



GOVERNMENT GAZETTE

OF THE

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CONTENTS

Page

GOVERNMENT NOTICE

No. 213	Determination of conditions relating to a central securities depository: Stock Exchanges Control Act, 1985	1
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Government Notice

MINISTRY OF FINANCE

No. 213

2022

DETERMINATION OF CONDITIONS RELATING TO A CENTRAL SECURITIES DEPOSITORY: STOCK EXCHANGES CONTROL ACT, 1985

Under section 4(1)(f) of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), I determine the conditions, as set out in the Schedule, with which a person contemplated in that section that intends to operate a central securities depository who, as a regular feature of that person's business, administers or holds in safe custody on behalf of any other person any investments in listed securities or any investments of which listed securities form part, must comply with.

I. SHIMI
MINISTER OF FINANCE

Windhoek, 13 July 2022

SCHEDULE**ARRANGEMENT OF CONDITIONS****PART 1****PRELIMINARY PROVISIONS**

1. Definitions
2. Objects of conditions

PART 2**PROHIBITIONS**

3. Prohibitions

PART 3**REGISTRATION**

4. Establishment of central securities depository
5. Application for approval and registration
6. Registration requirements
7. Approval and registration
8. Application for cancellation of registration or variation of conditions
9. Suspension, cancellation or variation of registration
10. Power of Registrar to take control
11. Approval of participant
12. Remedial action
13. Nominee companies
14. Remedial action for nominee companies
15. Principal office and principal officer
16. Professional indemnity and fidelity insurance cover
17. Appointment of auditor

PART 4**CUSTODY AND ADMINISTRATION OF SECURITIES**

18. Functions and duties of central securities depository
19. Functions and duties of participant
20. Depository rules
21. Amendments to depository rules
22. Issue of depository directives by central securities depository

PART 5**ADMITTED AND UNCERTIFICATED SECURITIES**

23. Uncertificated securities
24. Issue of uncertificated securities
25. Responsibilities of issuer of uncertificated securities
26. Deposit of securities
27. Ownership of securities
28. Verification of certificates and transfer to depositor
29. Trading of eligible securities
30. Restriction on trade in eligible securities
31. Receipt of certificates of eligible securities for safe custody
32. Liability of central securities depository for loss or damage of certificates
33. Withdrawal of immobilised securities

34. Withdrawal of uncertificated securities
35. Trading of securities withdrawn from central securities depository
36. Dematerialisation of securities
37. Central securities depository to maintain official record of depositors
38. Effect of reference to records in central securities depository
39. Participants and dealers in uncertificated securities to hold securities account
40. Issuance of statements of accounts

PART 6
SECURITIES TRANSACTIONS AND RECORDS

41. Evidence of transactions in respect of deposited securities
42. Provision of record of depositors to issuers
43. Depositor to be treated as member or debenture holder
44. Register of depositors
45. Termination and set-off
46. Public offer of securities
47. Corporate actions
48. Underwriters to open securities accounts
49. Pledge of securities to secure debt
50. Securities in or under suspension
51. Attachment

PART 7
SECURITY AND SECRECY

52. Protection of information
53. Permitted disclosures
54. Regulation of access to computer system

PART 8
GENERAL MARKET CONDUCT REQUIREMENTS

55. Codes of conduct
56. Declaration of practices as irregular or undesirable

PART 9
GENERAL MATTERS

57. Financial year
58. Name and change of name
59. Notification of certain matters
60. Preservation of records and accounts
61. Levy payments

PART 10
GOVERNANCE

62. Exemptions under this Part
63. Board of central securities depository
64. Duties of board
65. Duty to act in good faith
66. Audit committee
67. Central securities depository to provide assistance to Registrar
68. Annual financial statements and audit of records and accounts

PART 11
POWERS OF REGISTRAR

- 69. Powers of Registrar
- 70. Power to require production of records
- 71. Power to issue directives
- 72. Reporting obligations
- 73. Fees
- 74. Power to verify information
- 75. Late filing or payment
- 76. Administrative sanctions
- 77. Amalgamations and transfers
- 78. Disclosures to Registrar
- 79. Extensions of time and exemptions

PART 12
MISCELLANEOUS PROVISIONS

- 80. Settlement guarantee fund
- 81. Warranty
- 82. Recognition of trust

ANNEXURE

PART 1

PRELIMINARY PROVISIONS

Definitions

1. (1) In these conditions, a word or an expression to which a meaning has been assigned in the Act has that meaning and unless the context otherwise indicates -

“access”, in relation to a computer system, means the viewing, placing, editing or deleting of information on that computer system and the retrieval of information from that computer system;

“allottee” means a person to whom securities have been allotted, distributed or apportioned;

“bank” means a banking institution registered under the Banking Institutions Act, 1998 (Act No. 2 of 1998) and the Bank of Namibia;

“Bank of Namibia” means the Bank of Namibia established under the Bank of Namibia Act, 2020 (Act No. 1 of 2020);

“bearer security” means a type of investment in which no ownership information is recorded and the security is issued in physical form to the purchaser, with the holder presumed to be the owner and entitled to the coupon payments or otherwise under that security, and these mainly consist of share warranties;

“beneficial owner” means a natural person who holds or has an interest in securities issued by a company, through ownership, agreement, relationship or otherwise, alone or together with another person, but does not include any interest held by a person in a unit trust or collective investment scheme;

“book-entry” means an electronic or paperless system of tracking the ownership of uncertificated securities;

“business day” means any day of the week excluding a Saturday, Sunday or a public holiday as specified in or declared to be a public holiday under the Public Holidays Act, 1990 (Act No. 26 of 1990);

“certificate” means any physical document or written instrument which attests ownership of or title to a security and includes an instrument of transfer representing any security;

“certificated securities” means securities evidenced by a certificate;

“central securities account” means an account kept by a central securities depository for a participant that reflects the number or nominal value of securities of each kind deposited and all entries made in respect of such securities;

“central securities depository” means a public company approved by the Registrar and registered in terms of these conditions through which participants provide for the holding or control of the holding in custody and administration of securities or an interest in securities to facilitate the evidencing of ownership and the transferring of such securities or interests;

“central securities repository” means a collection of securities of the same kind held by a central securities depository;

“client” means a person to whom a participant of a central securities depository provides securities services, including a person that acts as an agent for another person in relation to those services in which case it will include the agent and exclude the other person if the contractual arrangement between the parties indicates this to be the intention;

“Companies Act” means the Companies Act, 2004 (Act No. 28 of 2004);

“company” means a company as defined in the Companies Act;

“computer system”, in relation to a central securities depository, means any device, together with input, output or other peripheral devices which is able or is intended to perform automatic processing, communication or storage of data, pursuant to a program including any depository link arrangement between central securities depositories;

“corporate body” means an incorporated body wherever or however incorporated and includes a company and a close corporation;

“customised link” means a depository link whereby a central securities depository that becomes a participant in the securities settlement system of another central securities depository is provided with additional specific services to the services normally provided by that central securities depository to participants in the securities settlement system;

“debt securities” means debentures, bonds, notes or other similar instruments representing or evidencing indebtedness, whether secured or otherwise;

“debenture” includes debenture stock, debenture bonds and any other securities of a company, whether constituting a charge on the assets of the company or not;

“dematerialisation” means the conversion of certificates so that ownership of, or title to, such securities exist only as accounting records;

“dematerialisation date” in relation to an uncertificated security, means the date determined by a central securities depository as being the last day on which a certificate representing such security must be recognised as *prima facie* evidence of ownership or title;

“deposit” means the placement of securities and includes effecting an entry in a securities account or a central securities account;

“deposited security” means a security standing to the credit of a security account which is transferable by way of book-entry in the record of depositors and a security in a securities account that is in suspense;

“depositor” means a holder of a securities account which is kept by or on behalf of a client by a participant that reflects the number or nominal value of securities deposited and all entries made in respect of such securities;

“depository agent”, in relation to a central securities depository, means a person appointed to be an agent of that central securities depository;

“depository directive” means a directive issued by a central securities depository in accordance with its depository rules;

“depository link” means an -

- (a) arrangement between central securities depositories whereby one central securities depository becomes a participant in the securities settlement system of another central securities depository in order to facilitate the transfer of securities from the participants of the latter central securities depository to the participants of the former central securities depository; or
- (b) arrangement whereby a central securities depository accesses another central securities depository indirectly via an intermediary,

and a depository link includes a standard link, a customised link, an indirect link and an interoperable link;

“depository rules” means the rules made by a central securities depository in accordance with these conditions or any other law relating to the custody and administration of securities;

“document” includes a book, record, security or account, and any information stored or recorded physically, electronically, photographically, magnetically, mechanically, electro-mechanically, optically or by any other means;

“eligible security” means a security determined by a stock exchange to be deposited with a central securities depository;

“entry” means the recording of any deposit, withdrawal, transfer, attachment, pledge to secure a debt or other transaction in respect of securities;

“financial crime” means any of the following:

- (a) an offence that involves theft, fraud, forgery or uttering a forged document, perjury or an offence under the Anti-Corruption Act, 2003 (Act No. 8 of 2003);
- (b) financing, facilitating or being involved in financing or facilitating an offence relating to a financial institution;
- (c) dealing with the proceeds of an offence, whether or not related to a financial institution;
- (d) an offence under the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004);

- (e) the funding of, or any offence relating to the funding of, terrorism under the Prevention and Combating of Terrorist and Proliferation Activities Act, 2014 (Act No. 4 of 2014); or
- (f) any offence under the Financial Intelligence Act;

“financial industry bodies” means firms and institutions that provide financial services to commercial and retail customers, industries including banks, investment companies and insurance companies;

“financial institution” means a financial institution as defined in section 1 of the NAMFISA Act;

“financial instrument” means any contract that gives rise to a financial asset of one entity and a financial liability or equity instrument of another entity;

“Financial Intelligence Act” means Financial Intelligence Act, 2012 (Act No. 13 of 2012);

“fit and proper” means the fit and proper requirements as described in the Annexure;

“immobilised securities” means securities stored collectively in order to eliminate physical movement of certificates or documents of ownership when transfer of ownership occurs, where the underlying physical certificates have been deposited with and are held by a central securities depository;

“indirect link” means an arrangement between a central securities depository and a third party that is a participant in the securities settlement system of another central securities depository, where such depository link is set up by the former central securities depository to facilitate the transfer of securities to its participants from the participants of the latter central securities depository;

“information” includes data recorded in a form which can be processed by equipment operating automatically in response to instructions given for a particular purpose;

“institutional investor” means a person whose ordinary course of business is to hold, manage or invest funds related to retirement benefits, insurance contracts, mortgage schemes, savings schemes and any funds or scheme in the nature of a collective investment scheme;

“interoperable link” means a depository link whereby central securities depositories agree to establish mutual technical solutions for settlement in the securities settlement systems that they operate;

“intraday” means trading securities in a single day only during the market’s regular business hours;

“issuer” means a person that borrows or raises funds through the sale of securities and any person performing the functions of a registrar for the issuer in respect of the security;

“key responsible person” includes a shareholder or other owner who controls the applicant, directors of the board, the principal officer, chief executive officer and other members of senior management of the central securities depository;

“listed” in relation to a listed security means admitted to the official list of a stock exchange or a list specifying all securities which have been admitted for listing on that stock exchange;

“member” in relation to -

- (a) a stock exchange, means a stock-broker or any person who is admitted to membership of the stock exchange and is under the rules of that stock exchange authorised to carry on the business of buying and selling securities on behalf of other persons or on his own account; and

- (b) a company, means a person who is recognised as a member of the company under the Companies Act;

“Minister” means the Minister responsible for finance;

“money market instrument” means a financial instrument that has a maturity or redemption date of one year or less at the time of issuance;

“NAMFISA” means the Namibia Financial Institutions Supervisory Authority established by section 2 of the NAMFISA Act;

“NAMFISA Act” means the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001);

“NAMFISA Appeal Board” means the appeal board established under section 19 of the NAMFISA Act;

“NAMFISA ERS” means the Electronic Regulatory System which facilitates communication between NAMFISA and the regulated industry;

“nominee company” means a company appointed by a participant that acts as the registered holder of securities or an interest in securities on behalf of other persons;

“participant” means a company that holds in custody and administers securities or an interest in securities and that has been accepted by a central securities depository as a participant in that central securities depository;

“person” means a natural person or a group of natural persons, a partnership, an estate, a trust, a foreign company or another form of corporate body or legal entity or juristic person recognised by law as having rights and obligations;

“pledge” includes a charge, a cession, a mortgage or any other form of encumbrance;

“record”, in addition to a record in writing, includes -

- (a) a photograph;
- (b) a disc, tape, sound-track or other device in which sounds or other data, that are not visual images, are embodied so as to be capable, with or without the aid of some other instrument, of being reproduced from the disc, tape, sound track or other device;
- (c) a film, tape or other device on which visual images are embodied so as to be capable, with or without the aid of some other instrument, of being reproduced from it and any reference to a copy of a record includes a film, tape or other device;
- (d) in the case of a record falling within paragraph (b) but not paragraph (c) of this definition, a transcript of the sounds or other data embodied in it;
- (e) in the case of a record falling within paragraph (c) but not paragraph (d) of this definition, a still reproduction of the images in it therein, whether enlarged or not; and
- (f) in the case of a record falling within both paragraphs (b) and (c) of this definition, the transcript of the sounds or other data embodied therein together with the still reproduction of the images embodied therein;

“register of depositors” means a record maintained by a central securities depository and contains specified particulars of the depositor;

“Registrar” means the registrar of stock exchanges referred to in section 2 of the Act;

“safeguarding” means the activities performed by a participant -

- (a) for the purposes of holding securities or funds in custody on behalf of another person; or
- (b) where the participant is accountable to another person for a third party’s holding of securities or funds in custody on behalf of that other person,

and includes the administration of matters incidental to those securities or funds;

“securities” means securities as defined in the Act and the Unit Trusts Control Act, 1981 (Act No. 54 of 1981);

“securities account” means an account kept by a participant for its own account, or for a client, or a nominee company for a person for whom it acts as a nominee, which reflects the number or nominal value of securities of each kind held for its own account or on behalf of that client or person, as the case may be, and all entries made in respect of such securities, and forms part of the relevant company’s register of members as referred to in the Companies Act;

“securities clearing house” means a public company that is retained by a stock exchange to provide securities clearing services to that stock exchange;

“securities clearing services” means securities clearing services or securities settlement services or both securities clearing and securities settlement services provided to a registered exchange by a securities clearing house;

“securities of the same kind” means securities issued by the same issuer and of the same class;

“securities repository” means a collection of securities of the same kind held by a participant;

“securities services” means -

- (a) to exercise discretion in buying or selling securities or in exercising any rights attached to those securities on behalf of another person;
- (b) the safeguarding of securities on behalf of another person; or
- (c) the safeguarding of another person’s funds intended for the purchase of securities on behalf of that other person;

“settlement” means to discharge the obligations arising from a transaction in securities;

“settlement bank” means a bank designated by the central securities depository and appointed by a participant to settle its transactions;

“share”, in relation to a company, means a share in the share capital of that company and includes stock, and in relation to an offer of shares for subscription or sale, includes a share and a debenture of a company and any rights or interests in a company or to that share or debenture;

“stock exchange” means a stock exchange as defined in the Act;

“standard link” means a depository link whereby a central securities depository becomes a participant in the securities settlement system of another central securities depository under the same terms and conditions as applicable to any other participant in the securities settlement system operated by the latter;

“sub-register” means the record of uncertificated securities administered and maintained by a participant, which forms part of the register of members of the company concerned;

“T+x” for settlement purposes means the trading day plus x number of business days;

“the Act” means the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985);

“these conditions” include any directive issued by the Registrar, code of conduct issued by the Registrar and any notice given, approval or exemption granted or condition imposed in terms of these conditions;

“trading day” means a day on which the market is open for trading and when a trading day ends, all trading ends and is frozen in time until the next trading day begins;

“uncertificated securities” means securities that are not evidenced by a certificate or written instrument and are transferable by book-entry without a certificate or a written instrument, resulting in the original certificate or other written instrument evidencing ownership or title no longer being recognised as *prima facie* evidence of ownership or title; and

“user” means a participant or its nominee, a depository agent, an issuer, a stock exchange, a clearing house of a stock exchange or another person that may be determined by the Registrar who may be given access to a computer system of a central securities depository.

