

NON-BANK FINANCIAL INSTITUTIONS REGULATORY AUTHORITY ACT, 2006
(Act No. 2 of 2007)

**NON-BANK FINANCIAL INSTITUTIONS REGULATORY AUTHORITY
(COMMODITIES EXCHANGE LICENSING) REGULATIONS, 2008**
(Published on 22nd August, 2008)

ARRANGEMENT OF REGULATIONS

REGULATION

1. Citation
2. Interpretation
3. Application for licence
4. Grant of licence
5. Minimum financial requirements
6. Human and technology resources
7. Exchange to establish proper markets
8. Business rules, listing rules and default rules
9. Appropriate access to exchange facilities for members
10. Systems and controls
11. Clearing and settlement arrangements
12. Transaction recording procedures
13. Safeguarding and administering assets
14. Investor protection
15. Ongoing compliance
16. Ongoing obligations
17. Addressing complaints by market users
18. Deterrence of misconduct
19. Promoting and maintaining standards
20. Whistle blowing procedure
21. False and misleading statements to the Regulatory Authority

SCHEDULE

IN EXERCISE of the powers conferred on the Minister of Finance and Development Planning by section 105 of the Non-Bank Financial Institutions Regulatory Authority Act, 2006, the following Regulations are hereby made —

1. These Regulations may be cited as the Non-Bank Financial Institutions Regulatory Authority (Commodities Exchange Licensing) Regulations, 2008.

Citation

2. In these Regulations —

Interpretation

“business rules” means the business rules of an exchange as required under regulation 8;

“clearance and settlement system” has the meaning assigned to it under the National Clearance and Settlement Systems Act;

Cap. 46:06

“exchange” means a commodities exchange licensed and regulated under these Regulations;

“futures contracts” means agreements to buy or sell a commodity or financial instrument or currency in a designated future date at a price agreed upon by the buyer and seller;

“futures options” means the right of choice where a buyer of options has the right but not the obligation to buy or sell futures contracts in accordance with market rules;

“listed securities” means securities included in the list of securities kept by an exchange;

“listing rules” means the listing rules of an exchange as required under regulation 8;

“markets” means a commodities market operated by an exchange licensed and regulated under these Regulations;

“trading” means the sale and purchase of listed commodities.

Application
for licence

3. (1) No person shall carry out or hold himself out as carrying out any business as a commodities exchange without a licence issued by the Regulatory Authority.

(2) An application for a licence to carry out business as a commodities exchange shall be in Form No. 1 set out in the Schedule.

(3) An application for a licence under subregulation (2) shall, in a manner and format as the Regulatory Authority may require, be accompanied by —

(a) full personal details, qualifications, experience and economic interests of its —

- (i) controller,
- (ii) manager,
- (iii) principal officer, and
- (iv) other senior officers;

(b) full personal details, qualifications, experience, economic interests and occupation of the —

- (i) directors of its board,
- (ii) shareholders of the applicant, and
- (iii) beneficial holders of the applicant;

(c) constitution of the applicant and other incorporating documents;

(d) a business plan which shall *inter alia* set forth —

- (i) the internal control procedures of the applicant, and
- (ii) proposed organisational structure and the powers and duties of office bearers;

(e) copies of contracts and arrangements for oversight of activities, in case of outsourcing;

(f) evidence of the minimum financial requirements as provided in regulation 5;

(g) evidence of human and technology resources sufficient to efficiently operate and manage its facilities as provided in regulation 6;

(h) evidence of capacity of exchange to be licensed to establish proper markets that are conducive to economic good, as provided in regulation 7;

(i) business rules and listing rules adequate to ensure, as far as is reasonably practicable, that the market will operate fairly, transparently and in an orderly way as provided in regulation 8;

(j) adequate systems and controls to maintain market integrity, including avoidance of conflict of interest as provided in regulation 10;

(k) an application for the Certificate of Recognition under the National Clearance and Settlement Systems Act and additional details with respect to clearing and settlement arrangements as provided in regulation 11;

Cap. 46:06

- (l) the list of instruments intended to be traded at the commodities exchange;
- (m) the licensing fee in the amount of P50 000; and
- (n) additional requirements as contained in the Act and these Regulations, as the Regulatory Authority may direct.

(4) Any person who contravenes subregulation (1) commits an offence and shall on conviction, be liable to the penalty provided in section 42 (2) of the Act.

