

COLLECTIVE INVESTMENT UNDERTAKINGS ACT, 2021

No. 23



of 2021

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SCHEDULES

An Act to provide for the supervision and regulation of collective investment undertakings, to enhance protection for investors and to provide for matters connected with or incidental thereto.

Date of Assent: 08.11.2021

Date of Commencement: ON NOTICE

ENACTED by the Parliament of Botswana.

CHAPTER I – *Preliminary*

1. This Act may be cited as the Collective Investment Undertakings Act, 2021, and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint. Short title and commencement
2. In this Act, unless the context otherwise requires — Interpretation
 - “advertisement” means a communication including oral, written, visual and electronic communication to the public or any section of the public, to clients, or any group of clients that provides information about a collective investment undertaking;
 - “asset manager” has the meaning assigned to it under the Non-Bank Financial Institutions Regulatory Authority Act; Cap. 46:08

“associated enterprise” means —

- (a) a holding company of a management company, asset manager, trustee, collective investment undertaking auditor or supervisory custodian or custodian;
- (b) a subsidiary company of a management company, asset manager, trustee, collective investment undertaking auditor or supervisory custodian or custodian;
- (c) a company which is a subsidiary of a body corporate, where the management company, asset manager, trustee, collective investment undertaking auditor or supervisory custodian or custodian concerned is also a subsidiary of the body corporate, but neither company is a subsidiary of the other;
- (d) in the case of a management company, asset manager, trustee, collective investment undertaking auditor or a supervisory custodian or custodian, any other body corporate that is not a subsidiary of the management company, asset manager, trustee or collective investment undertaking auditor or supervisory custodian or custodian but, in respect of which, the company is beneficially entitled to more than 20 per cent in nominal value of either the allotted share capital or of the shares carrying voting rights (other than voting rights which arise only in specified circumstances) in that other body corporate; or
- (e) a partnership in which the management company, trustee or supervisory custodian or custodian has an interest, and whose business is or, at the relevant time, was, in the opinion of the Regulatory Authority, materially relevant to an inspection being carried out or proposed to be carried out under this Act in the management company, trustee or supervisory custodian or custodian;

Cap. 08:07

“beneficial owner” has the meaning assigned to it in the Financial Intelligence Act;

“beneficially owned” means the rights over the property of a unit trust conferred by a trust deed on a unit-holder proportionate to the number of units held relative to the total number of units in issue;

“capital property” means the undertaking property, other than the income property and any amount for the time being standing to the credit of the distribution account;

“closed ended”, in relation to a collective investment undertaking, means an undertaking which, after the initial investment period, is closed for a set period during which no transactions with the manager of the fund take place in the units of the fund;

“closed ended investment company” means an investment company which has a fixed number of shares in issue;

“compensation scheme” means a compensation fund of last resort for customers of collective investment undertakings;

“constituting document” means for —

- (a) an investment company, the constitution of that company;
- (b) a partnership, the partnership agreement; and
- (c) a unit trust, the trust deed;

“controller” has the same meaning assigned to it under the Non-Bank Financial Institutions Regulatory Authority Act;

“custodian” has the meaning assigned to it under the Non-Bank Financial Institutions Regulatory Authority Act;

“debenture” has the meaning assigned to it under the Companies Act;

Cap. 42:01

“deposit” means a sum of money paid on terms under which it will be repaid, with or without interest or a premium, either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it;

“director” has the meaning assigned to it in the Companies Act;

“distribution account” means the account to which the income property of a collective investment undertaking may be transferred at the end of each annual accounting period;

“durable medium” means paper, electronic or any other instrument that enables the recipient to store information addressed personally to that recipient in such a way that it is accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

“eligible facilities agent” means a person eligible to be appointed to facilitate the purchase and repurchase of collective investment undertaking participations and provision of information and services in relation to foreign collective investment undertakings within Botswana;

“exempt collective investment undertaking” means a collective investment undertaking exempted under section 19(2);

“expert client” means an investor who has signed a declaration, as may be prescribed, and who meets the following criteria —

- (a) an individual holding financial assets (either single or jointly with a spouse) of P1 000,000 or more;
- (b) a financial services business licensed to conduct a regulated activity;
- (c) a bank licensed in Botswana or equivalent outside Botswana;
- (d) an institutional investor such as a pension fund, insurance fund, medical aid fund, collective investment undertaking, or any other entity as the Minister may prescribe; or
- (e) governments, statutory bodies, central banks or other national monetary authorities, local authorities and state owned organisations;

“feeder collective investment undertaking” means a collective investment undertaking the principal object of which is invested in a single collective investment undertaking;

“foreign company” has the same meaning assigned to it under the Companies Act;

- “foreign exempted collective investment undertaking” means a collective investment undertaking domiciled outside Botswana permitted by the Regulatory Authority to be offered to expert clients only within Botswana;
- “Guardian’s Fund” means the Fund established under the Administration of Estates Act;
- “holding company” has the meaning assigned to it under the Companies Act;
- “income property” means the total amount of money that the management company considers to be in the nature of income received or receivable for the account of and in respect of the property of a collective investment undertaking, but excluding any amount for the time being standing to the credit of a distribution account;
- “independent director” means a non-executive director of an investment company who meets the requirements to be able to act independently of the management company of that undertaking, of its investment adviser, its auditor, its legal adviser, its trustee or supervisory custodian or custodian and who is not a director, employee, partner, officer or professional adviser to any of these entities and who has not acted in that capacity three years prior to the appointment;
- “investment adviser” has the meaning assigned to it under the Non-Bank Financial Institutions Regulatory Authority Act;
- “investment company” means a collective investment undertaking which is a body corporate, the principal object of which is the diversified investment of its property in securities and real or personal property of whatever kind;
- “investment company with fixed capital” means a company under the Companies Act which is closed ended in terms of section 18 (3) (a) and has a fixed number of shares in issue, and is licensed or exempted under this Act;
- “investment company with variable capital” means a company which has a share capital that varies according to the value of the assets which represent the share capital and which satisfies the requirements of section 18 (3) (b) and (c);
- “key person” has the same meaning assigned to it under the Non-Bank Financial Institutions Regulatory Authority Act;
- “licensed corporate director” means a body corporate licensed which is a management company of an investment company with variable or fixed capital;
- “management company” means a body corporate licensed, and responsible for the establishment, promotion, operation, investment management and administration of a separately constituted collective investment undertaking, under this Act;
- “master undertaking” means an undertaking which has amongst its participants at least one feeder collective investment undertaking and which is not itself a feeder collective investment undertaking and which does not hold participations in a feeder collective investment undertaking;

“money market collective investment undertaking” means an open ended collective investment undertaking whose primary objective must be to maintain the net asset value of the undertaking either constant at par (net of earnings) or at the value of the participants’ initial capital plus earnings and which must sell and repurchase its participations every working day;

“net asset value” means the —

- (a) value of a unit trust’s fund less the service charge, the administration expenses and the remuneration of the trustee and any other liabilities of the fund not already taken into account in determining the value of the fund and shall include a provision for duties and charges; or
- (b) value of a share or shares of a particular class in an investment company for any particular dealing day as determined by the directors in accordance with the articles of that investment company;

“net asset value per participation” means the net asset value of the collective investment undertaking divided by the number of participations in issue at the time of the calculation of the net asset value;

“open ended”, in relation to a collective investment undertaking, means arrangements which are continually creating new shares, units or partnership interests when investors buy or sell securities and consequently, the Net Asset Value of the Collective Investment Undertaking increases or decreases as investors buy and sell shares, units or partnership interests, the Net Asset Value calculated periodically and investors may buy or sell shares, units or partnership interests at Net Asset Value, net of certain charges, at regular intervals;

“operator of a collective investment undertaking” means an operator of a licensed collective investment undertaking or an operator of an exempt collective investment undertaking, or both;

“operator of a licensed collective investment undertaking” means, in relation to an investment company, the licensed corporate director of that company which is the management company; and, in relation to a unit trust, the management company;

“operator of an exempt collective investment undertaking” means —

- (a) in relation to an investment company which has a licensed corporate director which is the management company, that management company;
- (b) in relation to an investment company which does not have a licensed corporate director, the Board of that company;
- (c) in relation to a unit trust, the management company; and
- (d) in relation to a partnership which is a collective investment undertaking, the general partner of that partnership;

- “participant” means any person holding units or shares or a partnership interest or any other form of participation, right or interest in a collective investment undertaking by reason of having invested capital in the collective investment undertaking;
- “participation” includes, a share, a unit, a partnership interest and any other instrument or interest granting a proportionate entitlement to undertaking property and the income earned by undertaking property and capital returns earned by undertaking property;
- “prospectus” means a document that discloses the terms of the offering of a collective investment undertaking;
- “recognised collective investment undertaking” means a collective investment undertaking recognised by the Regulatory Authority under section 22;
- “records”, in relation to a collective investment undertaking, has the meaning assigned to it under the Non-Bank Financial Institutions Regulatory Authority Act and section 186 of the Companies Act, and includes account records of the undertaking, valuation of the undertaking assets, calculation of the net asset value of participations in an undertaking or sub-undertaking; of the issue, cancellation and purchase and repurchase of participations; and of the portfolio and portfolio transactions for the undertaking;
- “Regulatory Authority” means the Non-Bank Financial Institutions Regulatory Authority established under the Non-Bank Financial Institutions Regulatory Authority Act;
- “related company” has the same meaning assigned to it under the Companies Act;
- “scheme of arrangement” means a procedure that allows a company to reconstruct its capital, assets or liabilities with the approval of its shareholders and the court;
- “securities” has the meaning assigned to it under the Securities Act;
- “share”, in relation to the capital of a company, has the meaning assigned to it under the Companies Act;
- “stand-alone undertaking” means an undertaking which is not an umbrella undertaking or a sub-undertaking;
- “sub-undertaking” means the various portfolios that are part of the undertaking property of an umbrella undertaking that are pooled, managed and accounted for separately;
- “sub-undertaking property” means the property of a sub-undertaking which is beneficially owned by the participants in that sub-undertaking;
- “subsidiary company” has the meaning assigned to it under the Companies Act;

- “supervisory custodian”, in relation to a licensed investment company or any licensed collective investment undertaking constituted otherwise than as a unit trust, means a body corporate to whom the property subject to the undertaking is entrusted for safekeeping that has the duties and functions set out in Chapter V, Part II which is a trustee or is eligible to be a trustee under this Act;
- “territory”, in relation to a collective investment undertaking, means a geographical region governed by a legal regime specific to that geographic region;
- “third party” means any person not working for the Regulatory Authority but is contracted by the Regulatory to assist with specific assignments;
- “Tribunal” has the same meaning assigned to it under the Non-Bank Financial Institutions Regulatory Authority Act;
- “trust deed” means any agreement deed between a management company and a trustee which is the constituting document of a unit trust;
- “trust property” has the same meaning assigned to it under the Trust Property Control Act; Cap. 31:05
- “trustee” means a body corporate holding the property constituting a unit trust undertaking on trust for the participants, which is eligible to be a trustee under this Act and which carries out the duties and functions set out in Chapter V;
- “umbrella undertaking” means an open ended collective investment undertaking which, to the extent as may be approved and subject to such conditions as may be applied by the Regulatory Authority or a foreign equivalent, may be divided into a number of sub-undertakings in which participants are entitled to exchange rights in one sub-undertaking for rights in another;
- “undertaking property” means the property subject to the collective investment undertaking;
- “unit” means securities issued by a collective investment undertaking and representing the rights of the participants in such an undertaking over its assets;
- “unit-holder” means any person who by reason of the holding of units or by reason of having invested capital in a unit trust is entitled to a proportionate part of undertaking property;
- “unit trust” means a collective investment undertaking constituted by a trust deed between a management company and a trustee binding the trustee to deal with the trust property solely for the benefit of unit holders, any of whom may enforce such obligation; and
- “working days” means Monday to Friday, and shall exclude Saturdays, Sundays and public holidays.

Application of Act

3. (1) Subject to any exception contained in this Act, this Act shall apply to a —

(a) collective investment undertaking investing in real and personal property and resident in Botswana within the meaning of section 9; and

(b) foreign collective investment undertaking marketing or proposing to market a unit in Botswana.

(2) This Act shall not apply to a collective investment undertaking which raise capital without promoting the sale of such collective investment undertaking unit to the public.

CHAPTER II — *Powers of the Regulatory Authority*

Financial services law under Non-Bank Financial Institutions Regulatory Authority Act

4. This Act is a financial services law under the Non-Bank Financial Institutions Regulatory Authority Act.

Powers of Regulatory Authority in relation to collective investment undertakings

5. (1) The Regulatory Authority's powers and authority under the Non-Bank Financial Institutions Regulatory Authority Act shall be exercisable in relation to collective investment undertakings under this Act.

(2) The powers and authority of the Regulatory Authority under subsection (1) shall also be exercisable in relation to the general partner of a collective investment undertaking and to the directors of an investment company licensed or exempted under this Act.

(3) The Regulatory Authority may disqualify a controller, key person, custodian, trustee or auditor of a collective investment undertaking from acting as a director of an investment company.

Powers of Regulatory Authority to issue licences, exemptions and recognitions of collective investment undertakings

6. The Regulatory Authority may —

(a) issue licences, exemptions and recognitions collective investment of undertakings or sub-undertakings and to suspend or cancel such licences, exemptions or recognitions for violating their fiduciary duties and laws applicable to collective investment undertakings;

(b) impose conditions in relation to a licence, an exemption or recognition; and

(c) order the removal of a controller or key person, custodian or trustee from the board of an investment company, or remove an auditor of a collective investment undertaking for violating their fiduciary duties and laws applicable to collective investment undertakings.

7. (1) The Regulatory Authority may, in writing, appoint a person to be an inspector or investigator of a collective investment undertaking.

(2) The Regulatory Authority shall provide an identity card to each inspector and investigator appointed under subsection (1).

(3) An inspector or investigator shall, when exercising a power conferred by this Act, produce his or her identity card for inspection.

8. (1) An inspector may, at any time, with or without prior notice, inspect the affairs or any part of the affairs of a collective investment undertaking to check whether a collective undertaking investment —

- (a) is being offered and operated in compliance with this Act;
- (b) is complying or has complied with a financial services law;
- (c) satisfies the criteria or standards set out in or made under a financial services law; or
- (d) is or has committed a financial offence.

(2) For the purposes of such an inspection, the inspector may enter any premises used by an undertaking or its operator or its trustee, supervisory custodian, custodian and auditor, at any reasonable time and may inspect and make copies or take extracts from any relevant record, document or thing in those premises and may interview any person relevant to the inspection.

(3) An undertaking and its operator or its trustee, supervisory custodian, custodian and auditor shall allow an inspector to have full and free access to its premises, records, personnel and documents as may be relevant to the inspection and where any of these persons has delegated any task for which the undertaking is responsible to another entity, he or she shall ensure that the inspector has the same access in relation to that entity.

(4) A person who contravenes subsection (3) commits an offence and is liable to a —

- (a) civil penalty not exceeding P2 500 for each day on which the offence occurs or continues to occur up to 90 days; or
- (b) cancellation of a licence or recognition where the offence continues beyond 90 days.

9. (1) The Regulatory Authority shall, where it appears to it that there is good reason to do so, investigate the affairs, or any aspect of the affairs, of any person so far as relevant to any collective investment undertaking activities which it was carrying on or appears to the Regulatory Authority to be or to have been carrying on or appears to be about to carry out.

(2) The Regulatory Authority may require the person whose affairs are to be investigated, in this Part referred to as “the person under investigation”, or any other connected person to appear before the Regulatory Authority at a specified time and place to answer questions or otherwise provide information with respect to any matter relevant to the investigation.

Regulatory Authority to appoint inspector or investigator

Inspection of licensed and recognised collective investment undertakings

Investigative powers in relation to collective investment undertakings

(3) The Regulatory Authority may require the person under investigation or any other connected person, to produce, at a specified time and place, any specified documents which appear to the Regulatory Authority, to relate to the matter being investigated.

(4) The Regulatory Authority may —

(a) upon receipt of any documents referred to under subsection (3), make copies of them or require the person producing them or any other connected person to provide an explanation relating to the documents; and

(b) where a person fails to produce the documents referred to in subsection (3), require the person or any other connected person who was required to produce them to state, to the best of his or her knowledge and belief, where the documents are.

(5) A statement by a person or other connected person in compliance with a requirement imposed under subsection (4) may be used as evidence in any proceedings against the person.

(6) The Regulatory Authority shall have the power to protect an investor's interest including the appointment of a curator or statutory manager taking action to withdraw a collective investment undertaking authorisation or suspension of prospectus while taking corrective action as directed by the Regulatory Authority.

(7) In this section, the word, "connected" in relation to a person under investigation means —

(a) any person who is or was a partner, employee, agent, appointed representative, banker, auditor or attorney of a person under investigation;

(b) where the person under investigation is a body corporate, any person who is or was a director, secretary or controller of that body corporate or of another body corporate of which it is or was a subsidiary;

(c) where the other person is an unincorporated association, any person who is or was a member of the governing body or an officer or controller of the association;

(d) where the other person is a representative of a person, any person who is or was his or her principal; and

(e) where the other person is the person under investigation and is a body corporate, any related company of that body corporate and any person who is a connected person in relation to that company.

(8) In this section, "documents" include information recorded in any form and, in relation to information recorded otherwise than in legible form, the power to require its production includes power to require the production of a copy of the information in legible form.

10. (1) The Regulatory Authority may appoint any of its officers or any other person to exercise, on its behalf, all or any of the investigation powers and such power to investigate shall specify the affairs, or any aspects of the affairs of the person to be investigated in a notice to investigate.

Investigation by
officer

(2) A person investigated by an officer or other person appointed in accordance with subsection (1) shall not be bound to comply with any requirement imposed by an officer or person exercising powers by virtue of a notice to investigate granted under this section unless the officer or person exercising such powers has, if required to do so, produced evidence of his or her appointment by the Regulatory Authority.

(3) A person shall not, by virtue of a notice of investigation, be required to disclose any confidential information or produce any confidential documents unless —

- (a) he or she is the person under investigation or a related company;
- (b) the person to whom the obligation of confidence is owed is the person under investigation or a related company;
- (c) the person to whom the obligation of confidence is owed consents to the disclosure or production; or
- (d) the Regulatory Authority has specifically required the information or documents.

(4) Where the Regulatory Authority appoints a person other than one of its officers to exercise any investigation powers, that person shall make a report to the Regulatory Authority on the exercise of those powers and the results of exercising them.

(5) The Regulatory Authority shall impose a condition that, upon appointment under this section, a third party shall be liable for loss suffered by an investor as a result of the negligence or failure to perform obligations by the third party.

11. (1) A person referred to in subsection (3) or any person who obtains the information directly or indirectly from a person referred to in subsection (3), shall not, subject to exemptions and restrictions, without the consent of the person from whom the primary recipient obtained the information and if different, the person to whom it relates, disclose information which is restricted for the purposes of this section and relates to the business or other affairs of any related person.

