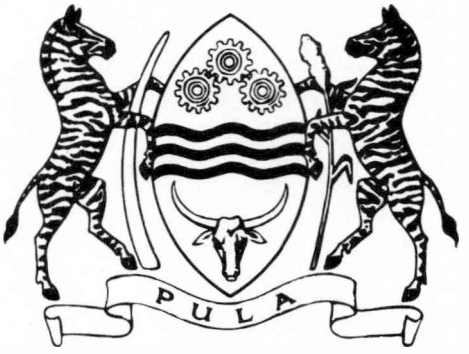
REPUBLIC OF BOTSWANA



GOVERNMENT GAZETTE

EXTRAORDINARY

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Supplement B — Botswana Government Extraordinary Gazette dated 26th November, 1999

Bill No. 19 of 1999

BANK OF BOTSWANA (AMENDMENT) BILL, 1999

(*Published on 26th November, 1999*)

MEMORANDUM

A draft of the above Bill, which it is proposed to present to the National Assembly, is set out below.

The object of the Bill is to amend the Bank of Botswana Act, 1996 so as to facilitate provision of regulatory measures for the —

(*a*) licencing of persons transacting foreign exchange business; and

(*b*) effective supervision of the international financial services centre to be established.

To achieve the objective, the Bill provides for the insertion of a new section 29A which provides a requirement that persons conducting the business of buying and selling foreign exchange (i.e. to transact foreign exchange business) are to apply to be licenced by the Bank of Botswana.

The Bill further provides for the insertion of a new Part VIIA which extends the regulatory and supervisory powers of the Bank of Botswana to include the supervision and regulation of companies which have applied for or been issued with tax certificates in accordance with section 137(2) of the Income Tax Act, 1995 as amended. Part VIIA provides —

(*a*) in clause 42A, for the definition of "company" to mean a body corporate constituted under the laws of Botswana or any other jurisdiction and includes a collective investment undertaking defined under the Collective Investment Undertakings Act, 1999;

(*b*) in clause 42B, for Part VIIA to apply to companies which have applied for or been issued with tax certificates under section 137(2) of the Income Tax Act, 1995, as amended, but not to any company which has been specifically exempted from its provisions and for Part VIIA not to affect any other powers of the Bank of Botswana, particularly in relation to the examination of books and records and the furnishing of information;

(*c*) in clause 42C, for the exemptions of companies by the Minister, if the Bank of Botswana is of an opinion that there are adequate supervisory and inspection provisions contained in any other enactment;

(*d*) in clause 42D, for the Bank of Botswana to regulate, inspect and supervise companies to enforce their compliance with the Act as regards the operations described in their tax certificates; for the Minister to make Regulations with respect to supervisory and reporting requirements of companies and such shall not constitute a warranty as to the solvency of companies nor make the Bank of Botswana liable in respect of any loss incurred through insolvency or default of companies;

(*e*) in clause 42E, for the Bank of Botswana to undertake an on site inspection of the operation and affairs of companies or any foreign office of such companies and the contravention of this provision is an offence that carries a maximum penalty of P5000;

(*f*) in clause 42F, for the Bank of Botswana to make recommendations , to the Minister with regard to the revocation of a tax certificate or to the appropriate licensing body for the revocation of the company's licence;

(*g*) in clause 42G, for the Bank of Botswana to disclose information, under conditions of confidentiality, to regulatory authorities in foreign jurisdictions;

(*h*) in clause 42H, for the Bank of Botswana to levy administration fees against a company to recoup its expenses incurred by it in performing its duties under this Part, which fees shall be established and notified in advance to such company annually;

(*i*) in clause 42I, for the prescription of offences of a company and any person purporting to act on behalf of a company; and

(*j*) in clause 42J, for the prescription of a penalty of P2,500,000 or to maximum imprisonment of three years and if the contravention continues after conviction, for the further penalty of P5000 for every day the contravention continues.

B. GAOLATHE,
Minister of Finance and Development Planning.

ARRANGEMENT OF SECTIONS

SECTION

1. Short title
2. Insertion of section 29A in Act No.19 of 1996
3. Insertion of Part VIIA

A BILL
—entitled—

An Act to amend the Bank of Botswana

Date of Assent:

Date of Commencement:

ENACTED by the Parliament of Botswana.

Short title

1. This Act may be cited as the Bank of Botswana (Amendment). Act, 1999.

Insertion of section 29A in Act No. 19 of 1996

2. The Bank of Botswana Act (hereinafter referred to as "the Act") is amended by inserting, immediately after section 29 thereof, the following new section —

Authority to transact foreign exchange business

29A. (1) Subject to subsection (3), no person shall carry on the business of buying and selling foreign exchange (hereinafter referred to as "to transact foreign exchange business") without a licence issued by the Bank in the prescribed form and on such terms and condition as it may determine.

(2) An application to transact foreign exchange business shall be in the prescribed form and shall be accompanied by such documentation, additional information and fees as may be prescribed.

(3) The requirement for a licence to transact foreign exchange business under subsection (1) shall not apply to a —

Act No. 13 of 1995

(*a*) bank licensed under the Banking Act;

Act No. 22 of 1992

(*b*) hotel licensed under the Tourism Act; or

(*c*) person being paid in foreign currency for goods or services rendered.

(4) Any person who contravenes the provisions of this section shall be guilty of an offence and shall be liable to a fine not exceeding P1 000 000 or to imprisonment for a term not exceeding seven years or to both.

Insertion of Part VIIA

3. The Act is amended by inserting, immediately after Part VII thereof, the following new Part VIIA —

"PART VIIA — *Regulation of companies which have applied for or been issued with a tax certificate*

Interpretation

42.A For purposes of this Part —

'company' means —

(*a*) a body corporate constituted under the laws of Botswana or of any other jurisdiction; and

(*b*) a collective investment undertaking as defined under the Collective Investment Undertakings Act.

Act No...of 1999

Application

42.B (1) This Part shall apply to a company which has applied for or been issued with a tax certificate (hereinafter referred to as "the tax certificate) in accordance with section 137 (2) of the Income Tax Act, other than a company which is subject to supervision or is capable of being inspected by virtue of an enactment which for the time being is specified by regulation under section 42.C, and shall be without prejudice to any powers granted to the Bank in relation to banks and other companies.

Act No.12 of 1995

(2) The provisions of this Act which relate to examination of books and records and the furnishing of information shall apply to a company under circumstances of subsection (1).

(3) Nothing contained in this Part shall affect any powers, with regard to the grant of authorisations or licences or their revocation, to be exercised by virtue of the existing law or of any other legislation by the Bank in relation to any bank, credit institution, stock broking, financial futures and options exchange, financial institution or intermediary, fund, collective investment undertaking or any other company.

Exemptions

42.C Where the Bank is of the opinion, after consultations with such government ministries as the Bank considers it appropriate to consult with, that there are adequate

supervisory and inspection provisions contained in any enactment relating to a company, then the Minister may by regulation specify the enactment concerned and where necessary in the context of that enactment, the company or class or type of a company, to which the regulation relates and accordingly the relevant supervisory and inspection provisions of this Part shall not apply to a company to which the regulation relates.

Supervisory and inspection powers

42.D (1) The Bank may regulate, inspect and supervise a company to enforce its compliance with this Act in regard to the operations described in its tax certificate.

(2) For the purposes of subsection (1), the Minister, after consultation with the Bank, may make regulations setting out such supervisory and reporting requirements relating to such company as the Bank considers prudent to impose on it from time to time for the purposes of the proper and orderly conduct of a company and the development of a financial services centre.

(3) A company shall comply with the conditions contained in the tax certificate and with regulations issued by virtue of this Part.

(4) The supervisory and inspection requirements and conditions of the Bank shall not —

(*a*) constitute a warranty as to the solvency of a company or entity forming part of a company; and

(*b*) make the Bank liable in respect of any loss incurred through the insolvency or default of a company.

Power to inspect

42.E (1) The Bank may appoint its officer or employee to undertake an on-site inspection of the operation and affairs of a company, and, if the Bank so specifies, any foreign office of such company in order to determine whether or not the company is conducting its business in a lawful and prudent manner.

(2) An officer of the Bank conducting such an inspection under subsection (1) may —

(*a*) examine all books, minutes, accounts, cash securities, vouchers, computer records and any other documentation and data whether in electronic form or otherwise; and

(*b*) require such information concerning its business or that of its affiliate whether in Botswana or abroad as considered necessary or desirable.

