



THE SECURITIES ACT GUIDELINES ON TRUSTEES AND CUSTODIANS IN A COLLECTIVE INVESTMENT SCHEME ESTABLISHED BY TRUST

GUIDELINE NO. 1 OF 2016

Effective Date 1/1/2016

This document contains Guidelines on trustees and custodians in a Collective Investment Scheme established under trust.

**GUIDELINES ON TRUSTEES AND CUSTODIANS IN A COLLECTIVE INVESTMENT SCHEME
ESTABLISHED UNDER TRUST**

SECURITIES AND EXCHANGE COMMISSION

THE SECURITIES ACT

**GUIDELINES ON TRUSTEES AND CUSTODIANS IN A COLLECTIVE INVESTMENT
SCHEME ESTABLISHED UNDER TRUST**

GUIDELINE NO. 1 OF 2016

PART A: PRELIMINARY
1. Title
2. Application
3. Key definition
4. Rationale
PART B: TRUSTEE
5. Obligations to appoint a trustee
6. Eligibility for appointment of a trustee
7. Duties and obligations of a trustee
8. Retirement/resignation of the trustee
9. Removal of a trustee
PART C: CUSTODIAN
10. Obligations to appoint a custodian
11. Eligibility for appointment of a custodian
12. Duties & obligations of a custodian
13. Records maintained by a custodian
14. Reports by a custodian
15. Retirement/resignation of a custodian
16. Removal of a custodian
PART D: SPECIFIC STEPS TO BE UNDERTAKEN
17. Steps to be taken following these Guidelines

GUIDELINES ON TRUSTEES AND CUSTODIANS IN A COLLECTIVE INVESTMENT SCHEME ESTABLISHED UNDER TRUST

IN EXERCISE of the powers contained in section *seventy-nine* of the Securities Act, Cap. 354 of the Laws of Zambia, the following Guidelines are hereby made:

PART A: PRELIMINARY

1. Title

- 1.1 These Guidelines may be cited as the “Guidelines on Trustees and Custodians in a Collective Investment Scheme established under trust”.

2. Application

- 2.1 These Guidelines shall apply to schemes established under trust which are required to appoint a trustee as per the Securities Act.
- 2.2 Whilst the Act requires all other schemes to appoint a custodian, we would nonetheless recommend the appointment of a trustee for purposes of good corporate governance. Suffice to mention, the SEC is proposing an alteration to the Act in order to institute the three tier model (i.e. trustee, custodian and management company) for all collective investment schemes.

3. Key Definitions

- 3.1 For the purposes of these Guidelines,

“**Act**” means the Securities Act Cap 354 of the Laws of Zambia

“**certificate of entitlement**” means a document of title, statement of account or any other document evidencing ownership of the holder thereof to one or more shares acquired by the holder in a collective investment scheme;

“**CIS**” means Collective Investment Scheme as defined under the Act

“**constitutive documents**” means the principal documents governing the formation of the scheme, and includes the trust deed in the case of a unit trust and the articles of association of an investment company and all material agreements

“**custodian**” means the entity approved by the Commission pursuant to part 1 of the Schedule to the Securities (Collective Investment Scheme) Rules to hold in custody funds, securities, financial instruments or documents of title to assets of a collective investment scheme

“**eligible nominee**” means a person approved by the Commission to act as a nominee

“**holder**” in relation to a unit or share in a scheme means the person who is entered in the register as the holder of that unit or share or the bearer of a bearer certificate representing that unit or share;

“**nominee**” means a person or company, not the owner, in whose name a stock, bond, or company is registered.