Confidential
information

(2) For purposes of this section, information is —

- (a) confidential if it was obtained by the primary recipient for the purposes of, or in the discharge of his or her functions under this Act; and
- (b) not confidential if it has been made available to the public by virtue of being disclosed in any circumstances which are not excluded by this section.

(3) The persons referred to in subsection (1) are —

- (a) the Regulatory Authority;
- (b) any person administering a compensation scheme;

- (c) any member of the Tribunal;
- (d) any person appointed or authorised by the Regulatory Authority to exercise any powers of investigation; or
- (e) any officer or representative of such persons as are referred to in paragraphs (a) to (d).

(4) This section shall not preclude the disclosure of information for the purpose of enabling or assisting any public or other body to discharge its functions as may be further specified in rules issued by the Regulatory Authority.

(5) Any person who contravenes this section commits an offence and is liable to a fine not exceeding P250 000 or to imprisonment for a term not exceeding 10 years, or to both.

Exemptions for disclosure of confidential information

12. Notwithstanding the provisions of section 11, confidential information may be disclosed if the disclosure is for the following reasons —

- (a) the institution of or otherwise for the purposes of civil or criminal proceedings;
- (b) the institution of or otherwise for the purposes of any disciplinary proceedings or proceedings before the Tribunal;
- (c) for the purpose of enabling or assisting the Regulatory Authority to exercise any powers conferred on it by this Act;
- (d) for the purpose of enabling or assisting a stock exchange, regulated market, central securities depository or a clearing and settlement organisation, or any other securities infrastructure business as defined under the Securities Act to discharge its functions under this Act or enabling or assisting the body administering a compensation scheme under this Act to discharge its functions under the scheme;
- (e) for the purpose of enabling or assisting an official receiver to discharge his or her functions under the Insolvency Act;
- (f) for the purpose of enabling or assisting any firm appointed to exercise any investigation powers or any auditor appointed under this Act to discharge his or her functions; or
- (g) for the purpose of enabling or assisting a regulatory agency outside Botswana to exercise its regulatory functions in terms of section 13.

Cap. 42:02

Co-operation

13. The Regulatory Authority may take such steps as it considers appropriate to cooperate with a foreign regulatory authority which has functions —

- (a) which correspond to those exercisable by the Regulatory Authority under this Act; or
- (b) in relation to the detection of financial crime.

Investigations in support of foreign regulatory authority

14. (1) At the request of a foreign regulatory authority the Regulatory Authority may —

- (a) exercise the power conferred by section 9; or
- (b) appoint one or more competent persons to investigate any matter.

(2) An investigator appointed under subsection (1) shall have the same powers and duties as an investigator appointed under section 10.

(3) In deciding whether or not to exercise its investigative powers, the Regulatory Authority may take into account —

- (a) whether in the country or territory of the foreign regulatory authority concerned, corresponding assistance would be given to the Regulatory Authority;
- (b) whether the case concerns the breach of a law, or other requirement, which has no close similarity in Botswana or involves the assertion of a jurisdiction not recognised by Botswana;
- (c) the seriousness of the case and its importance to persons in Botswana; and
- (d) whether it is otherwise appropriate in the public interest to give the assistance sought.

(4) The Regulatory Authority may decide not to exercise its investigative power unless the foreign regulatory authority undertakes to make such contribution towards the cost of its exercise as the Regulatory Authority considers appropriate.

(5) If the Regulatory Authority has appointed an investigator in response to a request from a foreign regulatory authority, it may direct the investigator to permit a representative of that foreign regulator to attend, and take part in, any interview conducted for the purposes of the investigation.

(6) A direction under subsection (5) is not to be given unless the Regulatory Authority is satisfied that any information obtained by a foreign regulatory authority as a result of the interview will be subject to safeguards equivalent to those contained in sections 9, 10 and 11.

15. (1) The Regulatory Authority shall create and maintain a register of licensed, recognised and exempted collective investment undertakings and shall make the register of licensed, recognised and exempted undertakings publicly accessible free of charge.

(2) The Regulatory Authority shall record, in the register variations, suspensions and cancellations of licences, recognitions and exemptions of collective investment undertakings.

Maintenance of register of collective investment undertakings by Regulatory Authority

CHAPTER III — *Collective Investment Undertakings: Generally*

PART I — *Meaning, Objectives and Structure of Collective Investment Undertakings*

16. (1) A collective investment undertaking means any arrangement with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangement (the “participants”), whether by becoming owners of the property or any part of it or otherwise, to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.

Meaning and objective of collective investment undertaking

- (2) The arrangement referred to in subsection (1) shall be such that —
- (a) the participants do not have day to day control over the management of the property in question, whether or not they have the right to be consulted or to give directions;
 - (b) it has any of the characteristics specified in subsection (3); and
 - (c) it satisfies the conditions set out in subsection (4).
- (3) The arrangement referred to in subsection (1) shall have any of the following characteristics —
- (a) the contributions of the participants and the profits or income out of which payments to be made are pooled; or
 - (b) the property in question is managed as a whole by or on behalf of the operator of the collective investment undertaking.
- (4) The property referred to in subsection (1) shall be beneficially owned and be managed by or on behalf of, a company, the trustee of a unit trust or some other entity or arrangement having as its purpose the investment of its funds with the aim of spreading investment risk and giving its members the benefit of the results of the management of those funds by or on behalf of that company, unit trust, entity or management.
- (5) Where any arrangement provides for the pooling referred to in subsection (3)(a) in relation to separate parts of the property, and each of the parts is maintained in a portfolio segregated in the books of the undertaking from the other assets of the undertaking, then the arrangement shall be regarded as constituting a collective investment undertaking:

Provided that the undertaking shall be regarded as an umbrella undertaking on the condition that the participants are entitled to exchange rights in one part for rights in another part.

- (6) Where each part of the undertaking property is segregated in the books of the umbrella undertaking and is a sub-undertaking —
- (a) the property subject to the sub-undertaking that is beneficially owned by the participants in that sub-undertaking shall not be used to discharge any liabilities of the participants in any other sub-undertaking;
 - (b) any liability of the participants in the sub-undertaking arising from the acquisition, management or disposal of the property subject to the sub-undertaking shall be discharged solely out of that property;
 - (c) a participant in the umbrella undertaking shall not be liable for debts arising from the acquisition, management or disposal of the property subject to a sub-undertaking in which the participant has participations beyond the amount which, at the time when any debts fall to be discharged, is equal to the value at that time of the participant's participations in that sub-undertaking;
 - (d) the operator, and no other person, of the sub-undertaking may, on behalf of participants in a sub-undertaking take and defend proceedings for the resolution of any matter relating to an authorised contract and take action in relation to the enforcement of any judgment given in such proceedings; and

- (e) the Regulatory Authority may exercise its powers in relation to a sub-undertaking as if that undertaking were a stand-alone undertaking.
- 17. An arrangement shall not constitute a collective investment undertaking if it is —**
- (a) an arrangement operated by a person other than by way of business;
 - (b) an arrangement where each of the participants carries on a business other than a business concerned with dealing in, arranging deals, managing or advising on securities or investments and enters into the arrangement for commercial purposes related to that business;
 - (c) an arrangement where each of the participants is a company in the same group as the management company of the undertaking;
 - (d) an arrangement where —
 - (i) each of the participants is a *bona fide* employee or former employee, or the spouse, widow, widower, child or step child under the age of 18 years of age of such an employee or former employee, of a company in the same group as the management company, and
 - (ii) the property to which the arrangement relates consists of shares or stock, debentures, loan stock or any other instrument creating or acknowledging indebtedness or warrants or certificates conferring rights in relation to any such investment, in each case being an investment in or in a member of that group;
 - (e) a franchise arrangement, that is to say, an arrangement under which a person earns profits or income by exploiting a right conferred by the arrangements to use a trade name or design or other intellectual property right or the goodwill attached to it;
 - (f) an arrangement the predominant purpose of which is to enable persons participating in it to share in the use or enjoyment of a particular property or to make its use or enjoyment available gratuitously to other persons;
 - (g) an arrangement under which the rights or interests of the participants consist of the benefit of certificates or other instruments conferring rights in relation to securities other than shares in an investment company;
 - (h) a contract of insurance;
 - (i) a pension scheme;
 - (j) a closed ended investment company which is established by the operator of another collective investment undertaking —
 - (i) for the purposes of holding investments, directly or indirectly, on behalf of that undertaking, or a series of collective investment undertakings established by a single sponsor to invest in parallel one with another, the “owning undertakings”, and

Arrangements
not constituting
collective
investment
undertaking

Structure of
collective
investment
undertakings

- (ii) the shares of which are not marketed to or otherwise available to any participant other than the owning undertakings;
 - (k) a building society;
 - (l) a co-operative society;
 - (m) a credit union; and
 - (n) any other arrangement that the Minister, in consultation with the Regulatory Authority, may specify by notice in the *Gazette*.
- 18.** (1) A collective investment undertaking shall be constituted as —
- (a) a unit trust in compliance with the requirements of Schedule II;
 - (b) an investment company with -
 - (i) fixed capital, or
 - (ii) variable capital; or
 - (c) a limited partnership in compliance with the requirements of Schedule I.
- (2) Without prejudice to subsection (1), the Minister may, in consultation with the Regulatory Authority, prescribe arrangements, other than those set out in subsection (1), under which collective investment undertakings may be constituted.
- (3) A collective investment undertaking shall be constituted by type as —
- (a) a closed ended undertaking which has no obligation to repurchase its participations from holders upon their request;
 - (b) an open ended undertaking, which is obliged to repurchase its participations from holders upon their request at a price related to net asset value of the undertaking property not less frequently than twice a month at regular intervals; or
 - (c) an interval undertaking, which is obliged to repurchase its participations from holders at a price related to net asset value of the undertaking property on a regular periodic basis which shall not be less frequently than twice per annum.
- (4) A collective investment undertaking which is an open ended undertaking in terms of subsection (3)(b) may be—
- (a) an umbrella undertaking;
 - (b) a master undertaking;
 - (c) a feeder collective investment undertaking; or
 - (d) any other formation as may be prescribed.
- (5) A collective investment undertaking shall not offer or purport to offer any guarantee or certainty whatsoever as to performance relating either to income or to capital.

PART II — *Licensing and Recognition of Collective Investment Undertakings*

Prohibition of
unlicensed
collective
investment
undertakings

- 19.** (1) A person shall not —
- (a) establish or operate a collective investment undertaking in Botswana, or purport to establish or operate such an undertaking, or act or purport to act as a trustee, supervisory custodian, management company or custodian of an undertaking in Botswana unless that person is licensed by the Regulatory Authority as required by this Act;

- (b) issue or cause to be issued an advertisement offering participations in a collective investment undertaking in Botswana unless –
 - (i) that person is licensed as a management company by the Regulatory Authority as required by this Act, and
 - (ii) the undertaking has been licensed or recognised by the Regulatory Authority under this Act; or
- (c) by way of business, arrange or offer to arrange or recommend the purchase of participations in a collective investment undertaking in Botswana unless –
 - (i) that person has been licensed by the Regulatory Authority as required under this Act, and
 - (ii) the undertaking is a licensed or recognised undertaking under this Act.

(2) The Minister may, in consultation with the Regulatory Authority, prescribe conditions under which any collective investment undertaking —

- (a) created or organised under this Act or under any foreign law whose participants are restricted to not more than 100 participants acting as principals that are expert clients domiciled in Botswana or outside Botswana; and
- (b) which is offered only in compliance with sections 27 and 28, may be exempted from subsection (1).

(3) Any agreement entered into by a person in the course of, or in consequence of, a contravention of subsection (1) shall be unenforceable against the other party, and that party shall be entitled to recover any money or other property paid or transferred by him or her under the agreement, together with compensation for any loss sustained by him or her as a result.

(4) The compensation recoverable under subsection (3) shall be such as the parties may agree or as the court may, on the application of either party, determine.

(5) The court may allow an agreement to which subsection (3) applies to be enforced, or money and property paid or transferred under that agreement to be retained if the court is satisfied that the person referred to in that subsection reasonably believed that his or her entering into the agreement did not constitute a contravention of subsection (1).

(6) Where a person elects not to perform an agreement which, by virtue of this section is unenforceable against him or her, or by virtue of this section recovers money paid or other property transferred by him or her under an agreement, the person shall repay any money and return any other property received by him or her under the agreement.

(7) Where any property transferred under an agreement to which this section applies has passed to a third party, the references to that property in subsections (3), (5) and (6) shall be construed as references to its value at the time of its transfer under the agreement.

(8) A contravention of subsection (1) shall not make an agreement illegal or invalid to any greater extent than is provided for in this section.

(9) Any person who contravenes this section commits an offence and is liable to a fine not exceeding P5 000 for each day on which the offence occurs or continues to occur up to 90 days or to imprisonment for a term not exceeding 10 years, or to both.

20. (1) The Regulatory Authority may licence a collective investment undertaking if —

- (a) it is incorporated or created in compliance with this Act;
- (b) the application for the licence is made —
 - (i) by an entity holding a licence as a management company under this Act, or
 - (ii) by an entity eligible to be granted such a licence under this Act;
- (c) all the assets of the collective investment undertaking are held and will at all times be held by an entity which is legally and functionally independent of the undertaking and its management company which —
 - (i) in the case of a unit trust is an entity holding a licence as a supervisory custodian or eligible to act as a supervisory custodian, or an entity eligible to be granted such a licence under this Act and which is a licensed bank under the Banking Act or a company which is wholly owned by such a bank or a foreign company holding an equivalent banking licence, or
 - (ii) in the case of an investment company is an entity holding a licence as a supervisory custodian or eligible to act as a supervisory custodian or an entity eligible to be granted such a licence and which is a licensed bank under the Banking Act or a company which is wholly owned by such a bank or a foreign company holding an equivalent banking licence;
- (d) the name of the undertaking is not undesirable or not misleading and is not the same as an existing undertaking;
- (e) the purposes of the undertaking are reasonably capable of being successfully carried into effect;
- (f) in the case of an investment company, the constitution of the company states that it is an investment company and that the company is not a private company or a company limited by guarantee under the Companies Act;
- (g) in the case of an open ended or interval undertaking, the participants are entitled to have participations repurchased in accordance with the constituting document of the undertaking at a price —
 - (i) related to the net asset value of the property to which the participations relate, and
 - (ii) determined in accordance with this Act;

- (h) in the case of an application for a licence for a closed ended undertaking, the constituting document of the undertaking contains an undertaking to become listed on the securities exchange in Botswana or equivalent regulated market within six months of the closing of its initial public offering or the undertaking is established for a fixed period of time of not more than 15 years after which the undertaking will be wound up and the proceeds distributed to participants;
- (i) in the case of an undertaking formed under the Companies Act, all individual directors of the company are of good repute and in good financial standing and have the competence and experience required for the performance of their duties and that the majority of the non-executive directors are independent directors;
- (j) in the case of an undertaking that will invest to any degree directly into immovables, that application is accompanied by the written consent of a professionally qualified independent valuer eligible to act in that capacity;
- (k) the application is accompanied by the written consent of an auditor eligible to act in such capacity to the undertaking;
- (l) the constituting document and the prospectus of the undertaking state that no agreement may be made to dispose of property or rights of the undertaking unless the obligation is capable of being immediately honoured by the undertaking and the property or rights are owned by the undertaking at the time of the agreement;
- (m) the application for the licence of the undertaking is made in the prescribed form; and
- (n) the prescribed fee is paid.

(2) The undertaking may be treated as complying with the requirements of subsection (1)(g) if its constituting document requires the management company to ensure that a participant is able to sell his or her participations on the securities exchange in Botswana or another equivalent regulated market at a price not significantly different from that defined in subsection (1)(g)(i).

(3) A person granted a licence or recognition under this Act shall prominently display a copy of the licence or recognition at its offices in Botswana.

(4) Any person who contravenes subsection (3) is liable to a civil penalty not exceeding P5 000.

(5) The Minister may prescribe additional requirements for the licensing of collective investment undertakings.

(6) A collective investment undertaking applying for a licence in accordance with this section shall meet the prescribed minimum financial resources.

(7) The Regulatory Authority is not bound to deal further with the application until all the requisite licensing information has been received.

(8) 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; and

(b) will maintain a sound financial position and not cause or promote instability in the financial system.

Recognition of
foreign
collective
investment
undertakings

21. (1) The Regulatory Authority may only recognise a collective investment undertaking if it meets the following requirements —

(a) it is established under the collective investment undertaking law of a country or territory outside Botswana which is similar or equivalent to this Act;

(b) it is licensed or approved as eligible for public offer as the equivalent of a collective investment undertaking in Botswana under the law of that country or territory;

(c) the regulatory regime governing collective investment undertakings of that category in that country or territory has been recognised by the Regulatory Authority as providing equivalent protection to investors in such undertakings as this Act;

(d) the recognition application demonstrates compliance with requirements for the public offering of recognised collective investment undertakings under this Act and the rules of the Regulatory Authority governing recognised undertakings including the appointment of an eligible facilities agent;

(e) the required disclosure to participants or potential participants and reporting to the Regulatory Authority are made in English;

(f) the application for the recognition is made in accordance with prescribed requirements; and

(g) the prescribed fee is paid.

(2) The Minister may prescribe additional requirements for the recognition of collective investment undertakings.

Determining
licensing or
recognition

22. (1) The Regulatory Authority shall determine, within six months of receiving a complete application, whether to licence or recognise a collective investment undertaking.

(2) The Regulatory Authority may determine an incomplete application if it considers it appropriate to do so.

(3) An applicant may withdraw an application for a licence or recognition, by giving written notice, at any time before the Regulatory Authority determines it.

(4) The Regulatory Authority may at its discretion take into consideration when determining recognition of undertakings established outside Botswana, the existence of equivalent arrangements for recognition of foreign undertakings in the legislation of the applicant undertaking's jurisdiction.

Issue and
notification of
licence or
recognition

23. (1) Where the Regulatory Authority approves an application for a licence or recognition, it shall issue the licence or recognition to the applicant.

(2) Where the Regulatory Authority issues a licence or recognition under subsection (1), it shall publish notice of the issuance of a licence or recognition in the *Gazette*.

24. (1) The Regulatory Authority may refuse to issue a licence or recognition to a collective investment undertaking if the application does not meet the requirements of this Act.

Refusal to
issue licence
or recognition

(2) Where the Regulatory Authority refuses to issue a licence or recognition under subsection (1), it shall state, in writing, its reasons for refusal to issue such licence or recognition.

25. (1) An operator of a licensed or recognised collective investment undertaking, who wishes to alter his or her licence, shall prior to such alteration, give written notice to the Regulatory Authority of any proposed alteration to the undertaking.

