

FINANCIAL INSTITUTIONS AND MARKETS ACT, 2021

FINANCIAL MARKETS

MINIMUM CAPITAL, CAPITAL ADEQUACY, SOLVENCY AND LIQUIDITY REQUIREMENTS FOR INVESTMENT MANAGERS, AND THE CONDUCT OF THE BUSINESS OF INVESTMENT MANAGEMENT

Standard No. FM.S.3.6

issued by NAMFISA under section 410(2)(l) and (q) of the Financial Institutions and Markets Act, 2021

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) “asset” means a present economic resource, a right or other source of value that is capable of producing economic benefits and is controlled by a natural or legal person as a result of past events, including money of any currency;
 - (c) “bank” means a body of persons, whether incorporated or not, that carries on the business of banking, and includes the Bank of Namibia referred to in section 2 of the Bank of Namibia Act, 2020 (Act No. 1 of 2020), a banking institution defined in section 1 of the Banking Institutions Act, 1998 (Act No. 2 of 1998), and the Post Office Savings Bank as defined in section 1 of the Posts and Telecommunications Act, 1992 (Act No. 19 of 1992);
 - (d) “banker’s acceptance” means a bill as defined in the Bills of Exchange Act, 2003 (Act No. 22 of 2003), drawn on, accepted and guaranteed by a bank and representing a promised future payment by that bank;
 - (e) “bond” means an acknowledgement of debt in which the issuer or guarantor undertakes to repay the principal debt together with interest on the maturity of the debt to the holder of the bond;
 - (f) “commercial paper” means a negotiable short-term financial instrument which is an acknowledgement of debt issued by an entity, whether backed by assets or not;
 - (g) “conflict of interest” means a situation which a person encounters, while rendering a financial service to a client, if that situation –
 - (i) impairs the objectivity of the person in any aspect of rendering the financial service to the client; or
 - (ii) prevents the person from rendering the financial service to the client in an unbiased and fair manner or from acting in the best interest of the client;
 - (h) “debenture” means a debenture stock, debenture bond and any other financial instrument, whether constituting a charge on the assets of the issuer or not;

- (i) “debt security” means a financial instrument issued by an issuer, evidencing or acknowledging the liability of the issuer to repay an amount of money specified in the security, subject to the conditions to which the security is issued;
- (j) “deposit” means an amount of money paid by a person to a bank subject to an agreement in terms of which the full amount of money, or any part thereof, will, conditionally or unconditionally, and with or without interest or a premium, be repaid to such person –
 - (i) on demand;
 - (ii) at a specified or unspecified date;
 - (iii) after a predetermined period of time;
 - (iv) after a predetermined period of notice of withdrawal; or
 - (v) subject to an agreement entered into by the parties concerned;
- (k) “financial instrument” means any contract that gives rise to a financial asset of one entity and a financial liability or equity instrument of another entity;
- (l) “financial market” means any market where the buying and selling of securities take place;
- (m) “issuer” means an issuer of securities, including an issuer of money market instruments;
- (n) “investment” means an asset or item acquired with the goal of generating income or appreciation, where appreciation refers to an increase in the value of an asset over time;
- (o) “liquid asset” means –
 - (i) any amount of cash consisting of Bank of Namibia notes and coins;
 - (ii) any balance in an account with a bank, branch of a foreign institution which is authorised in terms of the Banking Institutions Act, 1998, to conduct the business of a bank by means of such branch or a foreign bank;
 - (iii) any positive balance in a settlement account, other than a margin account, operated for the purpose of buying and selling of underlying assets;
 - (iv) money market instrument;
 - (v) participatory interest in a money market portfolio,
on condition that the assets in sub-paragraphs (i), (ii), (iv) and (v) are capable of being converted, without any penalty on capital in terms of the conditions of the asset, into cash within a period not exceeding seven days;
- (p) “marketable securities” means financial instruments that can easily be bought, sold or traded, are very liquid and can be easily and quickly converted into cash at a reasonable price;
- (q) “money market” means the sector of the financial market that includes financial instruments that have a maturity or redemption date that is one year or less at the time of issuance;

- (r) “money market instrument” means high quality debt securities issued by government and corporate borrowers, whose maturity or redemption date is up to one year, that seek to preserve capital and provide daily liquidity, while offering returns in line with money market rates, and includes a banker’s acceptance, bond, commercial paper, debenture, deposit, negotiable certificate of deposit, state-owned enterprise bill, promissory note, trade bill and treasury bill;
 - (s) “negotiable certificate of deposit” means a certificate of deposit issued by a bank, and payable to order or bearer;
 - (t) “paid-up share capital” means the amount of money a company has received from shareholders in exchange for participation in the ownership of the company by selling its shares on the primary market or directly to investors;
 - (u) “promissory note” means an unconditional promise in writing made by one person to another, signed by the maker, and engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to a specified person or his or her order, or to bearer; and
 - (v) “treasury bill” means a bill drawn by the Government of Namibia on the Secretary to the Treasury, calling on the latter to pay a sum certain in money to a specified person or his order, or to bearer on demand or on a certain specified future date.
- (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) client;
 - (ii) collective investment scheme;
 - (iii) entity; and
 - (iv) NAMFISA;
 - (b) as defined in section 78 of the Act –
 - (i) investment manager; and
 - (ii) investment management.