(2) Where in these conditions, reference is made to days within which anything is to be done, Saturdays, Sundays and public holidays must be excluded in calculating the days.

Objects of conditions

2. (1) These conditions lay down the requirements for the establishment, organisation and conduct of a central securities depository and the depository rules to promote a safe, efficient and smooth settlement of financial instruments.

(2) These conditions apply to the settlement of transactions in all financial dealings and activities of a central securities depository, unless specified otherwise.

PART 2 PROHIBITIONS

Prohibitions

3. (1) A person may only operate or act as a central securities depository, if that person is -

(a) approved by the Registrar; and

(b) registered under these conditions to operate or act in the applicable capacity under these conditions.

(2) A person who is not approved by the Registrar and registered under these conditions may not -

- (a) purport to be a central securities depository;
 - (b) behave in a manner or use a name or description which is calculated to indicate or likely to lead other persons to believe or which suggests, signifies or implies that the person is a central securities depository; or
 - (c) behave in a manner calculated to indicate that there is some connection between that person and a central securities depository.
- (3) A central securities depository may not purchase, acquire or deal in uncertificated securities as principal other than for a purpose and in a manner that may be permitted by the Registrar in writing.
- (4) A person who contravenes or fails to comply with subparagraph (1) or (2) commits an offence and on conviction is liable to a fine not exceeding N\$2000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

PART 3 REGISTRATION

Establishment of central securities depository

4. A central securities depository may only be established or operated by a public company incorporated in terms of the Companies Act.

Application for approval and registration

5. (1) A public company that intends to establish or operate a central securities depository must apply in writing to the Registrar by completing and submitting the application form determined by the Registrar.

- (2) The application form referred to in subparagraph (1) must be accompanied by -
 - (a) certified copies of the memorandum of association and articles;
 - (b) the proposed depository rules;
 - (c) the business plan approved by the applicant's board of directors;
 - (d) the organisational structure of the applicant;
 - (e) if available, a copy of its audited annual financial statements as at its latest financial year end;
 - (f) projected income statement, balance sheet and cash flow statement for at least a three year period;
 - (g) a schedule illustrating the funding provisions for anticipated supervisory responsibilities over the projected financial period referred to under item (f);
 - (h) a statement specifying the critical assumptions made in the preparation of budgets and the sources from which the applicant will derive its funding;
 - (i) where arrangements have been made for the funding of any temporary shortfall in available cash resources, a statement setting out the extent and terms of the arrangements;

- (j) copies of the public notices referred to under subparagraph (3);
- (k) a certified copy of the applicant's income tax registration certificate, and if applicable, the value added tax registration certificate, issued by the Ministry of Finance;
- (l) certified copies of each key responsible person's police clearance certificate or certificate of conduct, issued by the Namibian Police no longer than 12 months prior to the date of application;
- (m) certified copies of each key responsible person's identity document or passport;
- (n) copies of the updated curriculum vitae of each key responsible person, certified copies of each key responsible person's educational qualifications and proof of his or her employment history and experience;
- (o) proof of a bank account in the name of the applicant from a banking institution;
- (p) a certified copy of the appointment letter of the applicant's auditor;
- (q) a copy of the applicant's anti-money laundering compliance framework or policy in accordance with the Financial Intelligence Act;
- (r) proof of payment of the required application fee; and
- (s) such further information that the Registrar on reasonable grounds may require in a particular case.

(3) Before making an application for registration referred to in subparagraph (1), the applicant must give notice of the proposed application in two newspapers circulating widely in Namibia at the expense of the applicant, stating -

- (a) the name of the applicant;
- (b) the place where the proposed depository rules may be inspected by members of the public; and
- (c) the manner in which and the period within which, which period may not be less than 21 business days, objections to the application or the proposed depository rules may be lodged with the Registrar.

(4) The application form must be submitted to the Registrar both in hard copy and electronically on the NAMFISA ERS.

Registration requirements

6. (1) The Registrar must grant approval in respect of an application in terms of paragraph 5 and register the applicant if he or she is satisfied that -

- (a) the memorandum of association and articles and proposed depository rules of the applicant are consistent with these conditions;
- (b) the establishment or operation of the central securities depository enhances the positive development of the securities market in the country by promoting a safe, efficient and smooth settlement of financial instruments;

- (c) the granting of the approval and registration is in the public interest;
- (d) the applicant has the attributes reasonably necessary and adequate to -
 - (i) provide the financial services in question with professional integrity, prudence, proper skill and due diligence;
 - (ii) maintain a sound financial position and not cause or further instability in the financial system of Namibia; and
 - (iii) comply with these conditions;
- (e) the direct or indirect control of the applicant is not likely to be contrary to the interest of consumers of the financial services concerned;
- (f) the applicant will be in a position to ensure that its organisational or group structure will not hinder effective supervision by the Registrar;
- (g) the applicant will be in a position to ensure compliance with the depository rules by its participants and clients;
- (h) the applicant and every key responsible person of the applicant are fit and proper as described in the Annexure;
- (i) the name under which the applicant proposes to conduct business, or a translation, shortened form or derivative of that name is not in contravention of paragraph 58;
- (j) the applicant has professional indemnity insurance or fidelity insurance cover pursuant to paragraph 16;
- (k) the applicant has, at minimum, paid-up share capital adequate for employment in the business and will maintain liquid resources that cover 13 weeks of annual expenditure at all times;
- (l) the applicant has submitted any other information which, in the opinion of the Registrar, is necessary to assess the application and such information has been found satisfactory by the Registrar; and
- (m) the applicant has complied with any other requirements contained in these conditions.

Approval and registration

7. (1) If, after consideration of any objections received as a result of the notice referred to in paragraph 5(3), the Registrar is satisfied that the applicant complies with the requirements of paragraph 6, the Registrar must approve and register the applicant as a central securities depository and approve its proposed depository rules.

(2) Upon registration of the applicant, the Registrar must issue to the applicant a certificate of registration, specifying the -

- (a) principal office of the applicant in Namibia;
- (b) places in Namibia where the applicant may operate; and

(c) financial services in securities that may be provided by the applicant.

(3) The Registrar may impose any conditions on the registration of the applicant as he or she considers necessary, having regard without limitation, to all the facts and information available to him or her pertaining to the applicant.

(4) If an application is refused by the Registrar or is granted subject to conditions, the Registrar must -

(a) advise the applicant of the refusal or conditions by giving notice to the applicant containing the reasons for the refusal or the conditions; and

(b) give the applicant a reasonable opportunity to be heard by specifying a period of not less than 21 business days during which the applicant may make representations in writing to the Registrar.

(5) A central securities depository must comply with the conditions subject to which it was registered.

(6) A central securities depository registered under subparagraph (1) is regarded as a financial institution for purposes of -

(a) the Inspection of Financial Institutions Act, 1984 (Act No. 38 of 1984);

(b) the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984); and

(c) the NAMFISA Act.

Application for cancellation of registration or variation of conditions

8. (1) A central securities depository may apply to the Registrar for cancellation of its registration granted under paragraph 7 or for a variation to the conditions subject to which that registration was granted.

(2) An application made under subparagraph (1) must be made in writing to the Registrar and must be accompanied by such information as the Registrar may direct.

(3) Paragraph 7 applies with the changes required by the context to an application for a variation of conditions referred to in subparagraph (1).

(4) If the Registrar is of the opinion that it is reasonable to do so and not against the public interest, the Registrar may, subject to paragraph 10, by written notice to the applicant concerned -

(a) cancel the registration; or

(b) vary the conditions of registration, including the imposition of additional conditions.

(5) The Registrar must make public any cancellation of registration or variation of conditions of registration under subparagraph (5) and the reasons for it by notice in the *Gazette* and through any other appropriate public medium determined by the Registrar.

Suspension, cancellation or variation of registration

9. (1) The Registrar may take any of the actions set out in subparagraph (3), if the Registrar finds that a central securities depository -

- (a) has made a material misrepresentation or failed to provide information that was materially relevant in its application for registration;
- (b) has failed to comply with these conditions, the Act or relevant law;
- (c) no longer meets the requirements for registration;
- (d) has provided the financial services without professional integrity, prudence, proper skill and due diligence;
- (e) is in an unsound financial position;
- (f) has failed to comply with a directive, request or requirement by the Registrar issued under these conditions;
- (g) has failed to give effect to a decision of the NAMFISA Appeal Board;
- (h) has ceased to operate or has failed to commence operations within a reasonable time after being registered;
- (i) is involved in a financial crime; or
- (j) the key responsible person or persons or the central securities depository no longer meet the fit and proper requirements or has engaged in conduct identified in the depository rules as misconduct.

(2) In addition to the reasons set out in subparagraph (1), the Registrar may take any of the actions set out in subparagraph (3) if the Registrar is, after an inspection of the central securities depository's affairs, satisfied on reasonable grounds that the manner in which it is operated is -

- (a) not in the interests of participants and clients; or
- (b) defeating the objects of these conditions.

(3) If the Registrar is satisfied that any of the circumstances described in subparagraph (1) or (2) exist, the Registrar may, subject to paragraph 10, take any of the following actions with respect to the central securities depository -

- (a) suspend its registration;
- (b) cancel its registration;
- (c) vary the conditions of its registration, including the imposition of additional conditions; or
- (d) take any other steps that the Registrar may consider necessary.

(4) The Registrar must give written notice to the central securities depository of the intention to take any action referred to in subparagraph (3), together with the reasons for it.

(5) The Registrar must give the central securities depository a reasonable opportunity to be heard on any action referred to in subparagraph (3) by specifying a period of not less than 21 business days during which the central securities depository may make representations to the Registrar on the matter.

(6) The Registrar may provisionally suspend the registration or take control of the business of a central securities depository without giving notice and an opportunity to be heard pursuant to subparagraph (5), if the Registrar is satisfied on reasonable grounds that it is urgently necessary to do so in order to prevent or mitigate damage to the interests of participants and their clients, subject to any conditions as the Registrar may impose.

(7) In the case of the application of subparagraph (6) the Registrar must -

- (a) give the central securities depository notice an opportunity to be heard and make representations as soon as reasonably possible; and
- (b) having considered any representations received, determine whether the provisional suspension should be continued until further conditions can be imposed or the registration cancelled.

(8) The Registrar must give notice in the *Gazette* and through any other appropriate public medium determined by the Registrar of any suspension or cancellation of registration, variation of conditions of registration or any other steps taken under this condition and the reasons for taking the action.

Power of Registrar to take control

10. If the registration of a central securities depository is suspended or cancelled under paragraph 8 or 9, the Registrar must take steps and may impose conditions as are necessary to achieve the objects of these conditions, which steps may include -

- (a) the transfer of the business of the central securities depository to another central securities depository or appropriate institution;
- (b) the assumption of responsibility for one or more of the functions of the central securities depository; or
- (c) the winding-up of the central securities depository.

Approval of participant

11. (1) A central securities depository -

- (a) may accept a participant to hold securities or an interest in securities in that central securities depository in accordance with its depository rules; and
- (b) must timeously notify the Registrar of the acceptance of that participant by submitting a copy of the list of such participants maintained by the central securities depository to the Registrar.

(2) A person may only act as participant of a central securities depository when such person has duly been accepted by that central securities depository as a participant.

(3) The central securities depository must provide the Registrar with other information and material regarding the participants on its list as may be specified by the Registrar.

(4) A central securities depository must submit to the Registrar an update of the list referred to in subparagraph (1) when there has been an addition or removal of a participant within seven business days of that addition or removal.

(5) If a central securities depository removes a participant from the list referred to in subparagraph (1), the central securities depository must at the same time as submitting the update of the list as required by subparagraph (4), provide the Registrar with a statement indicating the reason that the participant has been removed from the list.

(6) A central securities depository may not remove a participant from the list as referred to in subparagraph (5) unless the central securities depository has given the participant concerned the reasons for the proposed removal and a reasonable opportunity to be heard.

Remedial action

12. (1) The Registrar may take any of the actions set out in subparagraph (2) if the Registrar, acting reasonably, finds that any of the following circumstances exist with respect to a participant -

- (a) the copy of the list submitted under paragraph 11 or the accompanying information and material contained information concerning the participant that was not materially accurate or omitted information that was materially relevant;
- (b) the participant no longer meets the requirements for a participant;
- (c) the participant has suspended the activities for a period of at least 12 months;
- (d) the participant is not in compliance with a requirement of these conditions; or
- (e) the participant has engaged in conduct of a kind that has been identified as misconduct in the depository rules.

(2) If the Registrar is satisfied that any of the circumstances described in subparagraph (1) exist, the Registrar may direct the central securities depository concerned to take remedial action, including without limitation -

- (a) directing the central securities depository to provide further information with respect to the participant;
- (b) directing the central securities depository to provide further training for the participant;
- (c) directing the central securities depository to take disciplinary action against the participant;
- (d) requiring an undertaking from the central securities depository, that it will, in order to comply with these conditions, take specific action or refrain from taking specific action; or
- (e) directing the central securities depository to undertake specific actions or refrain from specific actions.

(3) The Registrar may direct the central securities depository to remove the name of a participant from the list referred to in subparagraph 11(1) or (4) if on receipt of evidence that the required action has been taken pursuant to subparagraph (2), the Registrar, acting reasonably, finds that any of the circumstances referred to in subparagraph (1) continue to exist.

