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CONTENTS

Page

GENERAL NOTICE

No. 515 Bank of Namibia: Custody of Client Assets Rules: Virtual Assets Act, 2023 1

General Notice

BANK OF NAMIBIA

No. 515

2023

CUSTODY OF CLIENT ASSETS RULES: VIRTUAL ASSETS ACT, 2023

The Bank of Namibia designated as the Regulatory Authority in terms of section 5(1) of the Virtual Assets Act, 2023 (Act No. 10 of 2023) has in terms of section 51(1) of that Act made the Custody of Client Assets Rules set out in the Schedule.

J. !GAWAXAB
GOVERNOR
BANK OF NAMIBIA

SCHEDULE**ARRANGEMENT OF RULES****PART 1****DEFINITIONS AND SCOPE OF RULES**

1. Definitions
2. Scope of the rules

PART 2**GENERAL REQUIREMENTS**

3. General requirements

PART 3**HOLDING VIRTUAL ASSETS**

4. Holding virtual assets
5. Hardware and software
6. Technology audits
7. Using virtual assets for own account
8. Third party security interests

PART 4**DEPOSITING VIRTUAL ASSETS WITH THIRD PARTIES**

9. Depositing virtual assets with a third party custodian
10. Agreements with third-parties
11. Records

PART 5**RECORDS AND ACCOUNTS**

12. Records and accounts
13. Internal custody record checks
14. Evaluating internal record and account checks
15. External custody reconciliations
16. Independence of person performing checks and reconciliations
17. Frequency of internal custody record checks and external custody reconciliations
18. Time period for holding records

PART 6**SHORTFALLS AND DISCREPANCIES**

19. Discrepancies
20. Treatment of shortfalls

PART 7**VIRTUAL ASSET CUSTODIAN FAILURE**

21. Disapplied rules after Failure
22. Checks and reconciliations after Failure
23. Disposal of virtual assets after a Failure
24. Taking reasonable steps to notify clients
25. Record keeping regarding virtual assets disposed after a Failure
26. Transfers of virtual assets

PART 8**BANK NOTIFICATION REQUIREMENTS**

27. Notification requirements

PART 9**ENFORCEMENT**

28. Enforcement

PART 10**SHORT TITLE**

29. Short title

PART 11**EFFECTIVE DATE**

30. Effective date

PART 1**DEFINITIONS AND SCOPE OF RULES****Definitions**

1. In these rules, a word or an expression to which a meaning has been given in the Virtual Assets Act, 2023 (Act No. 10 of 2023), have that meaning, and –

“alternative provider” means a person to whom virtual assets are transferred in the event of the Failure of the virtual asset custodian;

“Fails” “Failure” “Failed”, in relation to a licence holder, means the appointment of a liquidator, or any equivalent procedure in any relevant jurisdiction;

“financial year” means a financial year referred to in section 21(1) of the Act;

“holding” “held” “hold” means the ability to exercise of control over the virtual assets, by use of a private key or other equivalent mechanism;

“internal custody record check” means a check as to whether the virtual asset custodian’s records and accounts of the virtual assets held by the virtual asset custodian, including those deposited with any third party custodian, correspond with the virtual asset custodian’s obligations to its clients to hold those virtual assets;

“nominee company” means a company that holds virtual assets in its own name in trust on behalf of another person such as the beneficial owner and set up under a custodial agreement for purposes of primarily holding and administering virtual assets on behalf of the beneficial owners;

“private key” means the information which gives the holder of that information control over crypto assets held on the blockchain;

“Regulatory Authority” means the Bank or any other entity designated as the Regulatory Authority in terms of section 5(1) of the Act;

“third party custodian” means a person –

- (a) issued with a licence under the Act to operate as a virtual asset custodian; or
- (b) that operates from an establishment outside of Namibia and holds licence equivalent to a virtual asset custodian licence with a regulator in that jurisdiction;

“the Act” means the Virtual Assets Act, 2023 (Act No. 10 of 2023);

“virtual asset custodian” means a person who holds a Class “R” virtual asset custodian licence referred to in Schedule 1 of the Act;

“wallet” means any storage device or mechanism for holding private keys.