Alteration of
licensed
collective
investment
undertakings

(2) The following shall be treated as a proposal to alter any licensed or recognised undertaking —

- (a) any proposed alteration to the constituting documents of the undertaking;
- (b) any proposed change to the operator, trustee, supervisory custodian, controller or key person of the undertaking;
- (c) the addition of any new sub-undertaking to an umbrella undertaking or termination of an existing sub-undertaking;
- (d) any proposed reconstruction or amalgamation involving the undertaking;
- (e) any proposal to wind-up the undertaking; or
- (f) any other alteration as may be prescribed by the Regulatory Authority.

(3) A trustee of a licensed unit trust shall give written notice to the Regulatory Authority of any proposal to remove the management company of the undertaking.

(4) A supervisory custodian and any director other than the licensed corporate director of a licensed investment company shall give written notice to the Regulatory Authority of any proposal to remove the management company of the undertaking.

(5) The Regulatory Authority shall not issue any direction under subsections (3) and (4) without giving the management company an opportunity to make representations on the matter.

(6) Any alteration to a licensed collective investment undertaking under this Part shall have no effect unless the Regulatory Authority has been informed and, where required by this Act, the Regulatory Authority has given its approval or where it is required by the constituting document of the undertaking, the participants have approved the change by way of extraordinary resolution.

(7) The Regulatory Authority may, after receipt of a written request under subsection (1) by the operator of a licensed or recognised collective investment undertaking, by notice to the operator —

- (a) vary the conditions of the collective investment undertaking's licence or recognition, including the imposing of additional conditions;
 - (b) suspend the collective investment undertaking's licence or recognition for the period specified in the notice; or
 - (c) cancel the collective investment undertaking's licence or recognition.
- (8) Any proposal of which notice has been given to the Regulatory Authority shall not have effect unless the Regulatory Authority, by written notice, has given its approval to the proposal or 40 working days have elapsed, beginning with the date on which the notice was given, without the operator of the undertaking or the person making such notification having received from the Regulatory Authority a refusal to accept the proposal.

(9) The Regulatory Authority shall not approve a proposal to change the management company, trustee, supervisory custodian, auditor, controller or key person of a licensed or recognised collective investment undertaking unless it is satisfied that, if the proposed change is made, the undertaking will continue to comply with section 16 of this Act.

(10) The Regulatory Authority shall, by notice in the *Gazette*, publish an alteration of the licensed or recognised collective investment undertaking.

Variation,
suspension or
cancellation of
licence or
recognition
by Regulatory
Authority

26. (1) The Regulatory Authority may vary, suspend or cancel a licence of a collective investment undertaking if it appears to it that —

- (a) the collective investment undertaking no longer complies with one or more of the requirements of this Part;
- (b) the operator or the board of the undertaking has contravened a requirement imposed upon it under this Act;
- (c) the operator of the undertaking or the entity acting as trustee or supervisory custodian to the undertaking or the board of an investment company has knowingly or recklessly given the Regulatory Authority information relating to the undertaking which is false or misleading in a material particular;
- (d) no regulated activity has been carried out in relation to the undertaking for a period exceeding 12 months;
- (e) the operator or the board of the undertaking has failed to disclose in a complete, accurate and timely manner information concerning the undertaking to the Regulatory Authority as required by this Act;
- (f) the operator of the undertaking has had its licence cancelled and no eligible replacement is appointed within 20 working days or the trustee or supervisory custodian has had its licence cancelled and no eligible replacement is appointed within 20 working days;
- (g) it is desirable to cancel the licence to protect the interests of the participants or potential participants in the undertaking;

- (h) the collective investment undertaking is causing or promoting instability in the financial system or is likely to do so; or
- (i) the collective investment undertaking is or is likely to be involved in a financial crime.

(2) Where any of the circumstances set out in subsection (1) arise, the Regulatory Authority may, by notice to the operator of the undertaking, copied to the trustee or supervisory custodian and board of the investment company —

- (a) vary the undertaking's licence;
- (b) suspend the undertaking's licence for the period specified in the notice; or
- (c) cancel the undertaking's licence.

(3) The Regulatory Authority may vary, suspend or cancel the recognition of a collective investment undertaking if it appears to it that —

- (a) the undertaking concerned no longer meets the requirements of section 16;
- (b) the operator of the undertaking or board of the investment company, or any equivalent person or body, or an eligible facilities agent to which its functions have been delegated within Botswana has contravened a requirement imposed upon it by this Act;
- (c) the operator or board of the undertaking or the entity acting as trustee or supervisory custodian to the undertaking, or any equivalent person or body, has knowingly or recklessly given it information relating to the undertaking which is false or misleading in a material particular;
- (d) no regulated activity is being carried out in relation to the undertaking and that period of inactivity began at least 12 months earlier;
- (e) the operator or board of the undertaking, or any equivalent person or body or an eligible facilities agent to which functions have been delegated within Botswana has failed to disclose in a complete, accurate and timely manner, information concerning the undertaking to the Regulatory Authority as required by this Act;
- (f) the licence of the eligible facilities agent to the undertaking is cancelled and no eligible facilities agent replacement is appointed within 20 working days;
- (g) it is desirable to cancel the recognition to protect the interests of the participants or potential participants in the undertaking;
- (h) the collective investment undertaking is causing or promoting instability in the financial system or is likely to do so; or
- (i) the collective investment undertaking is or is likely to be involved in a financial crime.

(4) Where any of the circumstances set out in subsection (3) arise, the Regulatory Authority may, by notice to the operator of the undertaking and board of the investment company, or any equivalent person or body and any eligible facilities agent of the undertaking —

- (a) vary the undertaking's recognition;
 - (b) suspend the undertaking's recognition for the period specified in the notice; or
 - (c) cancel the undertaking's recognition.
- (5) The Regulatory Authority shall not act in terms of subsection (2) or (4) in relation to a licensed or recognised collective investment undertaking respectively unless —
- (a) the Regulatory Authority has given the operator, or where relevant, the board of an investment company and the eligible facilities agent of the collective investment undertaking, written notice of the proposed action, setting out the reasons for the proposed action and stating that the undertaking has a specified period of at least 21 working 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 undertaking within that period.
- (6) The notice period in subsection (5)(a) shall not apply where it is necessary, in the interests of participants in an undertaking, for action to be taken immediately.
- (7) The Regulatory Authority shall, by notice in the *Gazette*, publish a variation, suspension or cancellation of a licence or recognition of a collective investment undertaking.

PART III — Exemption of Collective Investment Undertakings

Exemption of domestic collective investment undertakings

27. (1) An operator of a collective investment undertaking or an equivalent person may apply to the Regulatory Authority for an exemption.

(2) An application made under subsection (1) shall be in the prescribed form and accompanied by such fee as may be prescribed.

(3) The Regulatory Authority shall not issue an exemption to a domestic collective investment undertaking unless —

- (a) the portfolio of the undertaking is managed under this Act;
- (b) the application for the exemption of the domestic undertaking is made according to any requirements that the Regulatory Authority has set; and
- (c) the fund is marketed solely to expert clients.

Exemption of foreign collective investment undertakings

28. (1) An operator of a foreign collective investment undertaking or an equivalent person, may make an application to the Regulatory Authority for an exemption, in accordance with the provisions of this Act.

(2) An application made under subsection (1) shall be in the prescribed form and accompanied by such fee as may be prescribed.

(3) The Regulatory Authority shall not issue an exemption to a foreign collective investment undertaking unless —

- (a) it is to be promoted within Botswana and it complies with section 16 and is offered in terms of section 39;
- (b) the portfolio of the undertaking is managed by an entity holding a licence or approval equivalent to a management company or asset manager under this Act or the undertaking can demonstrate a regulatory status equivalent to exempt status under this Act;
- (c) the application for the exemption of the foreign undertaking is made according to any requirements that the Regulatory Authority has set; and
- (d) the fund is marketed solely to expert clients.

29. (1) The Regulatory Authority shall determine whether to exempt a collective investment undertaking within six months of receiving a complete application.

Determining exemption of collective investment undertakings

(2) The Regulatory Authority may determine an incomplete application if it considers it appropriate to do so.

(3) An applicant for an exemption may withdraw an application, by giving written notice, at any time before the Regulatory Authority determines it.

30. (1) Where the Regulatory Authority approves an application for an exemption under this Part, it shall issue the exemption to the applicant.

Issue and notification of exemption

(2) Where the Regulatory Authority has issued an exemption under subsection (1), it shall publish a notice in the *Gazette* and at least one newspaper of wide circulation in Botswana, of the issuance of such an exemption.

31. (1) The Regulatory Authority may refuse to exempt a collective investment undertaking or sub-undertaking if the application does not meet the requirements of this Part.

Refusal to exempt

(2) Where the Regulatory Authority refuses to exempt under subsection (1), it shall state, in writing, its reasons for the refusal.

32. The Regulatory Authority may withdraw the exemption of a foreign collective investment undertaking or sub-undertaking which fails to comply with sections 17 and 18.

Withdrawal of exemption of foreign collective undertakings

33. (1) An operator of an exempt collective investment undertaking, who wishes to alter his or her undertaking, shall give written notice to the Regulatory Authority, of the proposed alteration to the undertaking.

Alteration of exempted collective investment undertakings

- (2) The following shall constitute a proposal to alter an undertaking —
 - (a) any proposed alteration to the constituting documents of the undertaking;
 - (b) any proposed change to the operator, trustee, supervisory custodian, or directors of the undertaking;
 - (c) any proposed change to the prospectus of the undertaking which, if made, would be significant;
 - (d) the addition of any new sub-undertaking to an umbrella undertaking or termination of an existing sub-undertaking;

(e) any proposed reconstruction or amalgamation involving the undertaking; or

(f) any proposal to wind-up the undertaking.

(3) A trustee of a unit trust shall, prior to terminating an appointment of a management company, give written notice to the Regulatory Authority of any proposal to terminate the appointment of the management company of the undertaking.

(4) The supervisory custodian of an investment company shall, prior to terminating the appointment of an operator of the undertaking, give written notice to the Regulatory Authority of any proposal to terminate the appointment of the operator of the undertaking.

(5) A custodian of a limited partnership shall, prior to terminating the appointment of an operator, give written notice to the Regulatory Authority of any proposal to terminate the appointment of the operator of the undertaking.

(6) An alteration to an exempt collective investment undertaking under this Part shall not be effective unless the Regulatory Authority has been informed and, where it is required by this Act, the Regulatory Authority has given its approval or where it is required by the constituting document of the undertaking, the participants have approved the change by way of extraordinary resolution.

(7) The Regulatory Authority may, after receipt of a written request under subsection (1) by the operator of an exempt or foreign exempted collective investment undertaking, by notice to the operator —

(a) vary the conditions of the collective investment undertaking's exemption; or

(b) cancel the collective investment undertaking's exemption.

(8) Any proposal of which notice has been given to the Regulatory Authority shall not have effect unless the Regulatory Authority, by written notice, has given its approval to the proposal or 40 working days have elapsed, beginning with the date on which the notice was given, without the operator of the undertaking or the person making such notification having received from the Regulatory Authority a refusal to accept the proposal.

(9) The Regulatory Authority shall not approve a proposal to change the trustee, supervisory custodian, auditor, controller, key person or operator of an exempt collective investment undertaking unless it is satisfied that, if the proposed change is made, the undertaking will continue to comply with section 16.

(10) The Regulatory Authority shall notify an alteration of exempt status of a collective investment undertaking by publication in the *Gazette*.

34. (1) The Regulatory Authority may vary, suspend or cancel the exemption of a collective investment undertaking if it appears to the Regulatory Authority that —

Variation,
suspension or
cancellation of
exemption by
Regulatory
Authority

- (a) the collective investment undertaking no longer complies with any of the requirements of exemption;
- (b) the operator or the board of the undertaking has contravened a requirement imposed upon it by this Act;
- (c) the operator of the undertaking or the entity acting as trustee, supervisory custodian or custodian to the undertaking or the board of an investment company has knowingly or recklessly given the Regulatory Authority information relating to the undertaking which is false or misleading in a material particular;
- (d) no regulated activity has been carried out in relation to the undertaking for a period exceeding 12 months;
- (e) the operator or the board of the undertaking has failed to disclose in a complete, accurate and timely manner, information concerning the undertaking to the Regulatory Authority as required by this Act;
- (f) the operator has had its licence cancelled and no eligible replacement is appointed within 20 working days or the trustee or supervisory custodian or custodian has had its licence cancelled and no eligible replacement is appointed within 20 working days;
- (g) the collective investment undertaking is causing or promoting instability in the financial system or is likely to do so; or
- (h) the collective investment undertaking is or is likely to be involved in a financial crime.

(2) Where any of the circumstances set out in subsection (1) arise, the Regulatory Authority may, by notice to the operator of the undertaking and, copied to the trustee, supervisory custodian or custodian and board of the investment company —

- (a) vary the undertaking's exemption;
- (b) suspend the undertaking's exemption for the period specified in the notice; or
- (c) cancel the undertaking's exemption.

(3) This section shall apply in relation to the exemption of a foreign undertaking if it appears to the Regulatory Authority that —

- (a) the foreign exempt undertaking no longer meets the conditions of the exemption;
- (b) the operator, board of the undertaking or the entity acting as trustee or supervisory custodian to the undertaking or any equivalent person has knowingly or recklessly given the Regulatory Authority information relating to the undertaking which is false or misleading in a material particular; or
- (c) the operator, board of the undertaking or any equivalent person or an eligible facilities agent to which functions have been delegated within Botswana has failed to disclose information concerning the undertaking to the Regulatory Authority as required by this Act in a complete, accurate and timely manner.

(4) If any of the circumstances set out in subsection (3) arises, the Regulatory Authority may, by notice to the operator of the undertaking and board of the investment company or any equivalent person and any eligible facilities agent of the undertaking —

- (a) vary the foreign undertaking's exemption;
- (b) suspend the foreign undertaking's exemption for the period specified in the notice; or
- (c) cancel the undertaking's exemption.

(5) The Regulatory Authority shall not act in terms of subsection (2) or (4) in relation to an exempt collective investment undertaking unless —

- (a) the Regulatory Authority has given the operator, or where relevant, the board of an investment company and the eligible facilities agent of the collective investment undertaking, written notice of the proposed action, setting out the reasons for the proposed action and stating that the undertaking has a specified period of at least 21 working 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 undertaking within that period.

(6) The notice period stipulated in subsection (5)(a) shall not apply where it is necessary, in the interests of participants in an undertaking, for action to be taken immediately.

(7) The Regulatory Authority shall by notice in the *Gazette*, publish a variation, suspension or cancellation of an exemption of a collective investment undertaking.

PART IV — *Constituting Document and Prospectus of Collective Investment Undertakings*

Constituting
document of
collective
investment
undertaking

35. (1) Any provision of a constituting document of a collective investment undertaking shall be void in so far as it exempts the operator, trustee, supervisory custodian, custodian or auditor of the undertaking from any duty or function under this Act or of indemnifying any such person against liability for any failure to carry out such duty or function.

(2) The constituting document of the undertaking shall not contain any provision that —

- (a) conflicts with this Act; or
- (b) is unfairly prejudicial to the interests of participants generally or to holders of any class of participations.

(3) The constituting document of a collective investment undertaking shall contain a requirement that any contracts relating to the operation of the undertaking should place its operator, directors, trustee, supervisory custodian and custodian under a duty to deal with the Regulatory Authority in relation to the undertaking in an open and cooperative way, and to disclose to the Regulatory Authority anything relating to the undertaking of which the Regulatory Authority would reasonably expect notice to be given in a timely, accurate and complete manner.

(4) The constituting document of a collective investment undertaking shall require any contracts relating to the operation of the undertaking to place its controller, key person, operator, trustee, supervisory custodian and custodian under a duty to disclose to each of these parties in a complete, accurate and timely manner the information required by that party to fulfil its obligations to holders of participations in that undertaking under this Act and the constituting document of the undertaking.

(5) Any power conferred by this Act, on the operator, the trustee or the supervisory custodian, whether in a joint or sole capacity, is subject to any restriction in the constituting document of the undertaking.

(6) The constituting document of a collective investment undertaking shall demonstrate compliance with regulatory requirements relating to licensed, recognised or exempt status under this Act.

(7) An investment company with fixed capital and an investment company with variable capital shall have a constitution in terms of the Companies Act.

(8) The operator of a collective investment undertaking shall make the constituting document of each collective investment undertaking under its operation available for inspection during normal working hours at a physical address which is easily accessible to the public.

36. (1) A collective investment undertaking shall not be offered whether to the public or otherwise unless the offer is accompanied by a prospectus which complies with the requirements of this Act that has been filed with the Regulatory Authority by the operator of the collective investment undertaking, prior to any such offer being made.

Requirements
for prospectus
of collective
investment
undertaking

(2) Where the prospectus of a collective investment undertaking is for an umbrella undertaking, it shall contain information in relation to —

- (a) each sub-undertaking where the information differs from that of any other sub-undertaking; and
- (b) the umbrella as a whole, but only where the information is relevant to the umbrella as a whole.

(3) The prospectus referred to in this section shall —

- (a) be clear, concise and understandable in English;
- (b) contain the information investors would reasonably require for the purpose of making an informed decision to become a participant in the collective investment undertaking as may be prescribed; and
- (c) contain such other information as may be prescribed.

(4) A person shall not make an offer of a collective investment undertaking if there is —

- (a) a misleading or deceptive statement —
 - (i) in the relevant prospectus,
 - (ii) in the application form that forms part of the prospectus, or
 - (iii) any other financial promotion that relates to the offer or to the application form;

- (b) an omission of information that is required under this Act to be stated or which causes the financial promotion to be misleading;
 - (c) any inconsistency with the prospectus of the undertaking; or
 - (d) a new circumstance that under this Act requires an amendment to the prospectus where the amendment has not been published and issued.
- (5) A prospectus shall not contain any provision which conflicts with this Act nor shall it contain any extraneous material.
- (6) A person shall not directly or indirectly make a misleading or deceptive statement in relation to a collective investment undertaking or in connection with an offer of participations of a collective investment undertaking established under this Act which is —
- (a) at the time and in the light of circumstances in which it is made misleading or deceptive in respect of any material fact and which the person knows, or ought reasonably to know, is misleading or deceptive; or
 - (b) by reason of the omission of a material fact, rendered misleading or deceptive and which the person knows, or ought reasonably to know, is misleading or deceptive by reason of the omission of that fact.
- (7) A person does not contravene subsection (5) if that person proves that he or she —
- (a) made all enquiries that were reasonable in the circumstances; and
 - (b) after making the statement, believed on reasonable grounds that the statement or omission was not misleading or deceptive.
- (8) If at any time, after the issue of the prospectus of a collective investment undertaking and during the offering of the undertaking, there is a material change affecting any matter contained in the prospectus or a significant new matter arises, the operator shall immediately amend the prospectus accordingly in compliance with the requirements of this Act.
- (9) Every prospectus for a collective investment undertaking shall contain a prominent statement of the undertaking's regulatory status, the regulatory regime which applies to the undertaking and shall state the date of the prospectus.
- (10) The prospectus of a collective investment undertaking shall contain all the information required under this Act, including the application form for subscriptions for participations in the undertaking and the details of where they are available as required under this Chapter.
- (11) In addition to the prospectus required under subsection (1), the operator of a licensed collective investment undertaking shall produce a short form prospectus which shall comply with this Act.
- (12) The prospectus of a collective investment undertaking shall be provided to potential investors free of charge before the conclusion of a contract except in the case of a licensed collective investment undertaking where —

- (a) a short form prospectus shall be provided to potential investors free of charge before the conclusion of a contract; and
- (b) the prospectus referred to in subsection (1) shall only be made available free of charge upon request, in compliance with Chapter IV.