GUIDELINES ON TRUSTEES AND CUSTODIANS IN A COLLECTIVE INVESTMENT SCHEME ESTABLISHED UNDER TRUST

“trustee” means the entity appointed pursuant to part 1 of the Schedule to the Securities (Collective Investment Scheme) Rules ;

3.2 All other meanings as contained in the Act will also apply in these Guidelines

4. Rationale

- 4.1 At a meeting held on 21st November 2014, market players (in particular the trustee, custodians and management companies) made an appeal to the Securities and Exchange Commission (SEC) to provide guidance on the roles of the trustee and custodians. The request was made upon the realization that contrary to the prevailing practice for CISs to have both a custodian and trustee, the Act in its present form requires a CIS to have either a trustee or a custodian. The Act further prescribes that a “scheme established under trust must have a trustee, and all other CIS must have a custodian”. The Act also states that “trustees are expected to fulfill the duties imposed on them by the general law of trusts”. This therefore is in addition to the obligations (and responsibilities) as stipulated in the Schedule to the Statutory Instrument (SI) No. 161 of 1993, which responsibilities are the same for the custodian and trustee, whichever is appointed.
- 4.2 CISs established under trust have in addition to having a trustee appointed a custodian. This has been primarily on grounds that the one and only trustee authorized in the capital markets does not provide custodial services. Whilst this model remains the best under the circumstances, there is a challenge created in practice owing to the fact that the Act does not apportion responsibilities, let alone guide on how the two parties shall relate in the event that a CIS has both a custodian and a trustee. Furthermore, in most instances the appointment of the custodian was not done with the involvement of the trustee and as such there has been a lack of clarity on how the obligations under the Act will be adhered to. Hence the lapses observed during the SEC inspections which include assets not being properly registered in the name or order of the trustee; custodial agreements that do not take cognizance of the trustee as the principal client for the custodial services being sought; failure to have all assets of the CIS under custody; etc. The foregoing points to the fact that the three parties - being the management company; custodian; and trustee, are unclear about each other’s roles/responsibilities in the CIS.
- 4.3 In responding to the appeal made by all three parties, the SEC issued draft Guidelines on 30th November 2014, which Guidelines sought to clarify the functions of the trustee and custodian for CISs established under trust. The draft solicited comments from the three parties and we received a good number of responses. Most commenters supported the draft and having made changes that respond to commenters’ recommendations, the Guidelines are hereby adopted.
- 4.4 We must however state that in exercising its powers under Section 73 (3), the Commission intends to issue a statutory instrument to comprehensively address the lacunas in the Act with respect to CISs, including issues covered in these Guidelines.

**GUIDELINES ON TRUSTEES AND CUSTODIANS IN A COLLECTIVE INVESTMENT SCHEME
ESTABLISHED UNDER TRUST**

PART B: TRUSTEE

5. Obligations to appoint a trustee

5.1 Subject to Clause 1 of the Schedule to the SI No.161 of 1993, every CIS for which authorisation is requested and is established under trust must appoint a trustee acceptable to the Commission.

6. Eligibility for appointment of a trustee

6.1 Pursuant to Clause 2 of the Schedule to the SI No.161 of 1993, no person shall be appointed a trustee of a CIS unless such person is:

- (i) a bank registered under the Banking Act, or licensed or registered under any Act amending or replacing that Act; or
- (ii) a trust company which is a subsidiary of such a bank; or
- (iii) a trust company registered under the Companies Act; or
- (iv) a banking institution or trust company incorporated outside Zambia, which has a subsidiary incorporated in Zambia, and which is acceptable to the Commission.

6.2 A company must obtain approval from the Commission to be a trustee. The prescribed fee for approval must also be paid.

6.3 The Commission may revoke any approval already granted if at any time thereafter a trustee ceases to satisfy the requirements of the Act and these Guidelines

7. Duties and obligations of a trustee

7.1 The trustee of a CIS shall serve the scheme in compliance with the Act together with these Guidelines, the general law of trusts, trust deed, and the trustee's duties shall include the following:

- (i) take into his **custody OR under his control ALL** the property of the scheme and hold it in trust for the holders (in the case of a unit trust) in accordance with the provisions of the constitutive documents; Cash and registrable assets shall be registered in the name of or the order of the trustee.