Scope of rules

2. (1) These rules apply to persons issued with a licence under the Act to operate as virtual asset service providers or as token issuers, and that have custody of one or more virtual assets on behalf of one or more clients.

(2) These rules must be read in together with the Act, regulations, rules, directives and guidelines issued under the Act and laws relating money laundering and terrorism financing and proliferation activities and other applicable laws.

PART 2

GENERAL REQUIREMENTS

General requirements

3. (1) A virtual asset custodian must, when holding virtual assets belonging to clients –
- (a) make adequate arrangements so as to safeguard clients’ ownership rights, especially in the event of the virtual asset custodian’s insolvency; and

- (b) prevent the use of the virtual assets belonging to a client on the virtual asset custodian's own account except with the client's express consent.

(2) A virtual asset custodian must establish, implement and maintain adequate organisational arrangements to minimise and mitigate the risk of the loss or diminution of clients' virtual assets, or the rights in connection with those virtual assets.

PART 3

HOLDING VIRTUAL ASSETS

Holding virtual assets

4. (1) A virtual asset custodian must make the appropriate registration or recording of who has legal title and rights of access to virtual assets the virtual asset custodian holds in custody.

(2) A virtual asset custodian may hold virtual assets with a nominee company which is controlled by –

- (a) the virtual asset custodian;
- (b) an undertaking in the same corporate group as the virtual asset custodian; or
- (c) a third party custodian.

(3) A virtual asset custodian needs to be clear in his or her or its agreements with clients regarding the basis on which the virtual asset custodian holds virtual assets for clients, and in particular whether they are held –

- (a) on a segregated basis in which case the virtual asset custodian needs to clearly identify and segregate virtual assets belonging to different clients;
- (b) on an omnibus basis, in which case the virtual asset custodian needs to ensure at all times that the total amount and type of virtual assets held for clients at all times matches the amounts it has agreed to hold for its clients.

(4) A virtual asset custodian holding virtual assets with a nominee company or depositing virtual assets with a third party custodian must accept the same level of responsibility to its clients and the Regulatory Authority as the virtual asset custodian would itself have if holding virtual assets directly.

Hardware and software

5. (1) A virtual asset custodian must ensure that any software and hardware the virtual asset custodian uses in holding virtual assets is reliable, resilient and compatible with the virtual assets being held, and in this respect must consider –

- (a) the impact of the software architecture of the wallets used to hold virtual assets, as well as generally the interoperability of software used to hold virtual assets; and
- (b) the ability to ensure security using cryptographic keys, hard and cold wallet storage, password protection and encryption.

Technology audits

6. (1) A virtual asset custodian must appoint a suitably qualified and experienced independent person to carry out an annual audit of the virtual asset custodian's hardware and software used to hold virtual assets.

(2) A virtual asset custodian must provide to the Regulatory Authority, not later than three months after the end of each financial year, a written report setting out the methodology and results of the technology audit performed under subrule (1), including listing any recommendations or areas of concern.

(3) A virtual asset custodian must keep a record of the basis on which the virtual asset custodian has determined that the person appointed under subrule (1) is suitably qualified, experienced and independent to carry out the annual audit under subrule (1).

(4) The record referred to in subrule (3) must be kept for a minimum of five years from the date of the annual audit it relates to.

(5) A virtual asset custodian must, at least every 5 years, change the person used to carry out the annual audit under subrule (1).

Using virtual assets for own account

7. (1) A virtual asset custodian may not use a client's virtual assets for the virtual asset custodian's own account or the account of any other person or client of the virtual asset custodian, unless –

- (a) the client has given express prior consent to the use of the virtual assets on specified terms; and
- (b) the use of that client's virtual assets is restricted to the specified terms to which the client consents.