(3) A company shall comply with the requirements made pursuant to subsection (2).

(4) Where a company fails to produce a document or data, whether in electronic form or otherwise, to the officer of the Bank, within 28 days of the demand, the company shall be guilty of an offence and liable to a fine not exceeding P5,000.

Recommendations of Bank

42.F (1) The Bank may recommend —

(*a*) to the Minister, the revocation of a tax certificate issued under section 137 (2) of the Income Tax Act; Act No. 12 of 1995 where —

(i) the Bank considers that such a company has failed to comply with an order, directions or regulations made under this Part and the degree of non-compliance is sufficiently serious to warrant revocation;

(ii) it appears to the Bank that the company is carrying on business in a manner which is contrary to, detrimental to, the interests of the public;

(iii) a person purporting to act on behalf of the company, is convicted by a court of competent jurisdiction, in Botswana or elsewhere, of an offence relating to the proceeds of a serious crime;

(iv) the company has contravened a provision of an Act or regulation governing its formation or operations; or

(*b*) to the appropriate body, there revocation, in accordance with the enactment under which a licence was issued to any company, of such licence.

Disclosure of information

42.G The Bank may, under conditions of confidentiality, disclose information to regulatory authorities in foreign jurisdictions for the purpose of assisting them to exercise functions corresponding to those of the Bank under this Part.

Levying of fees

42.H The Bank may at its absolute discretion levy administration fees against a company to assist the Bank to recoup the expenses incurred by it in performing its duties under this Part, provided that the amount of such fees shall be established and notified to such a company annually in advance.

Offences

42.I Where an offence is committed by a company or a person purporting to act on behalf of a company and is proved to have been committed with the consent of, or to have been facilitated by any wilful neglect on the part of another person being a director, manager, secretary, member of a committee of management or other controlling authority of such body or official of such body, that person shall be guilty of an offence and shall be liable to be proceeded against and punished accordingly.

Penalty

42.J A person who contravenes any provision, fails to comply with a requirement or condition imposed under

this Part, or a directive by the Bank made in accordance with the provisions of this Part, shall be guilty of an offence and liable to a fine not exceeding P 2,500,000 or to imprisonment for a term not exceeding three years and if the contravention or failure to comply with a requirement, condition or direction is continued after the conviction, the person shall be guilty of a further offence and liable to a fine not exceeding P 5,000 for every day on which the offence is so continued.

Bill No. 20 of 1999

COLLECTIVE INVESTMENT UNDERTAKINGS BILL, 1999

(*Published on 26th November, 1999*)

MEMORANDUM

A draft of the above Bill which it is proposed to present to the National Assembly, is set out below.

The object of the Bill, is to re-enact the law governing the regulation of collective investment undertakings so as to provide for the designation of Bank of Botswana as the Regulatory Authority with specified powers to regulate such undertakings, and to provide, in the Bill and the Regulations to be made thereunder, comprehensive detail of the requirements to be fulfilled by undertakings in order to ensure, among other things, adequate protection for investors.

The Bill applies to collective investment undertakings, resident and/or marketing or proposing to market their units or shares in Botswana, whose principal object is —

(*a*) the collective investment of funds in real and personal property of whatever kind;

(*b*) spreading investment risk;

(*c*) maximising the benefits to be received by unit-holders as a result of appropriate management of the funds; and

(*d*) enabling unit-holders to redeem, on request, their units out of the undertaking's assets, except in the case of closed ended funds as may be provided in regulations.

The Bill is divided into 14 Parts. Part I deals with standard preliminary provisions.

Part II provides for the designation of Bank of Botswana as the Regulatory Authority and specifies the powers and functions of the Regulatory Authority.

Part III specifies the type of undertaking to which the Bill is applicable; the objectives and structure to which undertakings are to adhere and prohibits an undertaking to which the Bill is applicable converting to one to which the Bill is not applicable.

Part IV sets out the general requirements relating to licensing of undertakings resident in Botswana by the Regulatory Authority. In order to ensure the integrity of the operations of undertakings the Bill requires that the Regulatory Authority approve the management company, the trust deed and the choice of trustee. The Regulatory Authority is further required to satisfy itself that directors of the management company or investment company are of good repute and have the competence and experience to manage an undertaking.

Part V makes specific provision for unit trusts. The Bill requires that the assets of a unit trust be entrusted to a trustee for safe-keeping. It sets out the general requirements for, and obligations and liability of the trustee as well as the requirements in relation to the management company. The requirements for a trust deed and the strict qualifications for a trustee are laid down. Detailed obligations are assigned to the trustee to ensure that it carries out its work properly and the trustee is made liable to the management company and to the unit-holders for any loss suffered by them as a result of its unjustifiable failure to perform its obligations. No single company may act as management company and trustee and each must act independently of the other.

Part VI provides for investment companies with variable capital, stating that the share capital shall be equal to the value for the time being of the issued share capital of the company. This Part is in place of Part I of Table A of the Companies Act, as far as these investment companies are concerned.

Part VII requires that the assets of an investment company be entrusted to a custodian for safe- keeping. It sets out the requirements for, and obligations and liability of the custodian in a similar manner to those of trustees under Part V. The Regulatory Authority is empowered to exempt investment companies which market 80% or more of their shares through one or more stock exchanges from the requirements to have a custodian.

Part VIII prescribes the categories of investment in which undertakings subject to the Bill may invest.

Part IX obliges undertakings to purchase units or shares at the request of the unit holder and makes provision for the valuation of assets and the calculation of the issue and purchase prices of units.

Part X requires that prospectuses must be published and prescribes minimum information requirements. Requirements as to annual reports and auditors are prescribed in detail.

Part XI provides for collaboration between the Regulatory Authority and the competent authorities in other countries in relation to its licensing and supervisory duties.

Part XII provides for the inspection and enforcement powers of the Regulatory Authority and the keeping of such books and records as the Regulatory Authority may deem necessary.

Part XIII provides for miscellaneous provisions.

Part XIV provides for offences, regulations and transitional provisions.

B. GAOLATHE,
Minister of Finance and Development Planning.

ARRANGEMENT OF SECTIONS

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A BILL

—entitled—

An Act to re-enact the law governing the regulation of collective investment undertakings so as to provide for the designation of Bank of Botswana as the Regulatory Authority conferred with specified powers for regulating such undertakings; to provide comprehensive detail of the requirements to be fulfilled by collective investment undertakings in order to ensure adequate protection for investors; and to provide for matters incidental and connected to the foregoing.

Date of Assent:

Date of commencement:

PART I — *Preliminary*

Short title and commencement

1. This Act may be cited as the Collective Investment Undertakings Act, 1999 and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.

Interpretation

2. In this Act, unless the context otherwise requires —

"advertisement" includes the display or publication of any matter by way of leaflet, notice, circular, pamphlet, brochure, photograph, film, video, sound broadcasting, television, electronic communication or personal canvassing;

"appropriate person" means —

(i) an officer of the Regulatory Authority; or

(ii) 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;

"articles" and "memorandum" have the meaning ascribed thereto in the Companies Act;

"associated enterprise" means, as appropriate —

(i) a holding company of a management company or trustee,

(ii) a subsidiary company of a management company or trustee,

(iii) a company which is a subsidiary of a body corporate, where the management company or investment company or trustee concerned is also a subsidiary of the body corporate, but neither company is a subsidiary of the other,

(iv) in the case of a management company or investment company or a trustee of a collective investment undertaking, any other body corporate that is not a subsidiary of the management company or trustee 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

(v) a partnership in which the management company or investment company or trustee has an interest, and whose business is or, at the relevant time, was, in the opinion of the Regulatory Authority, materially relevant to any inspection of the management company or investment company or trustee being carried out or proposed to be carried out under this Act;

"beneficial owner" means a unit-holder with beneficial ownership over property of a unit trust;

"beneficial ownership" means the rights over the deposited property of a unit-trust conferred by a trust deed on a unit-holder;

"collective investment undertaking" has the meaning assigned to it in section 6;

"Companies Act" means the Companies Act, Chapter 42.01 of the Laws of Botswana, or as may subsequently be replaced;

"country" means an organised political community, unitary or federal, with one sovereign government recognised by the United Nations;

"custodian" means an entity which meets the qualifying conditions set out in section 33 and which holds the assets of an investment company in accordance with the provisions of this Act;

"debentures" means any debentures, debenture stock or bonds of any body corporate, incorporated in or outside Botswana, whether constituting a charge on the assets of the body or not;

