

**FINANCIAL INSTITUTIONS AND MARKETS ACT, 2021****FINANCIAL MARKETS****DEMUTUALISATION OF A SELF-REGULATORY ORGANISATION****Standard No. FM.S.3.5**

issued by NAMFISA under section 410(4)(n) of the Financial Institutions and Markets Act, 2021

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**Definitions**

1. (1) In this Standard –
  - (a) “Act” means the Financial Institutions and Markets Act, 2021 (Act No. 2 of 2021), and it must be read with the regulations prescribed under the Act and the standards and other subordinate measures issued by NAMFISA under the Act;
  - (b) “business day” means any day except a Saturday, Sunday, public holiday or any other day on which the self-regulatory organisation is closed;
  - (c) “demutualisation” means the process by which a self-regulatory organisation changes its legal status from an organisation or association not incorporated under the Companies Act and owned by its members, into a company having share capital and incorporated under the Companies Act;
  - (d) “demutualised self-regulatory organisation” means a self-regulatory organisation following the completion of demutualisation on the demutualisation date;
  - (e) “facility” when used with respect to a self-regulatory organisation includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction (including, among other things, any system of communication to or from the self-regulatory organisation, by ticker or otherwise, maintained by or with the consent of the self-regulatory organisation), and any right of the self-regulatory organisation to the use of any property or service;
  - (f) “member” means a person who is designated as a member of a self-regulatory organisation in accordance with its constitutive documents and rules; and
  - (g) “ticker” means a telegraphic or electronic receiving machine or instrument that automatically prints out data on stock market information or news reports on a strip of paper.
- (2) Words and phrases defined in the Act have the same meaning in this Standard, unless the context indicates otherwise, including without limitation, the following:
  - (a) as defined in section 1 of the Act –
    - (i) affiliate;
    - (ii) auditor;
    - (iii) authorised user;

- (iv) board;
  - (v) Companies Act;
  - (vi) corporate body;
  - (vii) NAMFISA;
  - (viii) officer; and
  - (ix) valuator;
- (b) as defined in section 78 of the Act –
- (i) exchange;
  - (ii) issuer;
  - (iii) listing requirements;
  - (iv) securities advisor;
  - (v) securities dealer;
  - (vi) self-regulatory organisation; and
  - (vii) stockbroker.

### **Resolutions for demutualisation**

**2.** (1) Prior to making an application to NAMFISA for the approval of its demutualisation, in accordance with its constitutive documents, and subject to the provisions of this Standard –

- (a) a self-regulatory organisation must adopt, at a general meeting of the members, of which not less than 14 clear days' notice has been given, a resolution that it must be converted from a mutual organisation or a voluntary association of members into a company having a share capital and incorporated under the Companies Act; and
- (b) a self-regulatory organisation must adopt, at a general meeting of which not less than 21 clear days' notice has been given, specifying the intention to propose the resolution as a special resolution, the terms and effect of the resolution and the reasons for it, a special resolution –
  - (i) on the proposed allotment of shares to the initial shareholders of the demutualised self-regulatory organisation; and
  - (ii) approving the proposed memorandum and articles of association of the demutualised self-regulatory organisation.

(2) The notices referred to in paragraphs (a) and (b) of sub-clause (1) shall be exclusive of the day on which they are served or deemed to be served, and of the day for which they are given.

(3) The notice must be given in the manner and form provided for in the self-regulatory organisation's constitutive documents, provided that where notice is given by post, it shall be deemed

to be served on the seventh day after posting, and where such seventh day falls on a non-business day, the next business day thereafter.

(4) Where the notice is published on the website, if so authorised by its constitutive documents, the notice must be available on the website throughout the period beginning with the date of that notification and ending with the conclusion of the meeting.

(5) Any person entitled to receive notice, attend and vote at a general meeting, is entitled to appoint another person, whether a member or not, as proxy to attend, speak, and vote in that person's stead at any general meeting, and the form appointing such a proxy shall be deemed to confer authority to demand or join in demanding a poll, and a demand by a person as proxy for a member is the same as a demand by the member.

(6) The form appointing a proxy must be in writing under the hand of the appointer or of his agent duly authorised in writing, or, if the appointer is a corporate body, under the hand of an officer or agent authorised by that body.

