SECURITIES ACT, 2014

No. 26 **of 2014**

ARRANGEMENT OF SECTIONS

SECTION

An Act to consolidate and amend the laws relating to the regulation and supervision of the securities industry in Botswana; to make provision for the regulation and supervision of securities institutions and markets; to prohibit insider trading and other forms of market abuse; and to make provision for matters connected with the foregoing.

Date of Assent: 27.08.2014

Date of Commencement: ON NOTICE

ENACTED by the Parliament of Botswana.

Part I — *Preliminary*

Short title and commencement

1. This Act may be cited as the Securities Act, 2014 and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.

Interpretation

2. (1) In this Act unless the context otherwise requires —

"Botswana Stock Exchange" means the Botswana Stock Exchange established under the Botswana Stock Exchange Act; Cap. 56:08

"central counterparty" means an entity that legally interposes itself between the counterparties to the securities traded within one or more financial markets, becoming the buyer to every seller and the seller to every buyer;

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

"central securities depository requirements" means the requirements made by a securities institution which operates a central securities depository, as set out in section 19;

"clearance and settlement system" has the meaning assigned to it under the National Clearance and Settlement Systems Act; Cap. 46:06

"company" has the meaning assigned to it under the Companies Act; Cap. 42:01

"controller" means —

(*a*) a person who is in a position to control or exert significant influence over the business or financial operations of the relevant person;

(*b*) if the relevant person is a body corporate —

(i) a director or member of the governing body of the body corporate,

(ii) a person that has the power to appoint a person to be a director or member of the governing body of the corporate,

(iii) a person whose consent is needed for the appointment of a person as a director of the body corporate,

(iv) a person that holds at least 20 percent of the shares of the body corporate,

(v) a person that has the power to control at least 20 percent of the voting rights attached to shares or other securities of the body corporate, or

(vi) a person that holds rights in relation to the body corporate that, if exercised, would result in that person holding at least 20 percent of the shares of the body corporate; or that person having the power to control at least 20 percent of the voting rights attached to shares or other securities of the body corporate;

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

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

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

"custodian" means a person who holds securities or cash on behalf of another person for safe keeping;

"deal" includes conveying or giving an instruction to deal;

"dematerialised" means a process through which the ownership of securities held in the form of certificates are converted into electronic form;

"document" includes a book, record or account, and any information stored or recorded electronically, photographically, magnetically, mechanically, electro-mechanically or optically or in any other form;

Cap. 46:08

"financial services law" has the meaning assigned to it under section 2 of the Non-Bank Financial Institutions Regulatory Authority Act;

"front running" means any situation in which the securities broker or dealer takes a position on a stock or a commodity, whether in the spot market or in options and futures, in anticipation of an event of which he or she has advance knowledge;

"governing body" means the body of persons in which the control of a securities institution is vested;

"inside information" means information which has not been made public and which —

(*a*) is obtained or learned as an insider; and

(*b*) if it were made public, would be likely to have an effect on the price or value of any securities listed on a securities exchange;

"insider" means a person who has inside information through —

(*a*) being an officer including a director, employee or shareholder of an issuer of securities listed on a securities exchange to which the inside information relates; or

(*b*) having access to such information by virtue of employment, office or profession,

where such person knows that the direct or indirect source of the information was a person referred to in paragraph (*a*) of this definition;

"issuer" means any entity, which may be a company or other entity recognised by a written law as a person which issues or proposes to issue securities to be listed on a securities exchange;

"licence" means a licence issued to a securities institution to conduct securities business under this Act;

"listed securities" means securities included in the list of securities kept or traded by a securities exchange;

"listings requirements" means the requirements made by a securities exchange in accordance with section 11;

"market corner" means to get sufficient control of a particular stock, commodity or other asset to allow the price to be manipulated;

"market maker" means an entity that quotes bid and offer prices continuously for specific securities that it holds in inventory and is prepared and able to buy or sell those securities at any time on its own account;

"members' requirements" means the requirements made by a securities exchange in accordance with section 10;

"nominated transfer agent or transfer secretary" means an entity nominated by a central securities depository to maintain a physical share register for those shares not dematerialised into the central securities depository system;

"non-bank financial institution" has the meaning assigned to it under the Non-Bank Financial Institutions Regulatory Authority Act;

"official list" means a list of securities and institutions that are listed on a securities exchange;

"participant" means a person who has the right to conduct business on a securities infrastructure business;

"Regulatory Authority" means the Non-Bank Financial Institutions Regulatory Authority established under section 6 of the Non-Bank Financial Institutions Regulatory Authority Act;

"requirements" means —

(*a*) members' requirements set out in section 10;

(*b*) listings requirements set out in section 11;

(*c*) trading requirements set out in section 18;

(*d*) central securities depository requirements set out in section 19; and

(*e*) takeovers requirements set out in section 58 (7);

"securities" means —

(*a*) shares in, or debentures of, a company, a corporation or an unincorporated body;

(*b*) stocks, bonds, certificates of deposit or depository receipts or treasury bills issued or proposed to be issued by a government;

(*c*) rights, options or interests in respect of securities referred to in paragraph (*a*) or (*b*);
(*d*) interests and instruments prescribed for the purpose of this definition;
(*e*) derivatives; or
(*f*) futures or options on any commodity, property, goods, index, interest or other rate and currency;

"securities broker or dealer" means a member of a securities exchange who —
(*a*) carries on the business of purchasing and selling or purchasing or selling listed securities on behalf of other persons;
(*b*) regularly purchases and sells or purchases or sells listed securities on his own behalf; and
(*c*) trades in commodities;

"securities business" means the carrying on of the business of —
(*a*) buying and selling of securities;
(*b*) a securities exchange;
(*c*) a central securities depository;
(*d*) a central counterparty;
(*e*) a transfer agent or a transfer secretary;
(*f*) providing custodial business;
(*g*) a participant in the central securities depository of Botswana;
(*h*) a market maker;
(*i*) a securities broker or dealer;
(*j*) an asset manager; and
(*k*) an investment advisor,
whether as principal or agent;

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

"securities infrastructure business" means —
(*a*) an exchange;
(*b*) a central securities depository;
(*c*) a clearance and settlement system other than a central securities depository; or
(*d*) a central counterparty;

"securities institution" means a licensed non-bank financial institution, which may be a company or other entity recognised by any written law as a person, which conducts a securities business;

"statutory manager" means a person appointed as a statutory manager under section 46;

"spot market" means a market in which listed securities are traded, cleared and settled within specified time parameters;

"trading requirements" means the requirements made by a securities exchange in accordance with section 18; and

"transfer agent" or "transfer secretary" means an entity which registers the transfer of ownership of securities.

Part II — *Licence to Conduct Securities Business*

Securities institution to be licensed

3. (1) No person shall establish or carry on a securities business unless such person is licensed as a non-bank financial institution by the Regulatory Authority.

(2) A person who contravenes subsection (1) commits an offence and on conviction is liable to a fine not exceeding P2 500 for each day on which the offence occurs or continues to occur or to imprisonment for a period not exceeding five years, or to both.

(3) The Minister may, with respect to a person referred to in subsection (1), prescribe the licensing criteria which shall include —

(*a*) academic qualifications and experience of a controller;

(*b*) financial resources;

(*c*) technical and business capacity to carry out the securities business for which the licence is sought;

(*d*) conditions that shall apply for purposes of renewal, expiration and revocation of the license; and

(*e*) such other matters as the Minister may determine.

(4) A licence granted by the Regulatory Authority in pursuance of this section shall be valid for a period not exceeding —

(*a*) five years, with respect to a securities exchange and a central securities depository; or

(*b*) three years, with respect to a securities broker or dealer, transfer agent or transfer secretary, a custodian, a central counterparty, a participant or a market maker.

