap. 56:09))*

1. The long title of the Collective Investment Undertakings Act (in this Schedule called “the Act”) is repealed and the following substituted—

“An Act to provide for the supervision and regulation of collective investment undertakings to enhance protection for investors; and to provide for matters incidental and connected to the foregoing.”

2. Section 2 of the Act is amended by substituting for the definition of “Regulatory Authority” the following new definition—

“‘Regulatory Authority’ means the Non-Bank Financial Institutions Regulatory Authority established under the Non-Bank Financial Institutions Regulatory Authority Act, 2006;”.

3. Part II of the Act is repealed.

4. Sections 9, 12, 13 and 14 of the Act are repealed.

5. Section 22 of the Act is amended by repealing subsections (1) and (4).

6. Part XI of the Act is repealed.

7. Sections 80, 81, 82, 83 and 84 of the Act are repealed.

8. Section 85 of the Act is amended by repealing subsection (4).

FOURTH SCHEDULE

(Amendments to Insurance Industry Act (Cap 46:01))

1. Section 2 of the Insurance Industry Act (in this Schedule called “the Act”) is amended by deleting the definition of “Registrar” and substituting thereof—

“‘Registrar’ means the Regulatory Authority established under the Non-Bank Financial Institutions Regulatory Authority Act, 2006;”.

2. The Act is amended by substituting for all references to registration references to licensing.

3. The Act is amended by repealing Part II.

4. The Act is amended by repealing sections 15, 19, 20, 21, 22 and 24.

5. The Act is amended by repealing subsections (1) and (2) of section 46 thereof.

6. The Act is amended by repealing sections 50, 60, 67, 68, 112, 118, 119, 120, 121 and 123.

7. The Act is amended in section 128 —

(a) by substituting for subsections (1), (2), (3), (4) and (5) the following subsections —

“Contraventions punishable by regulatory authority

(1) The directors, manager, controller and principal officer of an insurer or a broker acting in contravention of the provisions of section 8, 17 or 25 shall each be liable to a civil penalty not exceeding P10 000 to be imposed by the Regulatory Authority.

(2) Any person carrying on any insurance business without first being registered as an insurer shall be liable to a civil penalty not exceeding P10 000 to be imposed by the Regulatory Authority, and, where the person contravening this section is a company or partnership, every director, manager, controller and principal officer of the company or every partner, manager, controller or principal officer of the partnership shall each be personally liable as if he was personally responsible for the contravention.

(3) Any person carrying on the business of an insurance agent, broker or agent for a broker without first being registered as an insurance agent, broker or agent for a broker, as the case may be, shall be liable to a civil penalty not exceeding P3 600 to be imposed by the Regulatory Authority, and, where the person contravening this subsection is a company or a partnership, every director, manager, controller or principal officer of the company or every partner, manager or principal officer of the partnership shall each be personally liable as if he was personally responsible for the contravention.

(4) An insurance agent or agent for a broker acting in contravention of the provisions of section 47 shall, in addition to any offence for which he may be liable under any other law be liable to a civil penalty not exceeding P3 600 to be imposed by the Regulatory Authority.

(5) Any insurer or broker who knowingly employs any person deemed unsuitable by virtue of sections 17 and 51 respectively shall be liable to a civil penalty not exceeding P18 000 to be imposed by the Regulatory Authority.”.

(b) in subsections (7) and (8) by substituting for the word “fine” the words “civil penalty” wherever it appears.

8. The Act is amended by substituting for section 130 the following section —

“130. (1) Every person who acts in contravention of any of the provisions of this Act shall, where no punishment has been stipulated by any other section of this Act for that contravention, be liable to a civil penalty not exceeding P3 600 to be imposed by the Regulatory Authority.

(2) Where a contravention to which this section applies is committed by a body of persons, every director, manager, controller and principal officer of the company and every partner, manager or principal officer of the partnership shall be held personally responsible for the contravention:

Provided that if the individual concerned can prove to the satisfaction of the Regulatory Authority that he was not aware of the act or default which contravened the provisions of this Act and could not with reasonable diligence have become aware of it, he shall not be deemed liable under this section.

(3) The provisions of subsection (8) of section 128 shall apply to any civil penalty imposed under this section.”

FIFTH SCHEDULE

(Amendments to International Insurance Act, 2005 (No. 5))

1. (1) Section 2 of the International Insurance Act, 2005 (in this Schedule called “the Act”) is amended by substituting for the definition of “regulatory authority” the following new definition —

“‘Regulatory Authority’ means the Regulatory Authority established by the Non-Bank Financial Institutions Regulatory Authority Act, 2006;”

2. The Act is amended by omitting all references to authorisation for carrying on an international insurance business (however expressed) and substituting references to licensing to carry on an international insurance business (expressed in a similar way).

3. The Act is amended by repealing sections 3, 5 and 6.

4. The Act is amended by repealing subsection 7(1).

5. The Act is amended by repealing section 8.

6. The Act is amended by repealing sections 10(4), (5), (6) and (7) and 12(3), (4) and (5).

7. The Act is amended by inserting after section 16, the following new section —

“Application of certain sections

16A. Sections 14, 15 and 16 apply in addition to the other financial services laws.”

8. The Act is amended by substituting for section 30 thereof, the following —

“Contraventions punishable by regulatory authority

30. (1) Notwithstanding the provisions of section 29 (1), a person who contravenes any of the provisions of this Act shall be liable to a civil penalty not exceeding P5 000 to be imposed by the Regulatory Authority.

(2) Where a contravention to which this section applies is committed by a body corporate, every controller and officer of such body corporate shall be held liable for such contravention unless he or she proves, to the satisfaction of the Regulatory Authority, that he or she was not aware of the act or default which contravened the provisions of this Act and could not, with reasonable diligence, have become aware of it.

(3) Without prejudice to any other action taken or which can be taken by the Regulatory Authority under this Act, any civil penalty imposed by the Regulatory Authority under the provisions of this section shall be recoverable as a fine imposed by a court under the provisions of subsections (1) to (4) of section 303 of the Criminal Procedure and Evidence Act, and an affidavit sworn by an officer of the Regulatory Authority shall be sufficient proof of the lawful imposition of the fine to enable the court to issue a warrant under those provisions, except that no warrant shall be issued until any appeal has been heard and disposed of or until the time within which an appeal may be made thereunder has expired.”.

SIXTH SCHEDULE

*(Amendments to Pension and Provident Funds Act
(Cap. 27:03))*

1. Section 2 of the Pension and Provident Funds Act (in this Schedule called “the Act”) is amended —

- (a) by deleting the definition of “provisionally registered”; and
- (b) by substituting for the definition of “Registrar” the following new definition—

“Registrar’ means the Regulatory Authority established under the Non-Bank Financial Institutions Regulatory Authority Act, ~~2006~~”.

2. The Act is amended by omitting all references to registration of a fund (however expressed) and substituting references to licensing of a fund (expressed in a similar way).

3. The Act is amended by omitting all references to provisional registration of a fund (however expressed).

4. The Act is amended by repealing sections 3(1) to (10) (inclusive), 4, 11, 24, 25, 27, 30 and 35.

PASSED by the National Assembly this 7th day of December, 2006.

A. MATLHAKU,
Clerk of the National Assembly.