(4) The Registrar must give the central securities depository the reasons for the proposed removal and a reasonable opportunity to be heard before directing that the name of a participant be removed from a list pursuant to subparagraph (3).

(5) If a central securities depository fails to remove the name of a participant from the list when required to do so by the Registrar, the Registrar may, after giving the participant a reasonable opportunity to be heard, remove the name of the participant from the list.

(6) A participant that is removed from a list by a central securities depository or the Registrar may not act as a participant or be included on any list, a copy of which is submitted under paragraph 11 for such period as the Registrar may determine.

(7) A participant who continues to operate after being removed from a list under subparagraph (6), commits an offence and is liable on conviction to a fine not exceeding N\$2000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

Nominee companies

13. (1) A nominee company of a participant must be approved by the central securities depository in terms of the depository rules and comply with the requirements set out in the depository rules.

(2) The Registrar may specify requirements in relation to nominee companies.

(3) A central securities depository must, within 14 business days of approval of a nominee company under subparagraph (1), submit a list of approved nominee companies to the Registrar.

(4) The Registrar must maintain a list of all nominee companies approved under the depository rules and sent to the Registrar pursuant to subparagraph (3).

Remedial action for nominee companies

14. (1) A central securities depository may take any of the actions set out in subparagraph (2) if the central securities depository, acting reasonably, finds that any of the following circumstances exist with respect to an approved nominee company -

- (a) any of the requirements set out in the depository rules have not been met;
- (b) the nominee company no longer meets the requirements for an approved nominee company;
- (c) the nominee company has suspended its activities for a period of at least 12 months;
- (d) the nominee company is not in compliance with a requirement of these conditions;
or
- (e) the nominee company has engaged in misconduct.

(2) If the central securities depository is satisfied that any of the circumstances described in subparagraph (1) exist, the central securities depository may take, or direct the participant of which the nominee company is an approved nominee to take, remedial action, including without limitation -

- (a) directing the participant to provide further information with respect to the nominee company;
- (b) directing the participant to provide further training for the nominee company;
- (c) directing the participant to take disciplinary action against the nominee company;
- (d) directing the participant to make changes to the code of conduct and systems as provided for in the depository rules;
- (e) requiring an undertaking from the participant or from the nominee company or from both, that it will take specific action or refrain from taking specific action; or
- (f) directing the participant or the nominee company or both to take specific actions or refrain from taking specific actions.

(3) The central securities depository may direct the participant to withdraw its acceptance of the company as its nominee company if on receipt of evidence that the required action has been taken pursuant to subparagraph (2), the central securities depository, acting reasonably, finds that any of the circumstances referred to in subparagraph (1) continue to exist.

(4) The central securities depository must give the participant and the nominee company written reasons for the proposed action and a reasonable opportunity to be heard, before directing the participant to take the action pursuant to subparagraph (3).

(5) If a participant fails to withdraw its acceptance of the company as its nominee company when required to do so by the central securities depository, the central securities depository may, after giving the nominee company a reasonable opportunity to be heard, withdraw its approval of the nominee company.

(6) The central securities depository must inform the Registrar of any direction issued to a participant pursuant to subparagraph (3) or of the withdrawal of its approval of a nominee company pursuant to subparagraph (5).

(7) A person who continues to operate, or engage in, the business of a nominee company after the cancellation of registration under subparagraph (2), commits an offence and is liable on conviction to a fine not exceeding N\$2 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

Principal office and principal officer

- 15.** (1) Every central securities depository must -
- (a) have a principal office in Namibia where it must hold and maintain accounting records and such other documents as may be specified by the Registrar; and
 - (b) appoint to be its principal officer in Namibia, a fit and proper person who is -
 - (i) a Namibian citizen or a holder of permanent residence permit issued in terms of the Immigration Control Act, 1993(Act No. 7 of 1993); and

(ii) ordinarily resident in Namibia.

(2) Despite subparagraph (1)(b)(i), the Registrar may, in exceptional circumstances, grant permission that a principal officer referred to in that subparagraph may, subject to the Immigration Control Act, 1993 (Act No. 7 of 1993), for such period as may be determined by the Registrar, be a person other than a Namibian citizen or permanent resident.

(3) After the appointment of a principal officer pursuant to subparagraph (1)(b), the central securities depository must, within the period of seven business days, in writing notify the Registrar of the appointment.

(4) The Registrar may direct the central securities depository to appoint another person to be the principal officer on the grounds that a principal officer is not a fit and proper person and after giving the central securities depository and the principal officer a reasonable opportunity to be heard.

(5) When a principal officer resigns or the appointment of a principal officer is terminated by the central securities depository, or by the expiry of a contract of employment, the central securities depository must, within seven business days, in writing notify the Registrar and submit to the Registrar a written statement of the reasons for the termination or, in the opinion of the central securities depository, the reasons for the resignation.

(6) The principal officer referred to in subparagraph (1)(b) must be a member of the board of the central securities depository but the principal officer may not serve as chairperson of the board.

(7) The principal officer of a central securities depository is authorised to act on behalf of the central securities depository to ensure compliance with these conditions and in any case where a person, including the Registrar, communicates with that central securities depository that person may do so by addressing the communication to the principal officer.

(8) Process in any legal proceedings may be served on the central securities depository by serving a copy thereof at its principal office.

(9) A person who contravenes or fails to comply with subparagraph (3) commits an offence and is on conviction liable to a fine not exceeding N\$2 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

Professional indemnity and fidelity insurance cover

16. (1) A central securities depository must maintain indemnity insurance or fidelity insurance cover or both such insurances sufficient to cover the risk of losses due to -

- (a) fraud;
- (b) dishonesty;
- (c) negligence; or
- (d) any other dishonest acts or breaches of professional duty,

of its depository agents, employees, directors of the board or representatives.

(2) The nature and extent of the insurance contemplated in subparagraph (1) must, subject to subparagraph (4), be adequate and appropriate to the level and size of the business operations undertaken by the central securities depository.

(3) If the central securities depository forms part of a group of companies, the professional indemnity insurance or fidelity insurance cover may be obtained at group level, with the requirement that -

- (a) each entity that is covered by the group policy must be clearly identified in the policy documentation;
- (b) the amount of cover must be sufficient to cover the amounts required for each individual entity's situation; and
- (c) each entity that is covered must have a certified copy of the policy documentation available for scrutiny by the Registrar should it be required.

(4) The minimum professional indemnity or fidelity insurance cover must be N\$1 000 000 or any such amount as may be determined by way of written notice from time to time by the Registrar.

Appointment of auditor

17. (1) Every central securities depository must appoint and at all times have an auditor or firm of auditors to be the auditor for its business in Namibia.

- (2) A central securities depository may not appoint as its auditor -
 - (a) an auditor who is; or
 - (b) a firm of auditors, any member of which is,

a director of the board, officer, employee or shareholder or other owner of that central securities depository or who has any financial interest in that central securities depository.

- (3) An auditor appointed under subparagraph (1) -
 - (a) must perform the functions and duties assigned to;
 - (b) must exercise the powers conferred on; and
 - (c) is subject to the obligations imposed on,

an auditor by this paragraph.

(4) If a firm of auditors is appointed as auditor of a central securities depository, the firm of auditors and the central securities depository must jointly designate the member of the firm who will conduct the audit on behalf of the firm.

(5) A natural person or firm of auditors is qualified to be the auditor of a central securities depository if -

- (a) in the case of a natural person, that person is an auditor who -
 - (i) is registered under the Public Accountants' and Auditors' Act, 1951 (Act No. 51 of 1951) and admitted to membership of the Institute of Chartered Accountants of Namibia referred to in that Act;
 - (ii) has at least five years' experience at a senior level in performing audits of a financial institution;

- (iii) is ordinarily resident in Namibia; and
 - (iv) is independent of the central securities depository; and
- (b) in the case of a firm of auditors, the member of the firm designated pursuant to subparagraph (4) is qualified in accordance with item (a).
- (6) After the appointment of an auditor or the designation of a member of a firm of auditors who will conduct the audit, the central securities depository must, within seven business days, in writing notify the Registrar of the appointment or designation.
- (7) The Registrar may, on the grounds that the appointment of the auditor is not in compliance with subparagraph (2) or the auditor is not independent, and after giving the central securities depository and the auditor a reasonable opportunity to be heard, direct the central securities depository to appoint some another auditor or firm of auditors to be the auditor.
- (8) If an auditor resigns, the appointment of an auditor terminates due to the expiry of the contract or the appointment of an auditor is terminated by a central securities depository for whatever reason -
 - (a) the central securities depository must, within seven business days, notify the Registrar in writing and submit to the Registrar a written statement of the reasons for the termination or, in the opinion of the central securities depository, the reasons for the resignation; and
 - (b) the auditor must, within seven business days, submit a written statement to the Registrar of the reasons for the resignation or, in the opinion of the auditor, the reasons for the termination, stating any matter relating to the affairs of the central securities depository of which the auditor became aware in the performance of the duties as auditor, which in the opinion of the auditor may be of concern to the Registrar.
- (9) The auditor of a central securities depository may -
 - (a) at all times access the accounting records and other books and records of that central securities depository;
 - (b) require from the directors of the board, the principal officer or other officers the information and explanations that the auditor considers necessary for the carrying out of the duties of auditor; and
 - (c) attend and speak at any meeting of the board of the central securities depository.
- (10) Whenever the auditor of a central securities depository furnishes copies of a report or other document or particulars required under the Public Accountants' and Auditors' Act (Act No. 51 of 1951) or any other law in respect of that central securities depository, the auditor must also furnish a copy to the Registrar.
- (11) The auditor of a central securities depository must undertake such other examination of the affairs of the central securities depository as may reasonably be required by the Registrar at the cost of the central securities depository.
- (12) The auditor of a central securities depository must audit the annual financial statements of the central securities depository in accordance with International Financial Reporting Standards and report on those financial statements, except as otherwise specified by the Registrar.

(13) An auditor must report in writing to the board and principal officer of the central securities depository, with a copy to the Registrar, on any transactions or conditions that have come to the attention of the auditor which, in the opinion of the auditor, could significantly and adversely impact the financial position of the central securities depository, whether or not those transactions or conditions are reflected in the financial statements or annual return of the central securities depository.

(14) An auditor of a central securities depository will not incur any liability to any person for having furnished, in good faith, to the Registrar information on any irregularity or other matter of which the auditor has become aware in the capacity of auditor of the central securities depository, and which, in the opinion of the auditor, may be of concern to the Registrar.

(15) Subject to the auditing standards referred to in subparagraph (12), the auditor of a central securities depository may rely on the work performed by the valuator, if any, of the central securities depository, in expressing an opinion with respect to the financial affairs of the central securities depository under these conditions or any other law.

(16) An auditor must send a copy of any report or other document referred to in this paragraph to the valuator, if any, of the central securities depository.

PART 4 CUSTODY AND ADMINISTRATION OF SECURITIES

Functions and duties of central securities depository

- 18.** (1) A central securities depository -
- (a) must issue and enforce the depository rules;
 - (b) must supervise compliance by participants with these conditions and depository rules;
 - (c) may issue depository directives;
 - (d) subject to prior approval of the Registrar, may amend or suspend the depository rules;
 - (e) may hold all securities of the same kind deposited with it by a participant collectively in a separate central securities repository;
 - (f) must maintain a central securities account with due regard to the interests of participants and their clients;
 - (g) must notify a participant in writing or as otherwise agreed to by the participant of an entry made in the participant's central securities account;
 - (h) must facilitate the deposit of securities into the central securities depository;
 - (i) must facilitate the deposit and withdrawal of certificates in respect of securities deposited in the central securities depository;
 - (j) must facilitate the dematerialisation of securities;
 - (k) must establish a proper and efficient system for the verification, inspection, identification and recording of book-entry securities with the central securities depository;

- (l) must facilitate the efficient collection of fees and other charges that may be required;
- (m) must guard against falsification of any records or accounts required to be kept or maintained under these conditions;
- (n) must maintain central securities accounts with due regard to the interests of participants and their clients;
- (o) must balance and reconcile the aggregate of the central securities accounts with the records of the relevant issuer -
 - (i) in respect of each kind of certificated security, at least once every six months;
 - (ii) in respect of each kind of uncertificated security -
 - (aa) if that aggregate has not changed, at least once every month;
 - (bb) if that aggregate has changed, on the trading day after such change;
- (p) must administer and maintain a record of uncertificated securities deposited with it;
- (q) is entitled to access the records of uncertificated securities administered and maintained by its participants;
- (r) must disclose to participants and issuers the fees and charges required by it for its services;
- (s) must on request disclose -
 - (i) to the Registrar information about the securities held by a participant in a central securities account;
 - (ii) to an issuer information about the securities issued by that issuer and held by participants in central securities accounts;
- (t) may be retained as a securities clearing house by a stock exchange if the central securities depository also performs the functions of a securities clearing house;
- (u) must, if a participant ceases to be a participant, notify the Registrar in writing pursuant to paragraph 11(4) and if a nominee company ceases to be a nominee company, notify the Registrar pursuant to paragraph 13(4);
- (v) must conduct its business in a prudent manner and with due regard to the rights and obligations of participants, clients and issuers;
- (w) must notify the Registrar immediately of an intention to cease operations or if it commences an insolvency proceeding or an insolvency proceeding is commenced against it;
- (x) must designate one or more banks as a settlement bank for the settlement of funds in respect of transactions cleared through the central securities depository;
- (y) must comply with the Payment System Management Act, 2003 (Act No. 18 of 2003); and

(z) must perform such other functions as the Registrar may from time to time determine.

(2) The Registrar may assume responsibility for one or more of the functions of a central securities depository referred to in subparagraph (1) if the Registrar considers it necessary in order to achieve the objects of these conditions.

(3) The Registrar must, before assuming responsibility under subparagraph (2) -

(a) inform the central securities depository of the Registrar's intention to assume responsibility;

(b) give the central securities depository the reasons for the intended assumption; and

(c) call upon the central securities depository to show cause within a period specified by the Registrar why responsibility should not be assumed by the Registrar.

Functions and duties of participant

19. A participant must -

(a) comply with all the applicable depository rules and the functions approved by the central securities depository;

(b) deposit securities that are deposited with it by a client, with a central securities depository, unless the client expressly directs otherwise in writing;

(c) maintain a securities account for a client in respect of deposited securities;

(d) reflect the number or nominal value of each kind of securities deposited in a securities account;

(e) administer and maintain a record of all securities deposited with it in accordance with the depository rules;

(f) record all securities of the same kind deposited with it in a sub-register;

(g) disclose to clients and issuers the fees and charges required by it for its services;

(h) notify a client in writing or as otherwise agreed to by the client of an entry made in the client's securities account;

(i) on request disclose -

(i) to the central securities depository or the Registrar, information about the securities recorded in a securities account; and

(ii) to an issuer, information about the securities issued by that issuer and recorded in a securities account;

(j) maintain a central securities account with a central securities depository, and may -

(i) deposit securities with or withdraw securities from that central securities depository; or

- (ii) transfer or pledge an interest in securities through that central securities depository and in the case of securities held on behalf of clients, transfer or pledge interests in those securities in accordance with the instructions of the clients;
- (k) exercise the rights in respect of securities deposited by it with a central securities depository in its own name on behalf of a client when so instructed by the client;
- (l) balance and reconcile the aggregate of the securities accounts with the central securities account on a daily basis; and
- (m) perform such other functions as the Registrar may direct from time to time.