Licensing

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

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

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

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

(*a*) will carry on the activities to be covered by the licence with integrity, prudence and professional skill; and

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

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

(6) The Minister shall prescribe the expiration, renewal and revocation of a licence issued under this Act.

Display of licence

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

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

(3) A licensed securities institution shall prominently display a copy of its licence at its offices in Botswana.

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

Variation, suspension or cancellation of licence on request

6. The Regulatory Authority may, on written request by a licensed securities institution, by notice to the securities institution —

(*a*) vary the conditions of the securities institution's licence (including by imposing additional conditions);

(*b*) suspend the securities institution's licence for the period specified in the notice; or

(*c*) cancel the securities institution's licence.

Variation, suspension or cancellation of licence

7. (1) This section applies if it appears to the Regulatory Authority that a licensed securities institution —

(*a*) is not carrying on, or is likely not to carry on, the business for which it is licensed with integrity, prudence and professional skill;

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

(c) is causing or promoting instability in the financial system, or is likely to do so;

(*d*) is not complying or is likely not to comply with a financial services law;

(*e*) is or is likely to be involved in financial crime;

(*f*) has failed to submit reports as required by the Regulatory Authority; or

(*g*) has failed to pay a civil penalty imposed by the Regulatory Authority under this Act.

(2) If this section applies, the Regulatory Authority may, by notice to the licensed securities institution —

(*a*) vary the securities institution's licence —

(i) restricting the activities that can be carried on in terms of the licence, or

(ii) including further conditions on the licence;

(*b*) suspend the securities institution's licence for the period specified in the notice; or

(*c*) cancel the securities institution's licence.

(3) The Regulatory Authority shall not act in terms of subsection (2) in relation to a licensed securities institution unless —

(*a*) the Regulatory Authority has given the securities institution written notice of the proposed action, setting out the reasons for the proposed action and stating that the securities institution has a specified period of at least 21 days to make representations to the Regulatory Authority about the matter; and

(*b*) the Regulatory Authority has taken into account any representations made by or for the securities institution within that period.

(4) The Regulatory Authority may suspend the licence of a licensed securities institution without giving a notice in terms of subsection (3) if satisfied on reasonable grounds that it is necessary to do so to prevent or mitigate damage to the interests of securities institutions, clients of securities institutions or the financial system, but the Regulatory Authority shall —

(*a*) give the securities institution the notice as soon as practicable;

(*b*) give the securities institution the opportunity mentioned in subsection (3) (*a*); and

(*c*) having considered any representations made by or for the securities institution, determine whether the suspension should be confirmed.

Exemptions from and modifications of this Part

8. (1) The Regulatory Authority may, by notice —

(*a*) exempt a person wholly or partly, as specified in the notice, from this Part; or

(*b*) declare that this Part applies in relation to a person as modified in the declaration.

(2) An exemption or declaration may —

(*a*) apply generally or to a specified case or class of cases; or

(*b*) apply unconditionally or subject to specified conditions.

Matters to be considered in granting a licence to conduct securities business

9. (1) In considering an application to grant a person a licence under section 3, the Regulatory Authority may consult with the Bank of Botswana and other agencies of the Government that have functions related to the regulation or supervision of financial services, taxation, social securities or the financial system and the securities exchange or central securities depository in which the applicant seeks to operate.

(2) The Regulatory Authority shall notify the market in an appropriate manner if the holder of a licence to establish a securities exchange does not apply for a renewal of such licence six months before the expiry of its existing licence, and if the licence is not renewed the Regulatory Authority shall issue directives for the purpose of discontinuation of business and, where necessary, to enable the closure of the business to take place under a smooth transition.

(3) The Minister may prescribe additional criteria for the granting, variation, suspension or cancellation of such licences.

Part III — *Requirements of Securities Exchanges and Central Securities Depositories*

Members' requirements

10. (1) A securities exchange shall make members' requirements which are consistent with this Act and which specify the manner in which a securities broker or dealer shall —

(*a*) be admitted to and excluded from the securities exchange;

(*b*) operate and prohibit front running;

(*c*) keep books, accounts and other records as may be necessary to show the nature and details of all dealings and transactions entered into by a securities broker or dealer in his or her practice;

(*d*) operate bank accounts so as to ensure the separation of an investor's funds from a securities broker or dealer's own funds;

(*e*) administer each investor's funds separately so as to ensure that funds belonging to any investor are not used to settle the liabilities of another investor;

(*f*) ensure that any interest and income accruing in the investor's fund shall be credited to such investors subject to such charges as may be reasonably levied by the securities broker or dealer; and

(*g*) do such other matters as may be determined by the securities exchange as necessary.

(2) Any members' requirements made by a securities exchange under this section shall be of no effect unless approved by the Regulatory Authority and published by the securities exchange as rules of the securities exchange.

(3) A securities exchange may impose such fines, penalties or other remedies for any contravention of members' requirements, as provided under section 12.

Listings requirements

11. (1) Subject to subsection (2), a securities exchange shall make listings requirements, which include —

(*a*) the manner in which securities may be listed or removed from the official list;

(*b*) the manner in which the trading in listed securities may be suspended;

(*c*) requirements with which issuers including directors, employees and agents when acting on behalf of the issuer in its capacity as an issuer, shall comply, unless the securities exchange in question considers it appropriate to relax such requirements in consultation with the Regulatory Authority;

(*d*) the standards of conduct, disclosure and corporate governance that issuers including directors, employees and agents when acting on behalf of the issuer, shall meet, unless the securities exchange in question considers it appropriate to relax such standards;

(*e*) such fines, penalties or other remedies for any contravention of or failure to comply with the listings requirements, as provided under section 12;

(*f*) that no securities may be admitted to listing on a securities exchange unless the issuer thereof has obtained the prior approval for the listing of the relevant securities exchange;

(*g*) timely disclosure of material information that is likely to have a significant influence on the value or price of the security; or

(*h*) such other requirements and rules providing for the orderly and transparent manner in which securities may be listed and de-listed, as may be necessary.

(2) Where a securities exchange determines to relax any requirements in accordance with subsections (1) (*c*) and (*d*), it shall immediately inform the Regulatory Authority, which shall have the right to object to such relaxation of the requirements and shall communicate its objection no later than two days from the date the securities exchange informed it of such relaxation.

(3) If the Regulatory Authority does not respond within seven days of the notification, the relaxation of the requirements shall be deemed to be approved.

(4) Where there is an occurrence of a material change in the affairs of a listed issuer that is likely to have significant influence on the value or market price of its securities, the listed issuer shall immediately disclose the change to the securities exchange.

(5) Any listings requirements made pursuant to this section shall be of no effect unless approved by the Regulatory Authority and published by the securities exchange as Rules of the securities exchange.

Penalties imposed by securities exchanges, central securities depository and Regulatory Authority

12. (1) Any person who fails to comply with a requirement under this Act shall be liable to a penalty to be imposed by a securities exchange, central securities depository and Regulatory Authority as provided in subsections (2) and (3).

(2) A penalty for non-compliance as referred to in subsection (1) that may be imposed by the Regulatory Authority and a securities exchange with respect to —

(*a*) membership requirements, may include, as determined by the securities exchange, any or all of the following —

(i) a warning, made either privately or published in a newspaper of general circulation,

(ii) a fine not exceeding P250 000, or

(iii) suspension or expulsion from the securities exchange,

(*b*) listing requirements, may include, as determined by the securities exchange, any or all of the following –

(i) a warning, made either privately or published in a newspaper of general circulation,

(ii) a fine not exceeding P250 000, or

(iii) suspension or de-listing of a listed company's shares being traded on the securities exchange.