"deposited property" means a fund and all undistributed income arising from the investments comprised therein excluding any sums standing for the time being to the credit of a distribution account;

"director" means a person who, together with other directors, under the Companies Act or a trust deed or a memorandum and articles of a company, represents the management company, the investment company or the trustee or who effectively determines the policy of the management company, the investment company or the trustee;

"fiduciary duty" means a duty —

(*a*) to act in good faith;

(*b*) not to take a profit out of one's trust other than remuneration previously agreed with the person to whom the fiduciary duty is owed;

(*c*) not to place oneself in a position where one's duty and one's interests may conflict; and

(*d*) not to act for one's own benefit or the benefit of a third person without the informed consent of the person to whom the fiduciary duty is owed;

"foreign company" means a company incorporated outside Botswana;

"fund" means the investments and cash for the time being held by a trustee or custodian in trust for the unit-holders or shareholders of a collective investment undertaking in accordance with the provisions of the trust deed or memorandum and articles, as the case may be, with the exception that —

(*a*) it does not include any undistributed net income nor sums standing to the credit of any distribution account; and

(*b*) whenever there is an agreement to purchase or sell investments but such purchase or sale has not been completed, such investments shall be included or excluded, as the case may be, as if the purchase or sale had been completed;

"holding company" has the meaning ascribed to it under the Companies Act;

"investment" means the act of placing monetary resources into the creation or acquisition of assets as specified by the Regulatory Authority, including the purchase of real and personal property and securities;

"investment company" means a company the principal object of which is the investment of its funds in real or personal property of whatever kind;

"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;

"management company" means an incorporated body responsible for the establishment, promotion, management and administration of a collective investment undertaking as laid down in this Act, in regulations or in any other conditions prescribed by the Minister, after consultation with the Regulatory Authority;

"net asset value" means —

(*a*) the value of a unit-trust 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*) the 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;

"participant" means either a person who is a shareholder in an investment company or else a unit-holder in a unit-trust, as the context may require;

"prescribed exemptions" means exemptions to the provisions of this Act as the Minister may, in accordance with section 88(1), prescribe;

"purchase of shares or units" includes action taken by an undertaking to ensure that the stock exchange value of its shares or units does not significantly vary from its net asset value;

"recognised stock exchange" means a stock exchange approved by the Regulatory Authority for the purposes of this Act;

"Regulatory Authority" means the Bank of Botswana designated as the Regulatory Authority under section 3;

"resident" has the meaning assigned to it in section 8;

"security" means any medium of investment in the money market or capital market specified by the Regulatory Authority including a government security, a share or debenture, or right or interest, whether described as a unit or otherwise, in any share or debenture or a right, whether actual or contingent, in respect of money lent to, or deposited with, any holder of a licence issued under the Bank of Botswana Act;

"subsidiary company" has the meaning ascribed to it in the Companies Act;

"transferable securities" means securities in respect of which the right of transfer is unrestricted;

Act No. 19 of 1996

"trust" means an obligation imposed by a trust deed binding the trustee to deal with the deposited property solely for the benefit of the unit-holders, anyone of whom may enforce the obligation;

"trust deed" means a deed formulated as provided for under section 6(5);

"trustee" means a person or body of persons who fulfills the requirements of a trustee under section 6(6);

"umbrella fund" means a collective investment undertaking which, to the extent as may be approved and subject to such conditions as may be

applied by a Bank, may be divided into a number of sub-funds and in which shareholders or unit-holders are entitled to exchange rights in one sub-fund for rights in another;

"unit-holder" means any person who by reason of the holding of units or shares in a collective investment undertaking or by reason of having invested capital in the collective investment undertaking is entitled to any of the investments or relevant income of the undertaking; and the terms"shareholder" and "participant" shall be construed accordingly;

"unit of a collective investment undertaking" includes, where the context so requires, a share and any other instrument granting an entitlement to share in the investments or relevant income of an investment company ;

"unit of a unit trust" means one of the units into which the beneficial interests in the assets subject to the trust are divided or a share or any other instrument granting an entitlement to share in the investments or relevant income of the unit trust;

"unit trust" means a collective investment undertaking constituted in accordance with the provisions of section 6;

"usual time limits" means those time limits which are acceptable market practice in the context of a particular transaction.

PART II — *Regulatory Authority*

Designation of the Bank of Botswana as the Regulatory Authority

3. (1) The Bank of Botswana is hereby designated as the Regulatory Authority to licence, supervise and regulate collective investment undertakings in accordance with the provisions of this Act and shall have all the powers necessary for that purpose.

(2) The Regulatory Authority may delegate the discharge of its functions under this Act to any committee, sub-committee, appropriate person or employee of the Regulatory Authority, so appointed by the Minister by Order published in the *Gazette*, and nothing in this Act shall prevent the Regulatory Authority from being assisted in, or advised on, the discharge of its functions by any such committee, sub-committee, appropriate person or employee.

Functions of Regulatory Authority

4. (1) The primary function of the Regulatory Authority shall be to license collective investment undertakings in accordance with the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the Regulatory Authority shall —

(*a*) approve —

(i) management companies;

(ii) trust deeds;

(iii) credit institutions;

(iv) the publication of advertisements;

(v) the replacement of management companies and trustees;
(vi) the appointment to the office of director of a management company; and
(vii) the alteration of —
(*a*) the names of collective investment undertakings;
(*b*) trust deeds; or
(*c*) memoranda or articles of investment companies;
(*b*) satisfy itself as to the good repute, competence and experience of directors of management companies, investment companies and of trustees;
(*c*) estimate the —
(i) sufficiency of the financial resources that a unit trust has at its disposal ; or
(ii) paid up share capital of a unit trust or an investment company with variable capital to enable such unit trust or investment company to conduct its business effectively and meet its liabilities;
(*d*) permit any management company to engage in activities other than the management of a unit trust and such ancillary activities as would enable such company to administer its own assets;
(*e*) exempt in accordance with the requirements of this Act, a licensed investment company from the requirement to have a custodian;
(*f*) require the suspension of the purchase of units of collective investment undertakings in the interest of participants or the public;
(*g*) reduce, at its discretion, the frequency of the publication of the issue, sale or purchase price of units of collective investment undertakings;
(*h*) collaborate with the competent authorities in other countries in order to carry out its licensing and supervision functions under this Act;
(*i*) prescribe those debt instruments which it plans to treat as equivalent to transferable securities;
(*j*) analyse all financial returns submitted to it by virtue of this Act and hold regular meetings with senior management of collective investment undertakings; and
(*k*) do all such other things as may be necessary to bring into effect the provisions of this Act.

PART III— *Collective Investment Undertakings*

Application of Act

5. (1) Subject to any exceptions contained in the provisions of this Act, this Act shall apply to —
(*a*) collective investment undertakings investing in real and personal property and resident in Botswana within the meaning of section 8; and

(*b*) foreign collective investment undertakings marketing or proposing to market their units in Botswana.

(2) Subject to the exceptions provided for in sub-section (3), this Act, shall not apply to collective investment undertakings which raise capital without promoting the sale of their units to the public.

(3) Exceptions to sub-sections (1) and (2) may be prescribed.

Objective and structure of collective investment undertaking

6. (1) For the purposes of this Act, a collective investment undertaking shall be an arrangement —

(*a*) the principal object of which is the collective investment of its funds in real or personal property of whatever kind, including securities and other liquid financial assets, with the aim of giving its members, or unit-holders the benefit of the result of the management of its funds and, subject to any prescribed exemptions, spreading investment risk; and

(*b*) subject to prescribed exemptions the units of which are, at the request of holders, purchased, directly or indirectly, out of those undertakings' assets.

(2) Such an undertaking may be constituted as —

(*a*) a unit trust; or

(*b*) an investment company with variable capital whose articles provide that —

(i) the actual value of the paid up share capital of the company shall at all times be equal to the net asset value of the company; and

(ii) the shares of the company shall have no par value.

(3) The Minister may, after consulting the Regulatory Authority, prescribe arrangements, other than those set out in subsection (2), under which collective investment undertakings may be constituted.

(4) A unit trust shall be a collective investment undertaking in the form of a trust under which an obligation is imposed by a trust deed, as defined in subsection (5), binding the trustee, as defined in subsection (6), to deal with the deposited property solely for the benefit of the unit-holders, anyone of whom may enforce the obligation.