Depository rules

20. (1) The depository rules of a central securities depository must be consistent with these conditions.

- (2) The depository rules -
 - (a) must provide for equitable criteria for the acceptance and expulsion of a participant and for such acceptance and expulsion to be in the interests of issuers and clients;
 - (b) if applicable, must provide for arrangements for certificated securities to be dematerialised and for issuers to issue uncertificated securities;
 - (c) must provide for a securities holding system that enables the beneficial owner of the securities to be reflected as the legal owner on the issuer's official registers;
 - (d) must -
 - (i) provide for adequate steps to be taken by the central securities depository or a person to whom the central securities depository has delegated its investigative and disciplinary functions to investigate and discipline a participant or an officer or employee of a participant who contravenes or fails to comply with these conditions, depository rules, or the depository directives;
 - (ii) require a report on the disciplinary proceedings referred to in subitem (ii) to be furnished to the Registrar within 21 business days after the completion of proceedings referred to in that subitem; and
 - (iii) make provision for the procedure to be followed before or during any disciplinary proceedings;
 - (e) must provide for the manner in which a participant who is believed to -
 - (i) be able to furnish any information on the subject of any investigation; or
 - (ii) have in that participant's possession or under that participant's control any document, which has a bearing upon that subject,

may be required to appear before a person conducting an investigation, to be questioned or to produce such document;

- (f) must provide for requirements in respect of a participant's financial soundness and valid financial cover that the participant must hold in respect of -
 - (i) the participant's actual and potential liabilities;
 - (ii) the participant's conditional and contingent liabilities to the central securities depository; and
 - (iii) liabilities which existed before or accrue after a person has ceased to be a participant;
- (g) must require that -
 - (i) declared dividends and other payments owing by issuers in respect of securities are paid by such issuers to participants or clients and, if applicable, by participants to clients;
 - (ii) all notices regarding rights and other benefits accruing to the owners of securities deposited with the central securities depository are conveyed to participants and clients;
 - (iii) if applicable, the lawful instructions of clients with regard to voting rights and other matters are given effect to and that the necessary actions are taken;
 - (iv) the rights of participants or clients are not in any way diminished by the fact that securities held by them or on their behalf are held collectively in a central securities repository or securities account;
 - (v) securities belonging to or held on behalf of clients must be dealt with only in accordance with the instructions of the clients;
- (h) must require that where a participant agrees, or is otherwise required, to -
 - (i) receive monies in respect of securities on behalf of clients from a central securities depository or issuer, that such monies are, in fact, paid to the clients concerned;
 - (ii) convey to clients all information regarding rights and other benefits accruing to the securities held on behalf of such clients, that such information is, in fact, conveyed to the clients; and
 - (iii) give effect to the lawful instructions of clients with regard to voting rights and other matters, that the necessary actions are, in fact, taken;
- (i) must require that a participant, on written request from a client to withdraw securities or an interest in securities held in a securities repository or central securities repository, deliver a certificate evidencing the same number of securities or securities of the same nominal value and of the same kind, as the securities held on behalf of that client in the securities repository or central securities repository, as long as the client has a sufficient unencumbered credit balance of those securities with the participant;
- (j) must require that a participant's central securities account does not show a debit balance;

- (k) must provide that a central securities depository may refuse to accept securities issued by any particular issuer with due regard to the clearing and settlement arrangements of a stock exchange for transactions in those securities;
- (l) must provide for -
 - (i) the duty of a client to disclose to a participant, and the duty of a participant to disclose to a central securities depository, information about a beneficial, limited or other interest in securities deposited by a client with a participant or by a participant with a central securities depository, as the case may be; and
 - (ii) the manner, form and frequency of such disclosure;
- (m) must provide for the manner in which a central securities depository or a participant must keep records of clients, or owners or beneficial owners of securities or other interests in securities;
- (n) must provide for the manner in which participants must give instructions to a central securities depository;
- (o) if the central securities depository is appointed as a securities clearing house by a stock exchange, must provide for the manner in which the central securities depository may regulate, consistent with the rules of the stock exchange, the securities clearing and settlement functions to be performed by participants in the securities clearing and settlement process;
- (p) must provide for the purposes for which a central securities depository may issue depository directives;
- (q) must provide for the manner in which a participant must hold and administer securities;
- (r) must provide for the approval by the central securities depository of a nominee company of a participant, or any other nominee company who has an account with a participant, which nominee company holds securities in a securities repository or central securities repository;
- (s) must provide that no participant may open a securities account for a person whom the participant believes or suspects requires approval as a nominee company without having taken reasonable measures to ascertain that such person has the necessary approval;
- (t) must provide for the manner in which complaints against a participant or an officer or employee of a participant must be addressed;
- (u) must provide for a process whereby complaints by participants against the central securities depository in respect of the exercise of powers, duties and functions by the central securities depository may be made, considered and responded to;
- (v) must provide for the authority of and the manner in and circumstances under which -
 - (i) a central securities depository may limit the revocation of any settlement instruction given by a participant or its client;

- (ii) a participant or client may revoke any settlement instruction before the point in time when settlement instructions become irrevocable as determined in the depository rules, but prior to settlement; and
 - (iii) a central securities depository or a participant may terminate transactions on the commencement of insolvency proceedings;
- (w) must provide that a participant appoints a bank, from the banks designated by the central securities depository, as settlement bank for settlement of securities obligations;
- (x) must provide for procedures for confirmation of trades between direct market participants, which must occur as soon as possible after trade execution, but no later than trade date (T+0) but where confirmation of trades by indirect market participants is required, it must occur as soon as possible after trade execution, but no later than T+1;
- (y) must provide for clear and certain final settlement by linking securities transfers to funds transfers in a way that achieves delivery versus payment, which must occur no later than the end of the settlement date: provided where possible, a central securities depository must provide final settlement intraday or in real time;
- (z) must provide for rolling settlement with final settlement to occur no later than T+3;
- (aa) must provide for -
 - (i) arrangements in relation to the administration of securities held for own account or on behalf of a client by a participant, including the settlement of unsettled transactions;
 - (ii) arrangements in relation to the administration of dividends and other payments made by issuers for the benefit of participants or clients; and
 - (ii) the manner in which a shortfall in securities in the securities account must be apportioned among the persons whose securities are held in such account, under insolvency proceedings in respect of that participant;
- (bb) must provide for procedures to effectively measure, monitor, and manage its liquidity risk, and to maintain sufficient liquid resources in all relevant currencies to effect same-day and, where appropriate, intraday and multiday settlement of payment obligations with a high degree of confidence under a wide range of potential stress scenarios, including but not be limited to, the default of a participant and its affiliates that would generate the largest aggregate liquidity obligation for the central securities depository in extreme but plausible market conditions;
- (cc) must provide for procedures to effectively measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes;
- (dd) must provide for measures to ensure maintenance of sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence;

- (ee) must provide for conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant or participants either issue to, or receive from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed, if transactions in one or more categories of securities settled through the central securities depository settle on a net basis;
 - (ff) must provide, where the central securities depository extends intraday credit to its participants, procedures to institute risk controls that, at a minimum, ensure timely settlement in the event that the participant with the largest payment obligation is unable to settle;
 - (gg) must provide for procedures for securities lending and borrowing or repurchase agreements and other economically equivalent transactions;
 - (hh) must provide for the use of relevant international communication procedures and standards in order to facilitate efficient settlement of cross-border transactions as well as measures that effectively reduce the risks associated with cross-border settlements;
 - (ii) must provide for the manner in which the central securities depository monitors compliance by its participants with these conditions, the depository rules and the depository directives;
 - (jj) must provide for the establishment and maintenance of a settlement guarantee fund;
 - (kk) must provide for arrangements facilitating the deposit and withdrawal of certificates; and
 - (ll) must include such other matters as may be reasonably required by the Registrar.
- (3) A central securities depository may, with approval of the Registrar, make depository rules on matters additional to those listed under subparagraph (2).

(4) A depository rule made under this paragraph is binding on the central securities depository, a participant, a nominee company, an issuer of securities deposited with the central securities depository and their officers and employees and on clients.

Amendments to depository rules

21. (1) A central securities depository may not amend its rules, except with the prior written approval of the Registrar.

(2) No amendment of the depository rules is valid unless it has been approved by the Registrar in writing, and if the Registrar approves of it, such amendment comes into operation on a date mentioned in the approval.

(3) Before making an application pursuant to subparagraphs (1) and (2), the applicant must give prior notice of the proposed application in two newspapers circulating widely in Namibia at the expense of the applicant stating -

- (a) the name of the applicant;
- (b) the reasons for the proposed amendment and the nature of the proposed amendment; and

(c) the period within which objections to the application may be lodged with the Registrar.

(4) If, after consideration of any objection received as a result of the notice referred to in subparagraph (3), the Registrar is of the opinion that it is reasonable to do so and not against the public interest, the Registrar may, approve the amendment.

(5) The Registrar must make public any amendment of the depository rules under subparagraph (4), by notice in the *Gazette* and through other appropriate public medium as determined by the Registrar.

(6) Whenever it is necessary or desirable in the public interest, the Registrar may, after consultation with the central securities depository and with the consent of the Minister, by notice in the *Gazette* amend or rescind any or all of the rules of such central securities depository with effect from the date immediately following upon the date of publication of the notice or such later date as may be specified in the notice.

(7) The board of directors of a central securities depository may suspend any of its rules for a period not exceeding 21 business days, subject to the prior written approval of the Registrar.

Issue of depository directives by central securities depository

22. (1) A central securities depository may issue depository directives to an issuer of securities, a participant or nominee company in performing its duties and functions under these conditions.

(2) An issuer, participant or nominee company must comply with depository directives issued under subparagraph (1).

PART 5

ADMITTED AND UNCERTIFICATED SECURITIES

Uncertificated securities

23. (1) Certificated securities may, subject to these conditions and any other applicable law, be converted to uncertificated securities.

(2) Nothing in these conditions may be construed as preventing the application of section 98 of the Company Act to an issuer of uncertificated securities by a company as contemplated in that section of that Act.

Issue of uncertificated securities

24. (1) An issuer of securities to the public may, subject to and in accordance with any applicable laws -

- (a) issue uncertificated securities where it is authorised in its memorandum of association and articles or the Act, and authorised by a resolution of its board of directors; and
- (b) convert a certificated security into an uncertificated security where it is authorised in its memorandum and articles of association or the Act, and authorised by a resolution of its board of directors.

(2) A person may not hold the same security in certificated and uncertificated form.

(3) Where a person opts to hold a security with a central securities depository, the issuer must give details of the allotted security to the central securities depository.

(4) An issuer or a central securities depository and its participants must make arrangements in accordance with the depository rules for uncertificated securities to be evidenced by way of an entry.

(5) An issuer has the same obligations in respect of uncertificated securities as it has in respect of certificated securities except that no certificate is issued in respect of uncertificated securities.

(6) The central securities depository must on receipt of details of the allotted security, in terms of subparagraph (3), enter it in its records the name of the allottee as the beneficial owner of the security.

Responsibilities of issuer of uncertificated securities

25. An issuer of uncertificated securities must -

- (a) record in its register the number or nominal value of each kind of uncertificated securities issued by it;
- (b) maintain separate records for each central securities depository holding uncertificated securities, unless all those securities are held by one central securities depository;
- (c) if required by paragraph 25(5), record the name of that central securities depository or its wholly owned subsidiary, or nominee company, as the registered holder of the uncertificated securities;
- (d) balance and reconcile with a central securities depository the record referred to in item (a) in respect of each kind of uncertificated security -
 - (i) if that record has not changed, at least once every month;
 - (ii) if the record has changed, on the business day after such change; and
- (e) comply with any other requirements specified by the Registrar from time to time.

Deposit of securities

26. (1) Subject to subparagraph (2), a stock exchange may, after consultation with a central securities depository, determine that any security listed or proposed to be listed on the stock exchange be admitted by depositing the security with the central securities depository.

(2) A stock exchange must give notice to the public of all eligible securities determined by it to be deposited into a central securities depository in respect of securities listed on the stock exchange within the period determined in the depository rules.

(3) The deposit by a person of an eligible security with a participant must be considered to be a deposit of the security with that central securities depository.

(4) A central securities depository must hold securities only in book-entry form.

(5) The Registrar may direct that any securities held by a central securities depository must, unless they are bearer instruments, money market instruments or recorded in a sub-register, with due consideration to the depository rules, be registered in the name of that central securities depository, its wholly owned subsidiary or nominee company.

(6) A central securities depository or participant may not become the owner, co-owner, holder, pledgee for the purpose of securing a debt, of securities merely because of -

- (a) a deposit of securities;
- (b) the registration in its name of -
 - (i) securities;
 - (ii) limited rights in securities;
 - (iii) other rights in securities;
 - (iv) benefits in respect of securities; or
 - (v) benefits accruing to securities.

(7) Subparagraph (6) also applies to a wholly owned subsidiary of a central securities depository or participant.

Ownership of securities

27. (1) Where securities of any kind -

- (a) are deposited with -
 - (i) a participant; or
 - (ii) a central securities depository; or
- (b) accrue to the owner of securities held by -
 - (i) a participant in a securities repository; or
 - (ii) a central securities depository,

the person who was the owner of the securities at the time of deposit or accrual becomes entitled to an interest as co-owner of all the securities of the same kind comprised in the securities repository or central securities repository.

(2) In so far as any limited right exists in respect of any securities at the time of a deposit or accrual referred to in subparagraph (1), such limited right extends to the interest of such co-owner and to any securities delivered to that co-owner.

(3) The interest of a co-owner, client or participant in all the securities in a securities repository or central securities repository must be calculated by reference to the proportion that the number or nominal value of securities deposited by or on behalf of that co-owner, client or participant and accruing to such securities, bears to the total number or nominal value of all securities of that kind held in the securities repository or central securities repository.

- (4) A written statement issued by or on behalf of -
 - (a) a participant in respect of an owner of securities or of a client; or
 - (b) a central securities depository in respect of a participant,

and specifying the interest of that owner, client or participant, is *prima facie* evidence of the title or interest of that person in such securities.

Verification of certificates and transfer to depositor

28. (1) Transfer of an interest in securities held by a central securities depository or participant must be affected by entry in the central securities account or securities account of the transferor and the transferee kept by the central securities depository or the participant.