(3) A penalty for non-compliance as referred to in subsection (1) that may be imposed by the Regulatory Authority and a central securities depository, with respect to central securities depository requirements, may include, as determined by the central securities depository, any or all of the following —

(*a*) a warning, made either privately or published in a newspaper of general circulation;

(*b*) notification to any competent authority to which the participant of the central securities depository is subject, of the participant's non-compliance with requirements;

(*c*) a fine not exceeding P250 000;

(*d*) restricting or limiting the participant of the central securities depository's activities or access to identified services and facilities in the central securities depository, as may be determined by the central securities depository; or

(*e*) suspension or expulsion of the participant of the central securities depository from the central securities depository.

(4) A director, controller, employee or agent of an issuer who fails to comply with the listing requirements commits an offence and shall be liable to a fine not exceeding P100 000 to be imposed by the Regulatory Authority or a securities exchange, unless it is proved by any such person charged under this subsection that, through no act or omission on his or her part, he or she was not aware that the offence was being committed, or that he or she took reasonable steps to prevent its commission.

(5) If a person fails to pay a fine or penalty imposed on him or her under this section, the Regulatory Authority, securities exchange or central securities depository in question may file with the court a statement certified by it as correct, stating the amount of the fine or penalty imposed, and such statement thereupon shall prima facie have all the effects of a civil judgment lawfully given in that court against that person in favour of the Regulatory Authority, securities exchange or central securities depository.

Rights of securities exchanges with respect to listing securities

13. (1) A securities exchange may —

(*a*) receive and consider, and

(i) may grant, or

(ii) defer or refuse,

in accordance with its listings requirements and any other conditions that it may determine, applications for the inclusion of securities in its official list; and

(*b*) charge the fees provided for in the listings requirements.

(2) Where a securities exchange —

(*a*) wishes to list its own shares; or

(*b*) lists the shares of any company with which it is materially associated,

in circumstances where there appears to be a conflict of interest, the Regulatory Authority shall perform the functions of the listing authority.

Issuers or securities not meeting listings requirements

14. Subject to section 11(2), a securities exchange shall not admit securities to its official list in respect of which the issuer does or the securities do not meet the requirements of the listings requirements.

Review of refusal to list securities

15. If any person is aggrieved by a securities exchange's refusal to grant an application for the inclusion of securities in its official list as provided under section 13, such person may have such decision reviewed by the Regulatory Authority.

Right of securities exchange to remove securities from list

16. (1) A securities exchange may, subject to this Act and the listings requirements, remove securities from its official list, even if a removal may have the effect that an entire sector or substantial portion of the sector on the securities exchange is closed.

(2) If a securities exchange removes securities from its official list as provided in subsection (1) in circumstances where such removal will have the effect that an entire sector or substantial portion of the sector on the securities exchange will be closed, the securities exchange shall not proceed with such removal unless it has given investors which will be affected by such closure an opportunity to make representations to it about the removal of the securities:

Provided that a securities exchange shall not be obliged to provide investors with the opportunity to make representation if it considers, on reasonable grounds, that delay in making the decision on whether to remove the securities shall prejudicially affect the interest of the market and investors.

(3) The Regulatory Authority shall not be precluded from making any decision contemplated in subsection (1) which adversely affects the rights of any person where the Regulatory Authority deems it necessary in the interest of the market.

New listings requirements may be applied to securities already listed

17. (1) Listings requirements or specific conditions in respect of a particular issuer determined by a relevant securities exchange in respect of the listing of securities may be applied by the securities exchange to securities already listed before the listings requirements or conditions become effective, by notice to the issuer of such listed securities.

(2) Listings requirements or conditions so applied shall take effect from the date determined by the relevant securities exchange which date shall not be earlier, except when special circumstances justify an earlier date, than one month after the date on which the securities exchange so notifies the issuer.

Trading requirements

18. (1) A securities exchange shall make trading requirements which are consistent with this Act and which determine the framework or the basis for matching buy and sell orders with the objective of executing securities transactions in a fair, orderly and transparent manner.

(2) A securities exchange may, with the approval of the Regulatory Authority, make trading requirements on matters additional to those listed in subsection (1).

(3) Any trading requirements made by a securities exchange pursuant to this section shall be of no effect unless approved by the Regulatory Authority and published by the securities exchange as rules of the securities exchange.

Central securities depository requirements

19. (1) A central securities depository shall make central securities depository requirements for the deposit of securities, clearing, settlement and transfer of securities in dematerialised form.

(2) Central securities depository requirements shall comply with this Act, and the National Clearance and Settlement Systems Act.

Cap. 46:06

(3) A central securities depository may, with the approval of the Bank of Botswana and the Regulatory Authority, make central securities depository requirements on matters additional to those listed in subsection (1).

(4) Any central securities depository requirements made by a central securities depository pursuant to this section, or any amendments thereto, shall be of no effect unless approved by the Bank of Botswana and the Regulatory Authority and published by the central securities depository.

Obligations of securities exchanges and central securities depositories

20. (1) A securities exchange —

(*a*) shall enforce its requirements unless, on proper grounds exercised in good faith and after due consideration of the impact on the market and investors, it has determined to waive, subject to subsection (4), such requirements, other than listing requirements, to the extent and in such manner as it consider appropriate in its discretion and no person shall have a claim against the securities exchange by reason of any such waiver;

(*b*) shall supervise the compliance by its securities broker or dealers with this Act, and the requirements, in the case of the latter, save to the extent that on proper grounds exercised in good faith and after due consideration of the impact on the market and investors, it has determined to waive, subject to subsection (4), such compliance in such manner as it considers appropriate and no person shall have a claim against the securities exchange by reason of any such waiver; and

(*c*) may issue directives to issuers, traders and securities broker or dealers concerning any matter related to its operation.

(2) A central securities depository —

(*a*) shall make provision for the clearing and settlement of transactions in securities, subject to approval by the Regulatory Authority and the Bank of Botswana;

(*b*) shall enforce its central securities depository requirements, unless on proper grounds exercised in good faith and after due consideration of the impact on the market and investors, it has determined to waive, subject to subsection (4), such requirements to the extent and in such manner as it considers appropriate in its discretion and no person shall have a claim against the central securities depository by reason of any such waiver;

(*c*) shall maintain share and bond registers and be the transfer secretary for the issuers of equities and debt securities in respect of which it provides clearing and settlement of transactions;

(*d*) shall provide clearing and settlement of transactions in derivatives or commodities;

(*e*) shall supervise the compliance by issuers of securities deposited with such central securities depository, participants and nominated transfer agents, with this Act, and the central securities depository requirements, in the case of the latter, save to the extent that on proper grounds exercised in good faith and after due consideration of the impact on the market and investors it has determined to waive, subject to subsection (4), such compliance in such manner as it considers appropriate in its discretion, and no person shall have a claim against the central securities depository by reason of any such waiver; and

(*f*) may issue directives to issuers, nominated transfer agents and participants.

(3) In addition to the functions referred to in subsections (1) and (2), a securities exchange and central securities depository —

(*a*) shall comply with such other requirements and fulfil such other functions as may be determined by the Regulatory Authority, which are not inconsistent with this Act; and

(*b*) may do all other things that are necessary for, incidental or conducive to the proper operation of the securities business in question that safeguard and further the public interest and that are not inconsistent with this Act.

(4) Where a —

(*a*) securities exchange determines to waive or relax any requirements as provided in subsection (1) (*a*) and (*b*), it shall immediately inform the Regulatory Authority; or

(*b*) central securities depository determines to relax any requirements as provided in subsection (2) (*b*) and (*d*), it shall immediately inform the Regulatory Authority and the Bank of Botswana,

which, either in the case of the Regulatory Authority or the Bank of Botswana, shall have the right to object to such relaxation of the requirements and shall each communicate its objection no later than seven days from the date the securities exchange or central securities depository, as the case may be, informs it of such relaxation.

(5) If the Regulatory Authority or the Bank of Botswana do not respond within seven days of the notification, the relaxation of the requirements shall be deemed to be approved.

