

STOCKS AND SECURITIES

UNIT TRUSTS CONTROL ACT 54 OF 1981

[ASSENTED TO 18 AUGUST 1981] [DATE OF COMMENCEMENT: 9 SEPTEMBER 1981]

(Signed by the President)

as amended by

Inspection of Financial Institutions Act 38 of 1984
Financial Institutions Amendment Act 51 of 1988
Namibia Financial Institutions Supervisory Authority Act 3 of 2001
Unit Trusts Control Amendment Act 10 of 2011

ACT

To consolidate the laws relating to the regulation and control of the establishment, carrying on and management of certain trust schemes relating to securities; and the prohibition of analogous schemes relating to other assets; and to provide for incidental matters.

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1 Definitions

In this Act, unless the context indicates otherwise-

"approved securities"

[Definition of "approved securities" deleted by sec 1(b) of Act 10 of 2011]

"assets" means the investments comprising or constituting a unit portfolio of a unit trust scheme, and includes any income accruals derived therefrom; **"compulsory charge"** means any fiscal charge in connection with the creation and issue of units and any necessary charge payable for the benefit of a person other than the management company concerned or its agents (not being members of a recognized stock exchange) in connection with the acquisition of the underlying securities included or to be included in a unit portfolio;

[Definition of "assets" inserted by sec 1(a) of Act 10 of 2011]

"fixed property company" means a company all the issued shares of which are included in a unit portfolio, and the principal business of which consists in the acquisition and holding of urban immovable property or such other immovable property as the registrar may have approved;

"income accruals" means any dividends or interest or any other income for distribution received by the trustee or the management company on behalf of holders of units in the course of any income distribution period or carried forward from any previous income distribution period or due to such holders in respect of dividend or interest or any other income declarations made but not yet distributed;

"initial charge", in relation to a unit, means that portion of the selling price of the unit which represents the management company's charges in respect of expenditure incurred and work performed by it in connection with the formation and issue of such unit, but does not include any compulsory charge;

"licensed stock exchange" means a stock exchange licensed under the Stock Exchanges Control Act, 1985 (Act 1 of 1985);

[Definition of "licensed stock exchange" substituted by sec 8(b) of Act 51 of 1988.]

"liquid assets"

[Definition of "liquid assets" inserted by sec 1(b) of Act 10 of 2011]

"made-up price", in relation to the price of a unit at a particular date, means an amount representing the proportionate part of the aggregate value of the underlying securities comprised in the unit portfolio in question, determined in accordance with the market prices of such securities which are used by the management company as the basis for calculating the selling price of the unit as at that date plus amounts calculated to cover income accruals, compulsory charges and the management company's initial charge;

"management company", in relation to a unit trust scheme, means the company which manages or controls the scheme and issues unit certificates thereunder;

"Minister" means the Minister of Finance;

"open-ended investment company" means a company with an authorised share capital which is structured in such a manner that it provides for the issuing of different classes of shares to investors, each class of shares representing a separate portfolio with a distinct investment policy;

[Definition of "open-ended investment company" inserted by sec 1(c) of Act 10 of 2011]

"prescribed" means prescribed by regulation or, in relation to any form to be used for the purposes of this Act, means prescribed by the registrar;

"property shares" means securities in and of a fixed property company;

"recognized stock exchange" means a stock exchange licensed under the Stock Exchanges Control Act, 1985 (Act 1 of 1985), or a stock exchange outside the Republic recognized by the registrar for the purposes of this Act;

[Definition of "recognized stock exchange" substituted by sec 8(b) of Act 51 of 1988.]

"registrar" means the registrar of unit trust companies referred to in section 2;

[Definition of "registrar" substituted by sec 37 of Act 3 of 2001.]

"regulation" means a regulation made under this Act;

"securities"-

(a) means assets consisting of-

(i) shares, stocks and depository receipts in public companies;

(ii) notes;

(iii) bonds;

(iv) debentures;

(v) units in a unit trust scheme;

(vi) instruments based on-

(aa) an index as determined by an exchange;

(bb) an asset or group of assets, whether such group of assets is represented by an index or not;

(vii) money market instruments;

(viii) derivative instruments, including a warrant, option contract or future contract;

- (ix) an instrument declared by the registrar by notice in the *Gazette*;
 - (x) rights in the securities referred to in subparagraphs (i) to (ix); and
 - (xi) the securities contemplated in subparagraphs (i) to (x) that are listed on a foreign stock exchange; and
- (b) excludes any security contemplated in paragraph (a) and specified by the registrar by notice in the *Gazette*;

[Definition of "securities" substituted by sec 8(c) of Act 51 of 1988 and by sec 1(d) of Act 10 of 2011]

"service charge" means the periodical charge permitted to be deducted from the income accruing to the holders of unit certificates, to remunerate the management company for managing a unit portfolio, expressed in the relevant trust deed as a percentage of the average month-end market value of the total assets (excluding income accruals) comprising the unit portfolio during the income distribution period for which the charge is levied;

"stock exchange securities" means securities which are listed and authorized to be dealt in on a recognized stock exchange, and the prices of which are quoted in a list issued for publication by such stock exchange;

"this Act" includes the regulations;

"trust deed" means the agreement between a management company and a trustee, and includes a document of incorporation whereby a unit trust scheme is established and in terms of which it is administered;

[Definition of "trust deed" substituted by sec 1(e) of Act 10 of 2011]

"underlying securities", in relation to a unit portfolio, means the securities and other assets comprised in or constituting the unit portfolio and includes any moneys derived or resulting from the management of the unit portfolio which are held by or are due to the management company or the trustees for the benefit of the holders of unit certificates in that unit portfolio;

[Definition of "underlying securities" substituted by sec 1(f) of Act 10 of 2011]

"unit" means any interest or undivided share (whether called a unit or by any other name, and whether the value of such interest or share remains constant or varies from time to time) which may be acquired by an investor in a unit portfolio;

"unit certificate" means a document which serves as evidence of the title of the holder thereof to one or more units acquired by him in a unit portfolio;

"unit portfolio" means a group of securities and assets including any amount of cash in which members of the public are invited or permitted by a management company to acquire, pursuant to a unit trust scheme, units of a specific class which as a result of their specific characteristics differ from any other class of units;

[Definition of "unit portfolio" substituted by sec 1(g) of Act 10 of 2011]

"unit trust scheme" means any scheme or arrangement, in whatever form, including an open-ended investment company, in pursuance of which members of the public are invited to acquire an interest or undivided share (whether called a unit or by any other name) in one or more unit portfolios and to participate proportionately in the income or profits derived therefrom, whether the value of such interest, unit or undivided share which may be acquired remains constant or varies from time to time;

[Definition of "unit trust scheme" substituted by sec 1(h) of Act 10 of 2011]

"unlisted assets" means securities other than stock exchange securities and such other securities determined by the registrar by notice in the *Gazette*;

[Definition of "unlisted assets" inserted by sec 1(i) of Act 10 of 2011]

"urban immovable property" means any piece of land registered as an erf, lot or stand in a deeds registry, including the office of the Rand Townships Registrar, which is situated in a township within the meaning assigned thereto in section 1 of the Advertising on Roads and Ribbon Development Act, 1940 (Act 21 of 1940).

2 Registrar of unit trust companies

The person appointed in terms of section 5 of the Namibia Financial Institutions Supervisory Authority Act, 2001, as the chief executive officer of the Namibia Financial Institutions Supervisory Authority shall be the registrar of unit trust companies.

[Sec 2 substituted by sec 37 of Act 3 of 2001.]

2A

[Sec 2A inserted by sec 9 of Act 51 of 1988 and deleted by sec 37 of Act 3 of 2001.]

PART I

UNIT TRUST SCHEMES IN SECURITIES OTHER THAN PROPERTY SHARES (ss 3-28)

3 Restrictions on management of unit trust schemes

(1) No person other than a company which has been registered as a management company under section 4 shall manage or carry on any unit trust scheme in securities other than property shares or issue unit certificates thereunder.