(13) The prospectus and short form prospectus referred to in subsection (12) shall be made available in a durable medium chosen by the recipient.

(14) The trust deed or articles shall form an integral part of the prospectus and shall be annexed thereto unless the participant is informed in the prospectus that, he or she will be sent the trust deed or articles or be informed of the place in Botswana where he or she may consult them.

37. (1) The operator of a collective investment undertaking shall ensure that any prospectus or short form prospectus does not contain any information or any statement that is untrue, deceptive, or misleading, or any omission from it in any material matter required to have been included in the prospectus under this Act.

Responsibility and liability for prospectus of collective investment undertaking

(2) The operator of a collective investment undertaking shall pay compensation to any person who has suffered a loss or damage arising from any untrue, deceptive, or misleading statement in the prospectus or the omission from it of any material matter required to have been included in the prospectus under this Act.

(3) Any person who contravenes any provision of this Part commits an offence and is liable to a fine not exceeding P250 000 or to imprisonment for a term not exceeding 10 years, or to both.

38. (1) A person shall not issue or cause to be issued any financial promotion to the public in a prospectus or supplementary prospectus or participations offered in such a prospectus for a collective investment unless —

Publicity of prospectus

- (a) the prospectus of the collective investment undertaking has been filed with the Regulatory Authority;
- (b) the financial promotion states the prospectus has been published and gives an address where the prospectus may be obtained;
- (c) the undertaking in respect of which the prospectus is issued is a licensed undertaking;
- (d) the prospectus shall be dated and its essential elements kept up to date; and
- (e) in the case of an umbrella fund, the prospectus shall clearly state the charges applicable to the switching of investments from a sub-fund to another.

(2) A person shall not issue or cause to be issued any financial promotion to the public in respect of a prospectus or supplementary prospectus or participations offered in such a prospectus for a collective investment undertaking created under the law of a foreign country or territory unless —

- (a) that person is an eligible facilities agent;

- (b) the prospectus of the collective investment undertaking has been filed with the Regulatory Authority;
 - (c) the financial promotion states the prospectus has been published and gives an address where the prospectus may be obtained; and
 - (d) the undertaking in respect of which the prospectus is issued is a recognised undertaking.
- (3) Any person who contravenes this section is liable to a civil penalty not exceeding P10 000.

PART V — Offers and Participations in Collective Investment Undertakings

Offers

- 39.** (1) A person shall not make an offer of participations in a collective investment undertaking whether to the public or otherwise unless the offer of participations is made in accordance with this Act.
- (2) A person shall be regarded as making an offer of a participation or any right or interest in a participation if he or she —
- (a) makes an offer which, if accepted, would give rise to a contract for the purchase of participations by him or her or by another person with whom he or she has made arrangements for the purchase of participations;
 - (b) invites another person to make an offer which, if accepted, would give rise to a contract for the purchase of participations; or
 - (c) makes the offer or invitation by way of a financial promotion of the participations.
- (3) For the purposes of subsection (2) —
- (a) an “offer” or “invitation” includes an inducement; and
 - (b) a “financial promotion” is an advertisement or any other form of promotion or marketing inviting a person to —
 - (i) enter into an agreement,
 - (ii) offer to enter into an agreement, or
 - (iii) exercise any rights conferred by a participation to acquire, dispose of, underwrite or convert a participation.
- (4) The financial promotion referred to in subsection (3), may be communicated in any manner including the following —
- (a) orally;
 - (b) electronically; or
 - (c) in writing.
- (5) For the purposes of subsections (2) and (3), where an operator of a collective investment undertaking discloses information, the disclosure of such information is not a financial promotion provided the disclosure of the information does not —
- (a) include an express invitation or offer; or
 - (b) expressly encourage a person to engage in any of the activities specified in subsection (3).

40. (1) Any offer that does not comply with section 41 shall constitute an offer to the public.

Offer to public

(2) The listing or trading of participations in a collective investment undertaking on an exchange which is open to the public and which is regulated by the Regulatory Authority shall constitute a public offer.

41. An offer for the subscription or purchase of participations in a collective investment undertaking shall not be construed as an offer to the public —

Offer not to public

(a) if the offer is made only to —

- (i)** a bank licensed under the Banking Act or equivalent foreign company licensed by an equivalent foreign authority,
- (ii)** an entity domiciled in Botswana holding a market intermediary licence issued by the Regulatory Authority or an equivalent foreign company licensed by an equivalent foreign regulatory authority,
- (iii)** any other domestic or foreign company carrying on the business of portfolio management which is approved by the relevant regulator in Botswana or foreign regulator to undertake such activity,
- (iv)** any collective investment undertakings licensed, recognised or exempt by the Regulatory Authority under this Act or holding equivalent foreign regulatory status,
- (v)** any pension or provident funds under the Retirement Funds Act or holding equivalent foreign regulatory status,
- (vi)** any insurance companies under the Insurance Industry Act or holding equivalent foreign regulatory status, or
- (vii)** any expert clients or foreign persons holding equivalent regulatory status;

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(b) if the offer for subscription or purchase is such that the total acquisition cost of the participations for a single subscriber is not less than the minimum prescribed; and

(c) if the offer is accepted by not more than 100 persons acting as principals.

42. (1) The liability of a holder of a unit or share in a licensed collective investment undertaking shall be limited to the amount which, at the time when any debts fall due to be discharged, is equal to the net asset value at that time of the holder's participations.

Participations in collective investment undertakings

(2) The holder of a participation in an undertaking shall not be liable for acts or omissions of the operator or of the trustee or supervisory custodian of that undertaking.

(3) The constituting document of an open ended or interval collective investment undertaking may specify that fractions of participations in that undertaking may be issued.

(4) A collective investment undertaking may issue different classes of participations in an open ended or interval collective investment undertaking or in a sub-undertaking of an open ended or interval umbrella collective investment undertaking:

Provided that —

- (i) a participation class does not provide any advantage for that class that would result in prejudice to the holders of any other class of participation in the same undertaking or in the same sub-undertaking;
 - (ii) the nature, operation and effect of any participation class is capable of being explained clearly in the prospectus and is envisaged in the instrument constituting the undertaking; and
 - (iii) the effect of introduction of any new participation class is not contrary to the purpose of any provision of this Act.
- (5) Classes of participation of an open ended or interval collective investment undertaking or sub-undertaking may include currency classes whereby the participation price is expressed as the foreign currency equivalent of the Botswana Pula price of the participation and where purchase of participations and payment of distributions is made in the same foreign currency.
- (6) Initial offering of participations in collective investment undertakings may be made at a fixed price.
- (7) An investment company with fixed capital may only issue securities as authorised by the Companies Act.
- (8) An investment company with variable capital may only issue participations in the form of ordinary shares carrying equal voting rights as provided for under the Companies Act.
- (9) The payment for purchases and repurchases of a participation in a collective investment undertaking may be in specie subject to the following —
- (a) that the *in specie* contribution is permitted by the constituting document of the undertaking; and
 - (b) that the *in specie* contribution is an eligible investment under this Act, the constituting document and prospectus of that undertaking.
- (10) Valuation of assets contributed *in specie* shall be undertaken by the operator of the collective investment undertaking only by a methodology approved by the trustee or supervisory custodian and clearly stated in the prospectus of the undertaking.
- (11) There shall be no obligation to repurchase a participation in an open ended or interval collective investment undertaking if payment for that participation has not been received.

Register for
collective
investment
undertakings

43. (1) An operator of a collective investment undertaking shall create and maintain a register for the collective investment undertaking.

(2) The register referred to under subsection (1) shall be conclusive evidence of the persons entitled to the participations entered in it.

(3) The register referred to under subsection (1) shall contain —

- (a) the name, physical and postal address, national identification number and company registration number of each participant;
- (b) the number of participations of each class held by each participant;
- (c) the date on which the participant was registered for the participations standing to their name; and
- (d) the number of participations of each class in issue.

44. (1) Every participant in a collective investment undertaking of participations shall be entitled to transfer his or her participations by an instrument of transfer in any form that the operator may approve, but the operator shall not be under any duty to accept a transfer unless it is permitted by this Act and the constituting document of the undertaking.

Transfer of ownership of participations

(2) Every instrument of transfer shall be signed by or on behalf of the participant transferring the participations, or in the case of a body corporate, sealed by that body corporate or signed by one or more officers authorised to sign it, and the transferor shall be treated as the participant until such time as the name of the transferee has been entered in the register.

(3) Every instrument of transfer, stamped as necessary, shall be left for registration with the person responsible for the register, accompanied by —

- (a) any necessary documents required by legislation; and
- (b) any other evidence reasonably required by the operator.

45. (1) An operator of a collective investment undertaking and a sub-undertaking of a collective investment undertaking shall ensure that, taking into account the investment objectives of the collective investment undertaking or sub-undertaking as stated in its current prospectus, the property of the undertaking or sub-undertaking is invested to provide a spread of investment risk.

Spread of investment risk by collective investment undertakings

(2) Subsection (1) shall not apply to a collective investment undertaking or sub-undertaking that is licensed or exempted as a feeder collective investment undertaking or sub-undertaking provided that the collective investment undertaking into which that undertaking feeds complies with subsection (1).

PART VI — Auditor of Collective Investment Undertakings

46. (1) An operator of a collective investment undertaking shall, where applicable, with the prior approval of the directors, appoint an eligible independent auditor who shall hold office for a period of not more than three years.

Requirements for auditor of collective investment undertaking

(2) The appointment of a firm as auditor of a collective investment undertaking shall be an appointment of all persons who are partners in the audit firm.

(3) In the case of a licensed collective investment undertaking, the appointment of the auditor shall be approved by the trustee or supervisory custodian.

(4) An auditor shall be eligible to be appointed if —

- (a) the auditor has, prior to the appointment, consented in writing to serve as auditor to the collective investment undertaking;
- (b) on reasonable enquiry, the operator, and any trustee, supervisory custodian or directors are not made aware of any matter which would preclude the auditor from giving consent in terms of paragraph (a);

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- (c) the auditor is registered under the Accountants Act; and
- (d) the auditor has not been disqualified from auditing a bank, non-bank financial institution or collective investment undertaking in Botswana or outside Botswana by any professional association or regulatory authority.

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(5) The accounting information given in the annual report of a collective investment undertaking shall be audited by a person empowered to audit accounts in accordance with such financial reporting standards as are required under this Act, the Accountants Act, the Financial Reporting Act, international standards on auditing and such other standards as may be determined by the Regulatory Authority.

(6) The auditor's report shall be reproduced in full in the annual report and accounts of the undertaking.

(7) The auditor of a collective investment undertaking shall immediately report to the Regulatory Authority, in writing, if he or she has reason to believe that —

- (a) the information provided to participants or to the Regulatory Authority in the reports or other documents of the collective investment undertaking does not truly describe the financial situation and the assets and liabilities of the collective investment undertaking;
- (b) the assets of the collective investment undertaking are not, or have not been, invested in accordance with this Act, the prospectus or the constituting document;
- (c) there exists circumstances which are likely to affect materially the ability of the collective investment undertaking to fulfil its obligations to participants or meet any of its financial obligations under this Act;
- (d) there are material defects in the financial systems and controls or accounting records of the collective investment undertaking;
- (e) there are material inaccuracies in or omissions from any returns of a financial nature made by the collective investment undertaking to the Regulatory Authority;
- (f) a criminal offence involving fraud or other dishonesty has been, is being or is likely to be committed; or
- (g) there is material adverse change in the inherent risks in the business of a collective investment undertaking with the potential to jeopardise its ability to continue as a going concern.

(8) The auditor shall, where requested by the Regulatory Authority, furnish to the Regulatory Authority a report stating whether, in his or her opinion, the collective investment undertaking has or has not complied with a specified obligation of a financial nature under this Act.

(9) The operator of the collective investment undertaking concerned shall bear the cost, if any, of any report requested under subsection (8).

(10) At the request of the auditor, the Regulatory Authority shall provide written details of any financial returns made to the Regulatory Authority for the collective investment undertaking and required by the auditor to enable him or her to exercise his or her functions under this Act.

(11) The auditor shall send to the operator of the collective investment undertaking a copy of any report made by him or her to the Regulatory Authority under subsections (6) and (7).

(12) The Regulatory Authority may require the auditor to supply it with any information in relation to the audit of the business of the collective investment undertaking which, in the Regulatory Authority's opinion, is needed for the exercise of its functions under this Act or for the protection of the interests of participants, and the auditor shall comply with this requirement without delay.

(13) The Regulatory Authority may require that, in supplying information for the purposes of subsection (12), the auditor act independently of the collective investment undertaking.

(14) An auditor shall not be regarded as having contravened any duty he or she is subject to under this Act or being liable to the collective investment undertaking, or its participants, creditors or other interested parties, by reason of the auditor complying with any obligation imposed on him or her by this Act.

(15) Subject to subsection (16), the Regulatory Authority may direct an operator to terminate the appointment of an auditor of a collective investment undertaking which contravenes any requirements of this Act.

(16) The Regulatory Authority shall not issue a direction under subsection (15) unless —

(a) the reasons for the termination have been disclosed; and

(b) the auditor and the operator are given an opportunity to make representations on the matter.

(17) The operator of a collective investment undertaking shall ensure that the auditor of that undertaking is invited to attend any meeting of participants and receives the notice that any holder of a participation in that undertaking receives and shall take part at any meeting of participants or in any part of the business that affects him or her as an auditor.

47. (1) An auditor of a collective investment undertaking may resign from office by depositing a notice in writing to that effect together with a statement under subsection (2), at the operator's registered office and with the Regulatory Authority and any such notice shall take effect on the date on which the notice is deposited or on such later date as may be specified in the notice.

(2) An auditor of a collective investment undertaking who resigns from office for any reason shall deposit, at the operator's registered office and any trustee, the supervisory custodian's or custodian's registered office and with the Regulatory Authority, a statement indicating whether or not there are some circumstances connected with the resignation which the auditor considers should be brought to the attention of the participants or creditors of the collective investment undertaking or the Regulatory Authority.

Resignation of
auditor of
collective
investment
undertaking

Cooperation
with auditor

(3) When the auditor makes a statement which contains circumstances to be brought to the attention of the participants or creditors of the collective investment undertaking in terms of subsection (2), the operator of the collective investment undertaking shall send a copy of the statement to the Regulatory Authority with the operator's comments within 10 working days of receipt.

48. (1) An operator, a trustee, a supervisory custodian, a custodian or a member of the board of directors of a collective investment undertaking and their directors and officers shall not knowingly or recklessly make a statement to an auditor, whether written or oral, which conveys or purports to convey any information or explanation which the auditor requires, or is entitled to require, as auditor of the collective investment undertaking which —

- (a) is false, misleading or deceptive in a material particular; or
- (b) omits information, where the omission of such information is likely to mislead or deceive the auditor.

(2) An operator, a trustee, a supervisory custodian, a custodian or a member of the board of directors of a collective investment undertaking and their directors and officers shall not without reasonable excuse engage in any of the following conduct, including —

- (a) destruction, amendment or concealment of records;
- (b) coercion, manipulation, misleading, or influencing of the auditor;
- (c) failure to provide access to information or documents specified by the auditor; or
- (d) failure to give any information or explanation which the person is able to give where the person knows or ought to know that such conduct could, if successful —
 - (i) obstruct the auditor in the performance of his or her duties under this Part, or
 - (ii) result in the rendering of accounts of the collective investment undertaking or the auditor's report being materially misleading.

(3) Any person who contravenes any provision of this Part commits an offence and is liable to a fine not exceeding P250 000 or to imprisonment term not exceeding 10 years, or to both.

PART VII — Reports and Accounts of Collective Investment Undertakings

Requirements
for annual and
half yearly
reports and
accounts

49. (1) An operator of a collective investment undertaking shall prepare an annual audited report and accounts position of the collective investment undertaking and each sub-undertaking.

(2) The operator of a collective investment undertaking and sub-undertaking shall produce for each annual accounting period accounts of the collective investment undertaking which shall be approved by the board of directors of the undertaking and shall contain —

- (a) reports from the operator and auditor and where relevant the directors, the trustee or supervisory custodian or custodian summarising their duties and statements as required under this Act;

- (b) a balance sheet or statement of assets and liabilities and any off balance sheet commitments;
- (c) a statement of total return including a detailed income and expenditure account for the period;
- (d) a report on the activities of the period;
- (e) for an open ended or interval collective investment undertaking, a statement of movement of holders' assets;
- (f) any significant information which shall enable investors to make an informed judgment on the activities and investments and performance of the collective investment undertaking; and
- (g) any other information as may be prescribed.

(3) The operator of a collective investment undertaking shall produce an annual audited report and accounts for each collective investment undertaking and sub-undertaking for each annual accounting period.

(4) The report and accounts referred to in subsection (3) shall be prepared by the operator and filed with the Regulatory Authority within four months of the end of the annual accounting period concerned.

(5) The operator for each collective investment undertaking and sub-undertaking shall produce a half yearly unaudited report and accounts within the first six months of each annual accounting reporting period and the report and the accounts shall ---

- (a) contain the same information as required in the annual audited report and accounts; and
- (b) not contain an auditor's report or where relevant, the trustee's or supervisory custodian's reports.

(6) The half yearly report and accounts referred to in subsection (5) shall be prepared by the operator and filed by the operator with the Regulatory Authority within two months of the end of the annual accounting period concerned.

(7) The annual audited report and half yearly unaudited report shall be made available in a durable medium chosen by the recipient.

(8) The operator of the undertaking shall send to all participants who are entered in the register or entitled to be entered on the register of that undertaking on the last day of the financial year being reported upon, the annual audited report and accounts for the collective investment undertaking and sub-undertaking within four months of the end of the annual accounting period.

(9) The operator of the undertaking shall send to all participants who are entered in the register or entitled to be entered on the register of that undertaking on the last day of the financial year being reported upon, the half yearly unaudited report and accounts for the collective investment undertaking and sub-undertaking within two months of the end of the first six months of the annual accounting period.

(10) An operator shall offer to investors, a copy of the most recent annual audited report and accounts of a collective investment undertaking or sub-undertaking free of charge before they enter into a contract to purchase participations in that undertaking except in the case of a licensed collective investment undertaking which is required to offer a short form annual and half yearly report.