Part IV — *General Provisions in Relation to Securities Business*

Periodic disclosures and reports to be furnished to Regulatory Authority Cap. 46:10

21. (1) Every securities institution licensed under this Act shall file with Regulatory Authority and make public —

(*a*) comparative quarterly financial statements prepared in accordance with requirements under the Financial Reporting Act and such other standards as may be determined by Regulatory Authority, as soon as possible, but not later than 30 days of each quarter; and

(*b*) an annual report which includes audited comparative financial statements prepared in accordance with requirements under the Financial Reporting Act and audited in accordance with the International Standards on Auditing, and such other standards as may be determined by Regulatory Authority, as soon as possible, but not later than 90 days of its balance sheet date.

(2) Every securities institution shall, within 90 days of the end of its financial year, furnish the Regulatory Authority with its annual report, which shall include —

(*a*) a report on corporate governance policy, and other related information as the Regulatory Authority may require;

(*b*) audited financial statements that comply with the requirements under the Financial Reporting Act, and such other requirements as may be specified by the Regulatory Authority in the rules;

(*c*) a consolidated financial statement, in the case of a company or subsidiary, audited in accordance with the requirements under the Financial Reporting Act; and

(*d*) a report on risk management procedures and their application, and other related information as the Regulatory Authority may require.

(3) The Regulatory Authority may require that the report referred to under subsection 2 (*d*) be audited.

(4) The annual reports and the financial statements required under this section shall —

(*a*) be in such form, and shall include such information, as may be specified in the rules of the Regulatory Authority;

(*b*) in the case of a company with a subsidiary, be consolidated; and

(*c*) be approved by the board of directors of the securities institution, notwithstanding section 200 of the Companies Act.

(5) For the purposes of this section, a securities institution referred to in subsection (4) shall furnish to the Regulatory Authority all such other information and produce such other records or documents at such time and place as may be required in writing by the Regulatory Authority.

Timely disclosures of material information in public interest

22. (1) Where a material change occurs in the affairs of a securities institution that is likely to have a significant influence on the value or market price of its securities, the securities institution shall immediately issue a press release, in plain ordinary English, disclosing the change, unless such disclosure would amount to a criminal offence.

(2) Where the securities of a securities institution referred to in subsection (1) are listed on an exchange —

(*a*) a copy of the press release shall be filed with the exchange;

(*b*) the press release shall be issued after the close of trading, unless it is not possible to keep the information confidential; and

(*c*) where the information is released before the close of trading, the securities institution may request a halt in the trading from the exchange, pending the issue of dissemination of the information.

(3) The following shall, without limiting what amounts to a material change, require disclosure —

(*a*) any distribution of securities in Botswana or any other jurisdiction;

(*b*) any change in the beneficial ownership of the securities institution's securities that affects or is likely to affect the control of the securities institution;

(*c*) any change of name of the securities institution;

(*d*) any reorganisation in capital, merger or amalgamation;

(*e*) a takeover bid on its own securities or made on the securities of another securities institution or securities institution bid;

(*f*) any significant acquisition or disposition of assets, property or venture interests;

(*g*) any stock split, share consolidation, stock dividend, exchange, redemption or other change in capital structure; and

(*h*) any other change that may be provided for in the Regulatory Authority or securities exchange Rules.

(4) An acquisition is significant or disposition is significant when the value of the asset, property or interest acquired or disposed of exceeds 10 percent of the net assets of the securities institution.

(5) A securities institution may choose not to issue a press release where —

(*a*) the information concerns an incomplete proposal or negotiation;

(*b*) the information comprises matters of supposition or is insufficiently definite such that it would be misleading to the market for it to be disclosed;

(*c*) the information is generated solely for the purposes of the internal management of the securities institution and its advisers; or

(*d*) the information is a trade secret.

(6) Subsection (5) shall not apply where the board of the securities institution reasonably believes that transactions in the securities have taken place or are likely to take place based on undisclosed information.

(7) Where subsection (5) applies, the securities institution shall issue the press release under subsection (1) as soon as circumstances that justify the non-disclosure end.

Off-market transactions in listed securities

23. (1) Except as provided in subsection (2), transactions in all listed securities shall be executed through a licensed securities exchange.

(2) The Regulatory Authority may, upon determining the conditions to apply thereto, approve off-market transactions, provided that such transactions do not have a commercial bearing.

Carrying on business in unlisted securities

24. (1) The Regulatory Authority may, after consulting all securities exchanges, prohibit a person from carrying on a securities business in unlisted securities if that person carries on such business in a manner which is contrary to public interest.

(2) Notwithstanding subsection (1), the Regulatory Authority may —

(*a*) permit the carrying on of a securities business in unlisted securities subject to the imposition of specified conditions; and

(*b*) determine conditions in terms of which specified types of unlisted securities may be bought and sold.

(3) A person who buys unlisted securities from or sells unlisted securities to a person who contravenes or fails to comply with a prohibition or condition referred to in subsection (1) may cancel the transaction in which case such person shall be entitled to reclaim any amount paid in respect of such unlisted securities together with interest calculated at a rate as the Regulatory Authority may direct from the seller or buyer, as the case may be.

(4) The Regulatory Authority may require any person not being a person licensed under the provisions of this Act who it suspects to be carrying on business in unlisted securities, to —

(*a*) produce such documentation and information as the Regulatory Authority deems necessary; or

(*b*) be subject to an inspection or investigation under section 42 of this Act,

and such person shall produce documents and information, and afford an inspector or investigator full and free access to the premises, records and documents of the person as are relevant to the inspection or investigation.

(5) A person who fails to comply with any requirement under subsection (4) commits an offence and shall be liable to a fine not exceeding P150 000 or to imprisonment for a period not exceeding 15 years, or to both.

Requirements affecting advertisements

25. (1) A person, other than a securities broker or dealer, or an officer including a director or employee of a securities broker or dealer who is so permitted in terms of the members' requirements, may not in any manner, directly or indirectly, advertise or canvass for the business of a securities broker or dealer.

(2) A securities exchange may, if an advertisement, brochure or other document relating to securities is misleading or for any reason objectionable, direct that the advertisement, brochure or other document not be published or the publication thereof be stopped or that such amendments as the securities exchange considers necessary be effected.

Requirements affecting written comments on trading results

26. A person may not publish or circulate any written comment which relates to the trading results of an issuer or which may influence the value of the listed securities of an issuer, unless such comment is accompanied by —

(*a*) the name of the person or persons who compiled it or the name of the person or persons on the editorial staff of a publication, including electronic and print media who, in the opinion of the editor thereof, compiled it; or

(*b*) disclosure of the source from which it was obtained.

Fiduciary duty and duty of care and skill

27. A member of the governing body of a securities institution owes a fiduciary duty and a duty of care and skill to the securities institution.

Controller to be approved by Regulatory Authority

28. (1) A person, other than the Government, may not be a controller of a securities institution without the prior approval of the Regulatory Authority.

(2) The approval referred to in subsection (1) —

(*a*) may be given subject to such conditions as the Regulatory Authority may determine; and

(*b*) may not be given if it is not in the public interest.

Delegation of powers

29. (1) The Regulatory Authority may, if it considers it appropriate, delegate the Regulatory Authority's powers under this Act.

(2) A securities exchange or a central securities depository may delegate or assign any of its functions, subject to the Regulatory Authority's prior approval.

(3) The Regulatory Authority, a securities exchange or a central securities depository as the case may be, shall not be divested or relieved of a function delegated under this section and may, if necessary, withdraw the delegation at any time on reasonable notice.

Securities institution to provide Regulatory Authority with information

30. A securities institution shall furnish the Regulatory Authority with all notices, minutes and documents which are furnished to members of the governing body of the securities institution or a committee of the governing body when so required by the Regulatory Authority.