(2) A central securities depository or its participant must lodge the certificates with the issuer within the period determined in the depository rules after deposit of the certificates representing an eligible security and the transfer in respect of that security.

(3) The issuer must register the transfer of the security in respect of the certificates in the name of the depositor on receipt of the certificates.

- (4) The issuer must refuse registration of the transfer where -
 - (a) the issuer suspects that the certificate is not an authentic certificate or is a certificate that has been reported lost or destroyed; or
 - (b) in relation to any security -
 - (i) there has been a duplication in the issue of the certificate representing that security;
 - (ii) a certificate has been issued in excess of the issued capital of the issuer; or
 - (iii) the issuer has been served with an order granted by a Namibian court of law prohibiting dealing in respect of the security underlying the certificate.

(5) A central securities depository must enter the name of the depositor in its records.

(6) Where an issuer refuses registration of a transfer, the issuer must deliver to the depositor and the central securities depository, a written notice giving reasons for the refusal.

(7) An instrument of transfer lodged with an issuer may be registered in the name of a central securities depository.

(8) This paragraph does not apply to bearer securities.

Trading of eligible securities

29. A central securities depository or a participant must accept a certificate representing an eligible security to be admitted for the purpose of settlement of any trade on a stock exchange in accordance with the depository rules.

Restriction on trade in eligible securities

30. (1) A person may not trade in any eligible security on a stock exchange after the admission date, unless the security has been deposited with a central securities depository in accordance with these conditions.

(2) Despite subparagraph (1), an eligible security may be deposited at the central securities depository after the admission date at any time subject to the additional fees that may be imposed under the depository rules.

(3) For purposes of this paragraph the admission date is the date determined by a central securities depository as from which all eligible securities in physical form must be deposited with the central securities depository in dematerialised form.

Receipt of certificates of eligible securities for safe custody

31. (1) A central securities depository, in concurrence with the stock exchange, may determine a date by notice published in the manner agreed between the central securities depository and stock exchange after which a member of a stock exchange may not receive a certificate representing an eligible security for safe custody.

(2) A central securities depository must give notice, referred to in subparagraph (1), 21 business days prior to the date determined under subparagraph (1).

Liability of central securities depository for loss or damage of certificates

32. (1) A central securities depository and its participants are liable to a depositor for any loss or damage in respect of a certificate deposited by a depositor with the central securities depository or a participant.

(2) Despite subparagraph (1), a central securities depository is not liable for loss or damage of a certificate the transfer of which is not capable of registration.

(3) Subparagraph (2) does not relieve a participant from any obligation imposed on the participants by the rules of a stock exchange in its capacity as a member of the stock exchange to effect buying-in resulting from a refusal of an issuer to register a transfer.

Withdrawal of immobilised securities

33. (1) A depositor may withdraw an immobilised security to the credit of the depositor's securities account on application to the central securities depository.

(2) Where an application for the withdrawal of a deposited security is made and the appropriate notification and withdrawal documents are received by the issuer in accordance with the depository rules, the issuer or its share registry, must complete and deliver to the central securities depository certificates in connection with the transfer of the securities within 14 business days after the date of receipt of the withdrawal documents to be forwarded to the participant.

(3) Despite subparagraph (1), withdrawals are not allowed for securities issued by the Minister.

Withdrawal of uncertificated securities

34. (1) A depositor may withdraw uncertificated securities from a central securities depository at any time in accordance with the provisions of the depository rules.

(2) The withdrawal of uncertificated securities from a central securities depository must be through the process by which a depositor permits their electronic holdings, which is known as rematerialisation, to be converted into certificates in the manner as provided for in the depository rules.

(3) A stock exchange may, with the prior written approval of the Registrar, restrict or prohibit the withdrawal of a security or class of securities which is listed by the stock exchange for a period and in a manner as it considers appropriate.

(4) Where a stock exchange restricts or prohibits the withdrawal of uncertificated securities, the stock exchange must -

- (a) inform the central securities depository of the decision; and
- (b) give notice to the public of the uncertificated securities restricted or prohibited from withdrawal and the period of the restriction or prohibition.

Trading of securities withdrawn from central securities depository

35. (1) A person may not trade securities withdrawn from a central securities depository on a stock exchange unless the security is re-deposited in a central securities depository.

(2) A security which is re-deposited with a central securities depository may not be utilised to settle a transaction which took place on a stock exchange prior to the re-deposit of that security.

Dematerialisation of securities

36. (1) A central securities depository may, in consultation with the stock exchange, determine a date after which securities or a class of securities to be held by the central securities depository must be dematerialised in accordance with the process laid down under the depository rules.

(2) An issuer of an uncertificated security must be notified by the central securities depository of the action taken in terms of subparagraph (1).

(3) An issuer of an uncertificated security must -

- (a) give notice to the public that the security must, on the dematerialisation date, become an uncertificated security; and
- (b) take the necessary steps to amend its constitution, deed of establishment, trust deed, statutes or enabling statute to comply with these conditions and the depository rules within the period stipulated in the notice upon being notified of the decision.

(4) A notice of dematerialisation referred to in subparagraph (3) must specify a dematerialisation date of not less than 21 business days from the date of publication of the notice.

Central securities depository to maintain official record of depositors

37. (1) Every issuer of a security determined as an uncertificated security must within one trading day after the day on which a security is dematerialised -

- (a) surrender the physical register of members or debenture holders to the central securities depository;
- (b) provide information to the central securities depository of any member or debenture holder who appears in the appropriate register as a holder of a certificate not already admitted by the central securities depository; and
- (c) record in its register the number or nominal value of each kind of uncertificated securities issued by it.

(2) A central securities depository must maintain a register which must include the name and particulars of -

- (a) each depositor with a security credited to a securities account held by the depositor; and
- (b) each member or debenture holder whose name appears under the appropriate register of members or debenture holders of the issuer.

(3) Subject to the provisions of the Companies Act relating to a register of members and debenture holders, a record of depositors maintained by a central securities depository must -

- (a) contain information in electronic record form; and
- (b) contain any other information as may be required under the depository rules.

(4) This paragraph does not apply to any bearer security or may not be construed as making the central securities depository an agent of the issuer for the purpose of providing registration services.

(5) An issuer may not issue a certificate in respect of an uncertificated security after the dematerialisation date.

Effect of reference to records in central securities depository

38. With effect from the date of dematerialisation, subject to the provisions of the Companies Act and despite the provisions of the rules or regulations of the issuer, a reference in respect of an uncertificated security to -

- (a) a register of members or debenture holders including sub-registers maintained by a company under the Companies Act, is a reference to the register of depositors maintained by the central securities depository;
- (b) a transfer of shares or debentures under the Companies Act, is a reference to a book-entry transfer performed by the central securities depository; and
- (c) a certificate which is used as *prima facie* evidence of ownership of or title to a security, is a reference to a statement of account issued by the central securities depository.

Participants and dealers in uncertificated securities to hold securities account

39. (1) A person may not deal in uncertificated securities unless the person holds a securities account with a central securities depository.

(2) A central securities depository may establish different types of securities accounts for different classes of persons or securities.

(3) An entry in a securities account in respect of a transaction must -

(a) in the case of a securities account established and maintained directly by a central securities depository, be considered to have been made by, or with the authority of, the central securities depository; and

(b) in the case of a securities account established through and maintained by a depository agent on behalf of a central securities depository, be considered as having been made by, or with the authority of, the depository agent.

(4) A record of an entry in a securities account in respect of a transaction in uncertificated securities is *prima facie* evidence of the matters recorded, unless the contrary is proved.

Issuance of statements of accounts

40. (1) A central securities depository must regularly issue statements of accounts to depositors in respect of uncertificated securities held by or registered in the name of the central securities depository.

(2) Despite subparagraph (1) a depositor may in writing require the central securities depository to issue a statement of accounts in respect of uncertificated securities held by or registered in the name of the central securities depository.

(3) A central securities depository must on receipt of a written request as per subparagraph (2) and upon payment of charges which may be imposed under the depository rules, issue to the depositor the statement of accounts required.

(4) A statement of accounts issued in terms of this paragraph is *prima facie* evidence of the truth of the matters specified in that statement of account.

PART 6
SECURITIES TRANSACTIONS AND RECORDS

Evidence of transactions in respect of deposited securities

41. A transaction in respect of a deposited security by a depositor -

(a) must be recorded by book-entry in the securities account of the depositor by the participant or central securities depository; and

(b) must include a deposit of an eligible security and a trade or transfer of a book-entry from a securities account to another securities account maintained by the central securities depository.

Provision of record of depositors to issuers

42. (1) An issuer of an uncertificated security may, as provided for in the depository rules or by written notice, require a central securities depository to furnish it with a record of the depositors in whose securities accounts its issued securities are credited as at the date of the notice.

(2) The central securities depository must issue a record of depositors as required by an issuer within the period specified in the notice and in any case before the expiry of a period specified under the depository rules.

(3) A record of depositors issued in response to a request made by an issuer must contain at least the name, identity number, passport number or company registration number and statement or the number of uncertificated securities held in favour of each depositor.

(4) A record of depositors obtained by an issuer must be available for inspection by a member of an issuer without the payment of a fee but may be inspected by any other person on payment of a fee to the central securities depository, in respect of each inspection.

(5) A member of an issuer or any other person may require the issuer to furnish him or her with a copy of the record of depositors or a part of it on the payment of a fee equal to the quantum of information requested.

(6) The central securities depository must supply a copy of the record of depositors or a part of it to the member of an issuer or person who required the copy in terms of subparagraph (5) within a -

- (a) period of seven business days; or
- (b) longer period that the Registrar considers reasonable,

after the date of receipt of the request by that member or person.

(7) If the records of a central securities depository are inconsistent with those of a participant regarding securities deposited with the central securities depository by that participant, the records of the depository are considered to be correct until the contrary is proved.

Depositor to be treated as member or debenture holder

43. (1) A depositor of an uncertificated security whose name appears in the record of depositors is -

- (a) entitled to all the rights, benefits, powers and privileges;
- (b) subject to all the liabilities, duties and obligations,

in respect of the security as if the depositor was a member or debenture holder registered in an appropriate register maintained by the issuer of the security, in accordance with the Companies Act or any other law.

(2) A depositor is not entitled to attend, speak or vote at a general meeting of a company unless the depositor's name appears on the central securities depository register 48 hours prior to the general meeting.

(3) A central securities depository may not have an interest in deposited securities registered in its name, or be a bare trustee.

Register of depositors

44. (1) Persons named as depositors in a register of depositors must, for the period that the deposited securities are entered against their names in the register, be -

- (a) members of the company in respect of the amount of deposited securities entered against their respective names in the register of depositors; or
 - (b) holders of the amount of the issuer's deposited securities other than shares entered against their names in the register of depositors.
- (2) These conditions may not affect -
- (a) the obligation of a company to keep a register of its members and to allow inspection of the register under the Companies Act;
 - (b) the obligation of a company to keep a register of holders of debentures issued by the company and to allow inspection of the register under the Companies Act;
 - (c) the obligation of an issuer other than a company to keep a register of the holders of securities issued by the issuer;
 - (d) the right of a depositor to withdraw documents showing title to securities, from the central securities depository at any time in accordance with the depository rules and to register them in the depositor's name; and
 - (e) the enjoyment of a right, power or privilege or the imposition of a liability, duty or obligation under the Companies Act or any other law or statute, instrument or the regulations of a company on a depositor, as a member of a company or as a holder of debentures or securities.

Termination and set-off

45. (1) The central securities depository may terminate its agreement to clear or settle securities transactions or to act as a central securities depository for securities with an insolvent participant or with a participant in respect of whom insolvency or liquidation proceedings are commenced.

(2) Where the central securities depository terminates its agreement, the central securities depository may -

- (a) set off obligations between the insolvent participant and the central securities depository in accordance with the provisions of the agreement; and
- (b) if there is a net termination sum owed to the central securities depository by the insolvent participant, the central securities depository must be considered as a creditor of the insolvent participant in respect of that net termination sum.

(3) The central securities depository may realise assets of the insolvent participant in respect of a pledge in favour of the central securities depository or in terms of the depository rules or guarantees established by the central securities depository in accordance with the depository rules.

Public offer of securities

46. (1) For the purposes of this paragraph -

“offeror” in relation to a security means the person offering the security for sale; and

“security proposed to be listed on a stock exchange” means a reference to a security which has been approved by the stock exchange to be listed on that stock exchange.

(2) Where a stock exchange or a central securities depository determines any securities proposed to be listed on a stock exchange to be immobilised or dematerialised, the issuer of the security must notify the public that the security is determined to be immobilised or dematerialised in the prospectus or other offer document issued.

(3) Upon completion of the allotment or allocation of the security, the issuer or offeror must -

- (a) confirm with the stock exchange or central securities depository the record of the successful applicants together with information required by the central securities depository in order to make appropriate entries in the securities accounts of the respective applicants; and
- (b) deliver to the stock exchange or central securities depository the certificates, if any, in denominations specified by the central securities depository registered in the name of the beneficial owner or its nominee company.

Corporate actions

47. (1) Where an issuer, in relation to uncertificated securities -

- (a) makes a rights issue of shares by way of an increase in its total issued capital;
- (b) issues securities because of a rights issue or the conversion of debt securities; or
- (c) issues securities because of an exercise of a right or option to acquire securities in the share capital of the issuer,

the issuer must notify the central securities depository and deliver to the central securities depository -

- (i) a confirmed list of the names of the allottees for the purpose of amendment of the securities accounts held by the allottees; and
- (ii) the appropriate certificates, if any, in denominations that may be specified by the central securities depository registered in the name of the central securities depository.

(2) A prospective allottee must open a securities account with the central securities depository before acquiring any security.

Underwriters to open securities accounts

48. A person who intends to underwrite securities proposed to be listed on a stock exchange or a rights issue in respect of an uncertificated security must open a securities account with the central securities depository.

Pledge of securities to secure debt

49. (1) Where a security deposited with a central securities depository is pledged by a depositor, referred to as “the pledgor”, in favour of another person, referred to as “the pledgee”, the pledgee or a nominee of the pledgee must create a separate security interest in the security which is the subject of the pledge.

(2) A pledge to secure a debt, in respect of an interest in securities held by a central securities depository or participant or in a securities account held on behalf of a participant, must be affected by entry in the central securities account or the securities account of the pledgor, in favour of the pledgee, specifying the name of the pledgee or the nominee of the pledgee, the interest in the securities pledged and the date of entry.

(3) The pledgee must deposit the instrument of pledge contemplated in subparagraph (2) with the central securities depository where the securities pledged are held for registration.

(4) The depository agent must on receipt of the instrument of pledge register the instrument in a register of pledges maintained by the central securities depository and transfer the pledged security to a separate pledged securities account in the name of the pledgor as contemplated in subparagraph (2).