(11) The annual audited report and accounts and the half yearly report and accounts of an undertaking shall each be a stand-alone document and shall not contain any extraneous or financial promotion material.

Approval of reports and accounts

50. The annual audited and half yearly unaudited report shall —

- (a) in the case of an investment company, be approved by the operator and where relevant by the board of directors and signed on their behalf by the licensed corporate director and where there is another director of the undertaking, one other director; or where there is only a licensed corporate director, two directors of that company; or if there is no licensed corporate director, two directors of the investment company;
- (b) in the case of a unit trust, be approved by the board of directors of the management company and signed by two directors of the management company; and
- (c) in the case of a partnership, be approved by the general partner; and if the partnership is a corporation, signed by two directors of that corporation.

CHAPTER IV — *Types of Collective Investment Undertakings*

PART I — *Investment Companies*

Establishment of investment company

51. (1) An investment company with fixed capital may only be established in Botswana in terms of section 56 and an investment company with variable capital may only be established in terms of section 57, subject to any additional requirements as may be prescribed.

(2) This Act shall govern an investment company with fixed capital.

(3) An investment company with variable capital shall only apply where a matter concerning an investment company is not provided for in this Act.

Constitution of investment company

52. (1) An investment company created under this Act, whether the investment company is privately or publicly offered, shall have a constitution which complies with the Companies Act.

(2) The constitution of an investment company referred to in subsection (1) shall be filed with the Registrar of Companies following the Regulatory Authority's consent to issue a licence or an exemption to the investment company under Chapter III of this Act.

Prospectus of investment company

53. (1) The prospectus of an investment company issued in compliance with the requirements of Chapter III of this Act, whether such investment company is privately or publicly offered, shall constitute a prospectus required for the investment company under the Companies Act.

(2) The prospectus of an investment company referred to under subsection (1) shall be filed with the Registrar of Companies following the Regulatory Authority's consent to issue a licence or an exemption to the investment company under Chapter III of this Act.

54. The public offering of an investment company created under this Act shall comply and be governed by this Act and in the case of trading and listing of an investment company on an exchange, by the relevant trading and listing rules.

Public offering
in investment
company

55. (1) The annual audited report and accounts and half yearly unaudited report and accounts of an investment company issued in compliance with the requirements of this Act, whether such investment company is privately or publicly offered, shall constitute an annual or half yearly report and accounts required for the investment company under the Companies Act.

Annual report
and accounts
of investment
company

(2) The annual and half yearly report and accounts for an investment company referred to under subsection (1) shall be filed with the Registrar of Companies and the Regulatory Authority simultaneously.

56. (1) An application for a licence for an investment company with fixed capital shall be made as required under section 20 and shall be accompanied by —

Licensing and
exemption of
investment
companies
with fixed
capital

- (a) the constitution and the prospectus of the investment company in compliance with this Part;
- (b) the written agreement of a supervisory custodian eligible under this Act to act in this capacity; and
- (c) such other information as may be prescribed.

(2) An investment company with fixed capital licensed under this Act shall include the words “investment company with fixed capital” in its constitution, prospectus, reports and accounts and all disclosures required under this Act.

(3) An application for an exemption for an investment company with fixed capital may only be granted to an investment company with fixed capital by the Regulatory Authority if —

- (a) the application is made by the operator which holds or is eligible to hold a licence either as a management company or as an asset manager under the Non-Bank Financial Institutions Regulatory Authority Act;
- (b) the directors of the investment company are persons of honesty, integrity and good repute, who are competent to act as directors under the Companies Act and this Act and who collectively meet the requirements applicable to an asset manager under the Non-Bank Financial Institutions Regulatory Act;
- (c) the board of directors is comprised of an uneven number of directors whose number shall comply with the minimum number prescribed;
- (d) it is accompanied by the constitution and prospectus of the investment company which shall demonstrate compliance with requirements for eligibility for exemption;
- (e) it is accompanied by the written agreement of a custodian eligible under this Act and to act in this capacity;
- (f) it is accompanied by the written agreement of an auditor eligible under this Act to act in this capacity;

- (g) the application for the exemption of the undertaking meets the requirements of the Regulatory Authority;
- (h) the prescribed fee is paid; and
- (i) such other information as may be prescribed is provided.

(4) An investment company with fixed capital exempt under this Act shall include the words “exempt investment company with fixed capital” in its constitution, prospectus, reports and accounts and all disclosures required under this Act.

(5) The Regulatory Authority shall require an exempt investment company with fixed capital which fails to comply or fails to demonstrate compliance with this Act at all times to become a licensed investment company with fixed capital or to be wound up.

57. (1) An application for a licence for an investment company with variable capital shall be made as required under section 20 and shall be accompanied by —

- (a) the constitution and the prospectus of the investment company in compliance with this Act;
- (b) the written agreement of a supervisory custodian eligible under this Act and the Non-Bank Financial Institutions Regulatory Authority Act to act in this capacity; and
- (c) such other information as may be prescribed.

(2) An investment company with variable capital licensed under this Act shall include the words “investment company with variable capital” in its constitution, prospectus, reports and accounts and all disclosures required under this Act.

(3) The Regulatory Authority may grant an exemption of an investment company with variable capital if —

- (a) the application is made by the operator which shall hold a licence either as a management company or as an asset manager under this Act;
- (b) the Regulatory Authority is satisfied that all the undertaking property is to be held in safe custody by an entity holding or eligible to hold a licence as a custodian under the Non-Bank Financial Institutions Regulatory Authority Act;
- (c) the directors of the investment company are persons of honesty, integrity and good repute, who are competent to act as directors under the Companies Act and this Act;
- (d) the board of directors is comprised of an uneven number of directors whose number shall comply with the minimum number prescribed;
- (e) it is accompanied by the constitution and prospectus of the investment company which shall demonstrate compliance with requirements for eligibility for exemption under this Act;
- (f) it is accompanied by the written agreement of a custodian eligible under this Act to act in this capacity;
- (g) it is accompanied by the written agreement of an auditor eligible under this Act to act in this capacity;

- (h) the application for the exemption of the undertaking meets the requirements of the Regulatory Authority;
- (i) the prescribed fee is paid; and
- (j) such other information as may be prescribed is complied with.

(4) The Regulatory Authority may not —

- (a) licence or exempt an investment company with variable capital which does not have a separately constituted management company licensed under this Act; or
- (b) licence or exempt an investment company with variable capital if it does not have a separately constituted asset manager licensed under the Securities Act.

(5) An investment company with variable capital exempt under this Act shall include the words “exempt investment company with variable capital” in its constitution, prospectus, reports and accounts and all disclosures required under this Act.

(6) Any provision of the Companies Act dealing with —

- (a) the giving of financial assistance by a company for the purchase of its shares;
- (b) notice to the Registrar of Companies of certain alterations in share capital;
- (c) notice of increase of share capital;
- (d) the power of a company to reduce its share capital;
- (e) pre-emptive rights;
- (f) maintenance of capital;
- (g) restrictions on the distribution of profits and assets; or
- (h) creation of a legal reserve,

shall not apply to an investment company with variable capital.

(7) The authorised corporate director, on behalf of an investment company with variable capital, shall issue new shares upon receipt of a valid paid application for subscription of the shares and shall increase the issued share capital accordingly by the methodology established in the investment company’s constituting document in compliance with this Act.

(8) The authorised corporate director, on behalf of an investment company with variable capital shall purchase its shares upon the valid application of a shareholder to repurchase the shares and shall cancel the shares and reduce the issued share capital accordingly by the methodology established in the investment company’s constituting document in compliance with this Act.

(9) The authorised corporate director of an investment company with variable capital shall sell and purchase its shares on condition that such shares shall only be sold and purchased at their net asset value, to which any initial charge disclosed in the prospectus of the undertaking shall be added and from which any exit charge disclosed in the prospectus of the undertaking shall be deducted.

(10) A shareholder in an investment company with variable capital shall be empowered at the frequency stated in the prospectus of the investment company, to be entitled to request repurchases of all or part of his or her shares in the company and if such request is made the company shall purchase such shares, provided that the minimum investment as is required by the prospectus shall remain in the undertaking.

(11) Ordinary shares may be issued in an investment company with variable capital which have different rights attached to each class of shares, provided that this relates solely to —

- (a) the accumulation of income by way of periodical credit to capital rather than distribution (“accumulation shares”) as opposed to the distribution of income (“income shares”);
- (b) charges and expenses that may be taken out of undertaking property or payable upon entry to the undertaking or exit from the undertaking by shareholders; or
- (c) the currency in which prices or values of undertaking shares are expressed or payments made.

(12) The Regulatory Authority shall require an exempt investment company with variable capital which fails to comply or fails to demonstrate compliance with this Act at all times to become a licensed investment company with variable capital or to be wound up.

PART II — *Unit Trusts*

Establishment
of unit trust

58. A unit trust may only be established in terms of this Part and Schedule II, subject to any additional requirements as may be prescribed.

Licensing and
exemption of
unit trusts

59. (1) The management company shall apply for a licence or exemption for a unit trust.

(2) An application for a licence for a unit trust under subsection (1) shall be accompanied by a trust deed and meet the requirements set out in section 20.

(3) A licence or exemption shall not be issued unless the application is accompanied by the trust deed of the unit trust which is in compliance with this Act relating to licensing or exemptions respectively.

(4) The management company and the trustee under this Act shall enter into a trust deed in order to constitute a collective investment undertaking by way of a unit trust under this Act.

(5) The trust deed shall be binding on the management company, the trustee, holders of unit trusts through the purchase of the unit trusts and all persons claiming through them respectively as if such unit-holders and persons had been parties to the deed, and the unit or units created in pursuance of the unit trust shall be expressed in that deed.

(6) A holder of a unit in a unit trust shall be the beneficial owner of the assets of the unit trust in proportion to the number of units held relative to the total number of units in issue.

- (7) The Regulatory Authority may grant an exemption to a unit trust if —
- (a) the application for exemption is made by the operator which shall hold or be eligible to hold a licence either as a management company under this Act or as an asset manager under the Securities Act;
 - (b) the Regulatory Authority is satisfied that all the undertaking property is to be held in custody by a trustee holding a licence or eligible to hold a licence as such under this Act;
 - (c) the application is accompanied by the written agreement of an auditor eligible under this Act to act in that capacity;
 - (d) it is accompanied by the trust deed and prospectus of the unit trust which shall demonstrate compliance with requirements for eligibility for exemption under this Act;
 - (e) the application for the exemption of the undertaking is made according to the requirements of the Regulatory Authority;
 - (f) the prescribed fee is paid; and
 - (g) such other information as may be prescribed is provided.
- (8) A unit trust licensed under this Act shall include the words “unit trust” in its trust deed, prospectus, reports and accounts and all disclosures required under this Act.
- (9) A unit trust exempted under this Act shall include the words “exempt unit trust” in its trust deed, prospectus, reports and accounts and all disclosures required under this Act.
- (10) Units may be issued in an open ended or interval unit trust which have different rights attached to each class of units, provided that this relates solely to —
- (a) the accumulation of income by way of periodical credit to capital rather than distribution (“accumulation units”) as opposed to the distribution of income (“income units”);
 - (b) charges and expenses that may be taken out of undertaking property or payable upon entry to the undertaking or exit from the undertaking by unit-holders; or
 - (c) the currency in which prices or values of undertaking units are expressed or payments made.
- (11) The Regulatory Authority shall require an exempt unit trust which fails to comply with this Act at all times, to become a licensed investment company with variable capital or to be wound up.

PART III — *Collective Investment Undertaking Partnerships*

60. A collective investment undertaking partnership may only be established in Botswana pursuant to the provisions of section 62 and Schedule I, subject to the additional requirements of this Act.

Establishment
of collective
investment
undertaking
partnership

Exemption of
collective
investment
undertaking
partnership

61. (1) An application for the exemption for a collective investment undertaking which is a partnership shall be made by the operator of the undertaking which shall be the general partner and shall hold or be eligible to hold a licence under this Act and as a management company or as an asset manager under the Securities Act.

(2) An exemption may only be granted to a partnership if the Regulatory Authority is satisfied that all the undertaking property held by a custodian licensed under this Act is in safe custody.

(3) The Regulatory Authority shall not issue an exemption to a collective investment undertaking partnership unless —

(a) the partnership is a limited partnership which complies with Schedule I;

(b) the application is made by an entity —

(i) holding a licence as a management company under this Act,

(ii) eligible to be granted such an exemption under this Act, or

(iii) holding a licence as an asset manager under the Securities Act;

(c) the application is accompanied by the partnership deed and prospectus which complies with this Act and demonstrates compliance with section 36;

(d) it is accompanied by the written consent of a custodian eligible under this Act to act in that capacity to the partnership and which will be a limited partner;

(e) it is accompanied by the written agreement of an auditor eligible under this Act to act in that capacity;

(f) the application is made in accordance with the requirements of the Regulatory Authority;

(g) the prescribed fee is paid; and

(h) such other information as may be prescribed is provided.

(4) A partnership which is granted an exemption under this Act shall include the words “exempt collective investment undertaking partnership” in its constitution, prospectus, reports and accounts and all disclosures required under this Act.

(5) The Regulatory Authority shall require an exempt collective investment undertaking partnership which fails to comply or fails to demonstrate compliance with this Act at all times, to be wound up.

CHAPTER V — *Licensed Collective Investment Undertakings*

PART I — *Operation of Licensed Collective Investment Undertakings: Management Companies*

Requirements
for
management
company

62. (1) A management company of a collective investment undertaking shall only engage in activities related or ancillary to the operation of collective investment undertakings and in activities related to or ancillary to asset management, except where otherwise expressly permitted by the Regulatory Authority.

(2) A management company shall be a body corporate.

(3) A management company shall have such financial resources upon licensing and on an ongoing basis as shall be prescribed under this Act.

(4) A management company shall file with the Regulatory Authority the reports and information on collective investment undertakings that it operates as prescribed under this Act, in a timely, accurate and complete manner.

63. (1) A management company shall at all times —

- (a) operate the collective investment undertaking with due care and diligence in compliance with this Act, the constituting document and the prospectus of the undertaking;
- (b) act in the best interests of participants in the collective investment undertaking;
- (c) ensure that participants in the collective investment undertaking are treated fairly;
- (d) refrain from placing the interests of one participant or any group of participants above those of any other participant or group of participants; and
- (e) apply appropriate policies and procedures for preventing any malpractice that might reasonably be expected to affect the stability and integrity of an individual undertaking or the market.

Duties of
management
company

(2) A management company shall report to the Regulatory Authority immediately after it becomes aware of any material breach of this Act and of the collective investment undertaking's constituting document and prospectus.

(3) Any person who contravenes this section commits an offence and is liable to a fine not exceeding P250 000 or to a term of imprisonment not exceeding 10 years, or to both.

64. (1) A management company shall be responsible for —

- (a) ensuring that all property of a collective investment undertaking is clearly identified as the property of that undertaking and is held by a trustee or supervisory custodian separately from the property of the management company and from the property of other collective investment undertakings operated by the same management company and from other clients of the management company;
- (b) provision of all administrative services required by the undertaking;
- (c) creating and maintaining the register and transfer facilities;
- (d) offering and distribution of the participations of the undertaking;
- (e) dealing in participations of the undertaking, in the case of open ended and interval undertakings;
- (f) creating and maintaining accounting records of the undertaking and accounting for the income property, capital property and expenses of the undertaking;

Functions of
management
company

- (g) valuing the undertaking and calculating the net asset value of the undertaking and the net asset value per participation of the undertaking and where relevant the price per participation for purchases of participations;
- (h) making decisions as to the constituents of undertaking property in accordance with the constituting document and prospectus of the undertaking and the stated investment objective and policy;
- (i) instructing the trustee or the supervisory custodian in writing as to the exercise of rights attaching to undertaking property;
- (j) preparation of all required disclosure of information concerning the undertaking and for the required content and dissemination of said information;
- (k) creating and maintaining all records necessary to achieve and demonstrate the ongoing compliance of the operation of any collective investment undertaking with this Act;
- (l) filing all required reports with the Regulatory Authority concerning an undertaking; and
- (m) any other functions as may be prescribed by this Act.

(2) Subject to subsection (3), a management company may delegate to another party the provision of any of the functions for which it is responsible under subsection (1) but the management company shall remain responsible for those functions and their proper performance and for the oversight of any person to which it contracts such functions.

(3) The functions set out under subsections (1) (h) and (i) shall not be delegated to a trustee or supervisory custodian.

(4) A management company may only delegate a function to an entity that holds a licence required to perform that function under this Act and if it delegates a function to an entity outside Botswana, the entity shall hold the equivalent of the required licence within Botswana or territory in which it will perform the delegated function as approved by the Regulatory Authority.

(5) A delegation referred to under subsection (4) shall be such that —

- (a) the management company can effectively monitor the performance of the delegated function at all times;
- (b) it does not inhibit the Regulatory Authority's capacity to supervise the undertaking; and
- (c) it does not prevent the undertaking to be managed in the best interest of participants.

(6) A management company shall exercise due care and diligence in the discharge of its duties and shall be liable to the undertaking and its participants for any loss suffered by them arising from negligence, fraud, wilful default or recklessness or omission in the performance of its duties.

(7) A management company shall make and keep, for each undertaking and sub-undertaking for which it acts, such records as are necessary to —

- (a) enable the undertaking and the management company to comply with this Act; and
 - (b) demonstrate that such compliance has been achieved.
- (8) The records required under subsection (7) shall be —
- (a) kept in such a way that the Regulatory Authority is able to access them readily;
 - (b) such that they allow for any corrections or other amendments and the contents of such records prior to such corrections or amendments are easily ascertainable;
 - (c) such that it is not possible for the records to be manipulated or altered; and
 - (d) kept for a minimum of seven years.
- (9) The powers and duties of the management company under this Act and under the constituting document of the undertaking are in addition to powers and duties under any other applicable law.
- (10) The liability of a management company to participants may be invoked either directly or indirectly through the trustee or supervisory custodian.

65. (1) A management company shall not voluntarily terminate its appointment unless the termination is effective at the same time as the commencement of the appointment of a successor management company.

Replacement
of management
company

(2) The Regulatory Authority shall be notified immediately by the management company of —

- (a) the voluntary termination by the outgoing management company; and
- (b) the commencement of the new appointment by the incoming management company.

(3) The replacement of a management company shall not take effect without the consent of the trustee of a unit trust or the supervisory custodian of an investment company and the approval of the Regulatory Authority.

(4) The trustee of a unit trust shall replace the management company where any of the circumstances specified in subsection (6) exist.

(5) The supervisory custodian and any non-executive directors of the investment company shall replace the licensed corporate director where any of the circumstances specified in subsection (6) exist.

(6) The trust deed of a unit trust shall lay down the conditions for the replacement of the management company and the trustee, and shall contain rules to ensure the protection of participants in the event of such replacement.

(7) The articles of an investment company shall lay down the conditions for the replacement of the custodian and shall contain rules to ensure the protection of shareholders in the event of such replacement.