Applicability

2. This Standard applies to all financial intermediaries involved in investment management.

Capital Based Requirements Minimum Capital and Solvency

3. The investment manager must maintain, on an ongoing basis, paid-up share capital of at least N\$250,000.00 (two hundred and fifty thousand Namibia dollar) for employment in the business.

4. Subject to clause 5, the investment manager must maintain professional indemnity insurance or fidelity insurance cover or both such insurances sufficient to cover the risk of losses due to fraud, dishonesty, negligence, errors, omissions or any other dishonest acts or breaches of professional duty of its employees, directors or representatives.

5. The nature and extent of the insurance contemplated in clause 4 must be adequate and appropriate to the level of complexity and size of the business operations undertaken by the investment manager.

6. If the investment manager forms part of a group of companies, the professional indemnity insurance or fidelity insurance cover may be obtained at group level, but –

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

7. The minimum professional indemnity insurance or fidelity insurance cover must be N\$1,000,000.00 (one million Namibia dollar), or such other amount as may be determined, by way of written notice from time to time, by NAMFISA.

Capital adequacy

8. The assets of the investment manager, excluding non-marketable securities, immovable property, goodwill and any other intangible assets, must at all times exceed its liabilities.

9. The investment manager must, at all times, maintain marketable securities that exceed its liabilities by a sufficient margin to cover the risks to the investment manager's net worth, and must be structured to result in capital addressed to the full range of risks to which the investment manager is subject.

Liquidity adequacy

10. The investment manager must, at all times, maintain liquid assets equal to 13/52 weeks of annual expenditure.

11. In determining the "annual expenditure" to meet the 13/52 weeks liquidity requirement as prescribed under clause 10, the following items may be excluded:

- (a) employee bonuses and commissions (except where guaranteed);
- (b) employees', directors', and members' share in profits;
- (c) emoluments of directors or members;
- (d) other appropriation of profits to directors or members;
- (e) asset management fees that are calculated as a percentage of assets under management;
- (f) donations;
- (g) provision for bad debts;
- (h) any loss resulting from the sale of assets; and
- (i) any charge for depreciation.

12. The investment manager must have in place sound, effective and comprehensive strategies and processes to assess and maintain on an ongoing basis, the amounts, types and distribution of capital that it considers adequate to cover the nature and level of the risks to which it is or might be exposed, and maintain records such that capital levels can be readily determined at any time, and report to NAMFISA at least quarterly, or as may be determined by way of written notice from time to time by NAMFISA.

Non-Capital Based Requirements (Conduct of business obligations when providing investment management services to clients)

Standards of conduct

13. The investment manager must not be under liquidation or provisional liquidation.

14. The investment manager must observe high standards of integrity, prudence, professional care and fair dealing when conducting investment management activities, and must act in the best interest of clients with due skill, care, diligence and good faith.

15. The investment manager must have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems.

16. Outsourcing of important operational functions, where permitted, may not be undertaken in such a manner as to impair materially the quality of its internal control and the ability of NAMFISA to monitor the investment manager's compliance with all obligations.

Conflict of interest

17. The investment manager must take all reasonable steps to identify actual or perceived conflicts of interest between itself, including its managers, employees and representatives, or any person directly or indirectly linked to it by control and its clients, or between one client and another, that arise in the course of providing any investment management services.

18. The investment manager must adopt and document appropriate policies to minimise those conflicts of interest by identifying the instances where it would refuse to act and, where this is not necessary, making arrangements to minimise the risk of any loss to the client.

19. The investment manager must not take advantage of information it obtained from providing services to a client for its own benefit or the benefit of its employees or the benefit of another client, and where such an eventuality is likely to occur, the investment manager must

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- (a) adopt and document procedures, including the erection of information barriers, barriers between information technology systems, physical barriers or, if necessary, separate office locations, to minimise the possibility of information from one client being used for the benefit of another client, its employees;
- (b) train employees in matters relating to conflicts of interest and the procedures developed to avoid them; and
- (c) obtain undertakings from employees that they will not use information gained from clients to the benefit of the investment manager or for their personal benefit.

20. Where the investment manager has a material interest in a transaction to be entered into with or for a client, or a relationship which gives rise to a conflict of interest, the investment manager must not advise or exercise discretion in relation to that transaction unless it has –

- (a) disclosed the material interest or relationship that may give rise to a conflict, as the case may be, to the client; and
- (b) taken reasonable steps to ensure that neither the material interest nor relationship would adversely affect the interests of the client.

21. The investment manager must take reasonable steps to ensure that neither it nor any of its employees or agents offers or gives, or solicits or accepts, any inducement that is likely to conflict with any of the duties owed to clients.

Protection, segregation and safekeeping of clients' financial assets

22. The investment manager must take reasonable steps to ensure continuity and regularity in the performance of investment management services and activities. To that end, the investment manager must employ appropriate and proportionate systems, resources and procedures.