(2) A virtual asset custodian may not use virtual assets held on an omnibus basis for his or her or its own account or for the account of any other person unless, in addition to the conditions set out in subrule (1) –

- (a) each client whose virtual assets are held together in an omnibus account has given express prior consent in accordance with subrule (1)(a); or
- (b) the virtual asset custodian has in place systems and controls which ensure that only virtual assets belonging to clients who have given express prior consent in accordance with subrule (1)(a) are so used.

(3) For the purposes of obtaining the express prior consent of a client under this rule, the consent must be clearly evidenced in writing and the signature of the client or an equivalent alternative means of affirmative execution is required.

(4) Clients' consent under this rule may be given once at the start of the business relationship, as long as it is sufficiently clear that the client has consented to the use of their virtual assets.

(5) A record of the consent under this rule provided must be kept to evidence clearly what the client agreed to and to ascertain at all times the status of the virtual assets being held.

(6) A virtual asset custodian must take appropriate measures to prevent the unauthorised use of virtual assets for its own account or the account of any other person.

(7) Where a virtual asset custodian uses virtual assets for own account, the records of the virtual asset custodian must include details of the client on whose instructions the use of the virtual assets has been effected, as well as the number of virtual assets used belonging to each client who has given consent, so as to enable the correct allocation of any loss.

Third party security interests

8. (1) A virtual asset custodian may not grant any security interest, lien or right of set-off to another person over a clients' virtual assets unless the following conditions are satisfied:

- (a) the security interest, lien or right of set-off is in respect of debts which relate to—
 - (i) one or more of the virtual asset custodian's clients; or
 - (ii) the provision of services by that other person to one or more of the virtual asset custodian's clients; or
- (b) the virtual assets have been deposited with a third-party custodian and—
 - (i) the security interest, lien or right of set-off is required by the applicable law of a third country jurisdiction in which the virtual assets are held;
 - (ii) the virtual asset custodian discloses information to the client so that the client is informed of the risks associated with these arrangements; and
 - (iii) the virtual asset custodian has taken reasonable steps to determine that holding virtual assets subject to that security interest, lien or right of set-off is in the best interests of the virtual asset custodian's clients.

(2) A security interest, lien or right of set-off referred to in subrule (1) to facilitate the clearing or settlement of transactions referring to clients of the virtual asset custodian may be regarded as being granted in order to recover debts that relate to the provision of services to one or more clients.

(3) Where security interests, liens or rights of set-off referred to in subrule (1) are granted by a virtual asset custodian over virtual assets, or where the virtual asset custodian has been informed that they are granted, the virtual asset custodian must record that in client contracts and the virtual asset custodian's own books and such records must make clear the ownership status of virtual assets, such as in the event of an insolvency.

PART 4

DEPOSITING VIRTUAL ASSETS WITH THIRD PARTIES

Depositing virtual assets with a third-party custodian

9. (1) A virtual asset custodian may deposit virtual assets held by him or her or it on behalf of his or her or its clients into an account or accounts opened with a third-party custodian, but only if the virtual asset custodian exercises all due skill, care and diligence in the selection, appointment and periodic review of the third-party custodian and of the arrangements for the holding and safekeeping of those virtual assets, but the periodic review must be carried out at least annually.

(2) When the virtual asset custodian deposits virtual assets held on behalf of his or her or its clients with a third-party custodian, the virtual asset custodian must ensure that such third party is subject to equivalent regulations as the virtual asset custodian.

(3) A virtual asset custodian must present assessment as to the basis on which a third-party is subject to equivalent regulations and present this assessment to the Regulatory Authority for notification before depositing virtual assets with the third-party custodian.

(4) The Regulatory Authority may from time to time publicly list jurisdictions whose regulations are deemed equivalent for the purposes of this rule.