(8) In the event of involuntary termination of the appointment of a management company —

(a) the trustee of a unit trust shall appoint a new management company; and

(b) the supervisory custodian shall appoint a new management company with the approval of any non-executive directors, subject to the prior approval of the Regulatory Authority.

(9) Any person who contravenes this Part commits an offence and is liable to a fine not exceeding P250 000 or to imprisonment for a term not exceeding 10 years, or to both.

PART II — *Trustees and Supervisory Custodians of Licensed Collective Investment Undertakings*

Duties of trustee of licensed unit trust and supervisory custodian of licensed investment company

66. (1) A trustee of a unit trust and a supervisory custodian of an investment company shall at all times act, in relation to that undertaking in compliance with this Act, in accordance with the obligations of a trustee and a supervisory custodian under this Act and in compliance with the constituting document and prospectus of the undertaking.

(2) A trustee of a unit trust shall —

(a) act with due care and diligence in accordance with the terms of the trust deed and in the exercise of its functions and duties under this Act;

(b) exercise its powers in the best interests of the holders of participations who are the beneficiaries of the unit trust;

(c) act impartially in relation to all the beneficiaries of the unit trust;

(d) not profit by its office except through the payment of remuneration permitted under this Act;

(e) avoid any conflicts of interest between itself and the beneficiaries of the unit trust;

(f) act honestly at all times;

(g) keep proper accounts and records;

(h) ensure that there is an independent audit of the undertaking;

(i) take all the steps and complete all documents needed to ensure completion of transactions properly entered into for the account of the undertaking;

(j) ensure that all undertaking property in registrable form is, as soon as practicable, registered in the name of the trustee, its nominee or a person retained by it as sub-custodian;

(k) take into its custody or control all documents of title to undertaking property;

(l) collect all income due to be paid to the account of the undertaking;

(m) advise the operator immediately of any corporate actions arising from undertaking property and the need to take decisions relating to these; and

(n) ensure that instructions given to it by the operator for the exercise of rights attaching to the ownership of undertaking property are carried out.

- (3) The supervisory custodian of an investment company shall —
- (a) act with due care and diligence in accordance with the terms of the trust deed;
 - (b) exercise its powers in the best interests of the holders of participations who are the beneficiaries of the unit trust;
 - (c) act impartially in relation to all the shareholders of the investment company;
 - (d) not profit by its office except through the payment of remuneration permitted under this Act;
 - (e) avoid any conflicts of interest between itself and the beneficiaries of the investment company;
 - (f) act honestly at all times;
 - (g) exercise due diligence and care in the exercise of its duties and functions;
 - (h) keep proper accounts and records;
 - (i) ensure that there is an independent audit of the undertaking;
 - (j) take all the steps and complete all documents needed to ensure completion of transactions properly entered into for the account of the undertaking;
 - (k) ensure that all undertaking property in registrable form is, as soon as practicable, registered in the name of the supervisory custodian, its nominee or a person retained by it as sub-custodian;
 - (l) take into its custody or control all documents of title to undertaking property;
 - (m) collect all income due to be paid to the account of the undertaking;
 - (n) advise the operator immediately of any corporate actions arising from undertaking property and the need to take decisions relating to these; and
 - (o) ensure that instructions given to it by the operator for the exercise of rights attaching to the ownership of undertaking property are carried out.

(4) A trustee of a unit trust and a supervisory custodian of an investment company shall take all the property of the undertaking into its custody for safe-keeping pursuant to a written agreement with the management company.

(5) A trustee of a unit trust or a supervisory custodian of an investment company shall, in relation to a collective investment undertaking, take reasonable care to ensure that the undertaking is operated by the management company in accordance with the provisions of this Act relating to the collective investment undertaking concerned and in particular that —

- (a) the issue and cancellation of participations effected on behalf of the collective investment undertaking is carried out in accordance with this Act and the constituting document of the undertaking;

- (b) the net asset value and in the case of open ended and interval undertakings the price of participations in the undertaking are calculated in accordance with this Act and the constituting document of the undertaking;
 - (c) any consideration due to the undertaking in respect of issue or cancellation of participations is remitted to the undertaking within the time limits required under this Act;
 - (d) any income due to the undertaking is remitted to the undertaking and that the income is applied in accordance with this Act and the constituting documents of the undertaking;
 - (e) the instructions of the management company are carried out unless they conflict with this Act, the constituting document or prospectus of the undertaking;
 - (f) the conduct of the management company in the management of the undertaking is enquired into in each annual accounting period and reported to participants in a report that shall form a part of the annual report required by this Act;
 - (g) the report of the trustee or supervisory custodian in the annual report states whether in the opinion of the entity concerned the management company has managed the undertaking in the reporting period in accordance with —

 - (i) the limitations placed on the investment and borrowing powers of the undertaking, and
 - (ii) its constituting document and otherwise in accordance with the provisions of this Act, identifying any breaches of these and the steps which the trustee or supervisory custodian has taken in respect thereof; and
 - (h) in the case of an open ended or interval undertaking, reasonable care has been taken to ensure that the purchase and repurchase of participations is operated by the management company in accordance with the provisions of this Act relating to the collective investment undertaking concerned.
- (6) In the case of a unit trust the trustee shall, on the written instruction of the management company, issue and cancel units in the undertaking, specifying the number and value of units to be issued or cancelled.
- (7) The trustee shall refuse to issue or cancel units if the instruction of the management company conflicts with this Act and the constituting documents of the undertaking, or such action is not in the interests of unit-holders.
- (8) In the case of an open ended or interval investment company, the management company as the licensed corporate director shall issue and cancel shares in the company and shall immediately inform the supervisory custodian in writing of the number and value of shares in the undertaking issued or cancelled in each dealing period.

(9) The trustee of a unit trust and the supervisory custodian of an investment company shall, where they are of the opinion that a deal in undertaking property is not within this Act or the constituting document of the undertaking, require the management company to cancel the transaction or make a corresponding disposal or acquisition to restore the situation and compensate the undertaking for any resulting loss or expense.

(10) The trustee of a unit trust and the supervisory custodian of an investment company shall at regular intervals of not less than once per month undertake a reconciliation of their records of undertaking property and units or shares in issue with the equivalent records of the management company.

(11) Any failure of such reconciliation shall be reported immediately to the Regulatory Authority by the trustee or supervisory custodian.

(12) The powers and duties of the trustee and supervisory custodian under this Act and under the constituting document of the undertaking are in addition to powers and duties under any other applicable law.

(13) A trustee of a unit trust or a supervisory custodian of an investment company shall act independently from the management company and the collective investment undertaking.

67. (1) A trustee or a supervisory custodian of a collective investment undertaking shall —

- (a) hold and deal with the assets of the undertaking in accordance with this Act and the constituting document of the collective investment undertaking;
- (b) segregate the property of the undertaking from its own property, and the property of other undertakings, and the property of its other clients and from that of the management company; and
- (c) be responsible for the collection of income due to be paid for the account of the undertaking.

(2) A licensed custodian shall hold property of a collective investment undertaking in safe custody in Botswana except where it is necessary to keep it outside Botswana to facilitate portfolio transactions outside Botswana.

(3) Where the property of a collective investment undertaking is kept outside Botswana under subsection (2), the trustee or supervisory custodian may appoint a sub-custodian.

(4) The delegation of custodial authority to a sub-custodian shall not relieve the trustee or supervisory custodian from any of its obligations to the collective investment undertaking, the management company or to the Regulatory Authority.

(5) A delegation referred to under subsection (4) shall be such that —

- (a) the trustee or supervisory custodian can effectively monitor the performance of the delegated function at all times;
- (b) it does not inhibit the Regulatory Authority's capacity to supervise the undertaking; and
- (c) it does not prevent the undertaking from being managed in the best interest of participants.

Functions of trustee of licensed unit trust or supervisory custodian of licensed investment company

(6) A trustee or a supervisory custodian of an undertaking shall not be the operator of the undertaking.

(7) The legal entity that holds the trustee or supervisory custodian licence shall not also hold a licence as a management company or asset manager of a collective investment undertaking under this Act.

(8) The trustee or supervisory custodian shall exercise due care and diligence in the discharge of their duties and shall be liable to the management company and participants for any loss suffered by them arising from negligence, fraud, wilful default, omission or recklessness in the performance of their duties.

(9) The trustee or supervisory custodian's liability to participants referred to in subsection (8) may be invoked either directly or indirectly through the management company.

(10) Any person who contravenes this section commits an offence and is liable to a fine not exceeding P250 000 or to imprisonment for a term not exceeding 10 years, or to both.

68. (1) A trustee or a supervisory custodian shall keep at an office or offices within Botswana such books and records, including accounts, as may be specified from time to time by the Regulatory Authority and notify the Regulatory Authority of the address of every office at which any such book or record is kept.

(2) The Regulatory Authority may specify different books in relation to different unit trust schemes.

(3) An appropriate person duly authorised in writing by the Regulatory Authority may, for the purpose of the performance by the Regulatory Authority of its functions under this Act and upon the production of his or her authorisation, at all reasonable times inspect and take copies of, or extracts from, and make such enquiries as he or she may consider, in relation to —

- (a) the books and records kept pursuant to this Act by the management company, investment company, trustee or custodian of a licensed collective investment undertaking;
- (b) any books of account or other documents relating to the said management company, investment company, trustee or custodian and kept in accordance with the Companies Act; and
- (c) any other documents relating to the business of the collective investment undertaking, and for this purpose, enter any office or any place where he or she believes any such books, records or other documents are kept.

(4) A person who has in his or her power, possession or procurement of any such books, records or other documents shall —

- (a) produce them at the request of an appropriate person and permit him or her to inspect and take copies of, or extracts from, the books, records or other documents;
- (b) at the request of an appropriate person, give him or her any information which may be reasonably required in regard to the books, records or other documents; and

(c) give the appropriate person such other assistance and information as is reasonable in the circumstances.

(5) Subsection (4) (a) and (b) shall apply to every management company, investment company, trustee and custodian of a collective investment undertaking.

(6) Subsection (3) (a) shall apply to every associated enterprise of a management company, investment company, trustee, custodian and any other person, where an inspection of the accounts or other records is, in the opinion of the Regulatory Authority, materially relevant to the proper appraisal of the business of a collective investment undertaking during any period in respect of which an inspection or proposed inspection of the management company, investment company, trustee and custodian relates.

(7) Books and records kept pursuant to this Act shall be —

(a) in addition to any books or other records to be kept under any other law; and

(b) retained for at least such period as the Regulatory Authority may specify.

(8) References under this section to books, records or other documents shall be construed as including any document or information kept in a non-legible form, by use of electronic form or otherwise, which is capable of being reproduced in a legible form and the electronic or other means, if any, by which such document or information is so capable of being reproduced.

(9) For purposes of this section, “appropriate person” means —

(a) an officer of the Regulatory Authority; or

(b) in relation to any particular inspection, including a proposed inspection, any other person who, in the opinion of the Regulatory Authority, possesses appropriate qualifications or experience to carry out the inspection or any part thereof.

69. (1) The management company, investment company, trustee or custodian shall each furnish the Regulatory Authority —

(a) at such times as the Regulatory Authority may specify, such information and returns concerning a business to which a licence relates or the carrying on of such business by such person, as the case may be, as the Regulatory Authority may specify, being information and returns which the Regulatory Authority considers it necessary to have for the due performance of its functions under this Act; or

(b) within such period as the Regulatory Authority may specify, additional information and returns, not being information or returns specified under paragraph (a), concerning a business to which a licence relates or the carrying on of such business by such person, as the case may be, as the Regulatory Authority may specify, being information and returns which the Regulatory Authority considers it necessary to have for the due performance of its functions under this Act.

Furnishing
information to
Regulatory
Authority

(2) A person shall not furnish information or returns under this section which he or she knows to be false.

(3) Subsections (1) and (2) shall apply to a business of an associated enterprise to the extent that the Regulatory Authority considers the information or returns to be materially relevant to the appraisal of the business of the holder of the licence to which the associated enterprise relates.

Property of licensed collective investment undertaking not to be property of trustee or supervisory custodian

70. (1) The property of a collective investment undertaking and sub-undertaking shall not, for the purposes of the Insolvency Act, be deemed to be the property of the trustee or the supervisory custodian or any associated enterprise of those persons.

(2) A creditor of the trustee, supervisory custodian or custodian of a collective investment undertaking and sub-undertaking, other than a participant of that collective investment undertaking and sub-undertaking, shall not have any claim against the property of that collective investment undertaking and sub-undertaking.

Requirements for trustee of licensed unit trust or supervisory custodian of licensed investment company

71. (1) A trustee or supervisory custodian of a collective investment undertaking shall file the reports and information required under this Act relating to that undertaking, with the Regulatory Authority, in a timely, accurate and complete manner.

(2) The trustee or supervisory custodian shall report to the Regulatory Authority immediately after the trustee or supervisory custodian becomes aware of any breach of —

- (a) this Act and any applicable rules made under this Act; and
- (b) an undertaking's constituting document or prospectus that has had, or is likely to have, a materially adverse impact on the interests of participants.

Replacement of trustee of licensed unit trust or supervisory custodian of licensed investment company

72. (1) A management company of a unit trust shall replace the trustee or the management company of an investment company shall replace the supervisory custodian as specified in this Act and in the constituting document of the undertaking.

(2) The replacement of a trustee or a supervisory custodian shall not take effect without the approval of the Regulatory Authority.

(3) A trustee or a supervisory custodian shall not voluntarily terminate its appointment as a trustee or supervisory custodian unless the termination is effective at the same time as the commencement of the appointment of a successor trustee or supervisory custodian.

- (4) The Regulatory Authority shall be immediately notified of —
- (a) the voluntary termination by the outgoing trustee or supervisory custodian; and
 - (b) the commencement of the new appointment by the incoming trustee or supervisory custodian.

(5) The trustee or supervisory custodian shall not retire voluntarily unless, prior to retiring, that trustee or supervisory custodian has ensured that it has informed the new trustee or supervisory custodian of any circumstance of which the retiring entity has informed the Regulatory Authority.

(6) The new trustee or supervisory custodian shall confirm to the Regulatory Authority in writing that they are satisfied with the transfer of an asset after an audit report has been furnished to the Regulatory Authority.

(7) A trustee or supervisory custodian of a collective investment undertaking which breaches the requirements of this Part commits an offence and is liable to a fine not exceeding P250 000 or to imprisonment for a term not exceeding 10 years, or to both.

PART III — *Participations in Licensed Collective Investment Undertakings*

73. (1) An order to purchase participations in a licensed collective investment undertaking shall be fulfilled except —

Purchase of participations

- (a) where the order does not comply with the requirements of this Act or any other written law;
- (b) where the person subscribing is not eligible to invest in the undertaking, under this Act;
- (c) where the subscription is for a lesser value than the minimum investment required in the prospectus of the undertaking; or
- (d) in other circumstances specified in the prospectus of the undertaking or in any rules made under this Act.

(2) An application to purchase a participation in a licensed collective investment undertaking shall be irrevocable.

74. An order to repurchase participations in an open ended or interval collective investment undertaking shall be fulfilled except —

Repurchase of participations in open ended or interval collective investment undertakings

- (a) where the order does not comply with the requirements of this Act or any other written law;
- (b) where the resulting value or amount of participations in the undertaking will be lower than the minimum investment required in the prospectus of the undertaking; or
- (c) in any other circumstances specified in the prospectus of the undertaking or in any rules, codes of conduct or guidance made under this Act.

75. (1) A management company of an open ended and an interval collective investment undertaking or sub-undertaking may, in consultation with the trustee or supervisory custodian of that collective investment undertaking or sub-undertaking, if it is in the interests of participants of that undertaking, suspend repurchases of participations in that undertaking or sub-undertaking but shall, at the same time, suspend purchases of participations in the same undertaking or sub-undertaking.

Suspension of purchase and repurchase of participations in open ended or interval collective investment undertakings

(2) A management company which suspends the repurchase and purchase of participations under subsection (1) shall immediately notify the Regulatory Authority and participants of the suspension and the reasons for such suspension.

(3) A management company which has suspended the repurchase and purchase of participations under subsection (1) shall immediately notify the Regulatory Authority and participants of a proposed resumption of the repurchase and purchase of participations.

(4) The Regulatory Authority may, by rules, establish a time limit on the suspension of dealing in collective investment undertakings.

(5) Where the purchase and repurchase of participations in a master collective investment undertaking is suspended, whether that master undertaking is established under this Act or under an equivalent foreign legislative framework, the management company of any feeder collective investment undertaking into that master undertaking is entitled to suspend the purchase and repurchase of participations in the feeder collective investment undertaking for such time as the master undertaking is suspended.

(6) The trustee and supervisory custodian of a collective investment undertaking or sub-undertaking shall, in exceptional circumstances, require the management company of that undertaking, to temporarily suspend the purchase and repurchase of participations where it is necessary to protect the interests of participants in that collective investment undertaking or sub-undertaking.

(7) The Regulatory Authority shall, in exceptional circumstances require —

- (a) one or more management companies of a collective investment undertaking or sub-undertaking or of all collective investment undertakings, to temporarily suspend the purchase and repurchase of participations where it is necessary to protect the interests of participants in one or more collective investment undertakings; and
- (b) the resumption by one or more management companies of the purchase and repurchase of participations in one or more collective investment undertaking or sub-undertaking or all collective investment undertakings.

Approval of
participants

76. (1) A licensed collective investment undertaking established under this Act may not be required to hold an annual general meeting of holders of participations.

(2) The management company of a licensed collective investment undertaking or sub-undertaking shall, by way of a special resolution, obtain prior approval from the participants for any proposed change to the undertaking or sub-undertaking which —

- (a) changes the purposes or the nature of the undertaking;
- (b) may materially prejudice the interests of holders of participations;
- (c) alters the risk profile of the undertaking; or
- (d) introduces any new type of payment out of the undertaking property.

*PART IV — Payments by Participants in Licensed Collective
Investment Undertakings*

77. (1) A person, other than the management company of an undertaking, may not impose a charge on a subscriber or a participant when the subscriber or participant buys or sells participations in that collective investment undertaking.

Payments by
participants

(2) A management company may not levy any charge on a subscriber or a participant when the subscriber or participant buys or sells participations in a collective investment undertaking unless that charge is clearly and prominently disclosed in the prospectus of the undertaking.

78. (1) The only payments which may be recovered from the undertaking property of a licensed undertaking shall be those in respect of —

Payments
from licensed
collective
investment
undertakings

- (a) remunerating the management company, trustee or supervisory custodian or directors or auditor;
- (b) administration of the undertaking, excluding the safekeeping or administration of participations in the undertaking on behalf of holders of those participations; and
- (c) the investment or safekeeping of undertaking property.

(2) A payment may not be made from licensed undertaking property if it is unfair to, or if it materially prejudices, the interest of any class of participants or potential participants.

(3) Subsections (1) and (2) shall not apply to any payments in relation to taxation payable by an undertaking.