(5) For the purposes of this Act "trust deed" means a deed the contents of which are approved by the Regulatory Authority and which is entered into by a management company and a trustee in order to constitute a collective investment undertaking by way of a unit trust in accordance with this Act, which shall be binding on the management company, the trustee, the unit-holders of the unit trust and all persons claiming through them respectively as if such unit-holders and persons had been parties to the deed, and the trust or trusts created in pursuance of the unit trust shall be expressed in this deed.

(6) For the purposes of this Act "trustee" means a person or body of persons who —

(*a*) meets the qualifying conditions set out in section 18;
(*b*) is a party to the trust deed which establishes a unit trust scheme;
(*c*) is intended under the terms of the trust deed to stand possessed of the deposited property of the unit trust scheme upon trust for the unit-holders in proportion to the number of units held by them respectively;
(*d*) holds the deposited property as a single common fund, no unit of which shall confer any interest or share in any particular part of the deposited property; and
(*e*) in relation to a collective investment undertaking may also include, where the context so requires, a custodian.

Conversion of collective investment undertakings prohibited

7. A collective investment undertaking to which this Act applies shall not convert itself into a collective investment undertaking to which this Act would not be applicable and any purported conversion shall be null and void.

PART IV — *General Provisions on the Licensing of Collective Investment Undertakings*

Residence of collective investment undertakings

8. (1) For the purposes of this Act, a collective investment undertaking shall be deemed to be resident in Botswana if its investment company or, in the case of a unit trust, its management company, has its head office and its registered office in Botswana.

(2) A collective investment undertaking not resident in Botswana shall be deemed, for the purposes of this Act, to be resident in the country in which the investment company or the management company has its registered office.

Prohibition on conducting business without a licence

9. (1) Subject to the requirements for licensing and to subsection (2), no person shall conduct business as a collective investment undertaking unless such collective investment undertaking has been licensed under this Act by the Regulatory Authority.

(2) A collective investment undertaking which is resident in another country and which has received a licence from the regulatory authority in that country shall be permitted to market its units in Botswana on condition that it is in compliance with the provisions of this Act.

Directors required to be of good repute and competent experience

10. The Regulatory Authority shall not license a collective investment undertaking unless it is satisfied that the directors of the management company, investment company and of the trustee are of sufficiently good repute and have the competence and experience required for the performance of their duties.

Appointment to be approved

11. Appointments to the office of director of the management company or of the investment company shall be approved by the Regulatory Authority.

Application for a licence

12. An application for a licence shall be made in writing by the management company or the investment company and shall contain such information, including additional information, as the Minister may, prescribe.

Refusal of licence and right of appeal

13. (1) Where the Regulatory Authority decides to refuse to license a collective investment undertaking, it shall notify the collective investment undertaking of its decision and of the reasons therefor.

(2) The collective investment undertaking may then appeal to the High Court in accordance with section 83.

(3) If a decision on licensing has not been taken by the Regulatory Authority within 6 months of the submission of an application for a licence, a collective investment undertaking shall have the same right to appeal to the Court as that described in sub-section (2), on condition that the application included all the information, other than additional information required under this Act.

Right of appeal of a collective investment undertaking resident in another country

14. A licensed collective investment undertaking, resident in another country, shall have the same right of appeal against a decision by the Regulatory Authority to refuse it permission to market its units in Botswana or to prohibit further marketing in Botswana as does a collective investment undertaking resident in Botswana.

PART V — *Unit Trusts Management company*

Management company

15. (1) A unit trust shall be licensed only if the Regulatory Authority has approved the management company, the trust deed, the choice of trustees and its name.

(2) For the purposes of subsection (1), a management company shall be a body corporate that has its registered office and its head office in Botswana.

(3) The management company and trustee of a unit trust shall have such financial resources at their disposal as shall be prescribed as sufficient to enable them to conduct their business effectively and to meet their liabilities.

(4) The trust deed and the memorandum and articles of both the management company and the trustee shall be so drafted and all other arrangements shall be such that the effective control over the affairs of either the management company or the trustee is exercised independently of the control over the affairs of the other.

Prohibition on management company engaging in other activities

16. Save where expressly permitted by the Regulatory Authority, a management company shall not engage in activities other than the management of unit trusts and investment companies and such ancillary activities as would enable it to administer its own assets.

Assets of a unit trust

17. (1) The assets of a unit trust shall be entrusted to a trustee for safe-keeping in accordance with this Act.

(2) Individual unit-holders of the unit trust shall remain the beneficial owners of these assets in proportion to the amounts of money that they have subscribed or property that they have transferred in accordance with this Act.

(3) A trustee may entrust some or all of the assets in its safe-keeping to a third party and, provided that this is done in good faith and in accordance with the provisions of this Act, shall not be liable for the actions of such a third party.

(4) Assets of which a unit-holder remains the beneficial owner in accordance with subsection (2) are subject to all rights over the deposited property conferred by a trust deed on the said unit-holder.

(5) Whenever a unit-holder is the beneficial owner of any assets of a unit-trust, no creditor of the trustee, other than the said unit-holder, shall have any claim against those assets and those assets shall for the purposes of the Insolvency Act, be deemed not to be the property of the trustee or any third party.

Cap 42:02

Trustee

18. (1) A trustee shall either have its registered office in Botswana or have established a place of business in Botswana, if its registered office is in another country.

Act No 13 of 1995

(2) A trustee shall —

(*a*) be a licensed bank as required under the Banking Act, with a minimum paid-up share capital as may be prescribed;

(*b*) be a company which is wholly-owned by such a licensed bank, the liabilities of which are guaranteed by the licensed bank; or

(*c*) be a company incorporated in Botswana and which —

(i) is wholly owned by a credit institution approved by the Regulatory Authority, and on condition that the liabilities of the trustee are guaranteed by the said credit institution and the credit institution has a minimum paid-up capital as may be prescribed or the equivalent in a foreign currency;

(ii) is wholly owned by an institution in another country which is deemed by the Regulatory Authority to be the equivalent of such a credit institution, on condition that the liabilities of the trustee are guaranteed by the parent institution and the parent institution has a minimum paid-up capital as may be prescribed or the equivalent in a foreign currency; or

(iii) is wholly owned by an institution or company in another country which is deemed by the Regulatory Authority to be an institution or company which provides unit-holders with protection equivalent to that provided by the trustees referred to in paragraph (*a*), (*b*) and (*c*) (i) and (ii) and provided the liabilities of the company acting as trustee are guaranteed by the parent company or institution and the parent company or institution has such minimum paid-up capital as may be prescribed or the equivalent in a foreign currency.

(3) A trustee shall satisfy the Regulatory Authority that it has the appropriate expertise and experience to carry out its functions under this Act.

(4) Any provision in the trust deed of a licensed unit trust shall be void in so far as it would have the effect of exempting the trustee from, or indemnifying him against, liability for breach of trust where, having regard to the provisions of the trust deed conferring on him any powers, authorities or discretions, he fails to show the degree of care and diligence required of him as a trustee.

(5) Sub-section (4) shall not invalidate —

(*a*) any release otherwise validly given in respect of anything done or omitted to be done by a trustee before the giving of the release; or

(*b*) any provision enabling such a release to be given —

(i) on the agreement thereto of a majority of unit-holders holding not less than 75 per cent. in value of the units in issue of the unit trust concerned present and voting in person or by proxy at a meeting summoned for the purpose, and

(ii) either with respect to specific acts or omissions or on the trustee dying or ceasing to act.

(6) The trustee shall exercise a high degree of care in his use of the custodian property.

(7) The trustee may not obtain any material benefit from his position except as permitted by the trust deed.

Obligations of a trustee

19. (1) The trustee shall —

(*a*) ensure that the sale, issue, purchase and cancellation of units effected on behalf of a unit trust or by a management company are carried out in accordance with this Act and trust deed;

(*b*) ensure that the value of units is calculated in accordance with this Act and the trust deed;

(*c*) carry out the instructions of the management company unless they conflict with this Act or the trust deed;

(*d*) ensure that, in transactions involving a unit trust's assets, any consideration is remitted to it within the usual time limits;

(*e*) ensure that a unit trust's income is applied in accordance with this Act and the trust deed; and

(*f*) enquire into the conduct of the management company in the management of the unit trust in each annual accounting period and report thereon to the unit holders, and the trustee's report shall be delivered to the management company in good time to enable it to include a copy of the report in the Annual Report required under this Act.