(5) When a virtual asset custodian makes the selection, appointment and conducts the periodic review referred to under this rule, it must take into account, but is not limited to –

- (a) the expertise and market reputation of the third-party custodian;
- (b) the third-party custodian's performance of his or her or its services to the virtual asset custodian;
- (c) the arrangements that the third-party custodian has in place for holding and safeguarding virtual assets;
- (d) the capital or financial resources of the third-party custodian;
- (e) the creditworthiness of the third party custodian;
- (f) any other activities undertaken by the third-party custodian and, if relevant, any affiliated company;
- (g) anything else that could adversely affect clients' rights;
- (h) whether the third-party custodian has the appropriate regulatory permissions; and
- (i) any legal requirements related to the holding of the virtual assets that could adversely affect clients' rights.

(6) A virtual asset custodian must take the necessary steps to ensure that any client's virtual assets deposited with a third-party custodian are identifiable separately from the applicable assets belonging to the virtual asset custodian and from the applicable assets belonging to that third party custodian, by means of differently titled accounts or other equivalent measures that achieve the same level of protection.

Agreements with third-parties

10. (1) A virtual asset custodian must enter into a written agreement with any third-party custodian with whom it deposits clients' virtual assets.

- (2) The agreement referred to in subrule (1) must, at minimum –
 - (a) set out the binding terms of the arrangement between the virtual asset custodian and the third party custodian;
 - (b) be in force for the duration of that arrangement; and
 - (c) clearly set out the services that the third-party custodian is contracted to provide.

- (3) A virtual asset custodian must carefully consider the terms of the agreement with the third-party custodian, which must address the following issues, where relevant:
- (a) that legal title to the virtual assets does not belong to the virtual asset custodian;
 - (b) that the third-party custodian will hold or record virtual assets belonging to the virtual asset custodian's client separately from any applicable asset belonging to the virtual asset custodian or to the third-party custodian;
 - (c) the arrangements for registration or recording of the virtual asset, if this will not be registered in the virtual asset custodian's client's name;
 - (d) the restrictions over the circumstances in which the third-party custodian may withdraw assets from the account;
 - (e) the procedures and authorities for the passing of instructions to, or by, the virtual asset custodian;
 - (f) the procedures for the claiming and receiving of dividends, interest payments and other entitlements accruing to the virtual asset custodian's client; and
 - (g) the provisions detailing the extent of the third-party custodian's liability in the event of the loss of a virtual asset caused by the fraud, wilful default or negligence of the third party custodian or an agent appointed by the third party custodian.

Records

11. (1) A virtual asset custodian must make a record of the grounds upon which the virtual asset custodian satisfies him or her or itself as to the appropriateness of its selection and appointment of a third-party custodian.

(2) The virtual asset custodian must make the record referred to in subrule (1) on the date the virtual asset custodian makes the selection or appointment and must keep it from that date until five years after the virtual asset custodian ceases to use the third-party custodian to hold virtual assets belonging to clients.

(3) A virtual asset custodian must make a record of each periodic review of selection and appointment of a third-party custodian that it conducts, its considerations and conclusions.

(4) The virtual asset custodian must make the record on the date the virtual asset custodian completes the review referred to in subrule (3) and must keep it from that date until five years after the virtual asset custodian ceases to use the third-party custodian to hold virtual assets belonging to clients.

PART 5

RECORDS AND ACCOUNTS

Records and accounts

12. (1) A virtual asset custodian must keep such internal records and accounts as necessary to enable virtual asset custodian at any time and without delay to distinguish virtual assets held for one client from virtual assets held for any other client, and from the virtual asset custodian's own applicable assets, and the records must be client specific.

(2) A virtual asset custodian must maintain his or her or its internal records and accounts in a way that ensures their accuracy, and in particular their correspondence to the virtual assets held for clients and that they may be used as an audit trail.