(7) Any person, present and entitled to vote as a member or as a proxy of a member or as a representative of a corporate body at any general meeting, has, on a show of hands, only one vote irrespective of the number of rights that such person holds or represents.

**3.** (1) A resolution which is adopted in terms of clause 2(1)(b), other than a resolution referred to in clause 2(1)(a) adopted by an exchange, is of no force and effect unless -

- (a) there are present at that general meeting, in person as a member or as a proxy of a member or as a representative of a corporate body holding in the aggregate not less than 25% of the total votes of all the members entitled to vote; and
- (b) the resolution has been passed, on a show of hands, by not less than 75% of the number of members entitled to vote on a show of hands at the meeting or, where a poll has been demanded, by not less than 75% of the total votes to which the members present in person or as a proxy of a member or as a representative of a corporate body are entitled.

(2) If less than 25% of the total votes of all the members entitled to attend the general meeting and to vote are present or represented at a general meeting called for the purpose of passing a special resolution, the general meeting stands adjourned to a day not earlier than seven days and not later than 21 days after the date of the meeting.

(3) Where a general meeting has been adjourned as aforesaid, the self-regulatory organisation shall, upon a date not later than three days after the adjournment, publish in two newspapers circulating widely in Namibia, a notice stating -

- (a) the date, time and place to which the meeting has been adjourned;
- (b) the matter before the meeting when it was adjourned; and
- (c) the ground(s) for the adjournment.

(4) At the adjourned meeting, the members who are present in person or as a proxy of a member or as a representative of a corporate body and are entitled to vote may deal with the business for which the original meeting was convened, and a resolution passed by not less than 75% of those members is deemed to be a special resolution, even if less than 25% of the total votes are represented at that adjourned meeting.

**Application for demutualisation**

4. (1) The self-regulatory organisation shall not be considered to be a demutualised self-regulatory organisation unless it has obtained written approval of NAMFISA in accordance with this Standard.

(2) An application to NAMFISA for approval of the demutualisation of a self-regulatory organisation must be accompanied by the following additional documents and information:

- (a) every resolution adopted by the self-regulatory organisation pursuant to clause 2;
- (b) a valuation report of the self-regulatory organisation based on any internationally accepted method of valuation undertaken by a valuator;
- (c) the proposed authorised share capital of the demutualised self-regulatory organisation;
- (d) the proposed total issued share capital of the demutualised self-regulatory organisation;
- (e) the names of members of the self-regulatory organisation who are proposed to be the initial shareholders of the demutualised self-regulatory organisation and the number and value of shares to be allotted to each such shareholder;
- (f) the valuation methodology or conversion ratio applied in determining the equitable split of shareholding amongst members of the demutualised self-regulatory organisation and the methodology for determining the value per one right of the demutualised self-regulatory organisation;
- (g) information regarding its insurance, a guarantee fund, a compensation fund or other warranty to enable it to provide compensation to clients;
- (h) the proposed memorandum and articles of association of the demutualised self-regulatory organisation;
- (i) the proposed plan for the independent management of the commercial and regulatory functions of the demutualised self-regulatory organisation and timelines for implementation of necessary structures to ensure the functional separation of commercial and regulatory functions;
- (j) a detailed five-year business development plan for the demutualised self-regulatory organisation together with the capital expenditure estimates and the sources of finance for the five-year period;
- (k) the manner in which the rights and liabilities of the existing members shall be treated in the demutualisation;
- (l) the proposed timelines for the completion of operational manuals to guide the self-regulatory functions of the demutualised self-regulatory organisation detailing the scope of regulatory functions to be performed by the demutualised self-regulatory organisation;
- (m) the proposed rules of the demutualised self-regulatory organisation;
- (n) if the self-regulatory organisation is an exchange, the proposed listing requirements of the demutualised self-regulatory organisation;

- (o) the most recent audited annual financial statements of the self-regulatory organisation;
- (p) the risk assessment and mitigation framework for the assessment and mitigation of risks associated with the demutualisation; and
- (q) the proposed policies to address conflicts of interest at the demutualised self-regulatory organisation.

(3) Before making an application for approval referred to in sub-clause (2), the applicant must give notice of the proposed application, once in each three consecutive weeks in two newspapers circulating widely in Namibia at the expense of the applicant.