Power of Regulatory Authority to amend requirements affecting securities institutions

31. (1) The Regulatory Authority may, after consultation with the securities exchange or a central securities depository, amend the member's requirements, listings requirements, trading requirements or central securities depository requirements or issue new requirements.

(2) Where the Regulatory Authority decides, after consultation with the securities exchange or a central securities depository to amend the requirements under subsection (1), such amendments shall be published by the securities exchange or a central securities depository and shall come into operation on a date determined by the Regulatory Authority.

(3) The Regulatory Authority may —

(*a*) if there is an urgent imperative under exceptional circumstances;

(*b*) if it is in the public interest; and

(*c*) after consultation with the securities institution concerned,

amend the requirements of a securities institution in the rules of the securities exchange or a central securities depository.

(4) Subject to the prior approval of the Regulatory Authority, a securities exchange or the central securities depository may suspend any of the requirements of a securities institution for a period not exceeding 30 days at a time after reasonable notice of the proposed suspension has been published by the securities exchange or the central securities depository.

(5) Subject to the prior approval of the Regulatory Authority, a securities exchange or the central securities depository may, where necessary, suspend, indefinitely or for a specified period, requirements of a securities institution and the securities exchange or the central securities depository shall publish notice of such suspension within seven days of the suspension.

(6) The securities exchange may, for the periods of the suspensions under subsections (4) and (5), issue and publish an interim requirement.

(7) Any contravention of or failure to comply with a requirement referred to in subsection (5) shall have the same legal effect as a contravention of or failure to comply with a requirement.

Right of review for failure to comply

32. (1) Any person licensed under this Act, aggrieved by a securities exchange or a central securities depository's failure to comply with any statutory duty set out in this Act has the right to have such non-compliance reviewed by the Regulatory Authority.

(2) Any person aggrieved by a securities broker or dealer's, market maker's, participant's central counterparty's and transfer agent's, custodian's failure to comply with any statutory duty set out in this Act has the right to have such action or omission of the securities institution reviewed by the securities exchange or the central securities depository.

Part V — *Conversion and Amalgamation*

Conversion to a company

33. A securities exchange which is not a company limited by shares in terms of the Companies Act may, prior to its application to convert to such type of company in accordance with section 355 of the Companies Act, give written notice to the Regulatory Authority.

Amalgamation

34. Subject to the provisions of Part XIV of the Companies Act, two or more securities institutions may amalgamate or merge, or any of the assets and liabilities of a securities institution may be transferred to or taken over by any other securities institutions with the prior approval of the Regulatory Authority and subject to such conditions that the Regulatory Authority may determine.

Part VI — *Insider Trading and Market Abuse*

Information regarded as public

35. Information is regarded as having been made public when the information —

(*a*) is published in accordance with the requirements of the relevant securities exchange for the purpose of informing clients and their professional advisers;

(*b*) is contained in records which by virtue of any enactment are open to inspection by the public;

(*c*) can be readily acquired by those likely to deal in any listed securities —

(i) to which the information relates, or

(ii) of an issuer to which the information relates;

(*d*) is derived from information which has been made public; or

(*e*) is made available to the public in any other manner that may be deemed by the Regulatory Authority as causing the information to have been made public.

Insider trading and offences

36. (1) A person who is an insider who knows that he or she has inside information shall not deal directly or indirectly or through an agent for his or her own account in the securities listed on a securities exchange to which the inside information relates or which are likely to be affected by it.

(2) An insider shall not be considered as having contravened the provisions of subsection (1) if such insider proves, on a balance of probabilities, that he or she only became an insider after he or she had given the instruction to deal to a securities broker or dealer and the instruction was not changed in any manner after he or she became an insider.

(3) An insider who knows that he or she has inside information and uses such information to deal, directly or indirectly, for any other person in the securities, listed on a securities exchange, to which the inside information relates or which are likely to be affected by it commits an offence and is liable to a penalty as provided for under section 54.

(4) An insider shall not be considered as having contravened the provisions of subsection (3) if such insider proves on a balance of probabilities that he or she —

(*a*) is a securities broker or dealer and was acting on specific instructions from a client, save where the inside information was disclosed to him or her by that client; or

(*b*) only became an insider after he or she had given the instruction to deal to a securities broker or dealer and the instruction was not changed in any manner after he or she became an insider.

(5) An insider who knows that he or she has inside information shall not disclose the inside information to another person.

(6) An insider shall not be considered as having contravened the provisions of subsection (5) if such insider proves on a balance of probabilities that he or she disclosed the inside information because it was necessary to do so for the purpose of the proper performance of the functions of his or her employment, office or profession in circumstances unrelated to dealing in any security listed on a securities exchange and that he or she at the same time disclosed that the information was inside information.

(7) An insider who knows that he or she has inside information shall not encourage or cause another person to deal or discourage or stop another person from dealing in the securities, listed on a securities exchange to which the inside information relates or which are likely to be affected by it.

(8) An insider who contravenes subsection (7) commits an offence and is liable to a fine not exceeding P200 000, or to imprisonment for a term not exceeding 10 years, or to both.

(9) An insider who contravenes any of the provisions of this section, other than offences committed under subsections (3) and (7), shall be liable to a civil action instituted against him or her by the Regulatory Authority in terms of section 39.

Manipulative, improper, false or deceptive trading

37. (1) No person may —

(*a*) either for such person's own account or on behalf of another person, directly or indirectly use or knowingly participate in the use of any manipulative, improper, false or deceptive practice of trading in a security listed on a securities exchange, which practice —

(i) creates or might create a false or deceptive appearance of trading activity in connection with the security,

(ii) creates or might create an artificial price for the security, or

(iii) interferes with the free and fair operation of the market; or

(*b*) place an order to buy or sell listed securities which, to his knowledge will, if executed, have the effect contemplated under paragraph (*a*).

(2) A person who contravenes subsection (1) shall be liable to a civil action instituted against him or her by the Regulatory Authority in terms of section 39.

(3) Without limiting the generality of subsection (1), the following are deemed to be manipulative, improper, false or deceptive trading practices —

(*a*) approving or entering on a securities exchange an order to buy or sell a security listed on that exchange which involves no change in the beneficial ownership of that security;

(*b*) approving or entering on a securities exchange an order to buy or sell a security listed on that securities exchange with the knowledge that an opposite order or orders of substantially the same size at substantially the same time and at substantially the same price, have been or will be entered by or for the same or different persons with the intention of creating —

(i) a false or deceptive appearance of active public trading in connection with, or

(ii) an artificial market price for that security;

(*c*) approving or entering on a securities exchange, orders to buy a security listed on that securities exchange at successively higher prices or orders to sell a security listed on that exchange at successively lower prices for the purpose of unduly or improperly influencing the market price of such security;

(*d*) approving or entering on a securities exchange an order at or near the close of the market, the primary purpose of which is to change or maintain the closing price of a security listed on that securities exchange;

(*e*) approving or entering on a securities exchange an order to buy or sell a security listed on that exchange during any auctioning process or pre-opening session and cancelling such order immediately prior to the market opening, for the purpose of creating or inducing a false or deceptive appearance of demand for or supply of such security;

(*f*) effecting or assisting in effecting a market corner;

(*g*) maintaining at a level that is artificial the price for dealing in securities listed on a securities exchange;

(*h*) employing any device, scheme or artifice to defraud any other person as a result of a transaction effected through the facilities of a securities exchange; and

(*i*) engaging in any act, practice or course of business in respect of securities business which is deceptive or which is likely to have such effect.

(4) Notwithstanding subsection (3), the employment of price-stabilising mechanisms that are regulated in terms of the listings requirements and trading requirements of a securities exchange does not constitute a manipulative, improper, false or deceptive trading practice for the purposes of this section or insider trading for the purposes of section 36.