(3) The requirement that records and accounts are internal, means that they are maintained by the virtual asset custodian itself and must be separate to any records the virtual asset custodian may have obtained from any third parties, including any third-party custodian with whom the virtual asset custodian may have deposited virtual assets.

Internal custody record checks

13. (1) A virtual asset custodian must perform an internal custody record check as regularly as is necessary but without allowing more than two months to pass between each internal custody record check.

(2) A virtual asset custodian must only use his or her or its internal records in order to perform an internal custody record check, and for purposes the virtual asset custodian may not base its internal custody record checks on any records that the virtual asset custodian may have obtained from any third parties, such as those with whom it may have deposited virtual assets.

Evaluating internal record and account checks

14. (1) A virtual asset custodian must –

(a) establish a process that evaluates –

(i) the completeness and accuracy of the virtual asset custodian's internal records and accounts, in particular whether sufficient information is being completely and accurately recorded by the virtual asset custodian to enable him or her or it to ensure that he or she or it has a client-specific virtual asset record, and can readily determine the total of all the virtual assets that it holds for its clients; and

(ii) whether the virtual asset custodian's systems and controls correctly identify and resolve all discrepancies in its internal records and accounts of virtual assets held by the virtual asset custodian for clients;

(b) run the evaluation process established under paragraph (a) on the date of each internal custody record check; and

(c) promptly investigate and, without undue delay, resolve any causes of discrepancies that the evaluation process reveals.

(2) The evaluation process referred to in subrule (1) must correctly identify and resolve at least the following types or causes of discrepancies:

(a) items in the virtual asset custodian's records and accounts that might be erroneously overstating or understating the virtual assets held by the virtual asset custodian;

(b) processing errors; and

(c) information technology errors, including software issues that could lead to inaccurate records.

External custody reconciliations

15. (1) A virtual asset custodian must conduct, on a regular basis, reconciliations between his or her or its internal records and accounts of virtual assets held by the virtual asset custodian for clients and those of any third parties with whom those virtual assets are held.

(2) A virtual asset custodian must conduct the external custody reconciliations referred to in subrule (1) as regularly as necessary but allowing no more than two months to pass between each custody reconciliation.

(3) External custody reconciliations referred to in subrule (1) must be performed for each virtual asset held by the virtual asset custodian for its clients.

Independence of person performing checks and reconciliations

16. Whenever possible, a virtual asset custodian must ensure that checks and reconciliations required under these rules, are carried out by a person, such as an employee of the virtual asset custodian, who is independent of the production or maintenance of the records to be checked and reconciled or checked or reconciled.

Frequency of internal custody record checks and external custody reconciliations

17. (1) When determining the frequency at which to undertake the internal custody record checks and external custody reconciliations, a virtual asset custodian must have regard to –

- (a) the frequency, number and value of transactions which the virtual asset custodian undertakes in respect of clients' virtual assets; and
- (b) the risks to which clients' virtual assets are exposed, such as the nature, volume and complexity of the virtual asset custodian's business and where and with whom virtual assets are held.

(2) A virtual asset custodian must review the frequency at which the virtual asset custodian conducts internal custody record checks and external custody reconciliations at least annually to ensure that he or she or it continues to comply with the custody of client assets rules published under the act, and has given due consideration to the matters in subrule (1).

(3) The virtual asset custodian must record the date and the actions that he or she or it took in relation to the review referred to in subrule (2).

(4) A virtual asset custodian must make and retain records sufficient to show and explain any decision he or she or it has taken when determining the frequency of his or her or its internal custody record checks and external custody reconciliations.

(5) The records referred to in subrule (4) must be retained for five years or for such longer period required by the Regulatory Authority and communicated to the virtual asset custodian.

Time period for holding records

18. Unless otherwise stated, a virtual asset custodian must ensure that every record made under these rules are retained for a period of five years starting from the later of –

- (a) the date it was created; and

- (b) if it has been modified since the date it was created, the date it was most recently modified.

