Statutory Instrument No. 53 of 1998

COLLECTIVE INVESTMENT UNDERTAKINGS ACT
(No. 20 of 1996)

COLLECTIVE INVESTMENT UNDERTAKINGS REGULATIONS, 1998

(Published on 10th July, 1998)

ARRANGEMENT OF REGULATIONS

REGULATION

PART VII — *Miscellaneous Provisions*

IN EXERCISE of the powers contained in section 33 of Collective Investment Act, 1996, the Minister of Finance and Development Planning, having duly consulted the Interim Investment Supervisory Committee, hereby makes the following Regulations —

PART I — *Preliminary*

Citation

1. These Regulations may be cited as the Collective Investment Undertakings Regulations, 1998.

Interpretation and application

2. (1) Unless the context otherwise requires —

"investment advisor" means any person employed by a collective investment undertaking to advise it in respect of any decisions with regard to the investment or management by it of its assets, and the reinvestment of the proceeds thereof;

"representative" means the principal officer representing the interests of a person not resident or registered in Botswana;

"undertaking" means a collective investment undertaking.

(2) These Regulations apply to the categories of collective investment undertakings permitted to be licenced to operate in Botswana under section 7 of the Act.

PART II — *Application for Licence*

Application for licence

3. (1) An application for a licence to operate a collective investment undertaking shall be made to the Registrar by the principal officer of the undertaking, and the application shall contain information set out in the First Schedule.

(2) The application for a licence shall be accompanied by the following documents —

(*a*) certificate of incorporation in the case of a company, or certificate of registration in the case of a trust;

(*b*) the offering document to be issued by the undertaking;

(*c*) the name of the auditor of the undertaking;

(*d*) the name, address and audited accounts of the depositary;

(*e*) the name, address and licence of the fund administrator;

(*f*) documentary evidence of the details of a depositary and fund administrator required under regulations 5 and 9 respectively; and

(*g*) all contracts and agreements between the undertaking and the depositary and between the undertaking and the fund administrator.

(3) An application for a licence by a person not resident or registered in Botswana shall be accompanied by —

(*a*) evidence of local registration; or

(*b*) a representative agreement.

(4) The Registrar may grant a collective investment licence to an applicant who has satisfied the requirements of this regulation.

Withdrawal or suspension of licence

4. The requirements of regulation 3 impose continuing obligations with regard to a licenced collective investment undertaking and in the event of failure to comply with any such obligation the Registrar may —

(*a*) suspend the licence of the undertaking for such time, or until the happening of such event as the committee may determine; or

(*b*) withdraw the licence of the undertaking.

PART III — *Depositary*

Depositary requirements

5. (1) No person shall be registered by the Registrar as a depositary for a collective investment undertaking unless the person —

(*a*) is a body corporate with a registered office or registered branch of its foreign office in Botswana having a minimum issued and paid up capital and non distributable capital reserves of not less than one million Pula;

(*b*) has its liabilities guaranteed by a financial institution which has a minimum paid up share capital of five million Pula:

(*c*) has a registered office or registered branch of its foreign office in Botswana:

(*d*) is not engaged in or connected to the business of fund administration for any collective investment undertaking;

(*e*) has directors who hold such qualifications and experience in financial matters as the Registrar may determine; and

(*f*) has directors who have not been convicted of a felony or any offence involving dishonesty.

(2) The Registrar may register an applicant who has satisfied the requirements of sub-regulation (1) as a depositary for a named collective investment undertaking.

(3) The term 'financial institution' shall include institutions falling within the definition of the term 'bank' under the Banking Act, and institutions who provide the service of underwriting, marketing, or the administration of contracts of insurance and reinsurance.

Act No. 13 of 1995

Duties and obligations of depositary

6. It shall be the duty of the depositary to —

(*a*) take into its custody or under its control all the property of the collective investment undertaking and hold it in trust for the participants in accordance with the provisions of the constitutive document;

(*b*) take reasonable care to ensure that the sale, issue, repurchase, redemption and cancellation of units or shares effected by a collective investment undertaking are carried out in accordance with the provisions of the Act and the constitutive document of the undertaking;

(*c*) take reasonable care to ensure that the methods adopted by the fund administrator in calculating the value of units or participatory interests are adequate to ensure that the sale, issue, repurchase, redemption and cancellation prices are calculated in accordance with the provisions of the Act and the constitutive document of the undertaking;

(*d*) carry out the instructions of the fund administrator in respect of investments unless such instructions are in conflict with the provisions of the offering or constitutive document;

(*e*) take reasonable care to ensure that the investment and borrowing limitations set out in the constitutive document, and the conditions under which the undertaking was licenced, are complied with;

(*f*) take reasonable care to ensure that unit or share certificates are not issued until subscription moneys have been paid;

(g) ensure that any investments requiring registration held on behalf of shareholders or unit holders by the undertaking are properly registered in the names of the participants, or, with the consent of the participants, in the name of an eligible nominee; and

(*h*) issue a report to the participants which is to be included in the annual report, stating whether in the opinion of the depositary the fund administrator has in all material respects managed the undertaking in accordance with the provisions of the constitutive document and the report shall include any steps the depositary has had to take to ensure compliance by the fund administrator with the constitutive document in this respect.