(5) A purchase or sale of securities listed on a securities exchange does not, for the purposes of subsection (3) (*a*), involve a change in the beneficial ownership if a person who has a beneficial interest in those securities before the purchase or sale, or a person associated with that person in relation to those securities, directly or indirectly holds a beneficial interest in those securities after the purchase or sale.

(6) For purposes of subsection (3), the securities exchange and the Regulatory Authority may require a securities broker or dealer or investor to justify a decision taken thereto and may conduct any further enquiry as provided under section 42.

Misleading statements, promises or forecasts

38. (1) A person shall not, directly or indirectly, make or publish in respect of listed securities, or in respect of the past or future performance of an issuer any statement, promise or forecast which is —

(*a*) at the time and in the light of the circumstances in which it is made, false or misleading or deceptive in respect of any material fact and which the person knows, or ought reasonably to know, is false, misleading or deceptive; or

(*b*) by reason of the omission of a material fact, rendered false, misleading or deceptive and which the person knows, or ought reasonably to know, is rendered false, misleading or deceptive by reason of the omission of that fact.

(2) A person who contravenes subsection (1) is liable to a —

(*a*) civil penalty not exceeding P200 000 to be imposed by the Regulatory Authority; or

(*b*) civil action instituted against him or her by the Regulatory Authority in terms of section 39.

Civil liability

39. (1) An insider who knows that he has inside information and who —

(*a*) deals directly or indirectly or through an agent, for his own account, in the securities listed on a securities exchange to which the inside information relates or which are likely to be affected by it;

(*b*) makes a profit or would have made a profit if he had sold the securities at any stage, or avoids a loss, through such dealing; and

(*c*) fails to prove, on a balance of probabilities, any one of the defences set out in section 36,

is liable to a penalty as provided for under subsection (2).

(2) An insider found liable under subsection (1) shall, at the suit of the Regulatory Authority in any court, pay to the Regulatory Authority —

(*a*) the equivalent of the profit or loss referred to in subsection (1) (*b*);

(*b*) a penalty, for compensatory and punitive purposes, in a sum determined in the discretion of the court but not exceeding 10 times the amount referred to in subsection (*a*);

(*c*) interest; and

(*d*) the costs of the suit on such scale as may be determined by the court.

(3) An insider who knows that he has inside information and who —

(*a*) deals, directly or indirectly, for any other person in the securities listed on a securities exchange to which the inside information relates or which are likely to be affected by it;

(*b*) makes a profit for that other person or would have made a profit if the securities had been sold at any stage, or avoids a loss, through such dealing; and

(*c*) fails to prove any one of the defences set out in section 36 (4) on a balance of probabilities,

is, subject to subsection (8), liable to a penalty as provided for under subsection (4).

(4) An insider found liable under subsection (3) shall, at the suit of the Regulatory Authority in any court, pay to the Regulatory Authority —

(*a*) the equivalent of the profit or loss referred to in subsection (3) (*b*);

(*b*) a penalty, for compensatory and punitive purposes, in a sum determined in the discretion of the court but not exceeding 10 times the amount referred to in subsection (*a*);

(*c*) interest;

(*d*) the commission or consideration received for such dealing; and

(*e*) the costs of the suit on such scale as may be determined by the court.

(5) An insider who knows that he has inside information and who —

(*a*) discloses the inside information to any other person; and

(*b*) fails to prove on a balance of probabilities the defence set out under section 36 (4),

is, subject to subsection (8), liable to a penalty as provided under subsection (6).

(6) An insider found liable under subsection (5) shall, at the suit of the Regulatory Authority in any court, pay to the Regulatory Authority —

(*a*) if the other person dealt in the securities listed on a securities exchange to which the inside information relates or which are likely to be affected by it, the equivalent of the profit which the person made or would have made if the securities had been sold at any stage, or the equivalent of the loss avoided, as a result of such dealing;

(*b*) a penalty, for compensatory and punitive purposes, in a sum determined in the discretion of the court but not exceeding 10 times the amount referred to in subsection (*a*);

(*c*) interest;

(*d*) the commission or consideration received for such disclosure; and

(*e*) the costs of the suit on such scale as may be determined by the court.

(7) An insider who knows that he has inside information and who encourages or causes any other person to deal in the securities listed on a securities exchange to which the inside information relates or which are likely to be affected by it is, subject to subsection (8), liable, at the suit of the Regulatory Authority in any court to pay, to the Regulatory Authority —

(*a*) if the other person dealt in such securities, the equivalent of the profit which the person made or would have made if the securities had been sold at any stage, or the equivalent of the loss avoided, as a result of such dealing;

(*b*) a penalty, for compensatory and punitive purposes, in a sum determined in the discretion of the court but not exceeding 10 times the amount referred to in subsection (*a*);

(*c*) interest;

(*d*) the commission or consideration received for such encouragement; and

(*e*) the costs of the suit on such scale as may be determined by the court.

(8) If the other person referred to in subsections (3), (5) and (7) is liable as an insider in terms of subsection (1), the insider referred to in subsections (3), (5) and (7) is jointly and severally liable together with that other person to pay the amounts set out in subsection (4) (*a*), (*c*) and (*e*), (6) (*a*), (*c*) and (*e*), or (7) (*a*), (*c*) and (*e*), as the case may be.

Profits to be determined by court and recoveries to be placed in a fund

40. (1) For the purpose of section 39, the profit made, or the profit that would have been made if the listed securities had been sold at any stage, or the loss avoided, shall be determined in the discretion of the court which shall have regard to factors such as the consideration for the dealing referred to in subsections 39 (3), (5) and (7), the time between the relevant dealing and the publication of the inside information and any other relevant factors.

(2) Any amount recovered by the Regulatory Authority as a result of the proceedings referred to in section 39 or as a result of an agreement of settlement, shall be deposited by the Regulatory Authority directly into a market development fund, established as provided in subsection (3), to be dealt with as follows —

(*a*) the Regulatory Authority shall, as a first charge against the market development fund, be entitled to reimbursement of all expenses reasonably incurred by it in bringing such proceedings; and

(*b*) the balance shall accrue to the market development fund.

(3) The Minister may, by statutory instrument, establish the market development fund into which shall be deposited all moneys recovered by the Regulatory Authority under the provisions of this Part, and which shall be administered and utilised by the Regulatory Authority as the Minister may prescribe.

Procedural matters

41. (1) The Regulatory Authority may withdraw, abandon or compromise any civil proceedings instituted in terms of section 39 but any agreement of compromise shall be made an order of court and the amount of any payment made in terms of such compromise shall be publicised in such a manner as the Regulatory Authority may deem appropriate.

(2) Where civil proceedings have not been instituted, any agreement of compromise may, on application to the court by the Regulatory Authority after due notice to the other party or parties, be made an order of court and the parties to the agreement and the amount of any payment made in terms of such agreement shall be publicised in such a manner as the Regulatory Authority may deem appropriate.

(3) In the assessment of any penalty, the court shall take into account any award previously made under section 39 which arises from the same cause.

Administration of this Part

42. (1) In the exercise of its functions under this Part, the Regulatory Authority may —

(*a*) inspect or investigate any matter relating to a contravention referred to in sections 36, 37, 38 and 39;

(*b*) institute such proceedings as are provided for in this Part;

(*c*) summon any person who is believed to be able to furnish any information on the subject of any investigation or inspection or to have in such person's possession or under such person's control any document which has bearing upon that subject, to lodge such document with the Regulatory Authority, or to appear at a time and place specified in the summons, to be interrogated or to produce such document;

(*d*) interrogate any such person under oath or affirmation duly administered, and examine or retain for examination, subject to subsection (2), any document; and

(*e*) in relation to a matter investigated or inspected in terms of paragraph (*a*), on the authority of a warrant issued as provided in subsection (3), at any time without prior notice —

(i) enter any premises and require the production of any document,

(ii) enter and search any premises for any document,

(iii) open any strong room, safe or other container which he or she suspects contains any document,

(iv) examine, make extracts from and copy any document or, against the issue of a receipt, remove such document temporarily for that purpose,

(v) against the issue of a receipt, seize any document, and
(vi) retain any seized document for as long as it may be required for criminal or other proceedings:

Provided that the Regulatory Authority may proceed without a warrant, if the person in control of any premises consents to the actions contemplated in this subsection or if there are reasonable grounds to suspect that it is necessary to do so to prevent loss or destruction of, or damage to, relevant evidence.