(2) No company other than a company which-

(a) is registered as a public company under the Companies Act, 1973 (Act 61 of 1973); and

(b) has and maintains the prescribed share capital, paid-up share capital and non-distributable reserves actually employed or immediately available for employment in its unit trust business;

[Para (b) substituted by sec 10 of Act 51 of 1988 and by sec 2(a) of Act 10 of 2011.]

shall be or remain registered as a management company under section 4: Provided that the registrar may in his discretion, and on such conditions as he may deem fit, exempt any registered management company from compliance with the requirements of paragraph (b), for such a period, not exceeding six months, as he may determine.

(3) A management company which has not been exempted under the proviso to subsection (2), shall, if at any time it ceases to comply with the requirements of paragraph (b) of that subsection, within a period of three months thereafter in writing report to the registrar to that effect.

(4) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

[Subsec (4) substituted by sec 2(b) of Act 10 of 2011.]

4 Procedure in connection with registration of management companies

(1) Every company which desires to be registered as a management company under this Act shall lodge with the registrar an application for such registration in the prescribed manner and form and disclosing the prescribed particulars.

(2) The registrar may call upon any company which has applied for registration under subsection (1) to furnish him with any further information which is relevant to the application.

(3) If the registrar is satisfied-

- (a) that the trust deed which the management company proposes to enter into for the purposes of the unit trust scheme in question does not contain anything inconsistent with the provisions of this Act and is based on sound financial principles;
- (b) that the proposed trustees are qualified under this Act to act as trustees; and
- (c) that the manner in which the business of the applicant company is to be carried on is not inconsistent with the provisions of this Act and is based on sound financial principles,

he shall, subject to the provisions of subsection (4) and on such conditions as he may deem fit, register the applicant as a management company and issue to it a certificate of registration in the prescribed form.

[Subsec (3) amended by sec 11 of Act 51 of 1988.]

(4) The registrar shall not register any company as a management company under this section unless he is satisfied that the general financial and commercial standing of, and the nature of the business conducted by, such company are such as to fit it for assuming the duties and responsibilities of a management company and that its registration as a management company will be in the public interest.

5 Cancellation or suspension of registration of management company

(1) The registrar may at any time, subject to the provisions of subsection (2), cancel the registration of a company as a management company under this Act-

- (a) if he is satisfied that the company has contravened or failed or neglected to comply with any provision of this Act with which it is its duty to comply, or with any direction or requirement lawfully given or imposed under this Act, and that such failure or neglect has resulted or is calculated to result in serious prejudice to the interests of the public at large or of the holders of unit certificates issued by the company;
- (b) if he is satisfied, after an investigation in terms of section 26 has been held, that the manner in which the business of the company is carried on is unsatisfactory or not calculated to serve the best interests of such holders of unit certificates;
- (c) if it appears that the registration was obtained through fraud on the part of the management company; or
- (d) in the event of the company being wound up, either voluntarily or by the court,

or may, on any ground mentioned in paragraph (a) or (b), suspend its registration for a period not exceeding 12 months at a time.

- (2) The registrar shall not cancel or suspend the registration of a management company for any reason mentioned in subsection (1)(a), (b) or (c) unless he has-
- (a) notified the company concerned of his intention and of the grounds upon which he proposes to do so;
 - (b) allowed the company to make any representations to him which it may wish to make in connection with the proposed cancellation or suspension; and
 - (c) at the company's request, afforded it a reasonable opportunity of rectifying or eliminating the defect or irregularity complained of.

(3)(a) If a management company whose registration has been cancelled or suspended under subsection (1)(a), (b) or (c) has appealed to the Minister against the cancellation or suspension, and the Minister has upheld the registrar's decision wholly or in part, the management company shall have the right to appeal against the Minister's decision to the Provincial or Local Division of the Supreme Court having jurisdiction in the place where the head office of the management company is situated and the court may confirm or set aside the Minister's decision or may vary it by making any order which it would have been competent for the registrar to make under subsection (1), and the decision of the court shall, for the purposes of this Act, be deemed to be the decision of the registrar.

(b) The time within which an appeal under paragraph (a) shall be lodged and prosecuted, and the procedure to be followed by the parties in connection with such appeal, shall be as prescribed.

(4) Every application for re-registration as a management company by a company whose registration has been cancelled under this section shall be dealt with in all respects as if it were an application for registration by a company which was not, at the commencement of this Act, managing a unit trust scheme in securities other than property shares.

(5) If the registration of a management company is cancelled in terms of subsection (1)(a), (b) or (c), the provisions of this Act with regard to the continuance or the winding-up of the unit trust scheme in the event of the winding-up of the management company shall *mutatis mutandis* apply: Provided that the registrar may in any such case direct the former management company to defray in whole or in part the expenses incurred in continuing the management of the unit trust scheme, or in realizing any of the underlying securities, as also any commission to which a trustee or a person appointed to take over the duties and obligations of a trustee may be entitled under section 28.

(6) If the registration of a management company has been suspended under subsection (1), the company shall not, during the period of suspension, issue any fresh unit certificates, but shall, in respect of certificates already issued, continue the management of the unit trust scheme and deal with such certificates in all respects as it would have been bound to do had its registration not been suspended.

5A Change of management company name and shareholding or directors, and appointment and removal of directors and management staff

- (1) Despite anything to the contrary in any other law, a management company may not without the prior 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 so registered;
- (c) use or refer to itself by an abbreviation or a derivative of name under which it is so registered;
- (d) allow the acquisition of shares or any other interest in the management company resulting in the holding of 25 per cent or more of the value of all the shares or other interest in the management company;
- (e) directly or indirectly transfer its control to another person; or
- (f) change its directors.

(2) A management company must appoint fit and proper persons approved by the registrar as its directors or management staff members.

(3) An application for approval of appointment contemplated in subsection (2) must-

- (a) be submitted to the registrar in the form and manner;
- (b) be accompanied by information to satisfy the registrar that the applicant complies with the fit and proper requirements in respect of-
 - (i) honesty and integrity;
 - (ii) competence and operational ability; and
 - (iii) financial soundness,

determined by the registrar by notice in the *Gazette*.

(4) The registrar may by notice require a management company to terminate the appointment of a director or management staff member, if pursuant to subsection[s] (3) and (5) the director or staff member is not fit and proper to hold such position.

(5) When the registrar intends to act as contemplated in subsection (4), the registrar must-

- (a) give notice to the management company and the director or management staff member concerned of the intention of the registrar and the reasons therefore; and
- (b) afford the management company and director or management staff member an opportunity to be heard.

(6) Upon receipt of the notice referred to in subsection (5), the director or management staff member is deemed to have been suspended from duty pending the determination of the registrar after affording the director or staff member an opportunity to be heard.

[Sec 5A inserted by sec 3 of Act 10 of 2011]

6 Nature of securities which may be included in unit portfolios

(1) The registrar in concurrence with the Minister, by notice in the *Gazette*, may determine securities and other assets which may be included in a unit portfolio of a unit trust scheme and the minimum or maximum or both minimum and maximum restrictions and conditions subject to which such securities, classes of securities, or other assets may be included in a unit portfolio.

(2) Despite subsection (1), the registrar in concurrence with the Minister, by notice in the *Gazette*, may determine securities and assets which may be excluded from a unit portfolio and the minimum or maximum or both minimum and maximum restrictions and conditions subject to which such securities, classes of securities or assets may be so excluded from a unit portfolio.

[Sec 6 substituted by sec 4 of Act 10 of 2011]

7 Determination of market value

(1) Whenever a management company is unable to determine a market price for stock exchange securities for the purposes of a unit trust scheme, a fair market price for such securities shall at the request of such management company be determined by a stock-broker who is a member of a licensed stock exchange.

(2) If such management company does not agree with the price determined by any such stock-broker, it shall refer the matter to the committee of the stock exchange concerned, which shall thereupon determine the fair market price for such securities and whose decision shall be final.

(3) The registrar, by notice in the *Gazette*, may determine the method for determining the value of unlisted assets.

[Subsec (3) added by sec 5 of Act 10 of 2011]

8 Initial size of unit portfolio

Every unit portfolio formed pursuant to a unit trust scheme which contemplates the creation of an unlimited number of units in such unit portfolio, shall comprise, as at the date on which the management company commences the selling of units to the public, the prescribed underlying securities.