(5) When a pledge over a deposited security is being discharged or released, the central securities depository or the depository agent must on receipt of a notice of discharge or release executed by the pledgee and submitted by the pledgor, confirm the discharge or release and transfer the deposited security into the securities account of the pledgor.

(6) An interest in securities referred to under subparagraph (2) may not be transferred except with the written consent of the pledgee.

(7) The pledgee of an interest in securities referred to in subparagraph (2) is entitled to all the rights of a pledgee of movable property.

(8) Subparagraphs (2), (6) and (7) also apply, with the changes required by the context, to the pledge to secure a debt by one participant to another of an interest in securities held by a central securities depository in a central securities account.

Securities in or under suspension

50. (1) A central securities depository may specify a securities account to be in suspension -

- (a) where the transfer of the security in the name of the depositor or its nominee company is not registrable by the issuer;
- (b) where an application for withdrawal of the security has been made by a depositor; or
- (c) in circumstances determined by the central securities depository under the depository rules.

(2) A central securities depository may specify that an uncertificated security in a security account is under suspension -

- (a) where there is a need for the central securities depository to restrict the transfer, pledge or mortgage of the security in the event of an objection made or investigation in accordance with the depository rules; or
- (b) where the central securities depository has been instructed to restrict the movement of uncertificated securities by a Namibian court of law.

Attachment

51. (1) For the purposes of this paragraph, “sheriff” means the sheriff, deputy sheriff or other officer appointed under section 30 of the High Court Act, 1990 (Act No. 16 of 1990), the sheriff, deputy sheriff or other officer appointed under section 26 of the Supreme Court Act, 1990 (Act No. 15 of 1990) or the messenger of the court appointed in terms of section 14 of the Magistrates Courts Act, 1944 (Act No. 32 of 1944).

(2) The attachment of an interest in securities deposited with a participant and held in a central securities repository or securities repository is only complete when -

- (a) notice of the attachment has been given in writing by the sheriff to the participant;
- (b) the sheriff has taken possession of any securities account as evidenced by a written acknowledgement issued by the participant or the sheriff has certified that the sheriff has been unable, despite diligent search, to obtain possession of such written acknowledgement; and
- (c) the sheriff has made an entry of the attachment on such securities account or caused it to be made by such participant.

(3) The sheriff may upon exhibiting the original warrant of execution to the participant enter upon the premises where such account is kept and make an inventory and valuation of the interest attached.

PART 7 SECURITY AND SECRECY

Protection of information

52. (1) A central securities depository and its depository agents must take reasonable measures to protect information and documents related to the affairs of depositors and in particular, related to their securities accounts, against unauthorised access by other persons.

(2) Subject to these conditions, any other relevant law or an order of a competent court, a director, an officer, or an employee of a central securities depository, the depository agent or any other person who has access to information or documents related to the affairs of a depositor and securities accounts of a depositor may not disclose the information or the contents of a document to another person.

Permitted disclosures

53. A person may not disclose information or documents in respect of deposited securities to another person except -

- (a) if the depositor, the depositor’s agent or representative, has given written permission for the disclosure;

- (b) in a case where the depositor is declared insolvent or if the depositor is a company or corporate body and that depositor is being or has been wound up either in Namibia or elsewhere;
- (c) for the purpose of instituting civil proceedings or in the course of any civil proceedings -
 - (i) between a central securities depository or its depository agent and a depositor relating to the securities account of the depositor; or
 - (ii) between a central securities depository or its depository agent and two or more parties making adverse claims to securities or monies in the securities account of the depositor, where the agent seeks relief by way of interpleader;
- (d) to a central securities depository for the purpose of compiling the record of depositors under these conditions;
- (e) to an issuer in respect of a record of depositors issued under these conditions;
- (f) to any member of an issuer or any person in respect of a record of depositors issued under these conditions;
- (g) for the purpose of enabling or assisting the Registrar to exercise a power conferred on him or her under any other law;
- (h) for the purpose of enabling or assisting the Registrar to discharge his or her functions under any other law;
- (i) to enable or assist a stock exchange or clearing house of a stock exchange to discharge its duty; and
- (j) to enable or assist auditors of a central securities depository and its depository agents to discharge their duty.

Regulation of access to computer system

54. (1) A central securities depository may by notice in the *Gazette*, give access to its computer system to -

- (a) a participant or its nominee company;
- (b) its depository agents;
- (c) a stock exchange on which uncertificated securities are listed;
- (d) a clearing house of a stock exchange;
- (e) issuers; and
- (f) any other person as may be determined by the Registrar.

(2) The Registrar may issue a directive to provide for the extent to which a user or class of users can or cannot have access to the system for the purpose of regulating access to the computer system of a central securities depository.

PART 8
GENERAL MARKET CONDUCT REQUIREMENTS

Codes of conduct

55. (1) Subject to subparagraph (2), the Registrar may by notice in the *Gazette* issue codes of conduct for central securities depositories and participants relating to -

- (a) the making of adequate disclosures of relevant material information;
- (b) adequate and appropriate record keeping;
- (c) avoidance of fraudulent and misleading advertising, canvassing or marketing;
- (d) proper safe-keeping, separation and protection of funds and transactional documentation of clients;
- (e) suitable guarantees or indemnity or fidelity insurance cover, and mechanisms for adjustments of such guarantees or insurance cover; and
- (f) any other matter that is necessary or expedient to be regulated in such code for the better achievement of the objects of these conditions.

(2) Before issuing a code of conduct, the Registrar must -

- (a) advise the Minister and consult representatives of the financial services sector industry bodies;
- (b) publish a draft of the proposed code of conduct in the *Gazette* and allow not less than 21 business days after the date of publication for written representations to be made with respect to the proposed draft; and
- (c) take any representations made in terms of item (b) into account in determining whether to issue the code of conduct as originally published or in a modified form.

(3) A code of conduct referred to in subparagraph (1) is binding on the central securities depository and participant, their directors, principal officers, other officers and employees and their clients.

Declaration of practices as irregular or undesirable

56. (1) The Registrar may, by notice in the *Gazette*, declare a specific practice or method of conducting business as an “irregular or undesirable practice” or an “undesirable method of conducting business” for a central securities depository.

(2) The following principles must guide the Registrar in considering whether a declaration pursuant to subparagraph (1) may be made -

- (a) the practice concerned, directly or indirectly, has or is likely to have the effect of -
 - (i) harming the relations between a central securities depository and clients or the general public;
 - (ii) unreasonably prejudicing any client;

- (iii) deceiving any client; or
- (iv) unfairly affecting any client; or
- (b) if the practice is allowed to continue, one or more of the objects of the Registrar or of these conditions will, or is likely to, be defeated.

(3) The Registrar may not issue a declaration referred to in subparagraph (1) unless the Registrar has invited interested persons to make written representations to the Registrar concerning the intended declaration within a period of not less than 21 business days before the proposed date of publication of the notice.

(4) A central securities depository may not, on or after the date of the notice referred to in subparagraph (1), carry on a business practice or method of conducting business that has been declared as an “irregular or undesirable practice” or an “undesirable method of conducting business”.

PART 9 GENERAL MATTERS

Financial year

57. (1) The financial year of a central securities depository is a period of 12 months.

(2) A central securities depository may not, without the prior written approval of the Registrar, change its financial year.

Name and change of name

58. (1) A central securities depository must, for all purposes and in every document issued by it, use the name under which it is registered.

(2) The Registrar may not register a central securities depository under a name or approve a change of name to a name which is -

- (a) the same as that of a financial institution that has already been registered;
- (b) confusingly similar to that of another registered financial institution; or
- (c) likely to mislead the public.

(3) A central securities depository registered under these conditions may not, without the prior written approval of the Registrar -

- (a) change the name under which it is registered;
- (b) use or refer to itself by a name other than the name under which it is registered; or
- (c) use or refer to itself by a shortened form or derivative of the name under which it is registered.

(4) An application for approval of a change of name, use of another name or use of a shortened form or derivative of a name pursuant to subparagraph (3) must be made to the Registrar and be accompanied by the required fee.

(5) Upon receipt of an application referred to in subparagraph (4), if the Registrar is satisfied that the proposed name does not contravene the requirements of subparagraph (2) and that the applicant complies with the provisions of any other law applicable to a change of name, the Registrar must register the applicant under its new name and issue to such applicant a new certificate of registration under that name.

(6) Despite subparagraph (2)(a) and (b) and subparagraph (3)(b), a central securities depository may, with the consent of the Registrar, in conjunction with its registered name, use or refer to itself by the name of a financial institution with which it has merged or the assets and liabilities of which have been transferred to it, or, in the case of a change of name, the name by which it was previously known.

Notification of certain matters

59. (1) A central securities depository must notify the Registrar in writing of -

- (a) any change of its key responsible persons;
- (b) any change of the address of its principal office;
- (c) any location in addition to its principal office where it intends to carry on business; or
- (d) a change of its computer system or changes in the system.

(2) A central securities depository must, after each annual meeting of the central securities depository, file with the Registrar a return showing the -

- (a) name and residential and mailing address of each director holding office immediately following the meeting;
- (b) entities of which each director is a director or officer or which is controlled by that director;
- (c) experience and qualifications of each director;
- (d) date of expiry of the term of each director;
- (e) name, business and mailing address and date of appointment of the auditor of the central securities depository; and
- (f) experience and qualifications of the auditor.

(3) If a vacancy in a position of a director of the board, principal officer, other member of senior management or the auditor occurs and is filled by another person, the central securities depository must, within seven business days after the new appointment, provide the Registrar with such information as it is required to maintain the return referred to in subparagraph (2) in complete and accurate form.

Preservation of records and accounts

60. A central securities depository, depository agents and participants must preserve records and accounts relating to the central securities depository for a period of not less than 10 years.

Levy payments

61. A central securities depository must pay the levies determined in terms of the NAMFISA Act.

PART 10
GOVERNANCE

Exemptions under this Part

62. The Registrar may, in exceptional circumstances, exempt the board of directors from one or more requirements of paragraphs 63(1), 64(2)(a) and 66.

Board of central securities depository

63. (1) One third of the board of directors of a central securities depository must be independent directors, as described in the Annexure, who do not have a material or pecuniary relationship with that central securities depository.

(2) The chairperson of the board of directors of a central securities depository may not also be the principal officer, general manager or other senior officer of the central securities depository.

Duties of board

64. (1) Subject to these conditions, the board of directors of a central securities depository must manage, or supervise the management of, the business and affairs of the central securities depository subject to the overriding responsibility of ensuring that -

- (a) the financial resources of the central securities depository are sufficient to discharge its obligations;
- (b) clients are treated fairly; and
- (c) the provisions of these conditions are fully complied with.

(2) Without limiting the generality of subparagraph (1), the board of directors of a central securities depository must -

- (a) establish an audit committee to perform the duties referred to in paragraph 66;
- (b) establish procedures for identifying and dealing with conflicts or potential conflicts of interest, and for identifying and vetting related party transactions, with a view to managing and mitigating those conflicts or potential conflicts of interest;
- (c) designate a committee of the board of directors to monitor the procedures referred to in item (b);
- (d) establish investment and lending policies, standards and procedures;
- (e) establish procedures with respect to the fair treatment of clients, including the disclosure of information to them, the protection of their personal information, the prompt assessment and payment of the legitimate claims of such clients and the handling of client complaints;
- (f) appoint and dismiss senior officers and establish the level of remuneration for officers of the central securities depository based on criteria that promote the interests of the central securities depository and the integrity of the financial system and are not such as to encourage imprudent behaviour;

- (g) establish internal risk management strategies and policies for the identification, measurement, monitoring and controlling of significant risks on an on-going basis;
- (h) establish procedures for the outsourcing of functions, subject to the prior written approval of the Registrar;
- (i) monitor the procedures, strategies and policies referred to in this paragraph to ensure that they are being adhered to by the central securities depository and that they are modified from time to time to take account of changing circumstances; and
- (j) prepare the annual financial statements of the central securities depository in accordance with International Financial Reporting Standards and approve those statements.

(3) The board of directors of a central securities depository may appoint from among their number such other committees, in addition to the audit committee, as they consider necessary and may delegate to any such committee such of their powers as they consider appropriate but any such delegation does not limit the responsibilities of the members of the board.

Duty to act in good faith

65. (1) Every director of the board, principal officer and other members of senior management of a central securities depository in exercising any of the powers, and discharging any of the duties, of a director or an officer must -

- (a) act honestly and in good faith with a view to the best interests of the central securities depository and clients; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) Every director of the board, the principal officer, other members of senior management and employees of a central securities depository must comply with these conditions, the memorandum of association and articles, the depository rules and other applicable legislation.

(3) No provision in any contract, in any resolution or other documents of a central securities depository relieves any director of the board, principal officer, other member of senior management or employee of the central securities depository from the duty to act in accordance with these conditions or relieves such persons from liability for a contravention of these conditions.

Audit committee

66. The audit committee must comprise at least two directors of the board, at least one of whom must be an independent director, to -

- (a) review the annual financial statements of the central securities depository before they are approved by the board and make any recommendations or comments thereon to the board;
- (b) review such transactions and conditions that could significantly and adversely impact the financial position of the central securities depository as the auditor or any officer of the central securities depository may bring to the attention of the committee;

- (c) meet with the auditor of the central securities depository to discuss the annual financial statements;
- (d) meet with the chief internal auditor of the central securities depository or the officer or employee of the central securities depository acting in a similar capacity and with management of the central securities depository to discuss the effectiveness of the internal control procedures established for the central securities depository;
- (e) with regard to any annual return or other returns of a central securities depository that under these conditions must be approved by the board, report to the full board with regard to any comments or findings of the audit committee before board approval is requested;
- (f) call a meeting of the board of the central securities depository to consider any matters that the audit committee considers to be of concern; and
- (g) carry out any other responsibilities that may be delegated to the committee by the board.

Central securities depository to provide assistance to Registrar

67. (1) A central securities depository must provide assistance to the Registrar for the performance of his or her functions.

(2) The Registrar and his or her authorised representative must have access to any part of the premises of a central securities depository and a participant at reasonable times to ensure compliance with these conditions.

Annual financial statements and audit of records and accounts

68. (1) The central securities depository must submit copies of its audited annual financial statements and a duly certified audit report regarding the records and accounts of the central securities depository to the Registrar within 60 business days after the end of the central securities depository's financial year.

(2) The Registrar may, by notice in writing, direct that an audit be conducted of any aspect of, or all of, a central securities depository's operations at the expense of the central securities depository.

PART 11 POWERS OF REGISTRAR

Powers of Registrar

69. The Registrar has in relation to a central securities depository the powers conferred upon the Registrar by -

- (a) the NAMFISA Act;
- (b) the Inspection of Financial Institutions Act, 1984 (Act No. 38 of 1984);
- (c) the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984); and
- (d) any other law,

to regulate and supervise central securities depositories, and any incidental matters.