(2) The Annual Report referred to under subsection (1) shall state whether in the trustee's opinion the management has managed the unit trust in that period in accordance with the limitations imposed on the investment and borrowing powers of the manager and trustee by the trust deed and this Act and otherwise, in accordance with the provisions of this Act and the trust deed, and if it has not done so, in what respects it has not done so and the steps which the trustee has taken in respect thereof.

Liability of trustee

20. (1) The trustee shall exercise due care and diligence in the discharge of its duties and shall be liable to the management company and the unit-holders for any loss suffered by them arising from negligence, fraud, wilful default or recklessness in the performance of the said duties.

(2) Liability to unit-holders may be invoked either directly or indirectly through the management company.

Prohibition on a single company acting as management company and trustee

21. No single company shall act as both management company and trustee, nor shall holding or subsidiary companies or associated enterprises act as both management company and trustee and, in the context of their respective roles, the management company and the trustee shall have a fiduciary duty towards the unit-holders and shall act independently and solely in the interest of the unit-holders.

PART VI — *Investment Companies with Variable Capital*

Licensing by Regulatory Authority

22. (1) An investment company with variable capital shall not carry on business in Botswana unless it has been licensed by the Regulatory Authority.

(2) A person shall not buy or sell shares of an investment company with variable capital on behalf of that company, unless the company has been licensed by the Regulatory Authority.

(3) The Regulatory Authority shall not license an investment company with variable capital to carry on business unless it has paid up share capital which, in the opinion of the Regulatory Authority, will be sufficient to enable it to conduct its business effectively and meet its liabilities.

(4) An application by an investment company with variable capital for a licence shall be made in writing to the Regulatory Authority and contain such information as the Regulatory Authority may specify, including such information as the Regulatory Authority may further specify in the course of determining the application.

Share capital of investment companies with variable capital

23. (1) Notwithstanding anything contained in the Companies Act, the memorandum of an investment company with variable capital shall state that the —

(*a*) share capital of the company shall be equal to the value for the time being of the issued share capital of the company; and

(*b*) that there shall be a division of that share capital into a specified number of shares without assigning any nominal value thereto.

(2) The regulations contained in Part 1 of Table A in the First Schedule to the Companies Act shall not apply to an investment company with variable capital but the form of memorandum, set out in Table B of the First Schedule, shall have effect with the necessary modifications.

(3) Action taken by an investment company with variable capital to ensure that the stock exchange value of its shares does not deviate from its net asset value by more than a percentage specified in its articles, not to be greater than 5 per cent., shall be regarded as the equivalent of purchase of its shares by the company.

(4) Even though the memorandum of an investment company with variable capital may state that the sole object of the company is to be the collective investment of its funds, the memorandum may also contain other incidental or supplementary provisions and such incidental or supplementary provisions shall not derogate from the expressed sole object.

(5) References in the Companies Act to a company limited by shares shall be construed as including an investment company with variable capital and a reference to a share in, or the share capital of, a company limited by shares shall be construed accordingly.

(6) References to the nominal value of an issued or allotted share in, or of the issued or allotted share capital of, a company limited by shares shall be construed as a reference to the value of the consideration for which the share or share capital, as the case may be, has been issued or allotted.

Power of company to purchase own shares

24. (1) Subject to the provisions of this Part, an investment company with variable capital may, if so empowered by its articles, purchase its own shares on condition that no such shares shall be purchased unless they are fully paid.

(2) The purchase of shares shall be effected on the terms and in the manner laid down in the articles of the company.

Shareholder can request company to purchase his shares

25. Subject to the provisions of this Act, a shareholder in an investment company with variable capital, shall, if so empowered by the articles of the company, at any time request the company to purchase all or part of his shares in the company and, if such a request is made, the company shall purchase such shares.

Treatment of purchased shares

26. If an investment company with variable capital purchases its own shares, those shares shall be cancelled and the amount of the company's issued share capital shall be reduced by the amount of the consideration paid by the company for the purchase of the shares.

Name

27. An investment company with variable capital shall include the words 'Investment Company with Variable Capital' in all its deeds, announcements, publications, letters and other documents.

Purchase of shares at request of shareholder and treatment of purchased shares

28. Subject to the provisions of this section and section 46 on the obligations of an investment company with variable capital to purchase its own shares, such a company shall be obliged, if requested to do so by a shareholder, to purchase the shares offered by the shareholder.

Legal reserve

29. Nothing in the Companies Act or in this Act shall require an investment company with variable capital to create a legal reserve.

Restriction of Companies Act

30. No 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 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;

shall apply to an investment company with variable capital.

General

31. No restrictions in the Companies Act on companies acquiring their own shares shall apply in relation to the purchase of shares in pursuance of this Act.

PART VII — *Custodian*

Assets of investment companies

32. (1) The assets of an investment company shall be entrusted to a custodian for safe-keeping in accordance with the provisions of this Act.

(2) A custodian may entrust some or all of the assets in its safe-keeping to a third party and, provided that this is done in good faith and in accordance with the provisions of this Act, shall not be liable for the actions of such third party.

Custodian

33. The qualifying conditions in relation to a trustee of a unit trust set out in section 18 shall apply to a custodian.

Obligations of a custodian

34. (1) Subject to the provisions of section 19 (*c*) the obligations of a custodian shall be those of a trustee as set out in section 19.

(2) For the purposes of this section, the term "trust deed" in section 19 shall mean the memorandum and articles of association.

Exemption from requirement to have custodian

35. (1) A licensed investment company which markets its shares exclusively through one or more stock exchanges on which its shares are admitted to official listing may, at the discretion of the Regulatory Authority, be exempted from the requirement to have a custodian within the meaning of this Act.

(2) Sections 48 to 52 and section 71 shall not apply to such a company.

(3) The rules for the valuation of such a company's assets shall be stated in the articles of the company.

Liability of custodian

36. The custodian shall exercise due care and diligence in the discharge of its duties and shall be liable to the investment company and the shareholders for any loss suffered by them arising from negligence, fraud, bad faith, wilful default or recklessness in the performance of the said duties.

Prohibition on single company combining functions of investment company and custodian

37. (1) No single company shall act as both investment company and custodian, nor shall holding or subsidiary companies or associated enterprises act as both investment company and custodian and, in the context of their respective roles, the investment company and the custodian shall act independently and solely in the interest of the unit-holders.

(2) In carrying out its role as custodian, the custodian shall have a fiduciary duty towards the shareholders.

PART VIII — *Investment Policies of Collective Investment Undertakings*

Permitted investments

38. (1) In this Part, a 'regulated market' means a market which, subject to regulations, operates regularly and is recognised and open to the public.

(2) The exact nature of the property in which a collective investment undertaking may invest at any given time shall be as the Minister may prescribe after consultations with the Regulatory Authority.

Regulations concerning limitations on investments

39. (1) Limitations on investments by collective investment undertakings shall be as may be prescribed in regulations.

(2) The Minister may, after consultation with the Regulatory Authority, make regulations altering the limitations prescribed pursuant to sub-section (1).

Debt instruments, debentures and property required for an investment company's business

40. (1) The Regulatory Authority shall prescribe the debt instruments which it plans to treat as equivalent to transferable securities.

(2) Investment in debentures or other debt instruments in accordance with this section is deemed not to be borrowing for the purposes of this Act.

(3) An investment company may acquire real and personal property which is required for the purpose of its business.

Ancillary liquid assets and investment techniques and instruments

41. Collective investment undertakings may —

(*a*) hold ancillary liquid assets;

(*b*) employ techniques and instruments relating to transferable securities under the conditions and within the limits laid down by the Minister after consultation with the Regulatory Authority provided that such techniques and instruments are used for efficient portfolio management; or

(*c*) employ techniques and instruments intended to provide protection against exchange risks in the context of the management of their assets and liabilities.

Securities issued or guaranteed by countries, local authorities or public international bodies

42. The Minister may, after consulting the Regulatory Authority, prescribe the conditions and restrictions under which a collective investment undertaking may invest in different transferable securities issued or guaranteed by the government, the local authorities, other countries or public international bodies of which sovereign states are members.

Investment in other collective investment undertakings

43. (1) The Minister may, after consulting the Regulatory Authority, prescribe the conditions and restrictions under which a collective investment undertaking may invest in other collective investment undertakings.

(2) A management company may not charge any fees or costs for transactions relating to a unit trust's units where some of the unit trust's assets are invested in the units of another unit trust managed by the same management company or by any other company with which the management company is linked by common management or control, or by a substantial direct or indirect holding.