(2) For purposes of subsection (1) (*e*) any person from whom any document has been taken and retained under that subsection shall, so long as such document is in possession of the Regulatory Authority, at that person's request and expense, be allowed to make copies thereof or to take extracts therefrom at any reasonable time and under the supervision of the person in charge of the investigation or inspection.

(3) A warrant referred to in subsection (1) (*e*) —

(*a*) may be issued, on application by the Regulatory Authority, by a judge or magistrate who has jurisdiction in the area where the premises in question are located; or

(*b*) may only be issued if it appears from information under oath that there is reason to believe that a document relating to the matter being investigated or inspected in terms of subsection (1) (*a*), is kept at the premises in question.

(4) Any person from whom a document has been seized under subsection (1) (*e*), or such person's authorised representative, may examine such document and make extracts therefrom under the supervision of the Regulatory Authority during normal office hours.

(5) Any person who has been duly summoned under subsection (1) (*c*) and who, without sufficient cause —

(*a*) fails to appear at the time and place specified in the summons;

(*b*) fails to remain in attendance until excused by the Regulatory Authority from further attendance;

(c) refuses to take the oath or to make an affirmation as contemplated in subsection (1) (*d*);

(*d*) fails to answer fully and satisfactorily any question lawfully put to him or her under subsection (1) (*d*); or

(*e*) fails to furnish information or to produce a document in terms of subsection (1) (*c*),

commits an offence and is liable on conviction to a fine not exceeding P200 000.

(6) The Regulatory Authority may, subject to the conditions it may determine, delegate the power to investigate an alleged contravention of this Part to a person and such person has the powers set out in subsection (1) (*a*), (*c*), (*d*) and (*e*).

(7) An inspector or investigator acting under this Part shall have the powers and protections of a Commissioner in terms of the Commissions of Inquiry Act. Cap. 05:02

Preservation of common law rights

43. Nothing in this Part prejudices the common law rights of any person aggrieved by any dealing or offence contemplated in this Part to claim any amount.

Part VII — *Regulation of Takeovers and Mergers*

Definitions

44. (1) In this Part, unless the context otherwise indicates —

"acquisition", in relation to equity securities of any company, means the acquisition of securities in such company by any means whatsoever, including purchase or subscription;

"acting in concert" means, subject to subsection (2), acting in pursuance of an agreement, arrangement or understanding, whether formal or informal, between two or more persons pursuant to which they or any of them cooperate for the purposes of entering into or proposing an affected transaction;

"affected transaction" means any transactions as the Minister may, by Order published in the *Gazette*, determine or any transaction, including a transaction which forms part of a series of transactions, or scheme, whatever form it may take, which —

(*a*) taking into account any equity securities held before such a transaction or scheme, has or will have the effect of —

(i) vesting control of a listed company in any person, or two or more persons acting in concert, in whom control did not vest prior to such transaction or scheme, or

(ii) any person, or two or more persons acting in concert, acquiring, or becoming the sole holder or holders of, all the equity securities, or all the equity securities of a particular class, of a listed company; or

(*b*) involves the acquisition by any person, or two or more persons acting in concert, in whom control of any company vests, of additional equity securities of that company in excess of the limits prescribed in the rules made under section 58;

"control" means, subject to subsection (2) (*b*), a holding or aggregate holdings of equity securities, entitling the holder thereof to exercise or cause to be exercised, directly or indirectly, the specified percentage or more of the voting rights at meetings of that company or any company controlled by it, irrespective of whether such holding or holdings confer de facto control;

"equity securities" means shares and other transferable securities equivalent to shares in companies, as well as any other transferable securities giving the right to acquire any of the aforementioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares;

"holder" means the direct or indirect holder of equity securities in the offeree company;

"offeree company" means any company the equity securities or part of the equity securities of which are or are to be subject of any affected transaction or proposed affected transaction;

"offeror" means any person or two or more persons acting in concert who enter into or propose any affected transaction; and

"specified percentage" means the percentage, or different percentages with respect to different types of companies, prescribed in the rules made under section 58, for the purposes of determining control as defined in this section, except that the percentage shall in no case fall below 20 percent of the issued equity securities of any class.

(2) For purposes of subsection (1), the following persons shall be deemed to be acting in concert with one another unless the contrary is established, namely —

(*a*) a company, its holding company, subsidiaries, companies which are subsidiaries of its holding company and their subsidiaries, and companies of which such companies are associated companies, and for the purposes hereof ownership or control by a company of 20 percent or more of the equity securities of another company shall constitute the latter company as the former's associate;

(*b*) a company with -

(i) any of its directors or holders of its equity securities who are beneficial owners,

(ii) any company controlled by one or more of its directors, or

(iii) any trust of which any one or more of its directors is a beneficiary; and

(*c*) a company with any of its pension, provident or benefit funds.

Regulation of takeovers and mergers

45. (1) In regulating takeovers and mergers, the Regulatory Authority shall regulate in such manner as it shall deem necessary or appropriate —

(*a*) all affected transactions;

(*b*) all proposals which, on successful completion or implementation, would become affected transactions; and

(*c*) all types of securities businesses that are provided for in this Part.

(2) For purposes of this Part, it shall not be the function of the Regulatory Authority to judge the commercial advantages and disadvantages of affected transactions.

(3) The Regulatory Authority may exercise any of its powers of investigation, inspection and administration established under Part VI in the performance of its functions under this Part.

Part VIII — *Statutory Management and Winding Up*

Appointment of statutory managers

46. (1) The High Court may, on application, appoint a person to be the statutory manager of a securities institution.

(2) An application under subsection (1) may be made by the Regulatory Authority or with the Regulatory Authority's written consent.

(3) The High Court may make the appointment —

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

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

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

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

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

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

(4) Subject to subsection (5), the Regulatory Authority may appoint a person to be the statutory manager of a securities institution but only if it appears to the Regulatory Authority that —

(*a*) the securities institution —

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

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

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

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

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

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

(iii) the safety and soundness of financial institutions.

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

(6) On an application in terms of subsection (5), the High Court —

(*a*) shall, by order, confirm the appointment unless satisfied that the Regulatory Authority was not entitled to make the appointment, or that the grounds for making the appointment no longer exist; and

(*b*) may also make further ancillary orders, including as to costs, as is just.

Statutory management

47. (1) A person shall not be appointed or hold office as a statutory manager of a securities institution unless the Regulatory Authority has approved the person as the statutory manager of the securities institution.

(2) The statutory manager of a prudentially regulated securities institution shall —

(*a*) manage the affairs of the securities institution to the exclusion of its directors and other managers;

(*b*) have power to repudiate a contract to which the securities institution is a party, but only if the statutory manager considers the contract detrimental to the interests of clients of the securities institution; and

(*c*) be entitled to receive such remuneration from the securities institution as the High Court orders.

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

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

(*a*) what steps should be taken to ensure that the securities institution —

(i) complies with the financial services laws, or

(ii) will be financially sound; or

(iii) will not be involved in financial crime;

(*b*) if the statutory manager considers that it is not practicable to take steps under paragraph (*a*) —

(i) whether steps should be taken to transfer the business of the securities institution to another appropriate person and, if so, to whom and on what terms, and

(ii) whether the securities institution should be wound up.

(5) The statutory manager of a securities institution shall comply with written directions from the Regulatory Authority in relation to his or her functions.