4. (1) If the Regulatory Authority is satisfied that —

- (a) the exchange to be established by the applicant will help the development of the financial markets and protect the interests of investors and the public;
- (b) the applicant has complied with the requirements under regulation 3 (2);
- (c) the applicant has submitted the application for a Certificate of Recognition to operate a clearance and settlement system in accordance with the National Clearance and Settlement Systems Act;
- (d) the applicant has the capacity and intention to —
 - (i) promote fair, orderly and transparent commodities and derivatives markets;
 - (ii) facilitate efficient commodities and derivatives markets for the allocation of capital and the transfer of risks;
 - (iii) reduce systemic risk or any other risks that may adversely affect fair and orderly trading on the exchange;
 - (iv) detect and deter market manipulation, financial crime, market misconduct and other unfair trading practices, and
 - (v) maintain integrity of trading, clearing and settlement through fair and equitable rules that strike a balance between the demands of market participants or users of the commodities and derivatives markets; and
- (e) the applicant has demonstrated the capacity to meet the compliance and obligation requirements as provided for under regulations 15 and 16, it shall, within 90 days of receiving the application, grant a licence to the applicant.

Grant of
licence

Cap. 46:06

(2) A licence issued under this regulation —

- (a) shall contain a condition stipulating that the Regulatory Authority shall cancel the licence issued for the commodities exchange if the application submitted by the licensed commodities exchange for a Certificate of Recognition to operate a clearance and settlement system, in accordance with the National Clearance and Settlement Systems Act, is unsuccessful; and
- (b) may contain such other conditions as the Regulatory Authority may determine.

5. (1) An exchange shall have and maintain at all times minimum financial resources as follows —

- (a) cash amounts equal to one half of the estimated gross operating costs of the exchange for the next 12 month period; and
- (b) such other base capital amount not less than USD10,000,000, as may be set by the Regulatory Authority.

(2) The Regulatory Authority may increase the minimum base capital under subregulation (1) (a) as it may deem necessary depending on the risk profile of the exchange.

Minimum
financial
requirements

(3) An exchange shall have financial resources adequate with respect to the nature, size, and complexity of its business for the purpose of guarding against the risk of failure to fulfil liabilities as they fall due.

Human and
technology
resources

6. (1) An exchange shall have sufficient human and technology resources to operate its markets to the satisfaction of the Regulatory Authority.

(2) For purposes of subregulation (1) an exchange shall satisfy the Regulatory Authority with respect to —

- (a) employing fit and proper staff, appropriately trained for the duties to be performed and trained to the standards required;
- (b) appointing a key management team with adequate levels of experience and expertise to supervise and monitor the operations and functions of the exchange as a self-regulatory organization;
- (c) owning technology resources that are established and maintained in such a way as to ensure that they are secure and maintain the confidentiality of the data they contain.

(3) In considering whether a person is a fit and proper person the Regulatory Authority may have regard to —

- (a) financial standing;
- (b) economic interests;
- (c) relevant education, qualifications and experience;
- (d) ability to perform the relevant functions properly, efficiently, honestly and fairly;
- (e) reputation, character, financial integrity and reliability; and
- (f) criminal record and/or conviction for any offence involving dishonesty.

Exchange to
establish
proper markets

7. An exchange shall establish and operate proper markets that are conducive to the economic good and that do not cause or promote instability, to the satisfaction of the Regulatory Authority by —

- (a) having systems, procedures and policies which guarantee that only securities or contracts in which there is a proper market, or those securities which are admitted to its official list, are admitted to trading;
- (b) ensuring the continuing existence of a proper market by means of —
 - (i) having arrangements in place for relevant market information to be made available to persons engaged in dealing on an equitable basis,
 - (ii) providing adequate guarantees to ensure that securities serve an economic purpose,
 - (iii) having a sufficient range and number of investors willing and able to generate adequate supply and demand in the securities,
 - (iv) where appropriate, having a sufficiently liquid underlying cash market,
 - (v) in the case of physically settled securities, having capacity to make and take delivery of securities or underlying assets, and
 - (vi) the rules of an exchange allowing for the discontinuance or suspension of trading in securities when disclosure obligations have not been complied with and in other appropriate circumstances.

Business
rules, listing
rules and
default rules

8. (1) An exchange shall, to the satisfaction of the Regulatory Authority, have clear and fair business rules which are legally enforceable against its members, published and made freely available.

(2) An exchange shall have compliance procedures in place to ensure its business rules are enforced, complaints regarding persons granted access to its facilities are investigated, appeal procedures are in place and where appropriate, a disciplinary action resulting in financial and other types of penalties is available.

(3) An exchange, which admits securities to its own official list of securities, shall have listing rules which must be approved by the Regulatory Authority.

(4) The listing rules of an exchange shall, to the satisfaction of the Regulatory Authority, be clear and fair, legally enforceable and published and made freely available.