In this regard, the trustee's duties shall include, among others, the following:

- to ensure that all bank accounts for the CIS are opened with the trustee's knowledge and are in the name of the CIS (or the fund) and under the custody of the custodians. In this case all bank accounts shall have the name of the custodians and the CIS or fund e.g. Zambia Bank Nominees/SEC Zambia Mixed Fund. [The custodian must be a party to the mandates, in order of the trustee]
- to ensure that the custodian takes into custody all the CIS portfolio and holds it in trust for the holders in accordance with the Act together with these Guidelines
- to take all steps and execute all documents which are necessary to secure acquisitions or disposals properly made by the management company in accordance with the trust deed, management agreement and Act together with these Guidelines

**GUIDELINES ON TRUSTEES AND CUSTODIANS IN A COLLECTIVE INVESTMENT SCHEME
ESTABLISHED UNDER TRUST**

- (ii) be liable for any act or omission of any agent with whom any investments in bearer form are deposited as if they were the act or omission of any nominee in relation to any investment forming part of the property of the scheme;

In this regard, the trustee's duties shall include, among others, the following:

- to ensure that the CIS is managed by the management company in accordance with the agreement of service with the management company, the incorporation documents, the information memorandum and the rules of the CIS as per the Act together with these Guidelines
- to execute and deliver to the management company or his nominee upon the written request of the management company from time to time such powers of attorney or proxies as the management company may reasonably require, in such name or names as the management company may request, authorising such attorneys and proxies to vote consent or otherwise act in respect of all or any part of the CIS portfolio
- to ensure that decisions about the constituents of the CIS portfolio do not exceed the powers conferred on the management company
- to forward to the management company and the custodian without delay all notices of meetings, reports, circulars, proxy solicitations and other documents of a like nature received by it as registered holder of any investment

- (iii) take reasonable care to ensure that the sale, issue, repurchase, redemption and cancellation of units/shares effected by a CIS are carried out in accordance with the provisions of the constitutive documents;

In this regard, the trustee must ensure that an up-to-date members' register is maintained by the management company and a copy is submitted to the trustee monthly and upon request by the trustee or the Commission. The members register must be reconciled to the management accounts every month.

- (iv) take reasonable care to ensure that the methods adopted by the management company in calculating the value of units or shares are adequate to ensure that the sale, issue, repurchase, redemption and cancellation prices are calculated in accordance with the provisions of the constitutive documents;

In this regard, the trustee's duties shall include, among others, the following:

- to ensure that the management company maintains sufficient records and adopts such procedures and methods for calculation of prices at which shares are issued and redeemed to ensure that those prices are within the limits prescribed by the Act, the incorporation documents, the information memorandum of the scheme and the Guidelines of the collective investment scheme; Provided that if the trustee is not satisfied with any matter(s) specified in this Guideline it must inform the Commission
- to ensure that the management company adheres to Clauses 33 and 34 of the Schedule to the SI No.161 of 1993

- (v) carry out the instructions of the management company in respect of investments unless they are in conflict with the provisions of the offering or constitutive documents;

**GUIDELINES ON TRUSTEES AND CUSTODIANS IN A COLLECTIVE INVESTMENT SCHEME
ESTABLISHED UNDER TRUST**

In this regard, the trustee's duties shall include, among others, the following:

- to execute all documents as are necessary and take all steps to ensure that instructions properly given to it by the management company as to the exercise of rights (including voting rights) attaching to the ownership of collective investment scheme portfolio are carried out
- to exercise any right of voting conferred by any of the collective investment scheme portfolio which is in shares in other collective investment schemes managed or otherwise operated by the management company

[In these Guidelines 'voting' includes giving any consent or approval of any arrangement, scheme or resolution or any alternation in or abandonment of any rights attaching to any part of the collective investment scheme portfolio and 'right' includes a requisition or joining in a requisition to convene any meeting or to give notice of any resolution or to circulate any statement or to consent to any short notice of any meeting].

