

DRAFT FOR COMMENTS BY MARKET PARTICIPANTS



CENTRAL SECURITIES DEPOSITORY

B O T S W A N A

GUIDELINES FOR MARKET PARTICIPANTS IN RESPECT OF THE DETERMINATION OF “COMMERCIAL BEARING” IN OFF-MARKET TRANSACTIONS

1. BACKGROUND

Section 23 of the Botswana Securities Act No.26 of 2014 [Cap.56:08] (**Securities Act**) (as amended by the Securities Amendment Act, 2023) (**Securities Amendment Act**) requires that transactions in listed securities be executed on and through a licensed securities exchange.

However, off-market transactions may be approved by the Non-Bank Financial Institutions Regulatory Authority (**NBFIRA**) provided that such transactions do not have “**commercial bearing**”.

Section 2 of the Securities Act (as amended by the Securities Amendment Act) defines “**commercial bearing**” as:

“A transaction that attributes commercial benefits to parties involved in the transaction but does not include a gift or transfer conferred by a court order.”

The Central Securities Depository Botswana (**CSDB**) Rules 2025 reinforce this principle in Rule 9.2 by requiring two conditions for off-market approval:

1. no change in beneficial ownership; and
2. confirmation by NBFIRA that the transaction has no commercial bearing.

Similar principles apply in other markets such as South Africa (Johannesburg Stock Exchange and Cape Town Stock Exchange), where off-market transfers are permitted only in limited cases (for example, deceased estates, donations, intra-group restructures) and require documentation proving that no commercial benefit exists. Currently, there are no formal criteria for interpreting “**commercial bearing**”.

2. INTRODUCTION

The concept of “**commercial bearing**” is central to maintaining the integrity of Botswana’s securities market (in that, save for exceptional circumstances, transactions involving listed securities must take place on-market). While the Securities Act does provide a definition, the practical application has led to differing interpretations among market participants and regulators, particularly because the words “**commercial benefits**” are not themselves defined in section 2 of the Securities Act.

A requirement for clarity on “**commercial bearing**” is therefore essential for:

1. market integrity: ensuring fair and transparent execution of trades in the market;
2. regulatory compliance: avoiding misinterpretations of established statutory provisions; and
3. operational certainty: providing clear rules for issuers, fund managers, custodians and depositaries and other stakeholders.

These guidelines therefore aim to:

1. provide a structured interpretation of “commercial bearing” as per section 2 of the Securities Act; and
2. establish a two-limb test for off-market approvals, as required by CSDB Rule 9.2.

3. GUIDING PRINCIPLES FOR DETERMINING COMMERCIAL BEARING

These principles are designed to address the regulatory gap and ensure practical application.

3.1. Legal Compliance and Alignment

All decisions must align with section 2 and section 23 of the Securities Act and CSDB Rule 9.2. Off-market transfers should only be considered where both limbs of the test are satisfied, being:

- no change in beneficial ownership; and
- no commercial bearing.

3.2. Commercial Benefit

The assessment of commercial bearing must principally focus on economic advantage or gain, not solely on monetary consideration. Even if a transfer is free of payment, it may still confer commercial benefits, such as:

- operational or reputation gains;
- fee income or performance incentives;
- increased assets under management; or
- improved returns for the beneficial owner.

3.3. Transparency and Documentation

Issuers must provide clear reasoning and supporting evidence for their position. This must include:

- the purpose of the transfer;
- an analysis of whether any party gains a commercial benefit; and
- board or compliance sign-off.

3.4. Consistency Across Transactions

Transactions must be treated consistently. For example, portfolio restructuring or mandating reallocations should not be classified differently simply because there appears to be no monetary consideration. If there is economic advantage or gain to any party involved in the transaction, it must be subject to on-market transfer. It is essential that regulators and market participants should apply a uniform standard so as to avoid uncertainty.

3.5. Market Integrity and Investor Confidence

The ultimate goal is to ensure that transparency is maintained. Off-market transfers should remain an exception and not a loophole. This principle showcases the necessity for the application of consistent criteria and will preserve market integrity and investor confidence.