Power to require production of records

70. (1) The Registrar may give directives in writing to -
- (a) a central securities depository;
 - (b) a participant or its nominee company;
 - (c) a user;
 - (d) a person who is or has been an officer or employee of a central securities depository; or
 - (e) an agent, legal practitioner, auditor or other person acting in any capacity for or on behalf of a central securities depository, nominee company, a participant or a user,

to produce to the Registrar records and accounts related to the business or affairs of a central securities depository, a participant or a user and the records and accounts required to be kept by a central securities depository under these conditions.

- (2) Where the Registrar requires the production of records and accounts, the Registrar -
- (a) may take control of the records and accounts and make copies or extracts from it;
 - (b) may require any person who is a party to the compilation of the records and accounts to make a statement providing an explanation of the records and accounts;
 - (c) may retain control of the records and accounts for a period that the Registrar may consider necessary; and
 - (d) must permit any authorised person, upon being given reasonable notice and descriptions of the records and accounts, to have access to the records and accounts which are in the possession of the Registrar.

(3) Where the Registrar requires the production of records and accounts and the records and accounts are not produced, the Registrar may require a person to -

- (a) state where the records or accounts may be found; and
- (b) identify the last person who had custody of the records and accounts and where that person may be found.

Power to issue directives

71. (1) The Registrar may issue such directives as are considered necessary or desirable for carrying out his or her duties and functions under these conditions and to achieve the objects and intent of these conditions.

(2) The central securities depository must comply with any directives which may be issued by the Registrar.

(3) Without derogating from the generality of subparagraph (1), the Registrar may issue a directive requiring a central securities depository to -

- (a) furnish the Registrar with any information or documents in the possession or under the control of the central securities depository;
- (b) comply with the whole or a specified part of these conditions or any other relevant law;
- (c) cause an auditor to be appointed at the expense of the central securities depository to audit the central securities depository's records and to submit a report to the Registrar;
- (d) cause an expert nominated by the Registrar to be appointed to prepare a report on the central securities depository's affairs and to submit the report to the Registrar;
- (e) prevent a specified key responsible person from taking part in the management or conduct of the business of the central securities depository, except as permitted by the Registrar, after giving the person concerned and the central securities depository a reasonable opportunity to be heard;
- (f) remove an auditor of the central securities depository from office after giving the person concerned and the central securities depository a reasonable opportunity to be heard;
- (g) make arrangements to the satisfaction of the Registrar for the discharge of all or any part of the obligations of the central securities depository under these conditions or any other relevant law;
- (h) any other matter which is necessary or expedient for the better achievement of the objects of these conditions; or
- (i) take any other corrective action which the Registrar considers necessary or desirable in the interests of the central securities depository, its clients or the integrity of the financial system of Namibia.

(4) Where the Registrar has caused a report to be prepared pursuant to subparagraph (3)(d), the Registrar may, at any time up to the end of a period of 21 business days following receipt of the report, direct the central securities depository to assume the expense of it, at which point such expense becomes payable by central securities depository.

(5) A directive under subparagraph (3)(e) may only be issued if the Registrar is satisfied that the person referred to in that subparagraph -

- (a) was knowingly involved in the commission of a financial crime;
- (b) acted recklessly or with intent to defraud creditors or clients of the central securities depository;
- (c) has contravened these conditions, the Act or another relevant law in a manner that is likely to affect the financial stability of the central securities depository or to prejudice the interests of clients;
- (d) is conducting its affairs in an improper, reckless or financially unsound manner; or
- (e) is otherwise not fit and proper as described in the Annexure.

(6) A directive must specify the time by which, or period during which, it must be complied with.

(7) A directive issued under these conditions is not a ground on which a person may terminate, repudiate or cancel a contract with a central securities depository, accelerate any debt due under such a contract or close out a transaction with such central securities depository, despite any provision to the contrary in any document.

(8) A court may, on application by a party to a contract referred to in subparagraph (7), other than the central securities depository concerned, make an order relating to the effect of the directive on that contract.

(9) The Registrar may revoke a directive at any time by notice to the central securities depository or other person concerned.

Reporting obligations

72. (1) The Registrar may issue a directive imposing reporting requirements on -

- (a) a central securities depository;
- (b) a participant; and
- (c) a person who is or has at any time been a director of the board, principal officer, member of senior management or an auditor of a central securities depository.

(2) The directive referred to in subparagraph (1) may require the persons referred to in that subparagraph to make reports to the Registrar and to give information or documents to the Registrar on matters with respect to the central securities depository or participant concerned in connection with the performance of functions by the Registrar under these conditions, the Act or other relevant laws.

(3) Without derogating from the provisions of subparagraph (1) and (2), the Registrar may require -

- (a) the filing with the Registrar of periodic and other returns, including but not limited to quarterly reports, annual reports and financial statements;
- (b) notification of changes in management and control of a central securities depository;
- (c) reports on financial difficulties or suspected financial difficulties; or
- (d) reports on contraventions or suspected contraventions of these conditions, the Act or other relevant laws, and the commission or suspected commission of a financial crime.

(4) A person who makes a report to the Registrar -

- (a) with respect to -
 - (i) financial difficulties or suspected financial difficulties of a central securities depository; or
 - (ii) a contravention or suspected contravention of these conditions, the Act or other relevant laws or the commission or suspected commission of a financial crime; or

(b) pursuant to subparagraph (3),

whether or not the report is required by these conditions or the Act, is not liable for damages or other sanction in relation to any loss caused by the report if the report is made in good faith.

(5) A person may not subject a reporter to any prejudice in his or her employment or penalise a reporter in any way, on the grounds that the reporter has made a report referred to in subparagraph (4), whether or not the report is required under these conditions or the Act.

Fees

73. (1) The Registrar may, after considering a representation made under subparagraph (2), determine -

- (a) those matters under these conditions in respect of which fees are payable under these conditions;
- (b) the amount of the fee payable in respect of each such matter;
- (c) the persons by whom the fees must be payable and the manner of payment; and
- (d) where necessary, the payment of interest on overdue fees.

(2) Before making a determination with respect to fees under subparagraph (1), the Registrar must publish information about the proposed fees through a notice in the *Gazette* and in such manner as may be appropriate in order to bring the proposed fees to the attention of persons who may be affected thereby, together with a statement that representations on the proposed fees may be made to the Registrar within the time period specified in the notice which period may not be less than 30 business days from the date of the notice.

(3) A fee determined by the Registrar under subparagraph (1), or any change to such fee, comes into effect 30 business days after the date of the notice announcing the final fee or within such extended period as may be determined by the Registrar, which period may not exceed 60 business days from the date that the notice was published in the *Gazette*.

Power to verify information

74. (1) For purposes of subparagraph (2), “organ of the State” means -

- (a) any office, ministry or agency as defined in the Public Services Act, 1995 (Act No. 13 of 1995);
- (b) any local authority council as defined in the Local Authorities Act, 1992 (Act No. 23 of 1992);
- (c) any regional council as defined in the Regional Councils Act, 1992 (Act No. 22 of 1992); and
- (d) any other functionary or institution exercising a power or performing a function in terms of the Namibian Constitution, or exercising a public power or performing a public function in terms of any law.

(2) For the purposes of a determination in accordance with these conditions as to whether a person is fit and proper, the Registrar may verify any information at the Registrar’s disposal by making enquiries at any organ of the State, credit bureau authorised by law to keep information about the creditworthiness of any person or any other lawful source of information or by obtaining the evidence of any other person.

Late filing or payment

75. A central securities depository or other person that fails to -
- (a) file with the Registrar a return, report, statement, financial statement or any other document or information required under these conditions within the period specified; or
 - (b) pay any required fee on or before the due date,

may, with the prior consent of the Registrar, furnish the return, report, statement or other document or information or pay the required fee after the specified period or due date, subject to any administrative sanction referred to in condition 76.

Administrative sanctions

76. (1) The Registrar may impose an administrative sanction referred to in subparagraph (4) on any central securities depository or other person to whom these conditions apply when satisfied on available facts and information that the central securities depository or person -

- (a) has failed to comply with these conditions, a rule, a directive, a request or a requirement of the Registrar;
- (b) no longer meets the requirements for registration;
- (c) is in an unsound financial position; or
- (d) a key responsible person or the central securities depository no longer meets the fit and proper requirements as described in the Annexure.

(2) Before imposing an administrative sanction referred to in subparagraph (4), the Registrar must give the central securities depository or person reasonable notice in writing -

- (a) of the nature of the alleged non-compliance;
 - (b) of the intention to impose an administrative sanction;
 - (c) of the amount or particulars of the intended administrative sanction; and
 - (d) advise that the central securities depository or person may, in writing, within a period specified in the notice, make representations as to why the administrative sanction should not be imposed.
- (3) In determining an appropriate administrative sanction, the Registrar must consider -
- (a) the nature, duration, seriousness and extent of the relevant non-compliance;
 - (b) whether the central securities depository or person has previously failed to comply with any law;
 - (c) any remedial steps taken by the central securities depository or person to prevent a recurrence of the non-compliance;
 - (d) any steps taken or to be taken against the central securities depository or person by any voluntary association of which the central securities depository or person is a member; and

- (e) any other relevant factor, including mitigating factors.
- (4) After considering any representations and the factors referred to in subparagraph (3), the Registrar may -
- (a) give the central securities depository or person a written warning;
 - (b) give the central securities depository or person a reprimand;
 - (c) issue a directive to the central securities depository or person requiring the central securities depository or person to undertake a specified act or to refrain from undertaking a specified act in order to -
 - (i) remedy the effects of the contravention; and
 - (ii) ensure that the central securities depository or person does not commit any further contraventions of these conditions, the Act or other relevant law;
 - (d) require the central securities depository or person to establish compliance programs, corrective advertising or changes in the management practices of the central securities depository or person;
 - (e) suspend the registration of the central securities depository or person for a specified period and subject to such conditions as may be determined by the Registrar;
 - (f) subject to other provisions of these conditions, cancel the registration of central securities depository or person to carry on business; or
 - (g) impose a financial penalty not exceeding N\$10 million, payable by that central securities depository or person to the Registrar in the manner specified by the Registrar.
- (5) The Registrar may -
- (a) in addition to the imposition of an administrative sanction, make recommendations to the central securities depository or person in respect of compliance with these conditions, or any rule, directive, request or requirement of the Registrar under these conditions;
 - (b) direct that a financial penalty must be paid by a natural person or person for whose actions the central securities depository or person is accountable in law, if that person or persons was or were personally responsible for the non-compliance; or
 - (c) suspend any part of any administrative sanction on any condition that the Registrar considers appropriate for a period not exceeding five years.
- (6) On imposing the administrative sanction the Registrar must, in writing, notify the central securities depository or person of -
- (a) the decision and the reasons for it;
 - (b) in the case of a financial penalty, the amount payable as a penalty and any interest that may become payable and the interest rate, and the period within which the penalty must be paid to the Registrar; and

- (c) the right to appeal against the decision in accordance with section 24 of the NAMFISA Act.

(7) Any financial penalty imposed under subparagraph (4)(g) must be paid to the Registrar within the period and in the manner specified in the notice referred to in subparagraph (6) and is a debt due to NAMFISA.

(8) The Registrar must make public the decision and the nature of any sanction imposed if -

- (a) the central securities depository or person does not appeal against a decision of the Registrar within the required period; or
- (b) the Appeal Board confirms the decision of the Registrar,

unless the Registrar is of the opinion that there are exceptional circumstances present that justify the preservation of the confidentiality of a decision.

Amalgamations and transfers

77. (1) A central securities depository may not amalgamate with any other entity except with the prior written approval of the Registrar.

(2) The Registrar may not approve an amalgamation referred to in subparagraph (1) unless satisfied that the interests of clients are adequately protected and that the amalgamated entity will satisfy the requirements for registration under these conditions.

(3) A central securities depository may not transfer all or any portion of its business except with the prior written approval of the Registrar.

(4) The Registrar may not approve a transfer referred to in subparagraph (3) unless satisfied that the interests of clients of the transferring central securities depository and of the other party to the proposed transaction are adequately protected and that the other party is registered under these conditions.

Disclosure to Registrar

78. The Registrar may require any person to disclose to the Registrar -

- (a) information regarding the acquisition or disposal of deposited securities and the nature of the instructions given to the central securities depository or its depository agent in respect of the acquisition or disposal;
- (b) information regarding the disposal of the securities accounts and entries made in the securities accounts; or
- (c) the uncertificated securities acquired or disposed of by a depositor as trustee for or on behalf of another person, including the name of the person and the nature of instructions given to the depositor in respect of the acquisition and disposal.

Extensions of time and exemptions

79. (1) If these conditions require a central securities depository to do anything within a specific period of time, such period may on written request, with reasons, be extended by the Registrar on such conditions as the Registrar considers necessary.

(2) A central securities depository may in writing request the Registrar to exempt it from complying with specific provisions of these conditions.

(3) The Registrar may grant an exemption in terms of subparagraph (2) for such a period and on such conditions as the Registrar may determine and if the Registrar is satisfied that -

- (a) the rendering of central securities depository services or post-trade services is already partially or wholly regulated by any other law; or
- (b) the granting of the exemption will not -
 - (i) conflict with the public interest;
 - (ii) prejudice the interests of clients; and
 - (iii) frustrate the achievement of the objects of these conditions.

PART 12 MISCELLANEOUS PROVISIONS

Settlement guarantee fund

80. (1) A central securities depository must establish and maintain a settlement guarantee fund for the purpose of providing indemnity against default in respect of payments for or delivery of securities by a participant and of obligations of participants towards the central securities depository.

(2) The assets of the settlement guarantee fund must consist of moneys accruing to the settlement guarantee fund and contributions specified in the depository rules.

(3) Where the central securities depository has made payment from the settlement guarantee fund in relation to a default, even if the central securities depository is not a counter party to the transaction between selling and buying participants, it must be subrogated to the rights and powers of the participant not in default for the purpose of the seizure and sale of unpaid securities and of operating the settlement guarantee fund.

Warranty

81. (1) Every person, whether a client or participant, who deposits securities with a participant or central securities depository is deemed to warrant that -

- (a) such person is entitled to deposit such securities and that any document or instruction relating to such securities lodged or given by that person are authentic and correct in all respects; and
- (b) that person is deemed to have agreed to indemnify the participant or the central securities depository against any claim made upon the participant or central securities depository and against any loss suffered by the participant or central securities depository arising out of such deposit or breach of warranty.

(2) A central securities depository is not deemed to have given a warranty or indemnity referred to in subparagraph (1).

Recognition of trust

82. A central securities depository is not obliged to recognise any relationship of trust or agency of its participants in respect of securities.