PART 6

SHORTFALLS AND DISCREPANCIES

Discrepancies

19. (1) When a virtual asset custodian identifies a discrepancy as a result of carrying out an internal custody record check or external custody reconciliation, the virtual asset custodian must –

- (a) promptly take all reasonable steps both to investigate the reason for the discrepancy and resolve it without undue delay;
- (b) take appropriate steps for the treatment of any shortfalls until that discrepancy is resolved; and
- (c) where the discrepancy has arisen as a result of a breach of these rules, the virtual asset custodian must ensure it takes sufficient steps to avoid a reoccurrence of that breach.

(2) A discrepancy may not be considered resolved until it is fully investigated and corrected, and any associated shortfall is made good by way of the virtual asset custodian ensuring that –

- (a) he or she or it is holding the virtual assets that the virtual asset custodian ought to be holding for each of its clients; and
- (b) his or her or its own records, and the records of any relevant other person, such as a third-party custodian with whom the virtual asset custodian deposited the virtual assets, are accurate.

Treatment of shortfalls

20. (1) This rule applies where a virtual asset custodian identifies a discrepancy as a result of, or that reveals, a shortfall, which the virtual asset custodian has not yet resolved.

(2) Until the discrepancy referred to in subrule (1) is resolved a virtual asset custodian must do one of the following:

- (a) allocate a sufficient number of his or her or its own applicable virtual assets to cover the value of the shortfall and hold them for the relevant clients in such a way that the applicable virtual assets, or the proceeds of their liquidation, will be available for distribution for the benefit of the relevant clients in the event of the virtual asset custodian's failure and, in doing so—
 - (i) ensure that the applicable assets are clearly identifiable as separate from the virtual asset custodian's own property and are recorded by the virtual asset custodian in its client specific virtual asset record as being held for the relevant client;

- (ii) keep a record of the actions the virtual asset custodian has taken under this rule which includes a description of the shortfall, identifies the relevant affected clients, and lists the applicable virtual assets that the virtual asset custodian has appropriated to cover the shortfall; and
 - (iii) update the record made under sub-subparagraph (ii) whenever the discrepancy is resolved, and the virtual asset custodian has re-appropriated the applicable assets; or
- (b) appropriate a sufficient amount of its own money to cover the value of the shortfall, hold it for the relevant client, in which case the virtual asset custodian must—
 - (i) ensure the money is segregated from the virtual asset custodian's own funds and recorded as being held for the relevant client;
 - (ii) keep a record of the actions the virtual asset custodian has taken under this rule which includes a description of the shortfall, identifies the relevant affected clients, and specifies the amount of money that the virtual asset custodian has appropriated to cover the shortfall; and
 - (iii) update the record made under sub-subparagraph (ii) whenever the discrepancy is resolved, and the virtual asset custodian has re-appropriated the money; or
- (c) appropriate a number of applicable virtual assets in accordance with paragraph (a) and an amount of money in accordance with paragraph (b) which, in aggregate are sufficient to cover the value of the shortfall.

(3) The value of a shortfall referred to in subrule (2) must be determined as the previous day's closing mark to market valuation, or if none is available in relation to a particular virtual asset, the most recently available valuation, but if the value of a virtual asset is volatile or difficult to value, a virtual asset custodian must consider whether it is appropriate to set aside an additional amount to cover any likely change in the value of the shortfall.

(4) If the virtual asset custodian, where justified, concludes that another person is responsible for the discrepancy, regardless of any dispute with that other person, or that the discrepancy is due to a timing difference between the accounting systems of that other person and that of the virtual asset custodian, the virtual asset custodian must take all reasonable steps to resolve the situation without undue delay with the other person.

(5) Until the discrepancy is resolved the virtual asset custodian must consider whether it would be appropriate to notify the affected client of the situation and may take steps under subrule (2) for the treatment of shortfalls until that discrepancy is resolved.