[Sec 8 substituted by sec 6 of Act 10 of 2011]

9 Management company to make investment in every unit portfolio

(1) Every management company shall of its own resources have at all times invested in every unit portfolio a prescribed amount and shall hold the units in respect of such investment as the beneficial owner.

(2) The registrar, on application by a management company, may grant the management company exemption from compliance with the amount prescribed under subsection (1) and determine the amount to be invested by the company in every unit portfolio.

(3) The registrar may at any time revoke the exemption and the determination referred to in subsection (2) after giving the management company concerned an opportunity to be heard.

[Sec 9 substituted by sec 12 of Act 51 of 1988 and by sec 7 of Act 10 of 2011]

10 Accounts and returns to be kept and rendered by management company

(1) Every management company shall not less than once in every year transmit to every holder of a unit certificate in the unit trust scheme managed by that company, and to the registrar, a duly audited balance sheet and account of income and expenditure and such other statements as may be necessary, in regard to the operation of that scheme during the period which ended not more than three months before the date on which such balance sheet, account and statements are so transmitted, and in regard to its position as at the end of that period, reflecting *inter alia*-

- (a) the management company's capital resources actually employed or immediately available for employment for the purposes of the scheme;
- (b) the amount actually invested or employed by the management company from its own resources in every unit portfolio;
- (c) in respect of every unit portfolio, the total market value of each of the several securities included in that unit portfolio, and the value of each of those securities expressed-
 - (i) as a percentage of the total value of assets in the unit portfolio concerned; and
 - (ii) as a percentage of the total amount of securities of that class issued by the concern in which the investment is held,

and indicating which of such securities are stock exchange securities and which are not, as well as the amount of cash held in the unit portfolio;

- (d) the amount of the dividends and interest and any other income for distribution which have accrued to the underlying securities comprised in every unit portfolio, indicating the classes of income and the amount derived from each class, and how the income has been or is intended to be allocated, mentioning specifically the amount, if any, for amortization of securities in respect of wasting assets;
- (e) the amount of the proceeds of capital gains, rights and bonus issues and any other accruals and receipts of a capital nature which have been or are to be invested in the scheme for the benefit of certificate holders, indicating the classes thereof and the amount derived from each class, but excluding amounts derived from the sale of units;
- (f) the total amount derived from the sale of units, indicating the total amount paid in respect of compulsory charges, and the total amount paid in respect of the repurchase of units;
- (g) the management company's income derived from all sources in the operation of the scheme, indicating the sources and the amount derived from each such source, and its net profit or loss derived from such operation;
- (h) in respect of each unit portfolio, a review of fluctuations in the selling and repurchase prices per single unit during the period in question, including the highest and lowest selling prices and the highest and lowest repurchase prices; and
- (i) if securities in respect of wasting assets are amortized, the basis adopted during the period in question for the amortization of such securities.

(2) Copies of the balance sheet, account and statements referred to in subsection (1) shall be kept available at the registered office of the management company for inspection during ordinary office hours by any holder of unit certificates in the unit trust scheme affected or other person *bona fide* interested in the purchase of unit certificates from the company.

(3) A management company shall in addition, within a period of 30 days after receipt of a written request from the registrar, or within such further period

thereafter as the registrar may allow, lodge with the registrar such further information and explanations in connection with any balance sheet, account or statement referred to in subsection (1) as may be specified in the request.

(4) Every management company shall, in accordance with the regulations, lodge with the registrar-

- (a) copies of all advertisements, brochures and pamphlets published or proposed to be published by the company or any of its authorized agents, and of all proposed additions thereto and variations thereof, signed and certified in the prescribed manner by or on behalf of the directors of the management company: Provided that the registrar may exempt the company to such extent and on such conditions as he may deem fit, from the obligation to lodge with him a copy of any such advertisement, brochure or pamphlet prior to its publication;
- (b) a copy of every return or notice which the company is required to furnish to the Registrar of Companies under section 216(2) of the Companies Act, 1973 (Act 61 of 1973).

11 Appointment of auditor

(1) A management company shall appoint as its auditor a person registered under the Public Accountants' and Auditors' Act, 1951 (Act 51 of 1951), who is in public practice.

(2) No director or servant of a management company, and no firm of which any such director or servant is a member, shall be appointed as an auditor of that company.

(3) The auditor of a management company shall audit the books of every unit trust scheme managed by such company.

(4) The auditor shall satisfy himself that every account, statement and balance sheet prepared in compliance with section 10 or section 33, is properly drawn up so as to exhibit a true and fair view of the state of affairs of the management company according to the books kept by the management company and any other information which may be necessary for that purpose, and shall, if he has so satisfied himself, attest such account, statement or balance sheet accordingly, or, if he cannot so satisfy himself, attest it subject to such qualifications as he may deem necessary.

(5) The auditor shall report to the management company and the registrar any irregularity or undesirable practice in the conduct of the business of the management company or of any unit trust scheme managed by it which has come to his or her notice or knowledge.

[Subsec (5) substituted by sec 8(a) of Act 10 of 2011]

(6) The registrar, by notice in the *Gazette*, may determine further reports which the registrar may require the auditor to render and the form which such reports may take.

[Subsec (6) added by sec 8(b) of Act 10 of 2011]

12 Provisions with regard to contents of price lists, advertisements, brochures and similar documents

(1) If any price list, advertisement, brochure or similar document published by a management company or by any of its authorized agents for the purpose of promoting the sale of units, the price of any unit is mentioned or a particular unit

portfolio is referred to, the undermentioned particulars shall be clearly set forth therein with reference to each such unit or unit portfolio, namely-

- (a) the management company's initial charge, expressed as a percentage of the made-up price of the unit offered;
- (b) the management company's service charge;
- (c) an undertaking by the management company to repurchase any number of units offered to it on the basis of prices calculated in accordance with the requirements of this Act and on the terms and conditions set forth in the trust deed;
- (d) whether or not securities in respect of wasting assets included in the unit portfolio concerned are amortized.

(2) Any reference in any price list, advertisement, brochure or similar document published by a management company or by any of its authorized agents, to the yield to be derived from any unit offered for sale by the company, shall be confined-

- (a) in the case of any such document published after the lapse of a period of 12 months following the date of the first offer of units to the public, to particulars of the yield, calculated in the manner prescribed in the relevant trust deed, for the last preceding period of 12 months for which dividends have been declared, and a statement as to any facts likely to influence future yield; and
- (b) in the case of any such document published within the first-mentioned period, to information as to the probable yield calculated in a manner clearly set out in such document.

(3) If, in any price list, advertisement, brochure or similar document published by a management company or any of its authorized agents, it is stated that holders of unit certificates issued by the company are entitled to participate in its profits, there shall also be stated what amount was so distributed during the previous financial year, expressed as a percentage of the aggregate market value, as at the close of that year, of all underlying securities then held by the trustees on behalf of unit certificate holders.

(4) There shall be included in every price list, advertisement, brochure or similar document published by a management company or any of its authorized agents in which such company's units are commended to the public, a statement in clear and unambiguous terms, to the effect that the value of units in each unit portfolio is subject to fluctuation from time to time relative to the market value of the underlying securities comprised in the unit portfolio: Provided that the registrar may in his discretion, and subject to such conditions as he may deem fit, exempt the management company or any such agent from the obligation to comply with this subsection in relation to any advertisement or any particular type of advertisement which is of such a nature that it would be unreasonable to require the management company or such agent to comply with this subsection in relation thereto.

13 Registrar may object to terms of price list, advertisement, brochure and similar documents published or proposed to be published by management company or its agent

The registrar may disapprove of the terms of any price list, advertisement, brochure or similar document relating to a unit trust scheme published or proposed to be published by a management company or any of its authorized agents if in his

opinion the said terms are calculated to mislead or are, for any other good and sufficient reason, objectionable, and he may direct the management company to discontinue or refrain from publication of any such document, or to introduce such variations or modifications of its terms as he may specify.