23. The investment manager must hold its clients' financial assets in trust for and on behalf of the clients on behalf of whom the financial assets were received.

24. The investment manager must ensure that one or more client accounts are opened with the relevant institution for purposes of segregating clients' financial assets.

25. The investment manager must segregate its clients' bank accounts from any account holding financial assets belonging to the investment manager.

26. The investment manager must ensure that clients' financial assets do not form part of the financial assets of the investment manager for any purpose and must not be available in any circumstance for payment of any debt of the investment manager.

27. The investment manager must deposit into the client's bank account all funds received on behalf of, or from the client, upon receipt.

28. The investment manager must, on a daily basis, reconcile its records showing the amounts held on behalf of each client in the client bank account and the aggregate of clients' financial assets held in the client account or being held by third parties on behalf of clients.

29. Where there is more than one client bank account, the investment manager must reconcile each client bank account separately as well as the aggregate position on all clients' accounts.

30. The investment manager must keep records of:

- (a) all the amounts it has deposited into a client bank account held by the investment manager, specifying the client on whose behalf the amounts are held and the dates on which they were deposited into the account;
- (b) all withdrawals from a client bank account, the dates of the withdrawals, and the names of the client on whose behalf the withdrawals were made; and
- (c) any other particulars as may be determined, by way of written notice from time to time, by NAMFISA.

Protection of client rights

31. The investment manager must not, in any written communication or agreement, exclude or restrict –

- (a) any duty or liability to a client which it has under any law;
- (b) any other duty to act with integrity, prudence, professional care, skill and diligence that is owed to a client in connection with the provision to that client, of investment management services; or
- (c) any liability owed to a client for failure to exercise the degree of integrity, prudence, professional care, skill and diligence that may reasonably be expected of it in the provision of investment management services.

Client's understanding of risk

32. The investment manager must not –

- (a) recommend a transaction to a client, or effect a transaction with or for a client, unless it has taken all reasonable steps to enable the client to understand the risks involved;
- (b) knowingly mislead a client on any advantages or disadvantages of a contemplated transaction; or
- (c) promise a return unless such return is contractually guaranteed.

33. When providing investment management services, the investment manager must obtain the necessary information regarding the client's knowledge and experience in the investment field relevant to the specific type of product or service, the client's financial situation and investment objectives, so as to enable the investment manager to recommend to the client, the investments and financial instruments that are suitable for them.

34. Appropriate information must be provided in a comprehensible form to a client or a potential client about –

- (a) the investment manager and its services;
- (b) financial instruments and proposed investment strategies, including appropriate guidance on, and warnings of the risks associated with investments in those instruments, or in respect of particular investment strategies; and
- (c) costs and associated charges, so that they are reasonably able to understand the nature and risks of the investment management service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis.

35. The investment manager must, when making recommendations to a client, take all reasonable steps to satisfy itself that the client has a full understanding of the –

- (a) nature of the investment;
- (b) fees and charges associated with the investment;
- (c) risks of the investment;
- (d) factors that are likely to affect the performance of the investment;

- (e) terms and conditions of the investment; and
- (f) consequences of deviating from the terms and conditions of the investment.

Fair and clear communication

36. Clients must receive from the investment manager, adequate reports on the service provided. These reports must include, where applicable, the costs associated with the transactions and services undertaken on behalf of the client.

37. All information, including marketing communication, addressed by the investment manager to clients or potential clients must be fair, clear and not misleading. Marketing communication must be clearly identifiable as such.

Investment manager's understanding of investment options

38. When assessing an investment, the investment manager must assess the availability, reliability and relevance of information available both on the market and on the underlying assets. The analysis of the structure of the investment must be conducted both in normal and in stress scenarios.

39. When assessing an investment, the unique properties of the specific pool of assets must not be assumed to be identical to the broader asset category. An investment manager must ensure that their analysis of the underlying assets is based on information that is relevant for that specific type of underlying assets.

40. The investment manager must understand how cash flows will be allocated to the different tranches of the investment, whatever the structure of the investment.

41. The investment manager must have the appropriate expertise, including legal expertise and processes in place to perform credit risk assessment appropriate to the nature, scale and complexity of any investment strategy they implement and the type and proportion of debt instruments they invest in, and must refrain from investing in products or issuers when they do not have enough information to perform an appropriate credit risk assessment.

42. The investment manager must ensure when investing on behalf of a collective investment scheme that the investment is consistent with the disclosures, mandate and internal operations of the collective investment scheme, or with the way it has been marketed to investors.

43. The investment manager must make its own determination as to the credit quality of a counterparty, collateral or financial instrument before investing and throughout the holding period.

Reliance on credit rating agencies and other third parties

44. External credit ratings may form one element, among others, of the internal assessment process but do not constitute the sole factor supporting the credit analysis.

45. Where external credit ratings are used, the investment manager must understand the methodologies, parameters and the basis on which the assessment of a credit rating agency was produced, and have adequate means and expertise to identify the limitations of the methodology and assumptions used to form that assessment. The investment manager must also have adequate means and expertise to challenge the methodology and parameters.