- (vi) take reasonable care to ensure that the investment and borrowing limitations set out in the constitutive documents, and the conditions under which the scheme was authorised, are complied with;

In this regard, the trustee's duties shall include, among others, the following:

- to keep such records as are necessary -
 - a) to enable it to comply with the Act together with these Guidelines, and
 - b) to demonstrate that such compliance has been achieved

- (vii) issue a report to the holders to be included in the annual report on whether in the trustee's opinion, the management company has in all material respects managed the scheme in accordance with the provisions of the constitutive documents; if the management company has not done so, the respect in which it has not done so and the steps which the trustee/custodian has taken in respect thereof;

In this regard, the trustee's duties shall include, among others, the following:

- to cause proper books of accounts to be kept by the management company, in respect of the unit trust and shall make available annually in such manner as may be prescribed by the Commission audited statement of accounts in respect of the unit trust, together with a summary of any amendments of the trust deed that have been made since the date of the last statement.
- to issue a report to be included in the annual report of the CIS on whether in the custodian's opinion, the management company has in all material respects managed the scheme in accordance with the provisions of these Guidelines, incorporation documents, the information memorandum and the rules of the CIS, and if the management company has not done so, the respect in which it has not done so and the steps which the custodian has taken in respect thereof;

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

In this regard, the trustee must ensure that the management company prepares daily unit reconciliations agreeing the value of units issued to the funds received in the bank.

GUIDELINES ON TRUSTEES AND CUSTODIANS IN A COLLECTIVE INVESTMENT SCHEME ESTABLISHED UNDER TRUST

- (ix) ensure that any registrable investments which are held for shareholders or unit holders in the scheme are properly registered in the names of the shareholders or unit holders or, with the consent of the shareholder or unit holder, in the name of an eligible nominee; and

In this regard, the registrable investments shall be strictly in the name of the eligible nominee who shall be the custodian. The custodian shall hold all the CIS investments in order of the trustee and therefore in trust for the holders in accordance with the Act

- (x) where title to investments is recorded electronically, to ensure that entitlements are separately identified from those of the manager of the scheme in the records of the person maintaining records of entitlement.

7.2 A trustee shall not delegate to the management company -

- a) any function of oversight in respect of the management company; or
- b) any function of custody or control of the CIS portfolio.

8. Retirement/resignation of the trustee

8.1 Pursuant to Clause 5 of the Schedule to the SI No.161 of 1993, a trustee shall not be entitled to resign except upon the appointment of a new trustee, subject to the prior approval of the Commission.

8.2 If a trustee wishes to resign it shall give three months notice in writing to that effect to the management company and the Commission. The management company shall appoint within two months after the date of such notice, some other qualified person as the new trustee upon and subject to the Commission's prior approval and such person entering into a trust deed supplemental to the trust deed comprised in the incorporation documents. If the management company is unable to appoint a new trustee as aforesaid within such period of two months, the trustee shall be entitled to appoint a qualified company selected by it as the new trustee on the same basis as aforesaid.

[In this clause the expression "qualified person" means a company qualified to act as trustee in terms of the Act.]

9. Removal of a trustee

9.1 A trustee shall be removed by the management company in writing immediately on the happening of any of the following events, that is if:-

- a) a court of competent jurisdiction orders its liquidation (except a voluntary liquidation for the purpose of reconstruction or amalgamation under a scheme approved by the Commission);
- b) a manager or a receiver is appointed over any of its assets; or.
- c) the trustee ceases to carry on business as a bank or financial institution.

9.2 A trustee shall be removed by three months notice in writing given to the trustee by the management company with the approval of the Commission if:-

- a) the trustee fails or neglects after reasonable notice from the management company to carry out or satisfy any duty imposed on the trustee in accordance with the trust deed, the incorporation documents, the information memorandum, the rules of the CIS as per the Act, including these Guidelines; or
- b) the holders, by extra ordinary resolution resolve as such.

GUIDELINES ON TRUSTEES AND CUSTODIANS IN A COLLECTIVE INVESTMENT SCHEME ESTABLISHED UNDER TRUST

9.3 The Commission may revoke the approval of a trustee if at any time thereafter the trustee ceases to satisfy the requirements of the agreed terms as set out herein.