(4) A payment may not be made by an undertaking to any party that is not clearly disclosed in its prospectus.

(5) For the avoidance of doubt, a payment relating to the cost of financial promotion or remuneration of persons intermediating purchases or repurchase of participations in a collective investment undertaking shall not be payable by an undertaking or sub-undertaking with the exception of the charge that may be levied upon subscription to or repurchase from an undertaking or sub-undertaking that is payable only to the operator and any direct costs of listing of an undertaking or sub-undertaking on a stock exchange or regulated market.

*PART V — Short Form Documentation for Licensed Collective
Investment Undertakings*

79. (1) A management company of a licensed collective investment undertaking shall prepare and disseminate a short form prospectus for each stand-alone undertaking and each sub-undertaking of a licensed umbrella undertaking that it operates.

Short form
prospectus

(2) A management company shall provide a short form prospectus free of charge and it shall comply with the following —

Short form
annual and
half yearly
report

- (a) its contents shall be consistent with the full prospectus;
- (b) it shall be filed with the Regulatory Authority at the same time as the full prospectus;
- (c) it shall be amended in the same circumstances and manner as the full prospectus of the undertaking;
- (d) it shall state that the full prospectus and the most recent short form annual and half yearly report and accounts are available free of charge and how these may be obtained;
- (e) it shall contain the application form for subscription for participations;
- (f) it shall not contain information extraneous to that required by this Act; and
- (g) it shall contain all other information required under this Act.

(3) A management company shall provide the most recent short form prospectus to potential investors free of charge before they enter into a contract to purchase participations in a licensed collective investment undertaking or sub-undertaking and the full prospectus shall be made available to potential investors free of charge upon request.

80. (1) A management company of a licensed collective investment undertaking shall, at the end of its annual accounting period, prepare and disseminate a short form annual report for each stand-alone licensed undertaking and for each sub-undertaking of a licensed umbrella undertaking.

(2) The short form annual and half yearly report required under subsection (1) shall —

- (a) be consistent with the audited annual report and accounts;
- (b) be filed with the Regulatory Authority at the same time as the audited annual report and accounts;
- (c) state that the audited annual report and accounts are available free of charge and how these may be obtained;
- (d) be sent free of charge to existing investors within four months of the end of the financial year; and
- (e) comply with this Act and shall not contain information extraneous to that required by this Act.

(3) A management company of a licensed collective investment undertaking shall, at the end of the first six months of its annual accounting period, prepare and disseminate a short form half yearly unaudited report for each stand-alone licensed collective investment undertaking and sub-undertaking of a licensed undertaking for the first six months of each annual financial reporting period which shall contain the same information as required in the short form annual report, but unaudited.

(4) The short form annual report for a stand-alone licensed collective investment undertaking and sub-undertaking of a licensed umbrella undertaking for an annual accounting period shall be sent to all participants who are entered in the register or entitled to be entered in the register on the last day of the annual accounting period being reported upon.

(5) The short form half yearly report for a stand-alone licensed collective investment undertaking and sub-undertaking of a licensed umbrella undertaking for the first six months of an annual accounting period shall be sent to all participants who are entered in the register or entitled to be entered in the register on the last day of the first six months of the accounting period being reported upon.

(6) The most recent annual and half yearly short form report shall be offered to investors free of charge before entering into a contract to purchase participations in a licensed stand-alone collective investment undertaking and sub-undertaking, and the most recent annual audited and half yearly unaudited report and accounts shall be made available free of charge upon request.

(7) The short form annual report and short form half yearly report shall be made available in a durable medium chosen by the recipient.

PART VI — Investment and Borrowing Powers of Licensed Collective Investment Undertakings

81. (1) The property of a licensed collective investment undertaking or sub-undertaking of a licensed collective investment undertaking may only be invested in accordance with subsection (2) and as may be prescribed.

Permitted investments, lending and borrowing for licensed collective investment undertakings

(2) The following shall be observed when property of a licensed collective investment undertaking or sub-undertaking of a licensed collective investment undertaking is invested —

- (a) the kind of property in which the undertaking may invest;
- (b) the proportion of the property of the undertaking that may be invested in assets of any description;
- (c) the description of the transactions that are permitted;
- (d) the criteria for eligibility of asset classes and individual assets for investment by open ended, interval and closed ended collective investment undertakings;
- (e) the maximum exposure of any undertaking to one issuer, group of issuers, credit institution, property or undertaking;
- (f) the maximum concentration of ownership or influence over an issuer permitted to any one undertaking or to all undertakings managed or influenced by the same management company or associated management companies;
- (g) requirements for transactions with associated persons or entities or collective investment undertakings or other pools of assets managed by the same management company and for transactions conducted through associated enterprises; and
- (h) the permitted use of derivatives and forward contracts.

(3) The requirements of subsection (2) shall apply at the time of purchase of assets, except in the cases of paragraphs (a), (c), (d), (f), (g) and (h) which shall apply at all times.

(4) If the limits specified under subsection (1) are exceeded for reasons beyond the control of the management company or as a result of the exercise of subscription rights, the excess shall be remedied, taking due account of the interests of participants, within a maximum of 130 working days, except in the case where force majeure is declared by the Regulatory Authority.

(5) A management company may, subject to the provisions of this Act, borrow on behalf of a licensed collective investment undertaking and sub-undertaking of a licensed umbrella undertaking, and the management company shall set out -

- (a) the maximum percentage of the net asset value of a collective investment undertaking which may be borrowed;
- (b) the permitted method, nature and term of such borrowing; and
- (c) the requirements as to the status and eligibility of lenders.

(6) A licensed collective investment undertaking or sub-undertaking may not lend other than by investment in debentures or instruments signifying indebtedness.

(7) A licensed collective investment undertaking and a sub-undertaking of a collective investment undertaking shall not invest in participations of another collective investment undertaking or sub-undertaking of a collective investment undertaking except as permitted under this Act.

(8) A sub-undertaking of a collective investment undertaking shall not invest in another sub-undertaking of the same collective investment undertaking.

(9) A licensed collective investment undertaking which invests directly in immovable property may only be constituted as a closed ended undertaking.

(10) The management company, on behalf of an undertaking shall not carry out a purchase of any investment that is not in the ownership of the undertaking.

(11) Any person who contravenes this Part commits an offence and is liable to a fine not exceeding P50,000 or to imprisonment for a term not exceeding 5 years, or to both.

PART VII — Valuation of Licensed Collective Investment Undertakings

Requirements
for valuation
of licensed
collective
investment
undertakings

82. (1) The management company of a collective investment undertaking shall be responsible for valuation of the property of that undertaking and of collective investment undertaking sub-undertakings and for calculating the price of participations of open ended and interval undertakings and of open ended and interval sub-undertakings.

(2) The management company shall, in order to determine the value of a participation in a collective investment undertaking or sub-undertaking, carry out a fair and accurate valuation of all the undertaking or sub-undertaking property in accordance with the constituting document of the undertaking, the undertaking prospectus and this Act.

(3) The management company of a closed ended undertaking shall carry out a valuation under subsection (2) not less than every six months at regular intervals stated in the undertaking prospectus with the exception that valuation of immovables held by closed ended undertakings shall only be undertaken once per annum.

(4) The management company of an open ended undertaking and sub-undertaking shall carry out a valuation under subsection (2) not less than once every two weeks at regular intervals stated in the prospectus except during a fixed price initial offer period.

(5) The management company of an interval undertaking shall carry out a valuation under subsection (2) not less than once every six months at regular intervals stated in the prospectus except during a fixed price initial offer period.

(6) The management company of a money market collective investment undertaking shall carry out a valuation under subsection (2) not less than once every working day.

(7) The management company of an open ended or interval undertaking shall undertake a valuation under subsection (2) immediately before it creates a price at which participations of an open ended or interval undertaking are sold or repurchased or issued or cancelled.

(8) The management company shall agree with the trustee or supervisory custodian of an undertaking the basis of the valuation methodology to be applied to a collective investment undertaking or sub-undertaking and disclose this in the prospectus of that undertaking or sub-undertaking and the trustee or supervisory custodian shall ensure that the methodology is applied consistently and fairly.

(9) The trustee or supervisory custodian of a collective investment undertaking or the Regulatory Authority may require the management company to compensate subscribers for participations, repurchasers of participations or a collective investment undertaking or sub-undertaking for any loss suffered as a consequence of any error in valuation that exceeds the percentage set out in the rules made by the Regulatory Authority.

(10) Any person who fails to comply with this Part shall be liable to a civil penalty not exceeding P50 000.

Chapter VI — *Termination, Winding up and Transfers of Collective Investment Undertakings*

83. (1) A solvent collective investment undertaking or a solvent sub-undertaking shall be wound up in accordance with the provisions of this Act.

(2) An insolvent collective investment undertaking shall be wound up in accordance with the provisions of the Insolvency Act.

Limitations on winding up of collective investment undertaking

(3) Where any person other than the Regulatory Authority makes an application to the High Court for the winding up of any collective investment undertaking which is or has been licensed or exempt and is or has been carrying on a regulated activity in contravention of this Act or any other enactment which regulates non-bank financial institutions, the Regulatory Authority shall be entitled to be heard and participate in such proceedings.

84. (1) The Regulatory Authority shall not approve a plan for the winding up of a collective investment undertaking unless the Regulatory Authority is satisfied that the interests of the participants are properly protected.

(2) The circumstances in which a collective investment undertaking may be terminated or wound up shall include but not limited to —

- (a) if the licence or exemption of the undertaking is cancelled;
- (b) if a special resolution to either terminate or wind up the undertaking is passed with the Regulatory Authority's prior consent to the resolution;
- (c) on the date the fixed life of the undertaking expires or an eventuality arises upon which the constituting document requires that the undertaking be wound up;
- (d) on the date agreed by the Regulatory Authority for the termination or winding up or upon application by the operator of the collective investment undertaking for such termination or winding up where the undertaking or sub-undertaking is not economically viable or cannot achieve its purpose;
- (e) on the effective date of a scheme of arrangement which will result in the undertaking or sub-undertaking that is subject to the scheme being left with no property; or
- (f) any other circumstances as prescribed in the prospectus of the undertaking.

(3) If the operator has not previously notified participants of the proposal to wind up the undertaking or terminate the sub-undertaking, it shall immediately after winding up or termination has commenced give written notice of such commencement to all participants on the register as at the date of commencement.

(4) The winding up or termination shall not commence unless the trustee of a unit trust or the authorised corporate director of an investment company or the operator of a partnership have submitted to the Regulatory Authority a plan for winding up or termination and a statement of solvency of the undertaking or sub-undertaking concerned and that plan has been approved by the Regulatory Authority.

(5) The solvency statement shall confirm that the undertaking or sub-undertaking will be able to meet all its liabilities within 12 months of the date of the statement or state that the confirmation cannot be given.

- (6) The statement referred to under subsection (5) shall —
 - (a) relate to the undertaking or sub-undertaking's affairs, business and property at a date not more than 28 working days before the date on which notice is given to the Regulatory Authority;
 - (b) be approved by the operator of a unit trust, the supervisory custodian or custodian of an investment company and the custodian of a partnership; and
 - (c) be accompanied by the statement of the auditor of the undertaking or sub-undertaking to the effect that, in his or her opinion, the statement of solvency fairly reflects the situation of the undertaking or sub-undertaking.

85. (1) A trustee of a unit trust shall be responsible for the execution of the winding up of a unit trust and shall —

Winding up
by trustee

- (a) where the circumstance referred to in section 84(2)(e) arises, cancel all units in issue and wind up or terminate the unit trust or sub-undertaking of the unit trust in accordance with the scheme of arrangement;
- (b) in all other circumstances referred to in section 84(2) —
 - (i) realise the undertaking property,
 - (ii) after paying out or retaining adequate provision for all liabilities payable and for the costs of the winding up or termination, cancel all units in issue and distribute the proceeds of that realisation to the unit-holders and the operator proportionately to their respective interests in the unit trust or sub-undertaking of the unit trust as at the date of the event, and
 - (iii) pay into the Guardian's Fund any unclaimed net proceeds or other cash (including any unclaimed distribution payments) held by the trustee after one year on which they became payable minus any expenses properly incurred by him or her relating to that payment;
- (c) where the trustee and one or more unit-holders agree that the requirement in paragraph (b)(ii) to realise the undertaking property does not apply to that part of the property proportionate to the entitlement of those unit-holders, distribute that part of the property after making adjustments or provisions for ensuring that those unit-holders bear their proportional share of the liabilities and costs; and
- (d) on completion of the winding up, notify the Regulatory Authority in writing and at the same time the management company shall request the Regulatory Authority to cancel the relevant licence.

(2) The unit trust or sub-undertaking may be treated as having been wound up or terminated when the steps given in subsection (1)(a) to (c) are completed.

86. (1) The operator shall be responsible for the execution of the winding up of an investment company or termination of a sub-undertaking of an investment company.

Winding up
by operator

- (2) The operator shall —
- (a) where the circumstance referred to in section 81 (2) (e) arises, cancel all shares in issue and wind up or terminate the investment company or sub-undertaking of the investment company in accordance with the scheme of arrangement;
 - (b) in all other circumstances referred to in section 81 (2) —
 - (i) instruct the supervisory custodian or custodian to realise the undertaking property,
 - (ii) instruct the supervisory custodian or custodian how the proceeds shall be held to prudently protect the creditors and shareholders against loss, or
 - (iii) where sufficient liquid funds are available after making adequate provision for the expenses of winding up or termination and the discharge of the undertaking or sub-undertaking's remaining liabilities, arrange for the supervisory custodian or custodian to make one or more interim distributions to the shareholders proportionately to the right of their respective shares to participate in undertaking property at the commencement of winding up or termination;
 - (c) where the operator and one or more shareholders agree that the requirement in paragraph (b) (ii) to realise the undertaking property does not apply to that part of the property proportionate to the entitlement of that or those shareholders, distribute that part of the property after making adjustments or provisions for ensuring that the shareholders bear their proportional share of the liabilities and costs;
 - (d) on completion of the winding up, notify the Regulatory Authority in writing and at the same time request the Regulatory Authority to cancel the relevant licence; and
 - (e) arrange for the supervisory custodian or custodian to pay or lodge any sum of money which stands to the account of the investment company or investment company's sub-undertaking at the date of its dissolution within one month after that date, with the court or the Guardian's Fund.
- (3) The requirements of subsection (2) (b) shall be subject to any terms of any scheme of arrangement agreed to by special resolution passed on or before the commencement of the winding up or termination.
- (4) The investment company or investment company's sub-undertaking may be treated as having been wound up or terminated when the steps given in subsection (2) (a) to (c) are completed.
- 87. (1)** The general partner shall be responsible for the execution of the winding up of a collective investment partnership and for termination of a sub-undertaking of a limited partnership.
- (2) The general partner shall —

- (a) where the circumstance referred to in section 81 (2) (e) arises, cancel all partnership interests in issue and wind up or terminate the partnership or sub-undertaking of the partnership in accordance with the scheme of arrangement;
- (b) in all other circumstances referred to in section 81 (2) —
 - (i) instruct the supervisory custodian or custodian to realise the undertaking property,
 - (ii) instruct the supervisory custodian or custodian how such proceeds shall be held to prudently protect the creditors and partners against loss, or
 - (iii) where sufficient liquid funds are available after making adequate provision for the expenses of winding up or termination and the discharge of the undertaking or sub-undertaking's remaining liabilities, arrange for the supervisory custodian or custodian to make one or more interim distributions to the shareholders proportionately to the rights of their respective shares to participate in undertaking property at the commencement of winding up or termination;
- (c) where the general partner and one or more partners agree that the requirement in paragraph (b) (ii) to realise the undertaking property does not apply to that part of the property proportionate to the entitlement of that or those partners, distribute that part of the property after making adjustments or provisions for ensuring that, that, or those unit-holders bear their proportional share of the liabilities and costs;
- (d) on completion of the winding up, notify the Regulatory Authority in writing and at the same time request the Regulatory Authority to cancel the relevant licence; and
- (e) arrange for the custodian to pay or lodge any sum of money that stands to the account of the partnership at the date of its dissolution within one month after that date with the court or the Guardian's Fund.

(3) The requirements of subsection (2)(b) shall be subject to any terms of any scheme of arrangement agreed to by special resolution passed on or before the commencement of the winding up or termination.

(4) The undertaking may be treated as having been wound up or terminated when the steps given in subsection (2)(a) and (b) are completed.

88. (1) Once winding up or termination has commenced —

- (a) dealing, valuation and investment and borrowing powers and other requirements under this Act shall cease to apply to the undertaking or sub-undertaking;
- (b) issuance of participations shall cease and cancellation of participations shall cease except in respect of final cancellation;
- (c) the operator shall cease to sell or repurchase participations;

Required activities during termination and winding up

- (d) no transfers of participations may be registered and no change may be made to the register of participants without the agreement of the trustee or supervisory custodian or custodian;
- (e) in the case of winding up an investment company, the investment company shall cease to carry on its business except for its beneficial winding up; and
- (f) the corporate status and powers of an investment company, subject to this section, and the powers of the directors shall continue until the investment company is dissolved.

(2) Once winding up or termination has commenced the operator of a collective investment undertaking or sub-undertaking need not, if the trustee or supervisory custodian or custodian agrees, prepare any short form report due under this Act:

Provided that where this applies a copy of the annual audited report and accounts shall be prepared and supplied free of charge to any participant upon request and the obligation to prepare an annual audited and half yearly unaudited report and accounts shall continue to apply until completion of winding up or termination.

(3) Where subsection (2) applies, the operator shall keep participants appropriately informed about the winding up or termination of the undertaking or sub-undertaking and, if known, the duration of the winding up or termination.

(4) Where subsection (3) applies, the operator shall send a copy of the information required to the Regulatory Authority and every person who was a participant in the undertaking immediately before the winding up or termination commenced, unless a final distribution has been made.

(5) If after the commencement of a winding up or termination of an investment company and before the notice of completion of the winding up or termination has been sent to the Regulatory Authority there is a vacancy in the position of licensed corporate director or in the case of a limited partnership, a vacancy in the position of general partner, the supervisory custodian or custodian shall immediately present a petition for winding up of the undertaking under the Insolvency Act.

Winding up
by order of
High Court

89. (1) A collective investment undertaking may be wound up —

- (a) by order of the High Court upon application by the Regulatory Authority;
- (b) by order of the High Court on application by the operator, trustee, supervisory custodian or custodian of that undertaking; or
- (c) in any other circumstances as may be prescribed.

(2) The Regulatory Authority may present a petition to the High Court for the winding up of a collective investment undertaking which is or has been licensed or exempted and is or has been carrying on or has carried on any regulated activity in contravention of this Act or any other enactment regulating non-bank financial institutions.

(3) Sections 46, 47, 48 and 49 of the Securities Act shall apply with the necessary modifications to the winding up of a collective investment undertaking.