Retirement of depositary

7. (1) The depositary shall not be entitled to retire except upon the appointment of a new depositary and subject to the prior approval of the Registrar.

(2) The depositary shall be considered to have retired and shall be de-registered only when the new depositary, with the approval of the Registrar, takes up office.

Depositary, fund administrator to be independent

8. The depositary and the fund administrator shall not be connected persons and shall be persons who are independent of each other.

PART IV — *Fund Administrator*

Fund administrator requirements

9. (1) No person shall be licenced to administer and manage a collective investment undertaking as a fund administrator unless the person —

(*a*) is a body corporate with a registered office or registered branch of its foreign office in Botswana;

(*b*) has sufficient financial resources at its disposal to enable it to conduct its business effectively and meet its liabilities, in particular it shall have a minimum issued and paid-up capital and capital reserves of P250 000 or its equivalent in foreign currency;

(*c*) is engaged solely in the business of collective investment fund administration and management;

(*d*) does not lend money to any material extent;

(*e*) maintains at all times a positive net asset position;

(*f*) ensures that at least two of its directors shall be resident in Botswana;
(*g*) supplies the Registrar with the biographical details and an account of the professional qualifications and experience of the directors and every person succeeding them in office;
(*h*) ensures that none of its directors has been convicted of a felony or any offence involving dishonesty; and
(*i*) requires and has proof that any investment advisor that it may appoint is appropriately qualified for the performance of his functions.

(2) The Registrar may grant a fund administration licence to an applicant who satisfies the requirements of sub-regulation (1).

Duties and obligations of fund administrator

10. (1) It shall be the duty of a fund administrator to —
(*a*) manage the collective investment undertaking in accordance with the constitutive documents and in the exclusive interest of the participants and to fulfil the duties imposed on it by law;
(*b*) maintain or cause to be maintained the books and records of the undertaking and prepare or cause to be prepared the accounts of the undertaking and have at least one report published in respect of each financial year and sent to all registered participants; and
(*c*) ensure that the constitutive documents are made available for inspection by the public free of charge at all times during normal office hours at its place of business and make copies of such document available upon the payment of a reasonable fee.

(2) A fund administrator shall be liable to the participants, the depositary and to the investment advisor for any loss suffered by them as a result of the unjustifiable failure of the fund administrator to perform its obligations.

Retirement of fund administrator

11. (1) Subject to the approval of the Registrar, a fund administrator may be retired from administering and managing a collective investment undertaking by the depositary of the undertaking, if —
(*a*) the fund administrator goes into liquidation, becomes bankrupt or has a receiver appointed over its assets; or
(*b*) evidence is adduced by the depositary that a change in management is desirable in the interest of the participants.

(2) A fund administrator shall retire —
(*a*) if is it shown to the satisfaction of the Registrar that the fund administrator has committed an act or omission which, in terms of the constitutive document, disqualifies it from further administration and management of the undertaking; or
(*b*) when the Registrar withdraws the fund administrator's licence.

(3) Upon the retirement or dismissal of the fund administrator, the depositary shall appoint a new fund administrator as soon as possible, subject to the approval of the Registrar.

PART V — *Offering Document*

Matters to be disclosed in offering document

12. Each collective investment undertaking shall issue an offering document containing information listed in the Second Schedule, which information shall be sufficient to enable a prospective participant be in a position to make an informed judgement of the investment proposed, and which, as far as it is possible, —

(*a*) reflects the actual position of the undertaking at the date of the issue of the offering document; and

(*b*) is equivalent to a prospectus for the purpose.

Audited report to accompany offering document

13. The offering document shall be accompanied by the most recent audited report and accounts of a collective investment undertaking and with a semi-annual report, if published after the annual report.

Offering document to accompany application

14. No application form for membership to a collective investment undertaking shall be issued to a prospective participant unless it is accompanied by the offering document of the undertaking or an advertisement or report containing all the information required under the Second Schedule.

