

CHAPTER 56:09
COLLECTIVE INVESTMENT UNDERTAKINGS
ARRANGEMENT OF SECTIONS

SECTION

PART I
Preliminary

1. Short title
2. Interpretation

PART II

3. - 4.

PART III
Collective Investment Undertakings

5. Application of Act
6. Objectives and structure of collective investment undertakings
7. Conversion of collective investment undertakings prohibited

PART IV
General Provisions on the Licensing of Collective Investment Undertakings

8. Residence of collective investment undertakings
9.
10. Directors required to be of good repute and competent experience
11. Appointment to be approved
12. - 14.

PART V
Unit Trusts

15. Management company
16. Prohibition on management company engaging in other activities
17. Assets of a unit trust
18. Trustee
19. Obligations of a trustee
20. Liability of trustee
21. Prohibition on a single company acting as management company and trustee

PART VI
Investment Companies with Variable Capital

22. Licensing by Regulatory Authority
23. Share capital of investment companies with variable capital
24. Power of company to purchase own shares
25. Shareholder can request company to purchase his shares
26. Treatment of purchased shares
27. Name
28. Purchase of shares at request of shareholder and treatment of purchased shares
29. Legal reserve
30. Restriction of Companies Act
31. General

PART VII
Custodian

32. Assets of investment companies
33. Custodian

- 34. Obligations of a custodian
- 35. Exemption from requirement to have custodian
- 36. Liability of custodian
- 37. Prohibition on single company combining functions of investment company and custodian

PART VIII

Investment Policies of Collective Investment Undertakings

- 38. Permitted investments
- 39. Regulations concerning limitations on investments
- 40. Debt instrument, debentures and property required for an investment company's business
- 41. Ancillary liquid assets and investment techniques and instruments
- 42. Securities issued or guaranteed by countries, local authorities or public international bodies
- 43. Investment in other collective investment undertakings
- 44. Acquisition of shares carrying voting rights
- 45. Breaches of limits

PART IX

General Provisions Relating to Collective Investment Undertakings

- 46. Obligation on collective investment undertaking to purchase units
- 47. Issue of units
- 48. Purchase of units
- 49. Value of assets
- 50. Suspension of purchase of units
- 51. Creation and cancellation of units of unit trust
- 52. Issue of registered certificates or bearer securities
- 53. Replacement of management company, trustee and custodian
- 54. Remuneration and expenditure
- 55. Application of income
- 56. Borrowing
- 57. Granting loans or guarantees
- 58. Sales of securities

PART X

Prospectus, Reports and Publication of Information

- 59. Publication of prospectus
- 60. Annexation of trust deed or articles to prospectus
- 61. Offering of prospectus to investors
- 62. Publication of annual and half-yearly reports
- 63. Time limits
- 64. Contents of annual report
- 65. Contents of half yearly report
- 66. Transmission of reports to Regulatory Authority
- 67. Offering of reports to investors before contract concluded
- 68. Reports to be available to public
- 69. Supply of reports to participants
- 70. Auditing requirements in relation to annual report
- 71. Publication of issue and purchase prices
- 72. Publicity and advertising

PART XI

Special Provisions in Relation to the Regulatory Authority

73. - 76.

PART XII

Inspection and Enforcement Powers of the Regulatory Authority

- 77. Compliance with additional requirements imposed by Regulatory Authority
- 78. Keeping of books and records
- 79. Furnishing of information to Regulatory Authority
- 80. - 83.

PART XIII

Miscellaneous Provisions

- 84.
- 85. Publication and register of names of licensed collective investment undertakings
- 86. Regulatory Authority to approve subsequent changes

PART XIV

Offences, Regulations and Transitional Provisions

- 87. Offences
- 88. Regulations
- 89. Repeal of Act No. 20 of 1996 and savings

Act 20, 1999,
Act 2, 2007.

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

[Date of Commencement: 22nd June, 2001]

PART I

Preliminary (ss 1-2)

1. Short title

This Act may be cited as the Collective Investment Undertakings Act.

2. Interpretation

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-

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

"**articles**" and "**memorandum**" have the meaning ascribed thereto in the Companies

Act;

"**associated enterprise**" means, as appropriate-

- (a) a holding company of a management company or trustee;
- (b) a subsidiary company of a management company or trustee;
- (c) 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;
- (d) 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

- (e) 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 and which satisfies the requirements of section 23;

"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's fund less the service charge, the administration expenses and the remuneration of the trustee and any other liabilities of the fund not already taken into account in determining the value of the fund and shall include a provision for duties and charges; or
- (b) 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 such 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 Non-Bank Financial Institutions Regulatory Authority established under the Non-Bank Financial Institutions Regulatory Authority Act;

"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;

"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 fulfils 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 the Bank of Botswana, 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

3. – 4. PART III

Collective Investment Undertakings (ss 5-7)

5. Application of Act

(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 subsection (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 subsections (1) and (2) may be prescribed.