14 Exercise of voting power by management company

If a management company or its nominee exercises the voting power conferred by the underlying securities held in trust under a unit trust scheme, the management company or such nominee shall owe a duty to the holders of unit certificates issued pursuant to that scheme to exercise that voting power in such a manner as is best calculated to serve the interests of those holders without, however, entirely subordinating the interests of the company in which the voting power is held, to the immediate interests of such holders.

15 Sale of units only for cash and restriction on loans against security of units

No management company shall-

- (a) sell or offer for sale any unit under a unit trust scheme except on terms requiring payment of the full purchase price of the unit to be made upon the acceptance by the management company or any of its duly authorized agents, of the purchaser's offer for the purchase of the unit;
- (b) lend or advance any money on the security of units sold by it or by any other management company in relation to which it is either a holding company or a subsidiary within the meaning of those terms as defined in the Companies Act, 1973 (Act 61 of 1973).

16 No management company or director thereof may derive unauthorized gain from acquisition of underlying securities

(1) No management company and no director thereof shall either directly or indirectly derive any pecuniary advantage from the acquisition or sale, by such company, of any securities for the purposes of a unit trust scheme carried on or proposed to be carried on by it, except such advantage as may in the ordinary course of its business accrue to the company by virtue of any difference between the price at which it acquires the underlying securities and the price at which units therein are subsequently sold or by virtue of any underwriting business done by it: Provided that a management company, acting as the agent of the holders of unit certificates, shall not be prohibited from sharing with a stock-broker in the broker's commissions arising out of transactions in securities, in respect of a unit trust scheme: Provided further that a management company which has been appointed as an authorized dealer in foreign exchange shall not be prohibited from earning a profit on any foreign exchange transaction involving the purchase or sale of securities held outside the Republic.

(2) The provisions of subsection (1) shall not render unlawful any transaction whereby a management company acquires, for the purposes of a unit trust scheme, any securities-

- (a) in and of a company in which the management company or any director thereof is a shareholder; or
- (b) from any director of the management company, provided such director does not vote on the transaction and has, prior to the acquisition, made full disclosure to the management company of his interest in the

securities in question, and the price at which they are acquired is not higher than the current market price.

17 Permissible deductions from distributable yields

(1) If a management company amortizes the securities in respect of wasting assets, included in a unit portfolio, the company shall deduct from the amounts accruing to the holders of unit certificates (not being the proceeds of capital gains, rights and bonus issues of shares) such amounts as may be considered necessary for the amortization of such securities, and such deducted amounts shall be invested in securities which shall be included in the unit portfolio concerned.

(2) No other amounts whatsoever than those referred to in subsection (1), an amount calculated to cover taxes and auditor's fees for which the unit portfolio in question is liable and the management company's service charge shall be deducted by the management company from the amounts accruing to the holders of unit certificates.

18 Change of investments

(1) A management company may, if it considers it in the best interests of the holders of unit certificates to do so, sell or dispose of any of the underlying securities comprised in a unit portfolio, and shall substitute for such securities other underlying securities or cash equal in value to the net amount realized for the securities disposed of, less the compulsory charges in respect of the securities substituted.

(2) Every management company shall at least once every three months furnish to the registrar a full list of all the underlying securities, reflected in the manner required by section 10(1)(c), comprised in any unit portfolio managed by it, and any such list shall be kept available at the registered office of the management company and at the office of every authorized agent of the management company for inspection during ordinary office hours by any unit certificate holder or other person *bona fide* interested in the purchase of unit certificates from the company.

19 Limitation of amount of rounding-off accrual

(1) No management company shall sell any unit under a unit trust scheme at a price which exceeds the made-up price of that unit: Provided that where units in a newly established unit portfolio are offered to the public for the first time, a management company shall be permitted to make an initial offer on a specified date or for a specified period of a specific number of units at a fixed price based on the made-up price of the units on a previous date, which shall not be more than 28 days prior to the closing date of the offer.

(2) In making payment to the holders of unit certificates of dividends accruing on the units belonging to them, a management company may round off, to the nearest one cent, any amount so paid by way of dividends in respect of every so many units as represents the minimum number which, in terms of the management company's rules, must be purchased at any one time: Provided that any amount which, by virtue of such rounding-off, is left in the hands of the company, shall be carried forward to the credit of unit certificate holders in the next ensuing dividend distribution.

20 Qualifications of trustees

- (1) No person other than-
- (a) a company registered as a public company under the Companies Act, 1973 (Act 61 of 1973);

- (b) a company or institution, excluding a close corporation referred to in the Close Corporations Act, 1984 (Act 69 of 1984), incorporated under a special Act;

[Para (b) substituted by sec 13 of Act 51 of 1988.]

- (c) an institution which is entitled to carry on business as a banking institution under the Banks Act, 1965 (Act 23 of 1965.);
- (d) an institution which is registered as a domestic insurer under the Insurance Act, 1943 (Act 27 of 1943);

shall become or act as a trustee under a unit trust scheme.

(2) No company or institution referred to in subsection (1) shall become or act as a trustee under a unit trust scheme unless it-

- (a) maintains a paid-up capital and unimpaired reserves together amounting to the prescribed amount;

[Para (a) substituted by sec 9(a) of Act 10 of 2011]

- (b) has been registered by the Registrar as a trustee in relation to the particular scheme in question and is in possession of a valid certificate setting forth the fact of such registration.

(3) The registrar shall not register any company or institution as a trustee under this section unless he is satisfied that-

- (a) such company or institution is not, in relation to the management company, either a holding company or a subsidiary company within the meaning of those terms as defined in the Companies Act, 1973 (Act 61 of 1973); and
- (b) the general financial and commercial standing of such company or institution is such as to fit it for assuming the duties and responsibilities of a trustee and that the company or institution is by reason of the nature of its business sufficiently experienced and equipped to assume such duties and responsibilities,

and he may revoke any such certificate of registration already granted if at any time thereafter he ceases to be satisfied that the requisites mentioned in paragraphs (a) and (b) of this subsection are fulfilled by or in respect of the company or institution to which the certificate has been issued.

(4) Any person who contravenes the provisions of subsection (1) or (2) shall be guilty of an offence and liable on conviction to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

[Subsec (4) substituted by sec 9(b) of Act 10 of 2011]

(5) The registrar shall, before revoking a certificate of registration in terms of subsection (3), notify the person concerned of the grounds upon which such action is contemplated against him, and shall give him a reasonable opportunity of showing cause why the proposed action should not be taken, and every such person shall have the right to present his case verbally to the registrar and in doing so to be represented by any other person.

21 Duties and obligations of trustees

(1) Every trustee under a unit trust scheme, whether he became such before or after the commencement of this Act, shall, if he intends to retire from the trust, give to the management company and to the registrar not less than six month's notice of such intention, and during the said period of six months the management company shall take steps to substitute as trustee under the trust deed some other person competent to act as such in terms of section 20.

(2) If the management company fails to take the steps mentioned in subsection (1) within the said period of six months, the registrar may, after consultation with the management company, direct the company to appoint as trustee under the trust deed a competent person, nominated by the registrar, who is willing to act as such.

(3) Any trustee under a unit trust scheme who fails to ensure *inter alia* that the provisions of the trust deed concerning the investment policy of the scheme are carried out, shall be guilty of an offence.

22 Matters which must be provided for in trust deeds

(1) Every trust deed shall prescribe the rules for the administration of the unit trust scheme concerned, and shall *inter alia* contain provisions to the following effect, namely-

- (a) that the trustee shall, subject to the terms of the trust, hold the underlying securities in trust for the holders of unit certificates relating thereto;
- (b) that the trustee shall countersign, graphically or otherwise, every unit certificate before it is delivered by the management company to a purchaser;
- (c) that the trustee shall not so countersign any unit certificate unless he has received from the management company the cash proceeds of the issue of that certificate or securities to the required value, together with all documents necessary to effect transfer thereof;
- (d) that-
 - (i) any moneys for investment accruing from the issue of units;
 - (ii) dividends, interest or any other income accruing on underlying securities;
 - (iii) the proceeds of capital gains, rights or bonus issues; and
 - (iv) any moneys received by the management company from the realization of underlying securities,

shall be handed to the trustee in cash or deposited in a trust account or accounts controlled by the trustee;

- (e) that the proceeds of capital gains, rights and bonus issues shall be invested in the unit trust scheme concerned for the benefit of the holders of unit certificates;
- (f) that it shall be incumbent upon the management company managing such scheme to repurchase, subject to such terms and conditions as may in terms of the trust deed apply, any number of units offered to it, on the basis of prices calculated not more than 24 hours previously or (if

during the preceding 24 hours the stock exchange was closed) on such basis as may be prescribed in the trust deed;

- (g) that the trust deed may be amended in accordance with section 23;
- (h) that the initial charge shall not exceed five percent of the made-up price of units.