Estimated yields and forecasts

15. (1) Where performance data or estimated yield is quoted in an offering document, advertisement or any other invitation to the public to invest, the Registrar may require justification of the calculation.

(2) No forecasts of a collective investment undertaking's performance may be made.

PART VI — *Audit of Collective Investment Undertaking*

Auditing of accounts

16. (1) The accounts of a collective investment undertaking shall be audited at such frequency as the Committee shall determine by notice published in the *Gazette*.

(2) A collective investment undertaking and its auditors shall comply with such standards as may be prescribed by the Committee in the rules and with such directives and practices as the Committee may from time to time determine by notice published in the *Gazette.*

Periodic reports to be submitted

17. (1) Each collective investment undertaking shall submit to the Registrar and the Committee, periodic reports at such times as the Committee may determine by notice published in the *Gazette*.

(2) The periodic reports required to be submitted under sub-regulation (1) shall contain —

(*a*) evidence of compliance with liquidity and other ratios as may be applicable or as may be prescribed in the rules by the Committee;

(*b*) evidence of compliance with the objectives of the collective investment undertaking as set out in its constitutive document and as enunciated in any offering document;

(*c*) a balance sheet and profit and loss account; and

(*d*) such additional information as the Registrar may, from time to time, determine.

Maintaining of accounting information in Botswana

18. A collective investment undertaking shall maintain in Botswana and be in a position to produce on demand by the Registrar, all accounting and other information which constitutes essential documentation for —

(*a*) preparation of accounts and portfolio evaluations;
(*b*) the establishment of certificates of title and indebtedness;
(*c*) the analysis of participatory interest or shares in circulation;
(*d*) all agreements such as agreements with the trustees, promoters, managers, advisors, depositories and any other providers of services acting on behalf of the collective investment undertaking; and
(*e*) vouchers recording all transactions.

Report of audit to be published

19. (1) Following the completion of any audit prescribed by the Act, these Regulations or any rules, a collective investment undertaking shall publish a report containing the following —

(*a*) statement of assets and liabilities which shall describe all -
(i) transferable securities;
(ii) debt instrument;
(iii) bank balances;
(iv) other assets; and
(v) liabilities;
(*b*) aggregate net asset values;
(*c*) number of participatory interest in circulation;
(*d*) net asset value of each participatory interest;
(*e*) a portfolio distinguishing between -
(i) transferrable securities admitted to official exchange listings;
(ii) transferrable securities dealt within or on another organised market; or
(iii) other transferrable securities;
(*f*) a statement of the developments concerning the assets of the collective investment undertaking during the reference period including —
(i) income from investments;
(ii) other income;
(iii) management charges;
(iv) depositary charges;
(v) other charges and taxes;
(vi) net income;
(vii) distributions and income reinvestment;
(viii) increase or decrease in capital accounts;
(ix) appreciation or depreciation of investment;
(x) any other changes affecting the assets and liabilities of the collective investment undertaking; and
(*g*) a comparable table covering the last three financial years and for each financial year at the end of the financial year including the following —
(i) the total net asset value; and
(ii) the net asset value of each participatory interest.

(2) The committee may issue rules prescribing the form and content of any audit report and accounts to be published and audited pursuant to the provisions of this regulation.

PART VII — *Miscellaneous Provisions*

Exempt undertakings or arrangements

20. A collective investment undertaking or similar arrangement that is exempt from the provisions of section 31 (1) of the Act, shall comprise of—

(*a*) an undertaking or arrangement permitting participation in specified mortgage bonds which are stipulated to be and are registered in favour of a nominee company of which the Registrar has approved, which participation is on such conditions as the Registrar may deem fit;

(*b*) a nominee company the identity and shareholders of which, and the terms and conditions of which, meet such criterion as the Registrar may determine by notice published in the *Gazette;*

No. 13 of 1995

(*c*) a bank licenced in accordance with the provisions of the Banking Act, 1995;

Cap. 27:03

(*d*) a fund registered in accordance with the provisions of the Pension and Provident Funds Act;

Cap. 46:01

(*e*) a life insurance fund established in accordance with section 70 of the Insurance Industry Act;

(*f*) a partnership syndicated to own immovable property, develop it and split the profits derived from the rental stream; or

(*g*) a joint venture arrangement between two companies to assume the rights and obligations of a civil engineering or building contract and to share the profits.

Changes requiring consent of Registrar

21. Without the prior notification and written approval of the Registrar, no collective investment undertaking shall effect changes to —

(a) its name;

(*b*) its constitution;

(*c*) the fund administrator;

(*d*) the depositary;

(*e*) the auditor; or

(*f*) the ownership or control of the persons listed in paragraphs (*c*) to (*e*).