(6) In considering whether he or she or it must notify affected clients under subrule (5), a virtual asset custodian must act honestly, fairly, and professionally in accordance with the best interests of its clients.

(7) A virtual asset custodian that has failed is not required to take steps under subrule (5) in relation to the virtual asset custodian's own applicable assets or money in so far as the legal procedure for the virtual asset custodian's failure prevents the virtual asset custodian from taking any such steps.

PART 7**VIRTUAL ASSET CUSTODIAN FAILURE****Disapplied rules after Failure**

21. Rule 12, relating to records and accounts do not apply to a virtual asset custodian following its Failure.

Checks and reconciliations after Failure

22. (1) A virtual asset custodian must perform an internal custody record check and an external custody reconciliation that relates to the time of his or her or its Failure as soon as reasonably practicable after the Failure.

(2) Whenever possible, a virtual asset custodian must ensure that checks and reconciliations are carried out by a person, such as an employee of the virtual asset custodian, who is independent of the production or maintenance of the records to be checked and reconciled or checked or reconciled.

(3) The reference point for the internal custody record check and the external custody reconciliation must be the precise point in time at which the virtual asset custodian's Failure occurred.

(4) If any records and accounts of relevant third parties relating to the time of the virtual asset custodian's Failure are unavailable, the Virtual asset custodian must use the next available records and accounts to perform the external custody reconciliation.

(5) A virtual asset custodian must perform further internal custody record checks and external custody reconciliations as regularly as is necessary to ensure that the virtual asset custodian remains in compliance with these rules, as well as having regard to –

- (a) the frequency, number, and value of transactions which the virtual asset custodian undertakes in respect of clients' virtual assets; and
- (b) the risks to which clients' virtual assets are exposed, such as the nature, volume, and complexity of the virtual asset custodian's business and where and with whom virtual assets are held.

Disposal of virtual assets after a Failure

23. (1) A virtual asset custodian may not dispose of a virtual asset where this would breach its obligations under the Act, these rules, the law applicable to any third-party custodian used by the virtual asset custodian, or any agreement the virtual asset custodian has entered into.

(2) Before a virtual asset custodian takes any steps to dispose of a virtual asset it must –

- (a) attempt to return it to the relevant client or transfer it to an alternative provider for safekeeping on behalf of the client; and
- (b) take reasonable steps to notify the client of the virtual asset custodian's proposed course of action for disposing of the virtual asset.

(3) A virtual asset custodian is not required to attempt to return or transfer a virtual asset under subrule (2)(a) where the client to whom the virtual asset belongs has confirmed to the virtual asset custodian that it disclaims all its interests in the virtual asset.

(4) A virtual asset custodian is not required to notify a client under subrule (2)(b) where –

- (a) the virtual asset custodian is able to return the virtual asset to the relevant client or transfer it to an alternative provider; or
- (b) the client to whom the virtual asset belongs has confirmed to the virtual asset custodian that it disclaims all its interests in the virtual asset.

Taking reasonable steps to notify clients

24. (1) Taking reasonable steps to notify the client of the virtual asset custodian's proposed course of action for disposing of the virtual assets include the following course of conduct –

- (a) determining, as far as reasonably possible, the correct contact details for the client by using any available means to determine the correct contact details for the relevant client, including telephoning the client, searching internal records, media advertising, searching public records, mortality screening, using credit reference agencies or tracing agents;
- (b) writing to the client at its last known address either by post or by electronic mail –
 - (i) to inform the client of the virtual asset custodian's intention to dispose of the virtual asset;
 - (ii) to inform the client of the consequences of the virtual asset custodian's proposed course of action in relation to the client's ability to assert a claim in respect of that virtual asset; and
 - (iii) to invite the client to submit a claim for that virtual asset;
- (c) where the client has not responded within 28 days of the communication under paragraph (b)(i), attempting to communicate the information in paragraph (b)(i) to the client on at least one further occasion by any means other than that used in paragraph (b)(i) including by post, electronic mail, telephone or media advertisement.