Acquisition of shares carrying voting rights

44. Subject to any prescribed exemptions, an investment company or a management company, acting in connection with all the unit trusts which it manages and which fall within the scope of this Act, may not acquire such a number of voting shares in any company which would enable it to exercise significant influence over the management of that company.

Breaches of limits

45. If the limits prescribed are exceeded for reasons beyond the control of a collective investment undertaking or as a result of the exercise of subscription rights, the collective investment undertaking, taking due account of the interests of its participants, shall remedy the situation as soon as possible.

PART IX — *General provisions relating to Collective Investment Undertakings*

Obligation on collective investment undertaking to purchase units

46. (1) Subject to the provisions of section 50 (1), (2) and (3) governing suspension of purchase, an open ended collective investment undertaking shall purchase units at the request of the participant who owns such units.

(2) In this section "open ended collective investment undertaking" means a collective investment undertaking the shares of which shall, at the request of any of the holders thereof, be purchased by the undertaking directly or indirectly out of the undertaking's assets.

Issue of units

47. (1) The units shall be issued or sold at a price arrived at by dividing the net asset value of the collective investment undertaking by the number of units outstanding; this price may be increased by duties and charges.

(2) Units may not be issued unless the equivalent of the net issue price is paid into the assets of the collective investment undertaking within the usual time limits, and the distribution of bonus units shall not be precluded.

Purchase of units

48. Units shall be purchased at a price arrived at by dividing the net asset value of the collective investment undertaking by the number of units outstanding; this price may be decreased by duties and charges.

Value of assets

49. (1) In the case of a unit trust and, unless otherwise stated in an investment company's articles, the value of the assets of a collective investment undertaking shall be based, in the case of securities quoted on a recognised stock exchange, on the last known stock exchange quotation unless such quotation is not representative.

(2) For securities not so quoted, and for quoted securities for which the latest quotation is not representative, the value shall be based on the probable realisable value which shall be estimated by the investment company or management company with care and in good faith.

(3) The assets of a collective investment undertaking may only be purchased and sold at prices which are in conformity with the criteria set out in sub-sections (1) and (2).

(4) The trust deed of a unit trust or the articles of an investment company shall determine the frequency of the calculation of the issue and purchase price.

Suspension of purchase of units

50. (1) Notwithstanding section 46, a collective investment undertaking may, in the cases and according to the procedure laid down in its trust deed or articles, temporarily suspend the purchase of its units.

(2) Suspension may take place only in exceptional cases where circumstances so require, and the suspension is justified having regard to the interest of the participants.

(3) The Regulatory Authority may require the suspension of the purchase of units in the interests of the participants or the public.

(4) A collective investment undertaking which acts in accordance with sub-section (1) shall communicate its decision without delay to the Regulatory Authority.

Creation and cancellation of units of unit trust

51. (1) The trustee of a unit trust shall create or cancel units in accordance with the conditions laid down in the trust deed and on receipt of a written instruction from the management company.

(2) The trustee may refuse to create or cancel some or all of such units if it is of the opinion that such actions are not in the interests of participants.

(3) The trustee shall not create or cancel units during any period in which the purchase of units is suspended.

Issue of registered certificates or bearer securities

52. (1) The management company or the investment company or the trustee shall issue registered certificates or bearer securities, representing one or more portions of the collective investment undertaking which it manages, or alternatively, in accordance with the provisions of the trust deed or articles, written confirmations of entry of units or fractions of units in the register without limitation as to the splitting up of units.

(2) Except for cases where voting rights can only be exercised by whole units, rights attaching to fractions of units are exercised in proportion to the fraction of a unit held.

(3) The certificates and bearer securities shall be signed by the management company or the investment company and by the trustee, and it shall be lawful to reproduce such signatures mechanically.

Replacement of management company, trustee and custodian

53. (1) 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.

(2) 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.

Remuneration and expenditure

54. (1) The trust deed shall prescribe the remuneration and the expenditure which the management company is empowered to charge to a unit trust and the method of calculation of such remuneration.

(2) The articles shall prescribe the nature of the cost to be borne by the company.

Application of income

55. The trust deed or the articles shall lay down the conditions and manner of application of income.

Borrowing

56. Subject to provisions of its trust deed or memorandum and articles of association and of such other provisions as may be prescribed, a collective investment undertaking may borrow money.

Granting loans or guarantees

57. (1) Subject to prescribed exemptions neither —

(*a*) an investment company, nor

(*b*) a management company or trustee acting on behalf of a unit trust;

may grant loans or act as a guarantor on behalf of third parties.

(2) Subsection (1) shall not prevent such undertakings from acquiring transferable securities which are not fully paid.

Sales of securities

58. Neither —

(*a*) an investment company, nor

(*b*) a management company or trustee acting on behalf of a unit trust,

may carry out sales of transferable securities when such securities are not in the ownership of the investment company or the unit trust respectively.

PART X — *Prospectus, Reports and Publication of Information*

Publication of prosectus

59. (1) An investment company shall publish a prospectus, which shall be dated and its essential elements kept up to date.

(2) A management company shall publish a prospectus for each of the trusts it manages, which shall be dated and its essential elements kept up to date.

(3) A prospectus issued by a management company or investment company shall include the information necessary for investors to be able to make an informed judgement concerning the investment proposed to them and shall contain a minimum of the information required as may be prescribed, insofar as that information does not already appear in the documents annexed to the prospectus in accordance with section 60.

(4) The Companies Act shall not apply to a prospectus published by an investment company.

(5) In the case of umbrella funds, the prospectus shall clearly state the charges applicable to the switching of investments from one sub-fund to another.

Annexation of trust deed or articles to prospectus

60. 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, on request, he will be sent the trust deed or articles or be informed of the place in Botswana where he may consult them.

Offering of prospectus to investors

61. (1) The prospectus shall be offered to investors free of charge before the conclusion of a contract.

(2) A collective investment undertaking shall submit its prospectus and any amendments thereto to the Regulatory Authority.

Publication of annual and half-yearly reports

62. (1) An investment company shall publish an annual report for each financial year and a half-yearly report covering the first six months of the financial year.

(2) A management company shall publish, for each of the trusts it manages, an annual report for each financial year and a half-yearly report covering the first six months of the financial year.

Time limits

63. The annual and half-yearly reports shall be published within the following time limits, with effect from the ends of the periods to which they relate —

(*a*) four months in the case of the annual report; or

(*b*) two months in the case of the half-yearly report.

Contents of annual report

64. The annual report shall include —

(a) a balance sheet or a statement of assets and liabilities;

(b) a detailed income and expenditure account for the financial year;

(c) a report on the activities of the financial year;

(d) any other information required as may be prescribed; and

(e) any significant information which shall enable investors to make an informed judgement on the development of the activities of the collective investment undertaking and its results.

Contents of half yearly report

65. (1) The half-yearly report shall include such minimum information as may be prescribed.

(2) Where a collective investment undertaking has paid or proposes to pay an interim dividend, the figures shall indicate the results for the half-year concerned and the interim dividend paid or proposed.

Transmission of reports to Regulatory Authority

66. The annual and half-yearly reports and any other reports, requested by the Regulatory Authority, shall be submitted to the Regulatory Authority by the collective investment undertaking within such time as may be stipulated in the request.

Offering of reports to investors before contract concluded

67. The latest annual report and any subsequent half-yearly report published shall be offered to investors free of charge before the conclusion of a contract.

Reports to be available to public

68. The annual and half-yearly reports shall be made available to the public at the places specified in the prospectus.

Supply of reports to participants

69. The annual and half-yearly reports shall be supplied to participants free of charge on request.

Auditing requirements in relation to annual report

70. (1) The accounting information given in the annual report shall be audited by one or more persons empowered to audit accounts in accordance with the Companies Act.

(2) The auditor's report, including any qualifications, shall be reproduced in full in the annual report.

(3) If the auditor of a licensed collective investment undertaking (hereinafter referred to as "the auditor') has reason to believe that —

(*a*) the information provided to investors 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 the provisions of this Act, the prospectus, the trust deed or the articles; or

(*c*) there exist 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; or

(*f*) if the auditor proposes to qualify any certificate, which he is to provide in relation to financial statements or returns of the collective investment undertaking under the Companies Act or this Act,

the auditor shall report the matter to the Regulatory Authority in writing without delay.