(2) Every such trust deed shall further prescribe-

- (a) the investment policy to be followed in respect of the scheme concerned;
- (b) the manner in which the selling price of units is to be calculated;
- (c) the terms and conditions on which the management company will repurchase units and the manner in which the repurchase price is to be calculated;
- (d) if the management company undertakes to amortize securities in respect of wasting assets, the manner in which provision is to be made for such amortization;
- (e) if securities other than stock exchange securities may be included in any unit portfolio, the manner in which the market prices of such securities are to be determined for the purposes of the scheme;
- (f) the manner in which units shall be transferred from one holder to another;
- (g) if applicable, the manner in which additional units for sale to the public are to be created;
- (h) the manner in which the yield from units is to be calculated;
- (i) the manner in which the initial charge and the service charge are to be determined;
- (j) the manner in which units are to be cancelled.

23 Certain void provisions of trust deeds, and amendment of trust deeds

(1) Any provision in a trust deed relating to a unit trust scheme which is inconsistent with any provision of this Act shall be void.

(2) The parties to a trust deed may by supplemental deed alter or rescind any provisions of such trust deed or add further provisions thereto, but no alteration or rescission of or addition to any trust deed shall be valid-

- (a) unless the consent thereto of unit certificate holders has been obtained in the manner prescribed in the trust deed: Provided that if the registrar is satisfied that any such alteration, rescission or addition is required only to enable the provisions of the trust deed to be given effect to more conveniently or economically or otherwise to benefit the holders of unit certificates, will not prejudice the interests of such holders and does not alter the fundamental provisions or objects of the trust deed or operate to release the trustee or the management company from any responsibility to the holders of unit certificates, he may direct that such consent be dispensed with; or

- (b) unless the registrar is satisfied that any such alteration, rescission or addition does not contain anything inconsistent with the provisions of this Act or with sound financial principles.

(3) A provision in any trust deed, whether entered into before or after the commencement of this Act, purporting to relieve any party thereto from liability to the holders of unit certificates on account of his own negligence, shall be void.

24 Amalgamation of unit trust schemes and portfolios, and cession, transfer or take over of rights of holders of unit certificates in unit trust schemes and portfolios

(1) Two or more unit trust schemes or portfolios shall not amalgamate, and the rights of the holders of unit certificates in a unit trust scheme or portfolio shall, except in the circumstances referred to in section 18, not be ceded or transferred to or be taken over by any other person or unit trust scheme or portfolio, except with the prior consent of-

- (a) the holders of a majority in value of unit certificates in each unit trust scheme or portfolio (hereinafter in this section referred to as an original scheme or portfolio) to which a proposed amalgamation, cession, transfer or take-over refers; and
- (b) the registrar, granted on such conditions as he in writing may determine.

(2) A copy of the transaction (hereinafter in this section referred to as the proposed transaction) whereby the proposed amalgamation, cession, transfer or take-over is to be effected and such other particulars as may be necessary to enable the registrar to exercise his powers under this section, shall be submitted to the registrar by the parties to the proposed transaction.

(3) The registrar shall grant his consent under subsection (1)(b) only if he is satisfied that-

- (a) every holder of unit certificates in an original scheme or portfolio has been furnished in writing, within a reasonable period before the date determined by the registrar in terms of subsection (4), with particulars of the proposed transaction, including particulars of the provisions of subsection (4) and of the procedure which the management company and trustee concerned intend to follow so as to ensure that every such holder shall, on the date on which the proposed transaction becomes effective, hold in the new unit trust scheme or portfolio units with an aggregate money value which is not less than the aggregate money value of the units which such holder, immediately before the date on which the proposed transaction becomes effective, held in an original scheme or portfolio;
- (b) the proposed transaction will not be detrimental to any holder of unit certificates in an original scheme or portfolio; and
- (c) the holders of a majority in value of unit certificates in an original scheme or portfolio have not refused their consent to the proposed transaction.

(4) For the purposes of subsection (1)(a) it shall be deemed that holders of a majority in value of unit certificates in an original scheme or portfolio have given their consent to the proposed transaction unless the holders of a majority in value of unit certificates in such scheme or portfolio in writing notified the management company in question on or before a date determined by the registrar and disclosed

by the management company in writing to every such holder, that they refused their consent to the proposed transaction.

- (5) When a proposed transaction becomes effective-
- (a) the provisions of the trust deed of the new unit trust scheme or portfolio or of the unit trust scheme or portfolio which acquired rights by cession, transfer or take-over shall bind the holders of unit certificates in an original scheme or portfolio;
 - (b) all the securities, cash and any other asset of an original scheme or portfolio shall vest in and form part of the new unit trust scheme or portfolio or, as the case may be, the unit trust scheme or portfolio which acquired such securities, cash and other assets by cession, transfer or take-over;
 - (c) the provisions of the trust deed of the new unit trust scheme or portfolio or of the unit trust scheme or portfolio which acquired rights by cession, transfer or take-over, shall apply to the securities, cash and assets referred to in paragraph (b) and to any benefits which accrue therefrom to holders of unit certificates; and
 - (d) a holder of a unit certificate in an original scheme or portfolio shall acquire units in the new unit trust scheme or portfolio or in the unit trust scheme or portfolio which acquired rights by cession, transfer or take-over, having the same aggregate money value as that of the units held, immediately before the date on which the proposed transaction became effective, by such holder in an original scheme or portfolio.
- (6) If a proposed transaction becomes effective, every Registrar of Deeds-
- (a) in whose deeds registry property or other rights are registered in the name of or in favour of an original scheme or portfolio;
 - (b) on production to him of a certificate in which the registrar states that-
 - (i) he in terms of subsection (1)(b) has granted consent to the proposed transaction; and
 - (ii) the amalgamation, cession, transfer or take-over in question has been carried out properly; and
 - (c) on production to him of the title deed or other deed or document in question,

shall, on such title deed or other deed or document and in his registers or other books, make such endorsements and entries as may be necessary as a result of the said amalgamation, cession, transfer or take-over to effect or record the transfer of the said property or other rights to the new unit trust scheme or portfolio or, as the case may be, to the unit trust scheme or portfolio acquiring rights by means of the cession, transfer or take-over in question.

(7) No transfer or stamp duty or registration or other fees shall be payable in respect of any endorsement or entry made in terms of subsection (6), and no stamp duty or other fees shall be payable in respect of the issue of a substituting unit certificate or the transfer of assets as a result of any amalgamation, cession, transfer or take-over in terms of this section.

(8) Except in so far as this section provides otherwise, no amalgamation, cession, transfer or take-over in terms of this section shall derogate from the rights of any creditor or any obligation relating to an original scheme or portfolio.

25 Winding-up of unit portfolios

(1) If at the time (whether before or after the commencement of this Act) when a unit portfolio was first formed under a unit trust scheme, no period was fixed for the duration of that unit portfolio, the management company may, nevertheless, wind up that unit portfolio at any time after the expiration of 25 years from the date of first issue of unit certificates relating thereto, provided no new units have at that time been issued in the unit portfolio in question for at least 10 years.

(2) Notwithstanding the provisions of subsection (1), any competent division of the Supreme Court may, on the application of a management company, order any such unit portfolio to be wound up before the expiration of 25 years from the date of first issue of unit certificates relating thereto, if the court is satisfied that to do so would be in the interest of the holders of unit certificates in that unit portfolio.