(4) The notice referred to in sub-clause (3) must state –

- (a) the name of the self-regulatory organisation;
- (b) the intention of the self-regulatory organisation to demutualise;
- (c) the place where the proposed rules of the demutualised self-regulatory organisation may be inspected by members of the public;
- (d) the place where the proposed listing requirements, in case of an exchange, may be inspected by members of the public; and
- (e) the period within which, and the manner in which, objections to the proposed application, rules or listing requirements, as the case may be, may be lodged with NAMFISA by the members of the public, not being less than 30 days from the date of the last publication of the notice.

(5) NAMFISA may, in writing, direct the self-regulatory organisation to provide any additional information which NAMFISA may require.

### **Approval**

**5.** (1) NAMFISA may, if it considers it necessary, direct the self-regulatory organisation to make appropriate amendments to the documents and information submitted with an application under clause 4.

(2) Upon receipt of all the information submitted under clause 4 and subject to any amendments under sub-clause (1), NAMFISA may approve the application with or without conditions.

(3) Every approval required pursuant to this Standard shall be subject to the fit and proper requirements within the meaning of the Act.

### **Shareholding and voting rights**

**6.** If the self-regulatory organisation is an exchange –

- (a) no person shall, as from the demutualisation date, hold directly or indirectly, more than 10% of the voting shares of the exchange without the prior approval of NAMFISA;
- (b) the trading members of the exchange shall, with effect from the demutualisation date, reduce their cumulative shareholding in the demutualised exchange to not more than 40% within three years; and

- (c) no person shall, as from the demutualisation date, in a general meeting, exercise voting rights, directly or indirectly, of more than 10% of the total voting rights.

### **Governance – board**

7. (1) The demutualised self-regulatory organisation must be governed by a board.
- (2) The board of a self-regulatory organisation must be composed of a majority of independent directors.
- (3) The board must have a written charter setting out the roles and responsibilities of the board, including procedures for its functioning and procedures for identifying, addressing and managing conflicts of interest.
- (4) The self-regulatory organisation must adopt rules implementing governance guidelines that, at a minimum, establish policies regarding –
- (a) director qualification standards;
  - (b) director responsibilities;
  - (c) director access to management and independent advisors;
  - (d) director compensation;
  - (e) director orientation and continuing education;
  - (f) management succession; and
  - (g) annual performance evaluations of the board.
- (5) The self-regulatory organisation must, at a minimum, have the following board committees:
- (a) nominating committee;
  - (b) governance committee;
  - (c) compensation committee;
  - (d) audit committee; and
  - (e) regulatory oversight committee, or their equivalent.
- (6) Each of the board committees must report to the board.
- (7) All board committees must be composed of a majority of independent directors and must be chaired by an independent director.
- (8) Each board committee must have the authority to direct and supervise inquiries into any matter brought to its attention within the scope of its duties, and to obtain advice and assistance from independent legal counsel and other advisors as it deems necessary to carry out its duties.
- (9) The self-regulatory organisation must provide sufficient funding and other resources, as determined by each board committee, to permit the board committees to fulfil their responsibilities and to retain independent legal counsel and other advisors.

(10) The nominating committee must have a written charter that addresses the nominating committee's purpose and responsibilities, which, at a minimum, must be to identify individuals qualified to become board members, consistent with criteria approved by the board and administer a process for the nomination of individuals to the board.

(11) The governance committee must have a written charter that addresses the committee's purpose and responsibilities, which, at a minimum, must be to develop and recommend to the board a set of governance principles applicable to the self-regulatory organisation and to oversee the evaluation of the board and management.

(12) The governance committee must conduct an annual performance evaluation of the governance of the self-regulatory organisation, including the effectiveness of the board and its committees.

(13) The compensation committee must have a written charter that addresses the compensation committee's purpose and responsibilities, which, at a minimum, must be to have –

- (a) direct responsibility to review and approve corporate goals and objectives relevant to the compensation of the executive officers of the self-regulatory organisation;
- (b) evaluate the performance of the executive officers in light of those goals and objectives, and
- (c) consider and approve recommendations with respect to the compensation level of the executive officers, based on this evaluation.