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

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

(6) The auditor shall send to the collective investment undertaking a copy of any report made by him to the Regulatory Authority under sub-sections (2) and (3).

(7) 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, it needs for the exercise of its functions under this Act or the protection of the interests of participants, and the auditor shall comply with this requirement without delay.

(8) The Regulatory Authority may require that, in supplying information for the purposes of this sub-section, the auditor shall act independently of the collective investment undertaking.

(9) No duty to which the auditor is subject shall be regarded as contravened, and no liability to the collective investment undertaking, or its participants, creditors or other interested parties, shall attach to the auditor, by reason of his compliance with any obligation imposed on him by or under this Act.

Publication of issue and purchase prices

71. (1) A collective investment undertaking shall make public in an appropriate manner the issue, sale or purchase price of its units, at least twice a month, and also each time it issues, sells or purchases them.

(2) The Regulatory Authority shall have the discretion, however, to permit a collective investment undertaking to reduce the frequency to once a month on condition that such a derogation does not prejudice the interests of the participants.

Publicity and advertising

72. (1) All publicity and advertising comprising an invitation to purchase the units of a collective investment undertaking shall indicate the availability of a prospectus and the places where it may be obtained by the public.

(2) With the exception of cases arising in the circumstances described in sub-section (3), there shall not be published or communicated, without the approval of the Regulatory Authority, which approval may be subject to conditions, advertisements in relation to or referring to an unlicensed collective investment undertaking.

(3) Whenever a magazine or newspaper printed outside Botswana contains an advertisement in relation to or referring to an unlicensed collective investment undertaking but it is shown, to the satisfaction of the Regulatory Authority, that the newspaper or magazine in question has only a small circulation in Botswana and that the removal of the said advertisement would necessitate the production for circulation in Botswana of a special edition of the newspaper or magazine and that the cost of such production would impose a burden on the owner of the newspaper or magazine that would be unreasonably heavy in all the circumstances, the Regulatory Authority may exempt from the application of sub-section (2) advertisements published in the newspaper or magazine.

(4) The exemption in subsection (3) may be subject to conditions imposed by the Regulatory Authority and may be of unlimited or limited duration as the Regulatory Authority allows.

(5) The Regulatory Authority may revoke an exemption under sub-section (3).

(6) When the Regulatory Authority exercises a power under this section, notice of such exercise and its nature and the name of the newspaper or magazine to which it relates shall be published in the *Gazette*.

(7) Any person who publishes or communicates an advertisement or procures the publication or communication of an advertisement without the approval of the Regulatory Authority or who is in breach of any conditions imposed by the Regulatory Authority shall be in contravention of the provisions of this Act.

PART XI — *Special Provisions in Relation to the Regulatory Authority*

Collaboration with competent authorities in other countries

73. (1) The Regulatory Authority shall collaborate closely with the competent authorities in other countries in order to carry out its licensing and supervision duties under this Act and, subject to sub-section (2), shall for those purposes alone communicate to the competent authorities in such other countries all information required by them.

Act No. 19 of 1990 Act No. 13 of 1994 Act No. 20 of 1990

(2) Nothing in this Part shall absolve the Regulatory Authority from any duties imposed on it by the Proceeds of Serious Crime Act, the Corruption and Economic Crime Act or the Mutual Assistance in Criminal Matters Act.

Professional secrecy

74. All information acquired by a member, officer or employee of the Regulatory Authority in the performance of his duties or the exercise of his functions under this Act, or by an auditor appointed for the purposes of this Act, shall be deemed to be information for the purposes of section 19 of the Bank of Botswana Act, and the said section 19 shall apply to such members, officers, employees or auditors as if it were part of this Act.

Act No. 19 of 1996

Application of professional secrecy to information exchanged with other competent authorities Act No. 19 of 1996

75. Section 74 shall not preclude communications between the Regulatory Authority and the competent authorities of other countries, as provided for in this Act, but information exchanged with such competent authorities shall be deemed to be information for the purposes of section 19 of the Bank of Botswana Act.

Restriction on the use of information received from other countries Act No. 19 of 1990

76. Without prejudice to cases covered by criminal law or by the Proceeds of Serious Crime Act, the Corruption and Economic Crime Act or the Mutual Assistance in Criminal Matters Act, the Regulatory Authority may use information obtained from other countries only for the performance of its duties or in connection with legal proceedings relating to such performance.

Act No. 13 of 1994 Act No. 19 of 1990

PART XII — *Inspection and Enforcement Powers of the Regulatory Authority*

Compliance with additional requirements imposed by Regulatory Authority

77. Every management company, investment company, trustee or custodian, to which this Act applies, shall comply with such additional supervisory and reporting requirements or conditions relating to its business as the Regulatory Authority considers prudent to impose on it from time to time for the purposes and in the interest of the proper and orderly regulation of collective investment undertakings in accordance with this Act (hereinafter referred to as 'prudent requirements').

Keeping of books and records

78. (1) Every management company, investment company, trustee or 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 function under this Act and upon production of his authorisation, at all reasonable times inspect and take copies of or extracts from, and make such enquiries as he may consider necessary 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 under the Companies Act; and

(*c*) any other documents relating to the business of the collective investment undertaking;

and, for these purposes, enter any office to which sub-section (1) relates and any other place where he reasonably believes any such books, records or other documents are kept.

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

(*a*) produce them, at the request of an appropriate person, and permit him to inspect and take copies of or extracts from them;

(*b*) at the request of an appropriate person, give him any information which may be reasonably required with regard to them; and

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

(5) The provisions of sub-section (4) (a) and (*b*) shall apply to every management company, investment company, trustee and custodian of a collective investment undertaking and with the exception of the provisions of paragraph (*a*) of sub-section (3), to every associated enterprise of the management company, investment company, trustee and 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.

(6) Books and records kept pursuant to this Act shall –

(*a*) be in addition to any books or other records to be kept under any other enactment, and

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

(7) References in this section to books, records or other documents shall be construed as including any document or information kept in a non-legible form (by the use of electronics or otherwise) which is

capable of being reproduced in a legible form and all the electronic or other automatic means, if any, by which such document or information is so capable of being reproduced.

Furnishing of information to Regulatory Authority

79. (1) A management company, an investment company, a trustee or a custodian shall each furnish the Regulatory Authority –

(*a*) at such times as the Regulatory Authority may specify, such information and returns concerning the business to which the licence relates or the carrying on of a business as aforesaid 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;

(*b*) within such period as the Regulatory Authority may specify, any information and returns, not being information or returns specified under paragraph (a), concerning the business to which the licence relates or the carrying on of a business as aforesaid 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.

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

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

Revocation of licence

80. (1) The Regulatory Authority may revoke the licence of a collective investment undertaking if it appears to it that –

(*a*) any of the requirements for the licensing of the collective investment undertaking are no longer satisfied;

(*b*) it is undesirable in the interests of the participants or potential participants that the collective investment undertaking should continue to be licensed; or

(*c*) without prejudice to paragraph (*b*), the management company, investment company, trustee or custodian has contravened any provision of this Act or has furnished the Regulatory Authority with false, inaccurate or misleading information or has contravened any prohibition or requirement imposed under this Act.

(2) For the purposes of sub-section (1), the Regulatory Authority may take into account any matter relating to the collective investment undertaking, the management company, investment company, trustee or custodian, a director or controller of the management company, investment company, trustee or custodian or any person employed by or associated with them in connection with the collective investment undertaking.

(3) Provided that the procedure set out in section 81 has been followed by the Regulatory Authority and, unless the Regulatory Authority has decided on the basis of written representations not to revoke its licence, a collective investment undertaking shall, subject to sub-section (4), cease all its operations on the thirty first day following the service of notice of revocation under sub-section (1) of section 81.

(4) For the purposes of this section, the cessation of a collective investment undertaking's operations does not prohibit it from carrying on such activities as are necessary, in the interests of its participants, for the winding up of its operations.

(5) The Regulatory Authority may revoke the licence of a collective investment undertaking at the request of the management company, investment company, trustee or custodian of the collective investment undertaking; but it may refuse to do so if it considers that any matter concerning the collective investment undertaking should be investigated as a preliminary to such a decision or that the revocation would not be in the interests of the participants.

(6) The Regulatory Authority shall, within twenty one days of the revocation of a licence, publish a notice of the revocation in the Gazette and in at least one newspaper of national circulation.