(3) Upon the winding-up of a unit portfolio in terms of this section the management company shall realize all the underlying securities as expeditiously as possible having regard to the interests of holders of unit certificates, but shall incur no liability by reason of the exercise of its discretion as to the time of realization of any securities.

(4) The net proceeds of the realization of such securities shall be deposited in a trust account controlled by the trustee, and shall under the control and supervision of the trustee be distributed by the management company amongst the holders of unit certificates and the company in proportion to their respective interests therein.

(5) Pending the realization of the underlying securities in such winding-up the management company shall collect all dividends, bonuses and other distributions accruing in respect thereof and shall deposit and distribute the amounts collected in the manner prescribed in subsection (4).

26 Powers of inspection

(1) In addition to the powers and duties conferred or imposed upon him by this Act, the registrar shall have all the powers and duties conferred or imposed upon him by the Inspection of Financial Institutions Act, 1984 (Act 38 of 1984).

(2) Any reference in this Act to an inspection or investigation made under this section shall be construed as a reference to an inspection made under the Inspection of Financial Institutions Act, 1984.

[Sec 26 substituted by sec 14 of Act 51 of 1988.]

27 Powers of registrar after investigation

(1) If the registrar is of opinion, after an investigation as been made under section 26, that the interests of the holders of unit certificates issued by the management company or of the public at large so require, he may-

- (a) apply to the competent division of the Supreme Court under section 346 of the Companies Act, 1973 (Act 61 of 1973), for the winding-up of the management company as if he were a creditor thereof;
- (b) apply to the competent division of the Supreme Court under section 427(2) of the said Companies Act for a judicial management order in respect of the management company as if he were a creditor thereof;

- (c) require the management company, in accordance with his directions, to appoint in place of the trustee under the trust deed, any competent person nominated by the registrar who is willing to act as such;
- (d) require the management company, in accordance with his directions, to take steps for the winding-up of the trust scheme, the realization of the underlying securities, and the distribution of the net proceeds thereof, together with any accrued dividend, bonuses or other moneys available for distribution, among the holders of unit certificates in proportion to their respective interests;
- (e) direct the management company or the trustees to take any other steps, or to refrain from doing or continuing any act, in order thereby to eliminate or remedy any undesirable practice or condition or affairs brought to light by the investigation; or
- (f) require the management company to retire from the management of the trust scheme, whereupon the trustee shall in accordance with his directions, but subject to the provisions of sections 3 and 4, arrange for another company to take over the management of the scheme.

(2) The registrar shall have *locus standi* to oppose any application for the winding-up of, or for a judicial management order in respect of a management company, and timeous notice of any such intended application shall be given to the registrar by the person by whom it will be made.

28 Manner of dealing with trust property on winding-up of management company

(1) In the event of the winding-up of a management company, the trustee shall take immediate steps to cause the underlying securities constituting each unit portfolio to be transferred into the name of the trustee, and shall hold such securities on behalf of the holders of unit certificates relating thereto pending their realization by him.

(2) The trustee shall thereafter, unless the registrar has given any direction to the contrary in terms of this section, realize all such securities as expeditiously as possible having regard to the interests of holders of unit certificates, but shall incur no liability by reason of the exercise of his discretion as to the time of realization of any security.

(3) The net proceeds of such realization shall be distributed by the trustee amongst the holders of unit certificates and the management company in proportion to their respective interests therein.

(4) Pending the realization of the underlying securities the trustee shall collect all dividends, bonuses and other distributions accruing in respect thereof and shall distribute them, after deduction of any charges necessarily incurred by him in connection with such collection and distribution, amongst the holders of unit certificates and the management company in proportion to their respective interests.

(5) The registrar may, if it appears to him that it would be in the interest of the holders of unit certificates to continue the unit trust scheme for a period of time, direct the trustee to postpone the realization of any underlying securities transferred into his name for such period or periods, not exceeding five years at a time, as the registrar may determine and, pending such realization, to carry on the scheme in

accordance with the registrar's directions and to collect and deal with all dividends, bonuses and other distributions in accordance with subsection (4).

(6) A trustee who is acting in accordance with a direction of the registrar given in terms of subsection (5) may terminate his obligations as trustee on giving six months' notice in writing to the registrar, and the registrar may thereupon appoint some other fit and proper person to take over the duties and obligations of the trustee, subject to such conditions as the registrar may stipulate.

(7) As remuneration for any services rendered by him in terms of this section a trustee or a person appointed by the registrar to take over the duties and obligations of a trustee shall be entitled to a commission calculated at such rate, not exceeding five percent, as the registrar may determine, on all moneys received by him in carrying out his duties under this section, and the registrar may authorize the amount of such commission to be deducted, in such proportions as he may determine, from any moneys accruing, by virtue of the realization of any underlying securities in terms of this section, to the management company and the general body of unit certificate holders, respectively.

PART II

UNIT TRUST SCHEMES IN PROPERTY SHARES (ss 29-36)

29 Restrictions on management of unit trust schemes in property shares

(1) No person other than a company which has been registered as a management company in property shares under section 30 shall manage or carry on any unit trust scheme in property shares or issue unit certificates thereunder.

(2) No company other than a company which-

(a) is registered as a public company under the Companies Act, 1973 (Act 61 of 1973);

(b) has a paid-up share capital and non-distributable reserves which together amount to not less than R2 000 000 actually employed or immediately available for employment in its unit trust business; and

[Para (b) substituted by sec 15 of Act 51 of 1988.]

(c) has been formed solely for the purpose of establishing, carrying on or managing unit trust schemes in property shares and issuing unit certificates thereunder, and confines its activities solely to those purposes,

shall be or remain registered as a management company under section 30: Provided that the registrar may, in his discretion, and on such conditions as he may deem fit, exempt any registered management company from compliance with the requirements of paragraph (b), for such a period, not exceeding six months, as he may determine.

(3) A management company which has not been exempted under the proviso to subsection (2), shall, if at any time it ceases to comply with the requirements of paragraph (b) of that subsection, within a period of three months thereafter in writing report to the registrar to that effect.

(4) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

[Subsec (4) substituted by sec 10 of Act 10 of 2011]

30 Procedure in connection with registration of management company in property shares

(1) Every company which desires to be registered as a management company in property shares under this Act shall lodge with the registrar an application for registration in the prescribed manner and form and disclosing the prescribed particulars.

(2) The registrar may call upon any company which has applied for registration under subsection (1) to furnish him with any further information which is relevant to the application.

(3) If the registrar is satisfied-

- (a) that the trust deed which the management company proposes to enter into for the purposes of the unit trust scheme in question-
 - (i) does not contain anything inconsistent with the provisions of this Act;
 - (ii) prescribes in full the basis which the management company shall apply to determine at any given date the value of any property share included in a unit portfolio;
 - (iii) provides that the price at which a new unit is created, shall be determined by the management company by dividing the aggregate value of the underlying securities comprised in the unit portfolio on the date on which the new unit is created, including all income accruals or payments received in lieu of income accruals, by the total number of units existing on that date; and
 - (iv) is based on sound financial principles;
- (b) that the proposed trustees are qualified under this Act to act as trustees;
- (c) that the manner in which the business of the applicant company is to be carried on is not inconsistent with the provisions of this Act and is based on sound financial principles; and
- (d) that shares of a sufficient number of property companies will be included in every unit portfolio so as to ensure a satisfactory spread of investments,

he shall, on such conditions as he may deem fit, register the applicant as a management company in property shares and issue to it a certificate of registration in the prescribed form.

[Subsec (3) amended by sec 16 of Act 51 of 1988.]

31 Statements to be furnished to registrar by management company in property shares

(1) Every registered management company in property shares shall, within two months after its registration as such and thereafter within two months after the close of every financial year of the company, furnish to the registrar, in such form as may be prescribed, a statement setting forth-

- (a) full details of the underlying securities comprised in the unit portfolio in which it sells units, or in each such unit portfolio, if there are two or more;

- (b) the date on which every such unit portfolio was established and the number of units into which every such unit portfolio is divided;
- (c) full particulars of all immovable property owned by every fixed property company of which there are securities included in any such unit portfolio, including a description of each individual property so owned, its situation, and an estimate of the annual income and expenditure likely to be derived from and incurred in connection therewith;
- (d) the total cost to the management company of the securities in and of each fixed property company which are included in any such unit portfolio;
- (e) the price at which units in every such unit portfolio are sold by the management company.