(14) The audit committee must have a written charter that addresses the audit committee's purpose and responsibilities, which, at a minimum, must be to assist the board in oversight of the –

- (a) integrity of the self-regulatory organisation's financial statements;
- (b) self-regulatory organisation's compliance with related legal and regulatory requirements;
- (c) qualifications and independence of the self-regulatory organisation's auditor, including –
  - (i) direct responsibility for the appointment, disengagement, termination and compensation of the auditor;
  - (ii) overseeing the auditor's engagement;
  - (iii) meeting regularly with the auditor;
  - (iv) reviewing the auditor's reports with respect to the self-regulatory organisation's internal controls;
  - (v) pre-approving all audit and non-audit services performed by the auditor;
  - (vi) determination of the budget and staffing of the self-regulatory organisation's internal audit department; and
  - (vii) establishment of procedures for the receipt of complaints regarding accounting, internal accounting controls, or auditing matters of the self-

regulatory organisation and the confidential submission by employees of the self-regulatory organisation of concerns regarding questionable accounting or auditing matters.

(15) The regulatory oversight committee must have a written charter that addresses the regulatory oversight committee's purpose and responsibilities, which, at a minimum, must be to –

- (a) assure the adequacy and effectiveness of the regulatory program of the self-regulatory organisation;
- (b) assess the self-regulatory organisation's regulatory performance;
- (c) determine the regulatory plan, programs, budget, and staffing for the regulatory functions of the self-regulatory organisation;
- (d) assess the performance of, and recommend compensation and personnel actions involving, the chief regulatory officer and other senior regulatory personnel to the compensation committee;
- (e) monitor and review regularly with the chief regulatory officer matters relating to the self-regulatory organisation's surveillance, examination, and enforcement units;
- (f) assure that the self-regulatory organisation's disciplinary and arbitration proceedings are conducted in accordance with the self-regulatory organisation's rules and policies and any other applicable laws or rules, including those of the NAMFISA;
- (g) prior to the self-regulatory organisation's approval of an affiliated security for listing, certify that such security meets the self-regulatory organisation's rules for listing; and
- (h) approve reports filed with NAMFISA.

(16) The self-regulatory organisation may establish such other committees of the board as it deems appropriate, on condition that if such committee has the authority to act on behalf of the board, the committee must be composed of a majority of independent directors.

(17) The self-regulatory organisation may not delegate to any committee not consisting solely of independent directors the authority to act on matters that otherwise are within the jurisdiction of a board committee.

## **Independence**

**8.** (1) No director may qualify as an independent director unless the board affirmatively determines that the director has no direct or indirect material relationship with the self-regulatory organisation or any of its affiliates.

(2) The board must make the determination referred to under sub-clause (1) upon the director's nomination or appointment to the board and thereafter no less frequently than annually and as often as necessary in light of the director's circumstances.

(3) A director is not independent, unless he has no direct or indirect material relationship with the self-regulatory organisation or any affiliate of the self-regulatory organisation, any authorised user of the self-regulatory organisation or any affiliate of such authorised user, or any issuer that are listed or traded on a facility of the self-regulatory organisation.

(4) For the purposes of sub-clauses (1) and (3), a “material relationship” is a relationship which could, in the view of the self-regulatory organisation’s board, be reasonably expected to interfere with the exercise of a member’s independent judgement.

(5) Despite sub-clause (4), the following individuals are considered to have a material relationship with the self-regulatory organisation –

- (a) an individual who is, or has been within the last three years, an employee or executive officer of the self-regulatory organisation;
- (b) an individual whose immediate family member is, or has been within the last three years, an executive officer of the self-regulatory organisation;
- (c) an individual who –
  - (i) is a partner of a firm that is the self-regulatory organisation’s internal or external auditors;
  - (ii) is an employee of that firm; or
  - (iii) was within the last three years a partner or employee of that firm and personally worked on the self-regulatory organisation’s audit within that time;
- (d) an individual whose spouse, minor child or stepchild, or child or stepchild who shares a home with the individual –
  - (i) is a partner of a firm that is the self-regulatory organisation’s internal or external auditors;
  - (ii) is an employee of that firm and participates in its audit, assurance or tax compliance (but not tax planning) practice; or
  - (iii) was within the last three years a partner or employee of that firm and personally worked on the self-regulatory organisation’s audit within that time;
- (e) an individual who, or whose immediate family member, is or has been within the last three years, an executive officer of an entity, if any of the self-regulatory organisation’s current executive officers serves or served at that same time, on the entity’s compensation committee; and
- (f) an individual who received, or whose immediate family member who is employed as an executive officer of the self-regulatory organisation received more than N\$75,000.00 in direct compensation from the self-regulatory organisation during any 12-month period within the last three years.