(6) The statutory manager of a securities institution may apply to the High Court at any time for directions.

(7) The Regulatory Authority may at any time remove a statutory manager from office, and appoint a replacement, for whom the Regulatory Authority shall apply to court for an order confirming the appointment in terms of section 46 (5).

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

Termination of statutory management

48. If a statutory manager is appointed to a securities institution, the Regulatory Authority shall ensure that such a statutory manager remains appointed until the earlier of the times when —

(*a*) the Regulatory Authority is satisfied that the grounds for making the appointment no longer exist; or

(*b*) the Regulatory Authority applies for the securities institution to be wound up on the basis that it considers that the securities institution is insolvent and is unlikely to return to solvency within a reasonable time.

Winding up securities institutions

49. (1) A resolution, demand or other step to wind up a securities institution shall be of no effect unless the Regulatory Authority has approved of such action.

(2) The Regulatory Authority may apply to the court for an order that a securities institution be wound up if —

(*a*) a statutory manager has been appointed to the securities institution; and

(*b*) the Regulatory Authority is satisfied that the securities institution is insolvent and cannot be restored to solvency within a reasonable period.

(3) An application to a court for the winding up of a securities institution whether under the Companies Act or any other law shall not be made except by the Regulatory Authority or with its approval.

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

(*a*) the securities institution's licence has been or is to be revoked; or

(*b*) the Regulatory Authority is satisfied that adequate provision has been made to protect the interests of the clients of the securities institution.

Part IX — *Miscellaneous*

Financial services law

50. This Act is deemed to be a financial services law.

Protection of securities exchanges and officers

51. A securities exchange that has been declared a self regulatory organisation under the Non-Bank Financial Institutions Regulatory Authority Act, its officers including directors, employees or representatives, or any member of a governing body or committee of a governing body of the securities exchange, is not liable for any loss sustained by or damage caused in the exercise in good faith of functions and powers under or in terms of this Act, or the requirements or directives of a securities exchange, to any person as a result of anything done.

Disclosure by securities institutions to be in public interest

52. Notwithstanding any contrary provisions in any other law, a securities institution may disclose information relating to or arising from its functions to any other securities institution or supervisory authority, whether domestic or foreign, if such disclosure is in the public interest.

Suspension of operations

53. (1) Subject to subsection (2), the Regulatory Authority may temporarily suspend one or more operations of a securities exchange or a central securities depository in consultation with such securities institutions.

(2) The Regulatory Authority may suspend operations under subsection (1) where it is of the opinion that the price discovery on the securities exchange is being or is likely to be adversely affected due to the occurrence of —

(*a*) an emergency or a natural disaster; or

(*b*) an economic or financial crisis.

Criminal offences

54. Every person who —

(*a*) contravenes section 36 (3);

(*b*) knowingly hinders or prevents compliance with —

(i) any provision of the Act, or

(ii) any direction, order or requirement made under the Act,

commits an offence and on conviction is liable to a fine not exceeding P200 000 or to imprisonment for a period not exceeding 10 years, or to both.

Prohibited use of certain words

55. A person shall not use the words "central counterparty", "commodities exchange", "futures exchange", "securities broker or dealer" "securities exchange", "securities institution", or "stock market" or any other words that convey a similar meaning in connection with a business except with the written approval of the Regulatory Authority.

Settlement Guarantee Fund requirements

56. (1) A securities exchange and a central securities depository shall make Settlement Guarantee Fund requirements by which a Settlement Guarantee Fund shall be established in order to, amongst other things, grant compensation to clients for losses suffered as a result of a default resulting in a failure to complete a transaction.

(2) The Settlement Guarantee Fund requirements shall include requirements for —

(*a*) the persons required to contribute a levy to the fund;
(*b*) the amount of the levy imposed by the securities exchange for this purpose;
(*c*) different categories of claims that may be brought against the fund;
(*d*) restrictions on the amount of any claim;
(*e*) the control and administration of the fund;
(*f*) the imposition of any fines; and
(*g*) the ownership of the fund.

Investor Compensation Fund

57. The Regulatory Authority shall make Investor Compensation Fund requirements by which an investor compensation fund shall be established in order to, amongst other things, grant compensation to clients for pecuniary losses suffered as a result of the securities broker or dealers becoming incapable of meeting their contractual obligations to clients.

(2) The Investor Compensation Fund shall include requirements for —

(*a*) the persons required to contribute a levy to the fund;
(*b*) the amount of the levy imposed by the securities exchange for this purpose;
(*c*) different categories of claims that may be brought against the fund;
(*d*) restrictions on the amount of any claim;
(*e*) the control and administration of the fund;
(*f*) the imposition of any fines; and
(*g*) the ownership of the fund.

Rules

58. (1) The Regulatory Authority may, after consultations with relevant securities institutions, make rules for any matter which under this Act is to be provided for by the rules or for the better carrying out of its regulatory functions under this Act.

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

(*a*) a warning, made either privately or published in a newspaper of general circulation;
(*b*) notification to any competent authority to which the participant of the central securities depository is subject, of the participant's non-compliance with requirements;
(*c*) a fine not exceeding P250 000;
(*d*) suspension or de-listing of a member company's listed shares being traded on the securities exchange; or
(*e*) suspension or expulsion of the participants of the central securities depository or members of the securities exchange.

(3) The Regulatory Authority may make market abuse rules —
(i) concerning the administration of Part VI,
(ii) concerning the manner in which investigations or inspections in terms of Part VI are to be conducted,
(iii) to ensure that the Regulatory Authority is able to perform its functions in terms of Part VI,
(iv) dealing with the manner in which inside information should be disclosed and, generally, with the conduct expected of persons with regard to such information, or
(v) after consultation with the relevant securities exchanges, requiring such securities exchanges to implement such systems as are necessary for the effective monitoring and identification of possible contraventions of Part VI.

(4) The Regulatory Authority shall cause the publication of any proposed market abuse rule or amendment of such a rule, calling upon all interested persons who have any objections to the proposed rule or amendment, to lodge their objections with the Regulatory Authority within a period of 14 days from the date of publication of the Notice.

(5) If there are no objections under subsection (4) or if the Regulatory Authority has considered the objections and has decided to introduce the proposed rule or amendment in the form published, the rule or amendment shall come into operation on a date determined by the Regulatory Authority in the rules.

(6) If the Regulatory Authority has, after considering any objection under subsection (4), determined to amend the proposed rule as published, the proposed rule shall be published by the Regulatory Authority and shall come into operation on a date determined by the Regulatory Authority as contained in the rules published.

(7) The Regulatory Authority, in consultation with a securities exchange, shall make the takeovers and mergers rules in respect of matters covered under Part VII.

Regulations

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

(2) Without derogating from the generality of subsection (1), regulations may provide for any of the following —

(*a*) forms and procedures for any matter under this Act;

(*b*) fees, penalties and costs in relation to reviews of decisions made under this Act;

(*c*) the keeping and filing of reports, books and records;

(*d*) capital requirements for securities institutions;

(*e*) governance of securities institutions;

(*f*) notwithstanding anything contained in the Companies Act or any other law, the procedure to be followed in relation to, and the administration and distribution, of a securities broker or dealer's estate in the event of —

(i) cancellation of a licence under this Act, or

(ii) insolvency; or

(g) establishment and maintenance of —

(i) a settlement guarantee fund,

(ii) an investor compensation fund,

(iii) a market development fund, or

(iv) any other fund relevant for purposes of this Act.

(3) Regulations made under this section may prescribe for any person who, without reasonable cause, fails to comply with the regulations to be guilty of an offence and liable to a fine not exceeding P200 000 or to imprisonment for a term not exceeding five years, or to both, and in the case of a continuing offence, to a fine of P350 per day for every day during which such offence continues provided that such fine shall not exceed P200 000.

PASSED by the National Assembly this 28th day of July, 2014.