Appeals to the Minister

22. (1) Any person making an appeal against any decision of the Registrar in accordance with section 35 of the Act, shall, within one month of the pronouncement of the decision at issue, lodge a written notice of appeal with the Registrar, clearly setting out the decision being appealed against and the grounds of appeal.

(2) Upon receipt of the notice of appeal referred to in sub-regulation (1) the Registrar shall —

(*a*) prepare and despatch by registered post to the appellant a statement of the reasons for his decision; and

(*b*) require the appellant to state, in writing, within a period of 60 days, whether he proposes to continue with his appeal.

(3) If the appellant states that he does not propose to continue with the appeal he has lodged or if he does not furnish the Registrar with a reply within the period prescribed in sub-regulation (2), the appeal shall lapse.

(4) Upon receipt, by the Registrar, of the appellant's statement expressing the appellant's decision to proceed with the appeal, the Registrar shall, within 60 days, forward to the Minister —

(i) the notice of appeal;

(ii) the statement of the reasons for the Registrar's decision;

(iii) the statement of the appellant's decision to proceed; and

(iv) any other relevant document or such further information as the Minister may require.

(5) Upon receipt of the Minister's decision on the appeal, the Registrar shall, within 48 hours, communicate it to the appellant.

Offences and penalties

23. (1) Any person who is guilty of the non-rendition of any balance sheet, account, statement, document or report required to be furnished in terms of these Regulations, shall be liable to a fine not exceeding P10,000, as provided for under section 33 (2) of the Act.

(2) Any person who, in relation to these Regulations, commits an offence under section 36 of the Act, shall be guilty of an offence and be liable, upon conviction, to the penalty provided under the said section of the Act.

(3) Subject to sub-regulations (1) and (2), any person who contravenes the provisions of these Regulations shall be guilty of an offence and shall be liable, upon conviction, to a fine not exceeding P 500 or to imprisonment for a term not exceeding six months, or to both.

Rules

24. The committee may prescribe in the rules to be applicable to the different categories of collective investment undertakings permitted to be licenced to operate in Botswana under section 7 of the Act —

(*a*) requirements to be met by all or any category of collective investment undertaking, principal officer, investment advisor, promoters, managers, administrators, depositories, and registered agents of a collective investment undertaking in respect of minimum capital, guarantees and other requirements to safeguard investors from losses;

(*b*) investment restrictions in addition to any that may be contained in any provision of these Regulations;

(*c*) borrowing restrictions in addition to any that may be contained in any provision of these Regulations;

(*d*) liquidity and other ratios in addition to any that may be contained in any provision of these Regulations; and

(*e*) conditions and terms in, upon and under which a collective investment undertaking may be wound up.

FIRST SCHEDULE
(*regulation* 3(1))

INFORMATION TO BE CONTAINED IN THE APPLICATION FOR A LICENCE

General details of the collective investment undertaking

1. Name of the collective investment undertaking:
2. Names of branch (if any):
3. Structure of the collective investment undertaking:
4. Applicable law and the date and country of incorporation:
5. Quotation on any securities exchange and authorisation granted by other regulatory bodies:
6. Undertakings given to other regulatory bodies:
7. Launch: date and place:
8. Dealing: daily/weekly/other:
9. Valuation of assets: daily, weekly/other:
10. Pricing: forward/historic/other:
11. Investment plans to be offered in Botswana:

For each collective investment undertaking or branch

12. (*a*) Fee structure —
   - (i) level of all charges payable by investor; and
   - (ii) level/basis of calculation of all charges payable by the collective investment undertaking;

   (*b*) For equity/bond funds —
   - (i) investment objective and borrowing powers; and
   - (ii) currency of denomination;

   (*c*) Minimum initial subscription and the minimum subsequent holding:

Details of the parties to the collective investment undertaking

13. The fund administrator —
   - (*a*) Name:
   - (*b*) Registered/business address:
   - (*c*) Name of the ultimate holding company:
   - (*d*) Previous approval by the Committee to manage licenced collective investment undertaking?
     If no, the professional details of the directors and most recent audited financial report:
   - (*e*) Person(s) for contact with the Committee:

14. The depositary —
   - (*a*) Name:
   - (*b*) Registered/business address:
   - (*c*) Name of the ultimate holding company:
   - (*d*) Previous approval by the Committee as depositary of licenced collective investment undertaking?
     If no, names of the directors and most recent audited financial report.
   - (*e*) Person(s) for contact with the Committee:

15. The investment adviser (if any) —
   - (*a*) Name:
   - (*b*) Registered/business address:
   - (*c*) Name of the ultimate holding company:

16. For the depositary, fund administrator and investment adviser —
   - (*a*) which, if any, of these companies are connected persons?
   - (*b*) name anyone who holds appointments, as director or officer, with more than one of these companies

17. The auditor —
   - (*a*) Name:
   - (*b*) Registered/business address:
   - (*c*) The approximate percentage of the collective investment's transactions in value of securities carried out by the principal broker within the latest financial year of the undertaking:
   - (*d*) Whether the depositary, the directors of the collective investment undertaking, the fund administrator or the investment adviser is a connected person of the principal broker:

18. Legal representatives in Botswana (if any) —
   (*a*) Name:
   (*b*) Person(s) for contacts with the Committee:

SECOND SCHEDULE
(*regulation* 12)

INFORMATION TO BE DISCLOSED IN THE OFFERING DOCUMENT

(*Note*: This list is not intended to be exhaustive. The directors of the collective investment undertaking or the fund administrator are obliged to disclose any information which may be necessary for investors to make an informed judgment).

Constitution of the collective investment undertaking

1. Name, registered address and place and date of creation of the collective investment undertaking, with an indication of its duration if limited:

Investment objectives and restrictions

2. Details of investment objectives and policy, including summary of the investment and borrowing restrictions:

   If the nature of the investment policy so dictates, a warning that investment in the collective investment undertaking is subject to abnormal risks, and a description of the risks involved.

Operators and principals

3. The names and registered addresses of the following parties (where applicable) —
   (*a*) the directors of the collective investment undertaking/fund administrator and its board of directors;
   (*b*) the depositary:
   (*c*) the investment adviser:
   (*d*) the Botswana representative:
   (*e*) the Botswana distribution company, if different from (d) above:
   (*f*) the auditors:
   (*g*) the Registrar: and
   (*h*) the attorneys for the collective investment undertaking.

Characteristics of units or shares

4. Minimum investment (if any):

5. A description of the different types of units or shares, including their currency of denomination:

6. Form of certification:

7. Frequency of valuation and dealing, including dealing days:

Application and redemption procedures

8. The name(s) of the Botswana daily newspaper(s) in which prices will be published:

9. Procedure for subscribing/redeeming units or shares, and in the case of umbrella funds, conversion of units or shares:

10. The maximum interval between the request for redemption and the despatch of the redemption proceeds:

11. A summary of the circumstances in which dealing in units or shares may be deferred or suspended:

12. It shall be stated that no money should be paid to any intermediary in Botswana who is not a licensed dealer or investment adviser.

Distribution policy

13. The distribution policy and the approximate dates on which dividends (if any) will be paid (if applicable):

Fees and charges

14. (*a*) The level of all fees and charges payable by an investor, including all charges levied on subscription and redemption, and conversion (in the case of umbrella funds):
    (*b*) The level of all fees and charges payable by the collective investment undertaking, including fund administration fees, depositary fees and start-up expenses:

15. Disclosure of entitlement to brokerage or other transactions or benefits of any connected persons to the collective investment undertaking:

Taxation

16. Details of principal taxes levied on the collective investment undertaking's income and capital tax, if any, deducted on distribution to holders:

Reports and accounts

17. The date of the collective investment undertaking's financial year:

18. Particulars of what reports will be sent to registered holders and when. If there are bearer units in issue, information shall be given on where Botswana reports can be obtained.

Warnings

19. The following statements/warnings shall be prominently displayed in the offering document —
    (*a*) "Important — if you are in any doubt about the contents of this offering document, you should consult your stockbroker, bank manager, lawyer, accountant or other financial adviser",
    (*b*) a warning that the price of units on shares and the income from them (where income is distributed) may go down as well as up.

General information

20. A list of constitutive documents and an address in Botswana where they can be inspected free of charge or purchased.

21. The date of publication of the offering document.

22. A statement that the directors of the collective investment undertaking or fund administration accept responsibility for the information contained in the offering documents as being accurate as at the date of publication.

23. Details of collective investment undertakings not licenced shall not be shown in the offering document. Where names of such undertakings are mentioned, these shall be clearly marked as not licenced and not available to Botswana residents.

Termination of collective investment undertaking

24. A summary of the circumstances in which the collective investment undertaking can be terminated.

DATED this 2nd day of July, 1998.

P.H.K. KEDIKILWE,
Minister of Finance and Development Planning.

L2/7/300 I