(6) Despite sub-clause (5), an individual will not be considered to have a material relationship with the self-regulatory organisation solely because –

- (a) the individual had a relationship identified in sub-clause (5) if that relationship ended three years prior to the appointment; or
- (b) the individual had a relationship considered to be material under this clause with the subsidiary of the self-regulatory organisation that ended three years prior to the appointment.

(7) For the purposes of sub-clauses (5)(c) and (5)(d), a partner does not include a fixed income partner whose interest in the firm that is the internal or external auditor is limited to the receipt of fixed amounts of compensation (including deferred compensation) for prior service with that firm if the compensation is not contingent in any way on continued service.

(8) For the purposes of sub-clause (5)(f), direct compensation does not include:

- (a) remuneration for acting as a member of the board of directors or of any board committee of the self-regulatory organisation; and
- (b) the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the self-regulatory organisation if the compensation is not contingent in any way on continued service.

(9) Despite sub-clause (5), an individual will not be considered to have a material relationship with the self-regulatory organisation solely because the individual or their immediate family member –

- (a) has previously acted as an interim chief executive officer of the self-regulatory organisation; or
- (b) acts, or has previously acted, as a chair or vice-chair of the board of directors or of any board committee of the self-regulatory organisation on a part-time basis.

(10) The self-regulatory organisation must include industry representatives on its board, of which at least one director must be representative of issuers and at least one director must be representative of investors, and, in each case, such director must not be associated with an authorised user, stockbroker, securities advisor or securities dealer.

(11) When the board considers any matter that is recommended by, or otherwise is within the authority or jurisdiction of a board committee, a majority of the directors who vote on the matter must be independent directors.

(12) The self-regulatory organisation must establish policies and procedures to require each director, on their own initiative and upon request of the self-regulatory organisation, to inform the self-regulatory organisation of the existence of any relationship or interest that may reasonably be considered to bear on whether such director is an independent director.

(13) If the self-regulatory organisation fails to comply with the requirement that the board be composed of a majority of independent directors because there is a vacancy on the board or a director ceases to be independent, it must comply with this requirement by the earlier of its next annual meeting or one year from the date of the occurrence of the event that caused the failure to comply with this requirement.

(14) The self-regulatory organisation must establish procedures for interested persons to communicate their concerns regarding any matter within the authority or jurisdiction of a board committee directly to the independent directors.

(15) The independent directors must have the authority to direct and supervise inquiries into any matter brought to their attention within the scope of their duties and to obtain advice and assistance from independent legal counsel and other advisors as they determine necessary to carry out their duties.

(16) The self-regulatory organisation must provide sufficient funding and other resources, as determined by the independent directors, to permit the independent directors to fulfil their responsibilities, and to retain independent legal counsel and other advisors.

(17) The self-regulatory organisation must adopt, implement and maintain policies to ensure the enhancement of market integrity, market efficiency, and investor protection.

### **Regulatory programme**

**9.** (1) The self-regulatory organisation must establish policies and procedures to assure the independence of its regulatory programme from its market operations or other commercial interests.

(2) The self-regulatory organisation's regulatory programme must be –

- (a) structurally separated from the market operations and other commercial interests of the self-regulatory organisation by means of separate legal entities; or
- (b) functionally separated within the same legal entity from the market operations and other commercial interests of the self-regulatory organisation.

(3) The board must appoint a chief regulatory officer to administer the regulatory programme of the self-regulatory organisation, and the chief regulatory officer must report directly to the regulatory oversight committee.

(4) Any funds received by the self-regulatory organisation from regulatory fees, fines, or penalties must be applied only to fund programmes and operations directly related to such self-regulatory organisation's regulatory responsibilities.

(5) The self-regulatory organisation must make and keep books and records necessary to demonstrate compliance with the requirement in sub-clause (4).

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