(2) A copy of every such statement shall be kept available at the head office and at every branch office or agency of the management company for inspection, free of charge, during ordinary office hours by any holder of a unit certificate issued by the company or any person *bona fide* interested in the purchase of such certificates.

32 Information to be furnished to registrar upon variation of underlying securities

(1) Whenever a registered management company in property shares alters the composition of any unit portfolio in which units have been sold, by adding to it further underlying securities or by dealing with existing underlying securities in any manner contemplated by section 18, as applied by section 36, the management company shall within two months after any such alteration has taken place, furnish to the registrar a statement, in such form as may be prescribed, setting forth-

- (a) full details as to any securities in and of any fixed property company which have been added to or included in any such unit portfolio as a result of such alteration;
- (b) the date upon which such alteration took place and the number of units into which any such unit portfolio is divided after the alteration;
- (c) full particulars of all immovable property owned by every fixed property company securities of which have been added to or included in any such unit portfolio as a result of the alteration, including a description of each individual property so owned, its situation, and an estimate of the annual income and expenditure likely to be derived from and incurred in connection therewith;
- (d) the total cost to the management company of the securities in and of each fixed property company which have been added to or included in any such unit portfolio as a result of the alteration in its composition;
- (e) if such alteration has taken place in consequence of the sale, by the management company, of any of the underlying securities comprised in any such unit portfolio, then the cost to the management company of the underlying securities so sold and the amount of the net proceeds of the sale;
- (f) the price at which units in any such unit portfolio will thereafter be sold by the management company.

(2) Every holder of a unit certificate issued by the company and every other person *bona fide* interested in the purchase of such certificates shall have the right to inspect a copy of any such statement, free of charge, during ordinary office hours, at the head office and at every branch office or agency of the management company, for a period of three months after the date on which the statement was furnished to the registrar.

33 Accounts and returns to be furnished by management company to holders of unit certificates and to registrar

(1) Every management company in property shares shall, at least once in every calendar year, furnish to every holder of a unit certificate in the unit trust scheme managed by that company, and to the registrar, a balance sheet and an income and expenditure account, duly audited, and such other statements as may be necessary, in regard to the operation of that scheme during the period which ended not more than two months prior to the date upon which such balance sheet, account and statements are so furnished, and in regard to the company's position as at the end of that period, reflecting *inter alia*-

- (a) the management company's capital resources actually employed or immediately available for employment for the purposes of the scheme;
- (b) the amount actually invested or employed by the management company from its own resources in every unit portfolio;
- (c) in respect of each unit portfolio, the amount of cash held in the unit portfolio, and the total value of each of the several securities included in that unit portfolio, and the value of each of those securities expressed as a percentage of the total value of assets in the unit portfolio concerned;
- (d) the amount of the dividends and interest and any other income for distribution which have accrued to the underlying securities comprised in every unit portfolio, indicating the classes of income and the amount derived from each class, and how the income has been or is intended to be allocated, mentioning specifically the amount, if any, retained and invested in the scheme in respect of depreciation of assets;
- (e) the amount of the proceeds of capital gains, rights and bonus issues and any other accruals and receipts of a capital nature which have been or are to be invested in the scheme for the benefit of unit certificate holders, indicating the classes thereof and the amount derived from each class, but excluding amounts derived from the sale of units;
- (f) the total amount derived from the sale of units, indicating the total amount paid in respect of compulsory charges, and the total amount, if any, paid in respect of the repurchase of units;
- (g) the management company's income derived from all sources in the operation of the scheme, indicating the sources and the amount derived from each such source, and its net profit or loss derived from such operation;
- (h) in respect of each unit portfolio, a review of fluctuations in the prices per single unit during the period in question; and

(i) if amounts are retained in respect of depreciation of assets, the basis applied during the period in question for such depreciation.

(2) Every management company in property shares shall furnish to every holder of a unit certificate in the unit trust scheme managed by it, and to the registrar, together with the documents referred to in subsection (1), a balance sheet and an income and expenditure account, duly audited, relating to a period which ended upon a date not more than two months prior to the date upon which such balance sheet and account are furnished, in respect of-

(a) in the case of the registrar, every fixed property company shares of which are held in any unit portfolio; and

(b) in the case of such holder, every fixed property company shares of which are held in any unit portfolio in which such holder owns units on the first-mentioned date.

(3) Copies of the balance sheets, accounts and statements referred to in subsections (1) and (2) shall be kept available at the registered office of the management company for inspection during ordinary office hours by any holder of unit certificates in the unit trust scheme concerned or other person *bona fide* interested in the purchase of units from the company.

(4) A management company shall in addition, within a period of 30 days after receipt of a written request from the registrar, or within such further period thereafter as the registrar may allow, lodge with the registrar such further information and explanations in connection with any balance sheet, account or statement referred to in subsection (1) or (2), as may be specified in the request.

(5) Every management company shall, in accordance with the regulations, lodge with the registrar-

(a) copies of all advertisements, brochures and pamphlets published or proposed to be published by the management company or any of its authorized agents, and of all proposed additions thereto and variations thereof, signed and certified in the prescribed manner by or on behalf of the directors of the management company: Provided that the registrar may exempt the management company to such extent and on such conditions as he may deem fit, from the obligation to lodge with him a copy of any such advertisement, brochure or pamphlet, prior to its publication;

(b) a copy of every return or notice which the management company is required to furnish to the Registrar of Companies under section 216(2) of the Companies Act, 1973 (Act 61 of 1973).

34 Information to be disclosed in price list, advertisement, brochure and similar documents, and other conditions to be complied with by management company and trustee

(1) The undermentioned particulars shall be disclosed in any price list, advertisement, brochure or similar document published by a management company or any of its authorized agents, and at his request to every prospective purchaser of units from the company, namely-

(a) the number and nominal value of each of the several underlying securities comprised in each of its unit portfolios;

- (b) whether or not the management company undertakes to repurchase units from the holders thereof and, if so, the terms and conditions on which such repurchase will take place.

(2) There shall further be disclosed in any price list, advertisement, brochure or similar document published by a management company or any of its authorized agents, and the management company shall also bring up in its accounts, details of all immovable property held by every fixed property company of which there are shares included in any of its portfolios, showing separately, in the case of each such property, the net price or valuation at which it was acquired by the fixed property company concerned, and any other expenditure incurred by the company in connection with the acquisition thereof, such as agents' commission and transfer costs.

(3) The registrar may in his discretion, and subject to such conditions as he may deem fit, exempt a management company or any of its authorized agents from the obligation to comply with any provision of subsection (1) or (2) in respect of any advertisement, brochure, pamphlet or similar document the scope of which is confined to one or more of the following matters, namely-

- (a) stating the name and type of the unit trust scheme;
- (b) describing and commending the class of investment authorized;
- (c) indicating the minimum amount which can be invested under the scheme;
- (d) stating that full information can be obtained on application at a given address.

(4) A management company of a unit trust scheme in property shares shall not-

- (a) introduce into or have in a unit portfolio shares in a fixed property company an asset of which is pledged, hypothecated or otherwise encumbered (other than by a praedial servitude) or which is liable under a guarantee to discharge the liabilities of any other person in the event of the failure of that person to do so; and
- (b) sell to or place in a unit portfolio shares in a fixed property company at a price which exceeds the price actually paid by the management company therefor: Provided that this paragraph shall not be construed as prohibiting the management company from taking into account any appreciation in the value of shares in determining the aggregate value of the underlying securities comprised in a unit portfolio.

(5) It shall not be lawful for a director of any such management company to have any personal interest, direct or indirect, in the acquisition or disposal, by any such fixed property company, of any immovable property which forms part of its assets.

35 Listing of units by stock exchange

Every registered management company in property shares which does not undertake to repurchase units issued by it from any holder thereof shall apply for permission for such units to be dealt in on a licensed stock exchange and shall ensure that the requirements of such stock exchange for inclusion of the units in its list of the stocks and shares which may be dealt in on such exchange are complied with.