ANNEXURE

CRITERIA USED BY THE REGISTRAR TO DETERMINE WHETHER A KEY RESPONSIBLE PERSON MEETS THE FIT AND PROPER STANDARDS

1. Definition of “Fit and Proper”

The Financial Intelligence Act (hereinafter referred to as “FIA”), under section 35(15)(a), places an obligation upon NAMFISA as a supervisory body, and consequently on the Registrar, to “*adopt the necessary measures to prevent or avoid having any person who is not fit and proper from controlling, or participating, directly or indirectly, in the directorship, management or operation of an accountable or reporting institution.*”

This obligation derives from Recommendation 26 of the FATF Recommendations which requires supervisors to “*take the necessary legal or regulatory measures to prevent criminals or their associates from holding, or being the beneficial owner of, a significant or controlling interest, or holding a management function in, a financial institution.*”

Neither FIA nor the Regulations issued under FIA define the term ‘fit and proper’. It is generally accepted that fitness and propriety has five main components, namely -

- (a) identification;
- (b) honesty and integrity;
- (c) competence;
- (d) operational ability; and
- (e) financial soundness.

2. Assessment of fitness and propriety

Set out underneath are the criteria which the Registrar will consider in assessing the fitness and propriety of persons trading as, or are involved in, the business of central security depositories.

The Registrar will exercise judgment and discretion in assessing fitness and propriety and take into account all relevant matters including -

- (a) competence and capability;
- (b) honesty, integrity, fairness, ethical behaviour; and
- (c) financial soundness,

to ensure that the applicant is not likely to have significant implications for the sound and prudent management of a central security depository.

In the absence of internationally-agreed qualifications for the regulated accountable and reporting institutions, the Registrar has adopted an approach whereby a set of core competencies are used to assess whether an individual is qualified, competent and able to carry out the functions expected from a person involved in the business of the accountable or reporting institution.

In assessing fitness and propriety, the Registrar will also take account of the activities of the institution for which the controlled function is or is to be performed, the registration held by the institution and the markets within which it operates. If a matter comes to the Registrar's attention which suggests that the person might not be fit and proper, the Registrar will take into account how relevant and how important such matter is.

The fit and proper assessment is both an initial test undertaken during consideration of an application for registration, and also a continuing and cumulative test which takes into account the ongoing conduct of the institution and the history of compliance with all applicable laws and regulations.

All accountable and reporting institutions are required to adhere to the Registrar's registration requirements and ongoing supervisory oversight, including periodic on-site inspection and regular regulatory reporting. Accountable and reporting institutions are expected to conduct their affairs in conformity with all Namibian legislation, including adherence to Namibian anti-money laundering legislation, the FIA, the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004) and the Prevention and Combating of Terrorist and Proliferation Activities Act, 2014 (Act No. 4 of 2014).

3. Components of fitness and propriety

3.1 Honesty and Integrity

In determining a person's honesty and integrity, the Registrar will have regard to all relevant matters including, but not limited to those set out in Part A of the Appendix which may have arisen either in Namibia or elsewhere. The Registrar should be informed of these matters, but will consider the circumstances only where relevant to the requirements and standards of the regulatory system.

The Registrar will treat each declaration on a case-by-case basis, taking into account the seriousness of, and circumstances surrounding, any incidence, the explanation offered by the declarant, the relevance of the incident to the proposed role, the passage of time since the incident's occurrence and evidence of the declarant's subsequent status and behaviour.

The declarant should be able to demonstrate their honesty and integrity.

3.2. Competence

Competence relates to a person's ability to fulfil their assigned role (i.e. experience, qualifications, etc.). It also involves the applicant's ability to perform controlled function for which registration is sought.

The declarant has to demonstrate experience and training, as set out in Part B of the Appendix that they are suitable or will be suitable if approved to perform the controlled function.

3.3. Operational ability

Operational ability relates to the applicant's ability to fulfil the responsibilities imposed by applicable legislation, as set out in Part C of the Appendix.

3.4. Financial soundness

Financial soundness relates to the adequacy of applicant's financial standing (i.e. capital adequacy requirements) as set out in Part D of the Appendix.

This assessment is conducted at the institution level and not at the personal level of the directors, managers and other key persons.

4. Who should be assessed

All persons listed in the first column of Part B of the Appendix should be assessed. It is important to note that in terms of section 2.5 of the Exemption Order issued in terms of the Financial Intelligence Act, 2007 (Act No. 3 of 2007), published under Government Notice No. 75 of 5 May 2009, accounting and reporting institutions are exempt from establishing the identity of a listed public company and making further enquiries with regard to the identity of the beneficial owner or the individual directors, as required by Regulation 3 of the Regulations promulgated under Government Notice No. 74 of 5 May 2009. This exemption only applies if the following are met -

- (a) the public company is -
 - (i) listed on an exchange that is a member or associate or affiliate of the International Organisation of Securities Commission;
 - (ii) regulated by NAMFISA;
 - (iii) a public enterprise; or
 - (iv) a subsidiary of any of the above company or institution; and
- (b) the accountable institution or reporting institution has ascertained and verified -
 - (i) the registered name;
 - (ii) the registered number; and
 - (iii) the operating or trading address, if there are multiple operating/trading addresses, the address of the office seeking to establish a relation or enter into a transaction.

For all other persons listed in the first column of Part B of the Appendix, after completing the fit and proper statement, the persons must attach documents, or certified copies of documents, which can verify the information supplied by such person. For example -

- (a) a copy of a person identification document or company formation document to verify the identity;
- (b) police clearance certificate to verify lack of or presence of criminal convictions;
- (c) proof of academic qualifications or admission to professional body;
- (d) proof of admission to professional body; and
- (e) letters of good standing.

APPENDIX

PART A – HONESTY AND INTEGRITY

A person is able to demonstrate honesty and integrity if that person:

- i) is not disqualified from being a director of a company in terms of the Companies Act, 2004 (Act No. 28 of 2004);
- ii) has not breached a fiduciary obligation;
- iii) has not perpetrated or participated in grossly negligent, deceitful, or otherwise discreditable business or professional practices;
- iv) has not been reprimanded, or disqualified, or removed by a professional or regulatory body in relation to matters relating to the person's honesty, integrity or business conduct;
- v) has not been substantially involved in the management of a business or company which has failed, where that failure has been occasioned in part by deficiencies of honesty, integrity, fairness or ethical behaviour in that management;
- vi) is not of bad repute in any business or financial community or any market;
- vii) was not the subject of civil or criminal proceedings or enforcement action, in relation to the management of an entity, or commercial or professional activities, which were determined adversely to the person (including by the person consenting to an order or direction, or giving an undertaking, not to engage in unlawful or improper conduct) and which reflected adversely on the person's competence, diligence, judgment, honesty or integrity;
- viii) whether the person has been candid and truthful in all his dealings with any regulatory body and whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards;
- ix) has not been refused authorisation to carry on business by any regulatory body (whether in Namibia or elsewhere), or has such authorisation ever been suspended or revoked by any such body, because of negligence, incompetence or mismanagement;
- x) has not been a substantial shareholder in the business or company which has failed, where that failure has been occasioned in part by deficiencies of honesty, integrity, fairness or ethical behaviour in that management; or
- xi) has ever been found to be liable under the Financial Intelligence Act, 2012 or the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004) or the Preventing and Combating of Terrorist and Proliferation Activities Act, 2014 (Act No. 4 of 2014) or any other similar crime in any country.

PART B – EDUCATION REQUIREMENTS		
<p>Significant Owners A person is deemed to have significant ownership when the person -</p> <p>i) owns or controls, directly or indirectly, including through trusts or bearer share holdings for any legal person, 20% or more of the shares or voting rights of the entity;</p> <p>ii) together with a connected person owns or controls, directly or indirectly, including through trusts or bearer share holdings for any legal person, 20% or more of the shares or voting rights of the entity;</p> <p>iii) despite a less than 20% shareholding or voting rights, receives a large percentage of the person's declared dividends; or</p> <p>iv) otherwise exercises control over the management of the person in his or her capacity as executive officer, non-executive director, independent non-executive director, director, manager or partner.</p>	<p>Matric with Commercial or Business related subjects (mathematics, economics, accounting and computer science or any other business subject).</p>	<p>At least 5 years industry related experience at senior management level.</p>

Management	<p>i) A business degree (Finance, Commerce, Accounting, Economics or related business qualification) from an accredited university;</p> <p>ii) Matric with Commercial or Business related subjects (mathematics, economics, accounting and computer science or any other business subject);</p> <p>iii) Registered persons examinations of the South African Institute of Financial Markets; or</p> <p>iv) Chartered Financial Analyst.</p> <p>v) Other qualifications to be evaluated by the Registrar on a case by case basis.</p>	<p>i) At least three (3) years Industry related experience.</p> <p>ii) At least ten (10) years Industry related experience.</p> <p>iii) At least three (3) years Industry related experience.</p> <p>iv) At least one (1) year Industry related experience.</p> <p>v) Determined by Registrar on a case by case basis.</p>
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<p>Key employee (an employee with a significant ownership or decision-making role in the business and includes a director, controlling officer or any other person responsible for managing or overseeing, either alone or together with other such responsible persons, the activities of the CSD relating to the rendering of any financial services.)</p>	<p>i) A business degree (Finance, Commerce, Accounting, Economics or related business qualification) from an accredited university;</p> <p>ii) Matric with Commercial or Business related subjects (mathematics, economics, accounting and computer science or any other business subject);</p> <p>iii) Registered persons examinations of the South African Institute of Financial Markets;</p> <p>iv) Chartered Financial Analyst;</p> <p>v) Other qualifications to be evaluated by the Registrar on a case by case basis.</p>	<p>i) At least three (3) years Industry related experience.</p> <p>ii) At least ten (10) years Industry related experience.</p> <p>iii) At least five (5) years Industry related experience.</p> <p>iv) At least one (1) year Industry related experience.</p> <p>v) Determined by Registrar on a case by case basis.</p>
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PART C – OPERATIONAL ABILITY

- (1) Do the compliance arrangements specify how often compliance with procedures are monitored and reported?
- (2) Do they use a documented process to maintain the adequacy of their compliance and monitor arrangements?
- (3) Do they document processes to ensure records are kept for training programs attended, including continued education training, for their key individuals and/or representatives?
- (4) Do they have documented processes for the supervision and monitoring of their representatives to ensure they comply with the Act?
- (5) Do they use a documented process to ensure all representatives are trained, competent and will provide financial services on your behalf efficiently, honestly and fairly?
- (6) Do they have guarantees, professional indemnity or fidelity insurance cover?
- (7) Have they established compliance and reporting arrangements for your entity activities?
- (8) Do they have a process in place to ensure that providers selected for any outsourced functions are suitable?
- (9) Is entity to which functions are the outsourced a registered regulated entity?
- (10) To whom will they be outsourcing these activities?
 - (a) independent party;
 - (b) related party; or
 - (c) both.
- (11) What functions will be outsourced?
- (12) Is the entity to which they intend outsourcing identified?
- (13) Do they have internal controls structure, procedure and controls in place which include the following:
 - (a) segregation of duties and roles and responsibilities where such segregation is appropriate from an operational risk mitigation perspective;
 - (b) access rights and data security on electronic data, where applicable;
 - (c) physical security of the providers' assets and records, where applicable;
 - (d) documentation relating to business processes, policies and controls, and technical requirements;
 - (e) system application testing, where applicable;
 - (f) disaster recovery and back-up procedures on electronic data, where applicable;
 - (g) training for all staff regarding the requirements of the Act;
 - (h) training for all key individuals and/or representatives regarding the giving of advice and/or rendering of intermediary services by the provider; and
 - (i) a business continuity plan.
- (14) Are their terms and conditions of business separate from their mandate and/or application form?

PART D – FINANCIAL SOUNDNESS

An applicant is able to demonstrate financial soundness if:

- (1) when in existence for more than one year, has had and can provide a copy of its audited financial statements as at its latest financial year end;
- (2) can provide a copy of its budgeted income and expenditure statement (income statement), balance sheet and cash flow statements for a three-year period from date of its latest financial year end;
- (3) can provide a schedule illustrating its funding provisions for anticipated supervisory responsibilities over the budgetary period;
- (4) can provide a written statement by its Chief Executive Officer specifying the critical assumptions made in the preparation of budgets as well as specifying the sources of its funding;
- (5) can provide, where arrangements have been made for funding of any temporary shortfall in available cash resources by the party or parties concerned setting out the extent and terms of their commitment;
- (6) can provide a projection of management and staff requirements for the period covered by the budgets;
- (7) can provide a Business Plan that has been approved by its controlling body or its highest authority;
- (8) can provide details of its compensation plans (professional indemnity or fidelity insurance cover) sufficient to cover the risk of losses due to fraud, dishonesty, negligence or any other dishonest acts or breaches of professional duty of its employees, directors or representatives;
- (9) can provide proof of the minimum paid-up share capital adequate for employment in the business;
- (10) there are no indicators that the person will not be able to meet his debts as they fall due;
- (11) the person has not seriously or persistently failed to manage personal debts or financial affairs satisfactorily in circumstances where such failure caused loss to others;
- (12) the person has not been subject to any judgment debt or award that remains outstanding or has not been satisfied within a reasonable period;
- (13) the person meets determined minimum financial and insurance or bonding requirements;
- (14) the person has not made arrangements with creditors, filed for sequestration or liquidation or been adjudged bankrupt or had assets sequestered; or
- (15) the person has been able to provide a satisfactory credit reference.

PART E- INDEPENDENCE OF DIRECTORS OR OTHER PERSONS

- (1) An individual will not be considered independent in respect of an election or appointment to a position with a financial institution if the individual:
 - (a) is an associate of -
 - (i) the financial institution;
 - (ii) an entity that is an affiliate of the financial institution; or
 - (b) derives any benefit in the provision of a financial service to a client, other than through any contractual relationship with the financial institution documenting the election or appointment to the position.
 - (2) In relation to a financial institution, an individual will not be considered independent if, in respect of an election or appointment to a position with that financial institution or the individual:
 - (a) is employed, or has, within the immediately preceding year, been employed, by the financial institution concerned, or
 - (b) by an associate or affiliate of that financial institution.
 - (3) An auditor will not be considered independent, whether as an individual not associated with a firm of auditors or associated to a firm of auditors if the auditor:
 - (a) is a key person with respect to the financial institution concerned or is a key person of an associate or affiliate of that financial institution; or
 - (b) is associated with the valuator of that financial institution or with the member of the firm of valuers.
 - (4) A valuator will not be considered independent if the valuator:
 - (a) is a key person with respect to the financial institution concerned or is a key person of an associate or affiliate of that financial institution; or
 - (b) is associated with the auditor of that financial institution or with the member of the firm of auditors.
 - (5) Where it is contemplated that an individual may be elected or appointed to a position with a financial institution, that individual must disclose to the financial institution any matter which relates or may possibly relate to the independence of the individual, both before the election or appointment and on an ongoing basis.
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