PART C: CUSTODIAN

10. Obligations to appoint a custodian & eligibility for appointment of a custodian

10.1 Pursuant to Clause 4(a) of the Schedule to the SI No.161 of 1993, the trustee may appoint a custodian approved by the Commission

11. eligibility for appointment of a custodian

11.1 No person shall be appointed a custodian of a CIS unless such person is:

- a) a bank registered under the Banking Act, or licensed or registered under any Act amending or replacing that Act; or
- b) a trust company which is a subsidiary of such a bank; or
- c) a banking institution or trust company incorporated outside Zambia, which has a subsidiary incorporated in Zambia, and which is acceptable to the Commission.

11.2 Unless licensed as a dealer, a company must apply for a dealer's licence before they can offer custodial services to a CIS. The prescribed fee for approval of custodian must also be paid, unless the applicant is already licensed as a dealer.

11.3 The Commission may revoke the approval of a custodian if at any time thereafter the custodian ceases to satisfy the requirements of the agreed terms as set out herein.

12. Duties and obligations of a custodian

12.1 A custodian shall render custodial services to the CIS pursuant to a written agreement between the custodian and the trustee (and the management company), including the following -

- (i) to maintain the custody of all the CIS portfolio and hold it to the order of the trustee in accordance with the provisions of the Act, the incorporation documents, the information memorandum, the rules of the CIS and its service agreement;
- (ii) to receive and keep in safe custody title documents, securities and cash amounts of the CIS;
- (iii) to open an account or accounts in the name of the CIS for the exclusive benefit of such CIS;
- (iv) to transfer, exchange or deliver in the required form and manner securities held by the custodian upon receipt of proper instructions from the trustee or management company if so authorised by the trustee;
- (v) to require from the trustee (and management company) such information as it deems necessary for the performance of its functions as a custodian of the CIS;
- (vi) to promptly deliver to the trustee or management company or to such other persons as the trustee may authorise, copies of all notices, proxies, proxy soliciting materials received by the custodian in relation to the securities held in the CIS portfolio, all public

GUIDELINES ON TRUSTEES AND CUSTODIANS IN A COLLECTIVE INVESTMENT SCHEME ESTABLISHED UNDER TRUST

information, financial reports and stockholder communications the custodian may receive from the issuers of securities and all other information the custodian may receive, as may be agreed between the custodian and trustee and/or management company, as the case may be, from time to time;

- (vii) to exercise subscription, purchase or other similar rights represented by the securities subject to receipt of proper instructions from the management company;
- (viii) to exercise the same standard of care that it exercises over its own assets in holding, maintaining, servicing and disposing of the CIS portfolio and in fulfilling obligations in the agreement;
- (ix) where title to investments are recorded electronically, to ensure that entitlements are separately identified from those of the management company or the trustee, as the case may be, of the CIS in the records of the person maintaining records of entitlement;
- (x) to attend general meetings of the holders and be heard at any general meeting on matters which concern it as custodian;

12.2 Provided that the custodian shall in executing its duties exercise the degree of care expected of a prudent professional custodian for hire.

12.3 A custodian discharging its contractual duties to the scheme shall not contract an agent to discharge those functions; except where a portion of the CIS portfolio is invested in offshore investments, in which case the custodian may engage the services of an overseas sub-custodian approved by the trustee, with the notification of such appointment to the Commission.

12.4 The agreement between the custodian and the trustee (and management company as the case may be), shall make provision on the computation of the fee in respect of custodial services which shall be disclosed to the holders in the annual report each year.

13. Records maintained by a custodian

13.1 The custodian must keep such books, records and statements as may be necessary to give a complete record of:

- (i) the entire fund of the CIS portfolio held by the custodian; and
- (ii) each and every transaction carried out on behalf of the CIS

13.2 The custodian shall permit the trustee and/or the management company or a duly authorised agent of the Commission to inspect such books, records and statements within the premises of the custodian at any time during business hours

14. Reports by a custodian

14.1 The custodian must provide to the trustee and management company, and to the Commission; -

- (i) a written statement on a quarterly basis which lists all assets of the scheme in the scheme account(s) together with a full account of all receipts and payments made and other actions taken by the custodian;