36 Certain provisions of Part I to apply to and in respect of unit trust schemes in property shares

Sections 5, 8, 9, 11, 12(1), (2) and (3) (excluding subsection (1)(c)), 13, 14, 15, 16, 17, 18(1), 19, 20, 21, 22 (excluding subsections (1)(f) and (2)(c)), 23, 24, 25, 26, 27 and 28 shall *mutatis mutandis* and in so far as they can be applied, apply to and in respect of a management company in property shares and a trustee under a unit trust scheme in property shares, and in the application thereof a reference therein to amortization of wasting assets shall be construed as a reference to depreciation of assets.

PART III GENERAL (ss 37-47)

37 Prohibition of schemes analogous to unit trust schemes, subject to exceptions

(1) Subject to the provisions of subsection (2), no person shall do any act or enter into any agreement or transaction for the purpose of establishing, carrying on or managing any scheme, other than a unit trust scheme in terms of this Act, in pursuance of which members of the public are or will be invited or permitted for valuable consideration to acquire an interest or undivided share in an asset or one or more groups of assets and to participate proportionately in the income or profits derived therefrom.

(2)(a) The provisions of subsection (1) shall not apply in respect of a scheme or arrangement permitting of participation in specified mortgage bonds and which the registrar has exempted from the provisions of this Act, as he is hereby empowered to do on such conditions as he may deem fit, and the registrar shall, on such conditions as he may deem fit, so exempt every such scheme or arrangement which provides that such mortgage bonds shall be registered in favour of a nominee company which he has approved.

(b) An application for exemption under paragraph (a) shall be lodged with the registrar before the scheme or arrangement in question is put into operation.

(3) Any person who contravenes any provision of this section shall be guilty of an offence and liable of conviction to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

[Subsec (3) substituted by sec 11 of Act 10 of 2011]

38 Prohibition of misleading names and acts

(1) No company shall, unless it is entitled to carry on business as a management company under this Act, or except with the specific permission of the registrar pending the lodging and disposal of an application by such company for registration as a management company under this Act, or pending the change of its name, include in or have as part of its name or style or in any description of its business any reference to units, unit portfolios, unit certificates, unit securities, unit trusts or mutual funds or any derivative thereof, and no person who is not entitled to carry on business as a management company or as a trustee under this Act or is not the authorized agent of a management company shall do any act calculated to lead the public to believe that any business carried on by such person consists of or is connected with the management or conduct of a unit trust scheme.

(2) The registrar may on application by a company which is required to change its name by virtue of the provisions of subsection (1) allow a reasonable period not exceeding 10 years to such company to effect such change.

(3) No person shall carry on a unit trust scheme under a name which includes the word "invest" or any derivative thereof.

39 Operation of Companies Act in relation to management companies

(1) Save as expressly provided by this Act, the operation of the provisions of the Companies Act, 1973 (Act 61 of 1973), shall not be affected in relation to a management company within the meaning of this Act.

(2) In the application of section 357 of the said Act in respect of a management company, the registrar shall be deemed to be included among the persons to whom notice is required to be given under subsection (1)(b) of that section.

(3) In the application of section 427(2) of the said Act in respect of a management company, section 346(4)(a) shall be construed as if the words "or to the Registrar of Unit Trust Companies appointed under the Unit Trusts Control Act, 1981", were inserted after the words "shall be lodged with the Master" in that section.

[Subsec (3) substituted by sec 17 of Act 51 of 1988.]

(4) The registrar may, in respect of any management company which is being wound-up or judicially managed, by order in writing direct the liquidator or the judicial manager, as the case may be, to furnish him with a copy of any particular account, return, statement or other document which the liquidator or the judicial manager is required under any provision of the said Companies Act, to furnish to the Registrar of Companies or to the Master, or to furnish him from time to time with copies of all or any of such accounts, returns, statements or documents as and when they are furnished to the said Registrar or to the Master.

(5) Immediately after the confirmation of the final account in the winding-up of a management company, the Master of the Supreme Court concerned shall give the registrar notice thereof.

40 Exemption from Act 34 of 1934

The Trust Moneys Protection Act, 1934 (Act 34 of 1934), shall not apply in respect of a unit trust scheme operated in terms of this Act.

41 Annual report by registrar

The registrar shall once in every calendar year submit to the Minister a report concerning the activities of all registered management companies and, in general, concerning all matters relating to the promotion or management of unit trust or analogous schemes, and the Minister shall lay such report upon the Table of the House of Assembly within 14 days after the receipt thereof if Parliament is then in session, or if Parliament is not then in session, within 14 days after the commencement of its next ensuing ordinary session.

42 Regulations

(1) The Minister may make regulations with regard to any matter which, in terms of any provision of this Act, is required or permitted to be prescribed, or which it may be necessary or expedient to prescribe in order that the provisions of this Act may be effectively and conveniently administered.

(2) The registrar may prescribe the forms to be used for the purposes of this Act.

(3) Regulations made under subsection (1) may prescribe penalties not exceeding a fine of N\$1 000 000 for the late rendition by any person of any balance sheet, account, statement, document or report required to be furnished in terms of any provision of this Act or for any other matter the Minister may consider necessary or expedient.

[Subsec (3) substituted by sec 12 of Act 10 of 2011]

(4) Any penalty prescribed under subsection (3) may vary according to the period which has elapsed since the last date on which the balance sheet, account, statement, document or report in question was required to be made, transmitted or deposited, and may provide that the registrar may in his discretion grant an extension of time for the transmission or deposit of any such balance sheet, account, statement, document or report.

(5) Any penalty payable under subsection (3) shall be a debt due to the Government and may be recovered by the registrar by action in any competent court.

(6) Any regulations made under this section shall be laid upon the Table of the House of Assembly within 14 days of their publication, if Parliament is then in session, or if Parliament is not then in session, within 14 days after the commencement of its next ensuing ordinary session.

43 Offences

Any person who contravenes or fails to comply with the provisions of sections 5(6), 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19 or 21, 25(3) or (4), 31, 32, 33, 34, 35 or 38, or who fails to comply with any lawful direction or requirement of the registrar under any provision of this Act, shall be guilty of an offence.

44 General penalties

Any person who is, in terms of any provision of this Act, guilty of an offence in respect of which no penalty is specifically provided, shall be liable to a fine not exceeding N\$250 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.

[Sec 44 substituted by sec 13 of Act 10 of 2011]

45 Application to South West Africa

This Act and any amendment thereof shall also apply in the territory of South West Africa, including the Eastern Caprivi Zipfel.

46 Repeal and amendment of laws

(1) Subject to the provisions of subsection (2), the laws set out in the Schedule are hereby repealed to the extent set out in the third column thereof.

(2) Anything done or deemed to have been done under any provision of a law repealed by subsection (1), and which could be done under a provision of this Act, shall be deemed to have been done under the last-mentioned provision.

47 Short title

This Act shall be called the Unit Trusts Control Act, 1981.

Schedule LAWS REPEALED

[Schedule amended by sec 11(1) of Act 38 of 1984.]

No. and year	Short title	Extend of repeal
Act 18 of 1947	Unit Trusts Control Act, 1947	The whole.
Act 11 of 1962	Unit Trusts Control Amendment Act, 1962	The whole.
Act 65 of 1963	Unit Trusts Control Amendment Act, 1963	The whole.
Act 48 of 1964	Participation Bonds Act, 1964	Sections 14 and 15.
Act 58 of 1966	Second Finance Act, 1966	Sections 5 and 6.
Act 99 of 1967	Financial Institution Amendment Act, 1967	Sections 1 and 2.
Act 65 of 1968	Financial Institution Amendment Act, 1968	Sections 4, 5, 6, 7, 8,9 and 10.
Act 75 of 1970	Second Financial Institution Amendment Act, 1970	Section 2.
Act 101 of 1976	Financial Institution Amendment Act, 1976	Sections 17, 18, 19 and 20.
Act 99 of 1980	Financial Institution Amendment Act, 1980	Sections 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 and 37.
Act 36 of 1981	Financial Institution Amendment Act, 1981	Sections 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17.

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