(2) If after carrying out the steps in subrule (1)(a) and (1)(b), the virtual asset custodian has obtained positive confirmation that none of the contact details the virtual asset custodian holds for the relevant client are accurate or, if utilised, the communication is unlikely to reach the client, the virtual asset custodian does not have to comply with subrule (1)(c).

Record keeping regarding virtual assets disposed after a Failure

25. (1) After a Failure, a virtual asset custodian must make a record of any virtual asset disposed of at the time of the disposal.

- (2) The record referred to in subrule (1) must state –
 - (a) the virtual asset that was disposed of;

- (b) the value of the consideration received for the virtual asset disposed of;
 - (c) the name and contact details of the client to whom the virtual asset was allocated, according to the Virtual asset custodian's records at the time of making the record under this rule; and
 - (d) the efforts applied by the virtual asset custodian to determine the client's correct contact details.
- (3) A virtual asset custodian must keep the record under subrule (1) indefinitely.

Transfers of virtual assets

26. (1) This rule applies where, instead of returning a virtual asset to a client, a virtual asset custodian is able to transfer the virtual asset to an alternative provider for safekeeping on behalf of the client.

(2) A virtual asset custodian may transfer virtual assets to an alternative provider only if he or she or it exercises all due skill, care and diligence in the selection and appointment of the alternative provider taking into account, but not limited to –

- (a) the expertise and market reputation of the alternative provider;
- (b) the arrangements that the alternative provider has in place for holding and safeguarding virtual assets;
- (c) the capital or financial resources of the alternative provider;
- (d) the creditworthiness of the alternative provider;
- (e) any other activities undertaken by the alternative provider and, if relevant, any affiliated company;
- (f) anything else that could adversely affect clients' rights;
- (g) whether the alternative provider has the appropriate regulatory permissions; and
- (h) any legal requirements related to the holding of those virtual assets that could adversely affect clients' rights.

(3) A virtual asset custodian may only effect such a transfer if, in advance of the transfer, he or she or it has obtained a contractual undertaking from the alternative provider that –

- (a) the alternative provider will return the virtual asset to the client at the client's request; and
- (b) the alternative provider will notify the client, within 14 days of the transfer of that client's virtual asset having commenced –
 - (i) of the applicable regulatory regime under which the virtual asset will be held by the alternative provider; and
 - (ii) of any changes to the legal and regulatory protections provided to the client as a result of the transfer.

PART 8**BANK NOTIFICATION REQUIREMENTS****Notification requirements**

27. A virtual asset custodian must inform the Regulatory Authority in writing without delay if –
- (a) he or she or it Fails;
 - (b) he or she or its internal records and accounts of the virtual assets held by the virtual asset custodian for clients are materially out of date, or materially inaccurate or invalid, so that the virtual asset custodian is no longer able to comply with the requirements of these rules;
 - (c) he or she or it will be unable, or materially Fails, to take the steps required for the treatment of shortfalls;
 - (d) he or she or it will be unable, or materially Fails, to conduct an internal custody record check in compliance with these rules; or
 - (e) he or she or it will be unable, or materially Fails, to conduct an external custody reconciliation in compliance with these rules.

PART 9**ENFORCEMENT****Enforcement**

28. Where a licence holder or a person to whom these rules apply contravenes or fails to comply with a provision of these rules, the Regulatory Authority, may as it consider appropriate in the circumstance and in accordance with the Act, issue a directive, suspend or cancel a licence or amend a condition of a licence, or impose administrative sanctions or institute criminal proceedings in terms of the Act.

PART 10**SHORT TITLE****Short title**

29. These rules may be cited as Custody of Client Asset Rules.

PART 11**EFFECTIVE DATE****Effective date**

30. These rules become effective on the date of publication in the *Gazette*.
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