4. DECISION FRAMEWORK

The following two-limb test must apply as further described in Figure 1 below:

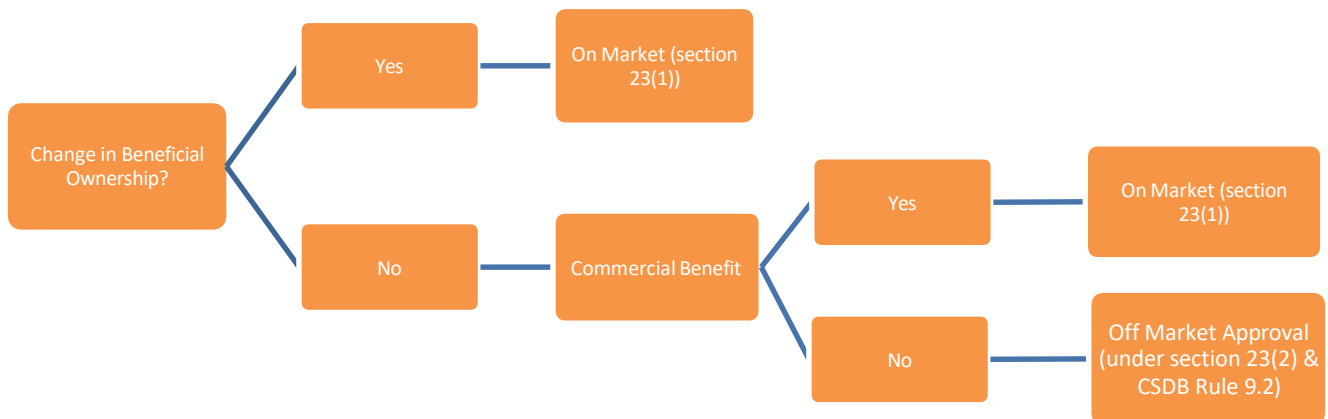
i. Does the transaction change in beneficial ownership?

- If yes, it must be executed on-market under section 23(1) of the Securities Act.
- If no, proceed to next test.

ii. Does the transaction confer any commercial benefit (direct or indirect)?

- If yes, it must be executed on-market under section 23(1) of the Securities Act.
- If no, eligible for off-market approval under section 23(2) of the Securities Act and CSDB Rule

Figure 1: Two-Limb Test for Off-Market Approval



5. QUESTIONS TO BE ADDRESSED BY ISSUERS WHEN PREPARING OFF-MARKET REQUESTS

Issuers must ensure the following elements are considered when preparing off-market requests:

- what is the purpose of the transfer?
- does it change beneficial ownership?
- does it confer any commercial benefit (fees, assets under management changes, operational gains)?
- what evidence supports “no commercial bearing”?

- how will this be documented and disclosed?

6. SUMMARY AND KEY POINTS

To ensure clarity and regulatory consistency, issuers should consider the following:

6.1. The Two-Limb Test for Off-Market Approval

Under section 23(2) of the Securities Act and CSDB Rule 9.2, off-market transfers should only be permitted on occasions where **both** of the following conditions are satisfied:

- no change in beneficial ownership; and
- no commercial bearing.

If either condition remains unsatisfied, the transaction must be executed on-market under section 23(1) of the Securities Act. This ensures consistency and prevents ambiguity in terms of statutory and regulatory interpretation.

6.2. Adoption of a broader interpretation of “Commercial Bearing.”

The definition of commercial bearing in section 2 of the Securities Act cannot be limited to direct monetary exchanges, as the inclusion of the words “*commercial benefits*” in section 2 of the Securities Act requires a broader interpretation. Accordingly, the determination of “*commercial bearing*” must include both direct and indirect commercial benefits such as:

- reputation gains or strategic advances;
- fee income or performance incentives;
- increased assets under management; or
- improved returns for the beneficial owner.

Recognizing these benefits will ensure that both economic and/or strategic value gains are treated as having commercial bearing and accordingly that the relevant transaction must be executed on-market.

6.3. Mandatory On-Market Execution where Commercial Bearing Exists

Any transaction that confers commercial benefits, in the form of economic advantage or gain to any party, should be processed on-market through the licensed exchange. This promotes transparency and market integrity as required by section 23(1) of the Securities Act.

7. CONCLUSION

These guidelines aim to remove ambiguity and ensure that off-market transfers remain an exception, not a loophole. By adopting this framework, the two-limb test, and the broader

interpretation of “**commercial bearing**”, issuers will safeguard transparency, fairness, and compliance with Botswana’s securities laws.