90. Subject to the provisions of section 88(1)(e), the presentation of a petition for winding up shall have the effect of suspending all the activities of the collective investment undertaking.

Effect of winding up petition

91. (1) A collective investment undertaking or sub-undertaking may be transferred in whole or in part to another collective investment undertaking by a scheme of arrangement subject to the approval of the Regulatory Authority.

Transfer of collective investment undertaking

(2) A partnership collective investment undertaking shall not be subject to a scheme of arrangement.

Chapter VII — *Miscellaneous Provisions*

92. (1) A person aggrieved by or whose interests are affected by a decision of the Regulatory Authority may apply for a review of that decision, to the Tribunal established under section 50 of the Non-Bank Financial Institutions Regulatory Authority Act.

Review of decisions

(2) Sections 51, 52 and 53 of the Non-Bank Financial Institutions Regulatory Authority Act in relation to the review and implementation of decisions of the Tribunal shall apply to a review of a decision under this Act.

93. (1) The Minister may make regulations providing for any matter which under this Act is to be provided for by regulations or is to be prescribed for the better carrying out of the objects and purpose of this Act or to give force or effect to its provisions or for its better administration.

Regulations

(2) Without prejudice to the generality of subsection (1), the Minister may, in consultation with the Regulatory Authority, make regulations governing —

- (a) licensing, exemption or recognition fees payable by collective investment undertakings and registration fees of sub-undertakings;
- (b) requirements for licensing, exemption or recognition of collective investment undertakings and registration of sub-undertakings and for reporting by and upon such undertakings to the Regulatory Authority including requirements for investment company directors, collective investment undertaking auditors, collective investment undertaking operators, and trustees and supervisory custodians and custodians of collective investment undertakings;
- (c) the variation, duration, suspension, expiration, renewal or cancellation of licences, exemptions, recognitions and registrations under this Act;
- (d) the activities or functions undertaken by the operator of a collective investment undertaking or a trustee or supervisory custodian or custodian of a collective investment undertaking which must be performed in Botswana;
- (e) the minimum and maximum capital requirements for collective investment undertakings;

- (f) such fees as may be required under this Act; and
 - (g) such penalties as may be required for non-compliance with the Regulations.
- (3) The Minister may, in consultation with the Regulatory Authority make regulations for foreign collective investment undertakings relating to —
- (a) recognition or exemption requirements for such collective investment undertakings;
 - (b) the offering of subscription for and purchase of participations in such collective investment undertakings within Botswana;
 - (c) the purchase and repurchase of participations of such collective investment undertakings within Botswana;
 - (d) dealing in participations in such collective investment undertakings within Botswana;
 - (e) disclosure of information to participants or potential participants in such collective investment undertakings and establishing the required content and timing of such disclosure within Botswana;
 - (f) the preparation of periodical reports with respect to such collective investment undertakings and the provision of those reports to the Regulatory Authority; and
 - (g) any other measures that may be necessary for the protection of participants or potential participants in such collective investment undertakings within Botswana.

Rules

- 94.** (1) The Regulatory Authority may make rules, codes of conduct and guidelines for licensed collective investment undertakings and sub-undertakings in relation to —
- (a) the appointment and replacement and the powers, duties, rights and liabilities of the management company, trustee, supervisory custodian, directors and auditor of a collective investment undertaking and permitted delegation of functions by such entities;
 - (b) the public offering and financial promotion of undertakings;
 - (c) the nature of participations in an undertaking and the rights and duties attaching to said participations including voting on special resolutions;
 - (d) the maintenance of the register of participants in collective investment undertakings;
 - (e) transfers of participations in collective investment undertakings;
 - (f) the amendment of collective investment undertakings including all aspects of convening and conducting extraordinary general meetings of participants;
 - (g) the transfer of undertakings including schemes of arrangement and winding up of collective investment undertakings and termination of sub-undertakings and disclosure to participants and the Regulatory Authority during such procedures;
 - (h) the keeping of records with respect to transactions and the financial position of undertakings, and inspection of those records;

- (i) the content, timing and format of disclosure of information on collective investment undertakings to participants and prospective participants and deadlines for its dissemination;
- (j) conflicts of interest in relation to collective investment undertakings;
- (k) the issue and cancellation of participations in collective investment undertakings;
- (l) the purchase and repurchase of participations in collective investment undertakings including initial fixed price offerings and suspension and resumption of purchase and repurchase of participations in collective investment undertakings;
- (m) the permitted fees and expenses of collective investment undertakings and the means of meeting them and the nature and manner of permitted payments by such undertakings and any limitations the Regulatory Authority may place upon these;
- (n) the charges that may be made upon purchase or repurchase of participations in collective investment undertakings and any limitations the Regulatory Authority may place on these;
- (o) the valuation and pricing of collective investment undertakings and their participations;
- (p) accounting for such collective investment undertakings and allocation and distribution of income;
- (q) restricting or regulating the investment, lending and borrowing powers exercisable in relation to collective investment undertakings and sub-undertakings or to a specified category of collective investment undertakings and sub-undertakings, including money market collective investment undertakings;
- (r) the interest that a management company, a trustee, a supervisory custodian, a custodian or auditor, or any other service provider as may be prescribed, may or may not hold in collective investment undertakings to which they provide services;
- (s) the information required to be disclosed by the operator of a collective investment scheme to its trustee or supervisory custodian, custodian and auditor and any other eligible person as may be prescribed;
- (t) complaints and compensation procedures;
- (u) the format, content and timing of disclosure of information relating to licensed and recognised collective investment undertakings and sub-undertakings of licensed and recognised collective investment undertakings, both to the Regulatory Authority and to participants; and the submission of periodic and ad hoc reports to the Regulatory Authority, prospectuses and short form prospectuses, annual audited reports and accounts and half yearly unaudited reports and accounts and short form annual and half yearly reports;
- (v) the scope of a collective investment undertaking's auditor's report and the scope of ad-hoc reports of the auditor;
- (w) declaring force majeure; and
- (x) any other measures that may be necessary for the protection of participants or potential participants in such collective investment undertakings or sub-undertakings.

Repeal of Cap.
56:09

Transitional
and savings
provisions

(2) The Regulatory Authority may, for a contravention of a Rule made under subsection (1), impose any one or more of the following penalties —

- (a) a warning made either privately or published in a newspaper of general circulation; or
- (b) a fine not exceeding P250 000.

95. The Collective Investment Undertakings Act (hereinafter referred to as the “repealed Act”) is hereby repealed.

96. (1) Notwithstanding the repeal effected under section 95 —

- (a) any changes to the constitution, trust deed or to the prospectus of a collective investment undertaking licensed by Regulatory Authority or by the Bank of Botswana or under the repealed Act that are required by this Act shall not be subject to a special resolution or extraordinary general meeting but shall be adopted by the giving of 60 working days advance notification, of all relevant changes, to the Regulatory Authority and to all participants in that undertaking as at the date of such notification;
- (b) all collective investment undertakings licensed by the Regulatory Authority or by the Bank of Botswana or under the repealed Act shall apply to the Regulatory Authority within six months from the date of commencement of this Act for a licence or exemption under this Act;
- (c) any foreign collective investment undertaking approved to be publicly or privately offered in Botswana before the commencement of this Act shall apply to the Regulatory Authority for recognition or exemption under this Act within six months from the date of commencement of this Act;
- (d) any management company or trustee licensed or approved by the Regulatory Authority under the repealed Act shall apply to the Regulatory Authority for a licence under this Act within six months from the date of commencement of this Act; and
- (e) any entity established in Botswana that was not a collective investment undertaking under the repealed Act that is a collective investment undertaking under this Act shall be licensed or exempted as required under this Act within six months from the date of commencement of this Act.

(2) Any foreign collective investment undertaking approved to be publicly or privately offered in Botswana before the commencement of this Act in terms of subsection (1)(c) which fails to receive recognition or exemption shall cease to be offered in Botswana.

(3) An entity described under subsection (1)(e) which fails to receive a licence or exemption within the six months shall be wound up.

(4) Any subsidiary legislation made under the repealed Act and in force immediately prior to the coming into operation of this Act shall, in so far as it is not inconsistent with this Act, continue in force and be of effect as if made under this Act.

SCHEDULE I
LIMITED PARTNERSHIPS
(sections 18 (1)(c) and 60)

General provisions

1. For the purposes of this Act a “partnership undertaking” is a collective investment undertaking which shall, at all times, satisfy the following conditions —

- (a) the undertaking is a limited partnership;
- (b) the limited partnership —
 - (i) is formed by deed,
 - (ii) at any time, has only one general partner, and
 - (iii) on formation, has at least one limited partner, who is the proposed custodian;
- (c) that the deed provides that where an exemption is granted under this Act in respect of the limited partnership —
 - (i) the partnership property subject to the undertaking is to be held by a custodian,
 - (ii) the custodian shall be a limited partner and eligible to act as such under this Act,
 - (iii) every other limited partner is to be a participant in the undertaking, and
 - (iv) units are to be issued to participants in exchange for a contribution to the partnership.

2. For the purposes of this Act a partnership is the relationship which subsists between persons carrying on a business in common with a view to profit under a partnership agreement and the word “business” includes every trade, profession and occupation.

3. A limited partnership shall consist of not more than one hundred persons, at least one of whom shall be a general partner who is licensed by the Non-Bank Financial Institutions Regulatory Authority and has unlimited liability for all debts and obligations of the firm, and one or more of whom are limited partners who shall at the time of entering into such partnership contribute capital sums subject to paragraph 7.7 save that the custodian or proposed custodian of a partnership undertaking shall not be required to make any capital contribution.

4. For the avoidance of doubt the general partner is a person who is a partner in a limited partnership and is not itself a limited partner.

Arrangements which do not create limited partnerships

5. The following are not limited partnerships for the purposes of this Act —
- (a) a limited liability partnership established under the Companies Act;
 - (b) any other body corporate wherever incorporated;
 - (c) an investment company whenever incorporated;
 - (d) a partnership constituted under the law of a country or territory outside Botswana which does not comply with this Act; or
 - (e) any other association or body formed under any other law, enactment, letters, patent or charter or under the law of a country or territory outside Botswana.

6. The following arrangements do not constitute carrying on the business of a limited partnership for the purposes of this Act —

- (a) where a person receives a payment contingent on or varying with the profits of a business;
- (b) where a person is an agent of a person engaged in a business and has a contract for his or her remuneration by a share of the profits of the business;
- (c) where a person receives a debt or other liquidated amount (by instalments or otherwise) out of the accruing profits of a business;
- (d) where a person is the beneficiary of the estate of a person who has died and receives by way of annuity a share of profits made in a business in which the deceased was a partner;
- (e) where a person lends money to a person engaged in or about to engage in a business and is by the terms of the loan agreement to receive a rate of interest varying with the profits of the business or a share of those profits;
- (f) where a person sells the goodwill of a business and receives (by way of annuity or otherwise) a share of the profits of the business in return for the purchase;
- (g) where a person shares an interest in property (whether or not they share profits made by the use of the property); and
- (h) where a person shares gross profits (whether or not they have a joint or common interest in any property from which, or from the use of which, the returns are derived).

The partnership deed

7. A partnership deed may be amended in accordance with its terms or with the agreement of all existing partners save as expressly prohibited in this schedule but shall contain the following arrangements —

7.1 Full Disclosure

Each partner and prospective partner is under an overriding obligation to act in good faith towards the partnership and its partners; and each partner and prospective partner shall keep each of the other partners fully informed of all matters which a prudent partner would reasonably expect to be disclosed to the partnership.

7.2 Partnership Property

Partnership property shall be held and applied by a custodian who shall be a limited partner and eligible to act as such under this Act.

7.3 Management of the Partnership by the General Partners

(1) The general partner shall undertake all day to day aspect of the management of the partnership business and affairs.

(2) Sub-paragraph (1) cannot be varied by the general powers to amend a partnership deed.

(3) The custodian of a partnership undertaking shall not be deemed to take part in the management of the partnership business of the undertaking by virtue of performing the powers and duties of the custodian.

7.4 The Role of the Limited Partner

(1) A limited partner shall not take part in the management of the partnership business, and shall not have power to bind the firm.

(2) A limited partner that is the custodian may, with the consent of the general partner and the consent of the Non-Bank Financial Institutions Regulatory Authority, assign his or her role in the partnership to another custodian, and upon such an assignment the assignee shall become a limited partner with all the rights of the assignor and the substitution shall be made in accordance with the partnership agreement.

7.5 The Liability of the Limited Partner

(1) A limited partner who is a participant in a partnership undertaking —

(a) shall not be liable for the debts of the undertaking beyond the amount which, at the time when any debts fall to be discharged, is equal to the value at that time of the limited partner's units; and

(b) shall cease to have any liability for the debts of the undertaking upon the repurchase of the limited partner's units.

(2) While a person remains a limited partner, he or she is not entitled either directly or indirectly to draw out or receive back the whole or part of any capital contribution made by him or her to the partnership.

(3) Where a limited partner decides to draw back or receive capital contributions under sub-paragraph (2) he or she becomes personally, jointly and severally liable for a partnership obligation incurred while he or she was a limited partner subject to the terms of the partnership deed and save that his or her liability cannot exceed the amount drawn out or received back.

7.6 The Liability of the General Partner

A partnership is bound by anything done by a general partner in the normal business of the partnership save where —

(a) the general partner has no authority to do the thing on behalf of the partnership; and

(b) the person with whom the partner is dealing has notice that the partner has no authority, or does not know or believe him or her to be a partner in the partnership.

7.7 Accounting Requirements

(a) the general partner shall keep proper accounting records of all transactions affecting the partnership; and

(b) comply with the auditing, accounting and financial requirements imposed by the Non-Bank Financial Institutions Regulatory Authority and by this Act.

7.8 Disclosure of Partnership Details

Any person dealing with a partnership is entitled, on request to be informed of the full name of each partner; and an address for service on each partner.

SCHEDULE II
UNIT TRUSTS
(sections 18 (1)(a) and 58)

General provisions

1. Save as otherwise provided by Chapter IV, Part II of this Act this Schedule governs the duties and powers of a trustee and the rights and interests of participants in a unit trust licensed and exempted under this Act.

2. For the avoidance of doubt a trustee is under an overriding obligation to act in good faith, in accordance with the purposes of the unit trust and otherwise consistent with its fiduciary duties.

3. The unit trust and its terms shall be for the benefit of the participants and shall have a purpose that is lawful, not contrary to public policy, and possible to achieve.

4. The unit trust shall be created by deed and such unit trust may continue indefinitely or terminate in accordance with this Act or with the terms of the trust deed.

5. Subject to paragraphs 3 and 4, a unit trust established under this Act shall be valid and enforceable in accordance with its terms.

Variation and termination of trust

6. A trust deed may expressly provide that with the consent of the Non-Bank Financial Institutions Regulatory Authority —

(a) its terms are capable of variation; or

(b) the unit trust itself or a power exercisable under the trust is revocable either in whole or in part.

7. A unit trust shall terminate under this Act where —

(a) the Non-Bank Financial Institutions Regulatory Authority exercises its power under this Act;

(b) it is revoked or expires pursuant to its terms; or

(c) the purposes of the unit trust have become unlawful or impossible to achieve.

8. Where a unit trust is terminated the trustee may retain such reasonable proportion of the trust property to make provisions for any liabilities present or future before distributing the property in accordance with this Act and the trust deed.

The participants of the trust

9. All participants in the unit trust arrangements shall be identifiable and ascertainable.

10. The trustee of the unit trust may not be a participant in the unit trust.

11. The participants of the unit trust may, subject to the terms of the deed, sell, charge, transfer or otherwise deal with their interests.

The trustee: remuneration and expenses

12. The trustee, save as expressly provided for by the terms of the trust deed, shall not be entitled to remuneration for his or her services and such remuneration where permitted shall be proportionate and reasonable with regard to the skills and services of the trustee.

13. A trustee may, where expressly provided by the unit trust deed, be reimbursed for all expenses and liabilities properly incurred in connection with the administration of the unit trust.

Powers and duties of the trustee

14. Upon appointment, the trustee shall in the execution of his or her duties and in the exercise of his or her powers and discretions —

- (a) act with due diligence as would a prudent person to the best of his or her ability and skill; and
- (b) observe the utmost good faith, in accordance with the terms and purposes of the unit trust and this Act.

15. A trustee shall administer a unit trust solely in the interest of the participants and in furtherance or support of the purposes of the unit trust and subject to the terms of such unit trust, a trustee shall so far as is reasonably practical preserve the value of the trust property.

16. A trustee shall act impartially in relation to all participants in the unit trust.

17. Except with the approval of the Non-Bank Financial Institutions Regulatory Authority or as permitted by this Act or expressly provided by the terms of the unit trust, a trustee shall not —

- (a) directly or indirectly profit from his or her trusteeship;
- (b) cause or permit any other person to profit directly or indirectly from the trusteeship;
- (c) on his or her own account enter into any transaction with the other trustees or relating to the trust property which may result in such profit;
- (d) sell or otherwise encumber the trust property unless —
 - (i) the transaction was expressly permitted under the terms of the trust deed;
 - (ii) the transaction was undertaken as a result of a direction from the Non-Bank Financial Institutions Regulatory Authority in the exercise of its powers under this Act.

18. A trustee shall not delegate his or her powers save where expressly provided for by this Act.

19. A trustee may take reasonable steps to enforce claims of the trust and to defend claims against the unit trust.

Disclosure

20. Subject to the terms of this Act and the provisions of the trust deed, a trustee shall not be required to disclose to any person, any document which —

- (a) discloses his or her deliberations as to the manner in which he or she has exercised a power or discretion or performed a duty conferred upon him or her;

- (b) discloses the reason for any particular exercise of such power, discretion or performance of duty or the material upon which the reason shall or might have been based; or
- (c) relates to the exercise or proposed exercise of such power, discretion or the performance or proposed performance of such duty, save where such disclosure is in the public interest.

Liability for breach of trust

21. A trustee shall be liable for a breach of trust committed by the trustee or in which the trustee has concurred.

22. A trustee who is liable for a breach of trust shall be liable for —

- (a) the loss or depreciation in value of the trust property resulting from such breach; and
- (b) the profit, if any, which would have accrued to the trust property if there had been no such breach.

23. A trustee shall not be liable for a breach of trust committed prior to his or her appointment, if such breach of trust was committed by some other person.

24. A trustee who becomes aware of a breach of trust shall take all reasonable steps to have such breach remedied.

25. Nothing in the terms of a trust deed shall relieve, release, or exonerate a trustee from liability for breach of trust arising from his or her own fraud, wilful misconduct or gross negligence and any clause which purports to do so is void.

Third parties dealing with trustee

26. A third party other than a participant who, in good faith assists a trustee, or who in good faith and for fair value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

27. A person, other than a participant who in good faith deals with a trustee, is not required to inquire into the extent of the trustee's powers to act on behalf of the trust.

PASSED by the National Assembly this 31st day of August, 2021.

BARBARA N. DITHAPO,
Clerk of the National Assembly.