GUIDELINES ON TRUSTEES AND CUSTODIANS IN A COLLECTIVE INVESTMENT SCHEME ESTABLISHED UNDER TRUST

- (ii) advice or notification of any transfers of CIS portfolio or securities to or from the scheme account(s) indicating the securities acquired for the account(s) and the identity of the party having physical possession of such securities;
- (iii) a copy of the most recent audited financial statements of the custodian prepared together with such information regarding the policies and procedures of the custodian as the trustee or management company may request in connection with the agreement or the duties of the custodian under that agreement;
- (iv) provide a report annually to the Commission demonstrating that compliance with these Guidelines, the offering document, the incorporation documents, the information memorandum, the rules of the CIS and its service agreement has been achieved.

15. Retirement/resignation of a custodian

- 15.1 Pursuant to Clause 5 of the Schedule to the SI No.161 of 1993, the custodian shall not be entitled to retire/resign except upon the appointment of a new trustee/custodian and subject to the prior approval of the Commission.
- 15.2 If the custodian wishes to retire/resign it shall give three months notice in writing to that effect to the trustee and the Commission and the custodian shall give reasons for the retirement/resignation.
- 15.3 The trustee shall appoint within two months after the date of a notice some other qualified person as the new custodian upon and subject to such person being approved by the Commission and entering into an agreement similar to the agreement comprised in the incorporation documents.
- 15.4 If the trustee is unable to appoint a new custodian as within the period of two months, the custodian shall be entitled to appoint a qualified company selected by it as the new custodian on the same basis as a custodian appointed under these Guidelines.
- 15.5 On receipt of the notice by the trustee, the agreement between the trustee (and management company as the case may be) and the custodian shall be deemed to have been terminated.

16. Removal of a custodian

- 16.1 A custodian shall be removed in writing immediately on the happening of any of the following events, that is if:-
- (i) a court of competent jurisdiction orders its liquidation, except a voluntary liquidation for the purpose of reconstruction or amalgamation approved by the Commission or ,
 - (ii) if a statutory manager or a receiver is appointed over any of its assets; or
 - (iii) the custodian ceases to carry on business as a bank or financial institution.
- 16.2 A custodian shall be removed by three months notice in writing given by the trustee to the custodian if –

GUIDELINES ON TRUSTEES AND CUSTODIANS IN A COLLECTIVE INVESTMENT SCHEME ESTABLISHED UNDER TRUST

- (i) the custodian fails or neglects after reasonable notice from the trustee or management company to carry out or satisfy any duty imposed on the custodian in accordance with the agreement; or
- (ii) the holders, by extra ordinary resolution resolve that such notice be given, and the trustee appoint as custodian some other qualified institution with the approval of the Commission.

16.3 In the event of a termination of the agreement as provided for or from the date of a winding up order issued by a competent court against the custodian, the custodian shall immediately hand over, and deliver all assets, documents and funds including those from the bank account(s) of the CIS held by such custodian to the custodian appointed in writing by the trustee and approved by the Commission, within thirty days from the date of such termination;

16.4 Within twenty days from the termination of the agreement, the custodian shall submit to the Commission an audit report indicating the assets, liabilities and an inventory of the scheme fund, securities and title documents of the scheme assets which have been handed over, transferred and delivered to the appointed custodian;

16.5 A copy of the notice given to the custodian for termination of services by the trustee shall be given to the management company

16.6 In the event of any disagreement between the trustee and the custodian, notification shall be made to the Commission by the trustee giving reasons for the termination of services of the custodian.

PART D: SPECIFIC STEPS TO BE UNDERTAKEN

17. Steps to be done following these Guidelines

17.1 Review of existing agreements between the trustee and management company and custodians to reflect the roles as clarified in these Guidelines

17.2 Execution of new mandates for CIS bank accounts to reflect the trustee as the Principal Client and authority. The mandates must include the custodian as a signatory on the account.

17.3 All title to investments must be changed into the name of the Nominee/CIS or fund

17.4 Prepare reconciliations of the CIS funds/investments between the management company and custodians and trustee

Dated the 5th day of November 2015