Notice of intention to revoke

81. (1) The Regulatory Authority shall, where it proposes to revoke a licence, otherwise than at the request of the management company, investment company, trustee or custodian, give the applicants or, as the case may be, the management company, investment company, trustee or custodian of the collective investment undertaking, written notice of its intention to do so, stating the reasons for which it proposes to act and that written representations may be made to it within thirty days of the date of service of the notice.

(2) The Regulatory Authority shall have regard to any such representations when determining whether to refuse the application or revoke the licence, as the case may be.

Regulatory Authority's powers of intervention

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

(*a*) that any of the requirements for licensing a collective investment undertaking are no longer satisfied;

(*b*) that the exercise of the power is desirable in the interests of participants or potential participants;

(*c*) without prejudice to sub-paragraph (*b*), that the management company or investment company, trustee or custodian has contravened any provisions of this Act or, in purported compliance with any such provision, has furnished the Regulatory Authority with false, inaccurate or misleading information or has contravened any prohibition or requirement imposed under this Act,

it may give a direction under sub-section (2).

(2) A direction under this sub-section may require the management company or the investment company to cease the issue and purchase, or both, of units on a specified date until such further date as is specified in

that or another direction, require the investment company or the management company, trustee and the custodian to wind up the collective investment undertaking by a specified date or, if no date is specified, as soon as is practicable.

(3) The revocation of the licence of a collective investment undertaking shall not affect the operation of any direction under sub-section (2); and a direction may be given under that sub-section to a collective investment undertaking, whose licence has been revoked, in cases where a direction under that sub-section was already in force at the time of the revocation.

(4) For the purposes of sub-section (1), the Regulatory Authority may take into account any matter relating to the collective investment undertaking, the management company, investment company, trustee or custodian, a director or controller of the management company, investment company, trustee or custodian or any person employed by or associated with the management company, investment company, trustee or custodian in connection with the collective investment undertaking.

(5) The Regulatory Authority may, either of its own motion or on the application of the parties concerned, withdraw or vary a direction given under this section, if it appears to the Regulatory Authority that it is no longer necessary for the direction to take effect or continue in force or that it should take effect or continue in force in a different form.

Review of Regulatory Authority's decision, etc., by the High Court

83. (1) Where the Regulatory Authority refuses an application for a licence, fails to take a decision on an application within 6 months of the submission of an application for a licence, revokes or refuses to revoke a licence or replaces the management company, trustee or custodian under this Act, the applicant, the management company, the investment company, trustee or custodian, as the case may be, may apply to the High Court to have the matter reviewed.

(2) Whenever an application is brought under sub-section (1), the High Court shall confirm the decision of the Regulatory Authority unless it is satisfied that the procedures laid down by, or the requirements of, this Act have not been complied with in any material respect.

(3) Where the High Court is satisfied that the procedures laid down by, or the requirements of this Act have not been complied with in any material respect, the High Court may set aside the decision of the Regulatory Authority or, if the Regulatory Authority has failed to take a decision within 6 months of the submission of an application for a licence, direct it to take a decision within such time as the Court directs, and in any such case, remit the matter to the Regulatory Authority which shall thereupon reconsider the matter and make a decision in accordance with such procedures and requirements.

PART XIII — *Miscellaneous Provisions*

Liability of Regularoty Authority

84. (1) The licensing of a collective investment undertaking by the Regulatory Authority shall not constitute a warranty as to the performance of the collective investment undertaking and the Regulatory Authority shall not be liable for the performance or default of any collective investment undertaking.

(2) No act or thing done by any officer of the Regulatory Authority, or by any person acting under the direction of the Regulatory Authority shall, if the act or thing done was bona fide for the purpose of carrying into effect the provisions of this Act, subject such officer or person to any liability, action, claim or demand whatsoever.

Publication and register of names of licensed collective investment undertakings

85. (1) The Regulatory Authority shall, within 21 days after the date of the licensing of a collective investment undertaking publish a notice to that effect in the *Gazette*.

(2) The Regulatory Authority shall establish and maintain a register of licensed collective investment undertakings.

(3) The Regulatory Authority shall by notice in the *Gazette,* publish from time to time, but not less frequently than once a year, the names of all collective investment undertakings which have been licensed by it and whose licence has not been revoked.

Act No. 13 of 1995

(4) The Annual Report made by the Bank of Botswana in accordance with section 28 of the Banking Act, shall contain a report on the exercise of its functions under this Act.

Regulatory Authority to approve subsequent changes

86. (1) The management company, the trustee or the custodian of a collective investment undertaking shall not be replaced, nor may the name of a collective investment undertaking or a trust deed or an investment company's memorandum or articles be altered without the approval of the Regulatory Authority.

(2) Within 21 days after changing the name of a collective investment undertaking or altering the trust deed or memorandum or articles of a collective investment undertaking, the responsible management company or investment company shall deposit with the Regulatory Authority a copy of the deed, memorandum or articles so altered.

(3) The trust deed of a unit-trust shall specify the conditions under which there may be effected, and the procedure to be followed with respect to, the replacement of the management company, trustee or custodian with another management company, trustee or custodian and shall contain provisions to ensure the protection of unit-holders in the event of any such replacement.

(4) The Regulatory Authority may, where it appears to it to be desirable in the interests of unit-holders or potential unit-holders in a licensed unit-trust, replace the management company, trustee or custodian.

(5) Where the Regulatory Authority proposes to replace a management company, a trustee or custodian it shall give the management company, trustee or custodian, as the case may be, notice of its intention to do so, which notice shall contain a statement of the reasons for which the Regulatory Authority proposes to act and of the right of the management company, trustee or custodian to make representations under sub-section (6).

(6) A management company, trustee or custodian which has been given notice under sub-section (5) may, within 30 days of receipt of the notice, make written representations to the Regulatory Authority.

(7) The Regulatory Authority shall have regard to any such representations in determining whether or not to replace the management company, trustee or custodian.

(8) Where the Regulatory Authority replaces the management company, trustee or custodian under this section, the management company, trustee or custodian, as the case may be, may apply to the High Court in accordance with section 83.

(9) Upon the replacement by the Regulatory Authority of a management company, trustee or custodian that management company, trustee or custodian, as the case may be, shall cease to hold office and its powers and duties under the trust deed shall be exercised and carried out by the new management company, trustee or custodian.

PART XIV — *Offences, Regulations and Transitional Provisions*

Offences

87. (1) An investment company, management company, trustee or custodian which has contravened any provision of this Act shall be guilty of an offence.

(2) An auditor who contravenes any provision of this Act shall be guilty of an offence.

(3) Where an offence under this Act, committed by a body corporate or by a person purporting to act on behalf of a body corporate, is proved to have been so committed with the consent, or connivance of, or to be attributable to, or to have been facilitated by, any neglect on the part of any officer or employee of that body, that person shall also be guilty of an offence.

(4) A person guilty of an offence under sub-section (1), (2) or (3) shall be liable on conviction to a fine not exceeding P 2 500 000 or, in the case of an individual, to imprisonment for a term not exceeding three years or to both.

(5) In the case of a continued contravention in respect of a person convicted under sub-section (4) that person shall be guilty of a further offence for every day on which the contravention continues and liable on conviction to a fine not exceeding P 5 000 for every day on which the offence is so continued.

(6) In this Act, a reference to a contravention includes a reference to a failure to comply.

Regulations

88. (1) The Minister may, after consultation with the Regulatory Authority, make regulations for the better carrying out of the purposes and provisions of this Act, or to give force or effect to its provisions.

(2) Without prejudice to the generality of the powers conferred in subsection (1) regulations may —

(*a*) provide such conditions for the granting of a licence to a collective investment undertaking generally or by reference to a particular category of collective investment undertakings;

(*b*) provide for the prudential requirements of the investment policies of the collective investment undertaking;

(c) prescribe matters to be contained in a prospectus and other information disseminated by collective investment undertakings;

(*d*) prescribe the manner of the vesting of assets or specified assets of the collective investment undertaking in a person nominated by the Regulatory Authority with such of the powers or duties of a custodian for the company as are specified by the Regulatory Authority.

Repeal of Act No. 20 of 1996 and savings

89. (1) The Collective Investment Undertakings Act (hereinafter referred to as the repealed Act) is hereby repealed.

(2) Notwithstanding the repeal effected under subsection (1) any—

(*a*) application, claim or other process commenced,

(*b*) determination, order or ruling made,

under the repealed Act, immediately before the commencement of this Act, shall, in so far as there is no inconsistency with the provisions of this Act, be deemed to have been made under this Act.

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