6. Objective and structure of collective investment undertaking

(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 any 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, any one 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 in relation to a collective investment undertaking may also include, where the context so requires, a custodian.

7. Conversion of collective investment undertakings prohibited

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 (ss 8-14)

8. Residence of collective investment undertakings

(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.

9. 10. Directors required to be of good repute and competent experience

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.

11. Appointment to be approved

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

12. – 14. PART V

Unit Trusts (ss 15-21)

15. Management company

(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.

16. Prohibition on management company engaging in other activities

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.

17. Assets of a unit trust

(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.

18. Trustee

(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.

(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 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 paragraphs (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) Subsection (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.

19. Obligations of a trustee

(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 the 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 this Act and the trust deed 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.

20. Liability of trustee

(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.

21. Prohibition on a single company acting as management company and trustee

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 (ss 22-31)

22. Licensing by Regulatory Authority

(1) (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 such paid up capital as shall be prescribed as sufficient to enable it to conduct its business effectively and meet its liabilities.

(4) **23. Share capital of investment companies with variable capital**

(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 the 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.

24. Power of company to purchase own shares

(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.

25. Shareholder can request company to purchase his shares

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.

26. Treatment of purchased shares

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.

27. Name

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.

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

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.

29. Legal reserve

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

30. Restriction of Companies Act

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.

31. General

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 (ss 32-37)

32. Assets of investment companies

(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.

33. Custodian

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

34. Obligations of a custodian

(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.

35. Exemption from requirement to have custodian

(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.

36. Liability of custodian

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.

37. Prohibition on single company combining functions of investment company and custodian

(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 (ss 38-45)

38. Permitted investments

(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 consulting the Regulatory Authority.

39. Regulations concerning limitations on investments

(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 subsection (1).

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

(1) The Regulatory Authority shall determine the debt instruments which it plans to treat as equivalent to transferable securities and notify collective investment undertakings accordingly."

(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.

41. Ancillary liquid assets and investment techniques and instruments

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.

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

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.

43. Investment in other collective investment undertakings

(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.

44. Acquisition of shares carrying voting rights

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.

45. Breaches of limits

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 (ss 46-58)

46. Obligation on collective investment undertaking to purchase units

(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.

47. Issue of units

(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.

48. Purchase of units

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.

49. Value of assets

(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 subsections (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.

50. Suspension of purchase of units

(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 subsection (1) shall communicate its decision without delay to the Regulatory Authority.

51. Creation and cancellation of units of unit trust

(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.

52. Issue of registered certificates or bearer securities

(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.

53. Replacement of management company, trustee and custodian

(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.

54. Remuneration and expenditure

(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.

55. Application of income

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

56. Borrowing

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.

57. Granting loans or guarantees

(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.

58. Sales of securities

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 (ss 59-72)

59. Publication of prospectus

(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.

60. Annexation of trust deed or articles to prospectus

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.

61. Offering of prospectus to investors

(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.

62. Publication of annual and half-yearly reports

(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.

63. Time limits

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.

64. Contents of annual report

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.

65. Contents of half yearly report

(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.

66. Transmission of reports to Regulatory Authority

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.

67. Offering of reports to investors before contract concluded

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.

68. Reports to be available to public

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

69. Supply of reports to participants

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

70. Auditing requirements in relation to annual report

(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 subsections (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 subsection, 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.

71. Publication of issue and purchase prices

(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.

72. Publicity and advertising

(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 subsection (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 subsection (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 subsection (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

73. – 76. PART XII

Inspection and Enforcement Powers of the Regulatory Authority (ss 77-83)

77. Compliance with additional requirements imposed by Regulatory Authority

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').

78. Keeping of books and records

(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 functions 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 subsection (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 subsection (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 subsection (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.

79. Furnishing of information to Regulatory Authority

(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) Subsections (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.

80. – 83. PART XIII

Miscellaneous Provisions (ss 84-86)

84. 85. Publication and register of names of licensed collective investment undertakings

(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.

(4) 86. Regulatory Authority to approve subsequent changes

(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 subsection (6).

(6) A management company, trustee or custodian which has been given notice under subsection (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 (ss 87-89)

87. Offences

(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 subsection (1), (2) or (3) shall be liable on conviction to a fine not exceeding P2,500,000 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 subsection (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 P5,000 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.

88. Regulations

(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.

89. Repeal of Act No. 20 of 1996 and savings

(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.