(5) The listing rules shall include the type of securities being admitted to the official list of securities, and requirements with respect to —

(a) an issuer's financial reporting, how regular reports are made and the international accounting standards or any other accounting standard accepted by the Regulatory Authority to which they comply;

(b) auditing standards;

(c) an issuer's track record in terms of profit or operating history;

(d) the amount of securities in the class of securities which can be considered as in free float;

(e) any restrictions that may exist on transferability; and

(f) any other relevant matter deemed necessary by the Regulatory Authority.

(6) An exchange shall have default rules in place which in the event of a member being or appearing to be unable to fulfil its obligations in respect of one or more contracts, enables action to be taken with respect to unsettled market contracts to which the member is a party.

9. An exchange shall restrict access to its facilities or trading systems to —

(a) persons who are licensed or otherwise exempt from licensing under the Act; or

(b) who are granted access on the basis of a criteria which have been set out under its business rules.

10. (1) An exchange shall at all times ensure that its systems and controls are adequate and suitable for the performance of its functions and appropriate to the size and nature of its operations.

(2) Systems and controls should exist in relation to —

(a) the transmission of information to users of its facilities;

(b) the assessment and management of risks including conflicts of interest;

(c) the operation of its functions;

(d) the safeguarding and administration of assets which belong to its users; and

(e) the fitness and propriety of its employees and the adequacy of its technology resources.

(3) An exchange shall have systems and controls in relation to the supervision and monitoring of transactions on its facilities or trading systems.

(4) An exchange shall carry out regular reviews of its systems and controls.

11. (1) An exchange shall obtain a Certificate of Recognition to operate a clearance and settlement system in accordance with the National Clearance and Settlement Systems Act for the purpose of having in place clearing and settlement arrangements as required by law and to the satisfaction of the Regulatory Authority.

Appropriate access to exchange facilities for members

Systems and controls

Clearing and settlement arrangements

(2) An applicant shall submit its application for a Certificate of Recognition to operate a clearance and settlement system, addressed to the appropriate authority as provided under the National Clearance and Settlement Systems Act, to the Regulatory Authority jointly with the application for a licence to carry out business as a commodities exchange.

(3) The Regulatory Authority shall present the application, and represent the applicant before the appropriate authorities, if it is satisfied that the application submitted for a Certificate of Recognition to operate a clearance and settlement system under subregulation (2) is in compliance with the requirements of the National Clearance and Settlement Systems Act.

(4) An exchange shall ensure that adequate and satisfactory arrangements are in place for securing the timely discharge of the rights and liabilities of the parties to transactions conducted on or through its facilities and trading systems.

(5) An exchange shall ensure that a central securities depository carrying out clearing services, which the exchange utilizes, provides services that include satisfactory arrangements for securing the timely discharge of the —

(a) rights and liabilities; and

(b) settlement obligations,

of the parties to transactions for which the exchange provides such services.

(6) In determining whether this licensing requirement is complied with, the Regulatory Authority shall consider where applicable —

(a) the exchange's rules, procedures and practices relating to clearing and settlement;

(b) arrangements for matching trades and ensuring that the parties are in agreement about trade details;

(c) procedures to detect and deal with the failure of settlement in accordance with its rules;

(d) arrangements for taking action to settle if settlement does not take place in accordance with its rules;

(e) arrangements for monitoring settlement performance;

(f) the exchange's default rules and default procedures; and

(g) arrangements for settlement guarantee funds.

Transaction
recording
procedures

12. An exchange shall ensure that satisfactory arrangements are made for —

(a) recording the activity and transactions effected on or through its facilities;

(b) maintaining the activity and transaction records for at least seven years; and

(c) providing the Regulatory Authority with these records in a timely manner.

Safeguarding
and adminis-
tering assets

13. An exchange shall ensure that where its facilities provide for the safeguarding and administration of assets which belong to users of those facilities, satisfactory arrangements are made for that purpose and clear terms of agreement exist between the users of the facility and the exchange.

Investor
protection

14. (1) An exchange shall at all times provide safeguards to ensure investor protection, to such standard as the Regulatory Authority may determine.

(2) Without derogating from the generality of subregulation (1) an exchange shall have business rules, procedures and an effective surveillance programme that ensures that business conducted on or through its facilities or trading systems is conducted in an orderly manner to provide proper protection to investors, including —

(a) segregation of client funds; and

(b) monitoring for conduct which may amount to market misconduct, financial crime and money laundering.

15. (1) An exchange shall provide details of how it will ensure ongoing compliance with its business and listing rules, to the satisfaction of the Regulatory Authority.

Ongoing compliance

- (2) An exchange shall have compliance procedures in place to ensure that —
- (a) its business rules and listing rules, where applicable, are enforced;
 - (b) complaints regarding persons granted access to its facilities are investigated;
 - (c) appeal procedures are in place; and
 - (d) where appropriate disciplinary action and appropriate penalties are available.

16. (1) An exchange shall at all times do all things necessary to make sure that its markets are fair, transparent, orderly and efficient for the purpose of reducing any systemic or any other type of risk that may adversely affect fair and orderly trading on the exchange.

Ongoing obligations

(2) An exchange shall submit to the Regulatory Authority a report in writing at such times as the Regulatory Authority may direct addressing matters affecting the exchange contained in the Act and such other matters as the Regulatory Authority may direct to be submitted.

(3) The report referred to in subregulation (2) may include the following matters —

- (a) ongoing compliance by the exchange with the terms of its licence;
- (b) complaints received and dealt with;
- (c) disciplinary matters arising and dealt with;
- (d) adequacy and performance of systems and controls;
- (e) financial matters concerning the operation of the exchange or the central securities depository; and
- (f) other relevant matters.

17. (1) An exchange shall have in place procedures to address complaints by market users so as to ensure that due process is upheld on an ongoing basis, to the satisfaction of the Regulatory Authority, which shall include —

Addressing complaints by market users

- (a) effective arrangements for the investigation and resolution of complaints made against the exchange;
- (b) establishing and maintaining a register of complaints made against the exchange and resolutions reached.

(2) Records of the complaints shall be maintained for a minimum of seven years.

18. (1) An exchange shall have appropriate measures to identify, deter and prevent market misconduct, financial crime and money laundering on and through the exchange facilities and report to the Regulatory Authority any market misconduct, financial crime and money laundering.

Deterrence of misconduct

- (2) An exchange shall have rules and procedures to prohibit or prevent any —
- (a) abusive trading or act and trades in which a party is improperly indemnified against losses;
 - (b) trades intended to create a false appearance of trading activity;
 - (c) cross trades executed for improper purposes;
 - (d) pre-arranged or pre-negotiated trades;
 - (e) trades intended to assist or conceal any potentially identifiable trading abuse; and
 - (f) trades which one party does not intend to close or settle.

Promoting and maintaining standards

19. (1) An exchange shall provide details of how it will promote and maintain standards, as required by the Regulatory Authority from time to time.

(2) An exchange shall take all necessary steps to promote and maintain high standards of integrity and fair dealing in the carrying on of business on or through its facilities or trading systems and cooperate with the Regulatory Authority with regard to regulatory matters when and as required.

Whistle blowing procedure

20. An exchange shall have appropriate procedures and protections for allowing employees to disclose any information to the Regulatory Authority or other appropriate bodies involved in the prevention of market misconduct, financial crime and money laundering.

False and misleading statements to the Regulatory Authority

21. (1) In accordance with section 92 of the Act, no person shall, in connection with an application submitted to the Regulatory Authority for a licence under these Regulations —

- (a) make or procure the making of a statement to the Regulatory Authority which he or she knows or ought reasonably to know is false or misleading;
- (b) omit to state any matter to the Regulatory Authority where he or she knows or ought reasonably to know that, because of the omission, the application is misleading.

(2) Any person who contravenes subsection (1) shall be liable to the civil penalty imposed by the Regulatory Authority under section 92 (1).

SCHEDULE
(regulation 3(2))

Form1

APPLICATION FOR A COMMODITIES EXCHANGE LICENCE

Submitted by.....

.....

.....

Full address.....

.....

.....

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Date.....

To:
The Chief Executive
Non-Bank Financial Institutions Regulatory Authority
Gaborone

Dear Sir/Madam,

I/We apply for the licensing of¹.....

.....

as a commodities exchange.

The registered office of the commodities exchange shall be at²

.....

The head office of the commodities exchange shall be at³

.....

The person managing the business of the commodities exchange will be

Address

.....

The Principal Officer/Representative of the commodities exchange

Address

.....

Date on which applicant intends to commence, carrying out business as a commodities exchange in or within Botswana

I/We enclose: —

- (a) two copies of the;
 - (i) Rules;
 - (ii) Constitution and/or other incorporating documents of the company (certified);
- (b) all other requirements to accompany the application in terms of regulation 4 (2);
- (c) the application fee in the amount of P50 000.

Yours faithfully

.....

(Authorised signature)⁴

MADE this 22nd day of August, 2008.

B. GAOLATHE,
*Minister of Finance and Development
Planning.*

L2/7/231 I

¹Full name of the commodities exchange to be licensed.

²Provide physical address of the registered office of a company registered in terms of the Companies Act, 2003, Act No. 32 of 2004.

³Provide full physical and postal address.

⁴The application should be signed by the Principal Officer or Director of the company.