



Republic of Namibia
Financial Intelligence Centre

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DIRECTIVE NO 03 OF 2017

REGISTRATION OF DISCRETIONARY TRUSTS

SEPTEMBER 2017

1. INTRODUCTION

- 1.1 The Financial Intelligence Centre (FIC) as part of its continuous efforts to assist the Government of the Republic of Namibia in combatting Money Laundering (ML), Terrorism Financing (TF) and Proliferation Financing (PF), hereby issues this Directive in terms of Section 9(2)(c) of the Financial Intelligence Act, 2012 (Act No. 13 of 2012) as amended (hereinafter referred to as the FIA).
- 1.2 In terms of Section 5 of the FIA and its complimentary Regulation 3, the Master of High Court is required to register all testamentary and *inter vivos* trusts in the prescribed manner and form, as well as collect and keep up-to-date information in respect of the founder, each trustee, each income beneficiary and each beneficial owner of all registered testamentary and *inter vivos* trusts. The Master of High Court may not register any trust without the aforementioned information being availed to him/her.
- 1.3 The enforcement of the above *proviso* has created an implementation impossibility as far as the registration of discretionary trusts are concerned.

2 PURPOSE

The purpose of this Directive is to:

- highlight the difference between the registration requirements under the FIA and the Trust Moneys Protection Act, 1934 (Act No 34 of 1934) respectively;
- highlight the implementation impossibility when applying Section 5 (2) of the FIA to discretionary trusts;
- direct the Master of High Court to register discretionary trusts without prescribed information of the beneficiaries being available at the time of registration/lodgement;

- direct the trustees of discretionary trusts to provide to the Master of High Court with the prescribed beneficiary information as soon as the ultimate beneficiary has been identified, and before the beneficiary can receive any benefit from the trust or exercise any vested rights or institute a claim for their benefits; and
- direct the Trustees/Trust Practitioners/Administrators/Agents, captured under Item 3(c) & (d) of Schedule 1 to the FIA, to register their particulars as Accountable Institutions (AIs) with the FIC in terms of section 39, read with regulation 25 of the FIA.

3 DIFFERENCE BETWEEN REGISTRATION REQUIREMENTS UNDER THE FIA AND THE TRUST MONEYS PROTECTION ACT, 1934 (ACT NO 34 OF 1934)

3.1 Registration as envisaged in Section 5 of the FIA requires the Master to open and keep a register of prescribed information on all trusts for purposes of identifying all natural persons that has anything to do with that trust. The rationale behind this section stems from the fact that trusts (or legal arrangements as they are called in other jurisdictions) has been identified internationally as a popular vehicle for money laundering purposes. As such, for purposes of combating money laundering, it is important to identify and keep record of any natural person that is connected to or is to benefit from that trust.

3.2 Similarly, the Trust Moneys Protection Act also requires some form of registration/recording of written appointments of trustees with the Master of the High Court.

Section 2 of this Act requires that “**Every trustee appointed by written instrument operating *inter vivos*..... shall lodge such instrument with the Master or a copy thereof.... and shall from time to time lodge with the Master any written variations of such instrument or a copy thereof likewise certified.**” It has been trite practice in Namibia that the Master’s Office issues a trust certificate to the trustee upon lodging of the trust deed or letter of appointment of the trustee; on the strength of which the trustee is allowed to open a bank account in the name of the trust.

It should be noted that, unlike the formation of a company, the trust itself comes into existence as soon as the trust agreement has been concluded between the relevant parties, and the validity or existence of the trust is not dependent upon the lodgement of the trustee appointment letter with the Master.

- 3.3 For purposes of this Directive, Section 3 of this Act, which actually provides for the issuing of such a trust certificate, will not be discussed.
- 3.4 The registration requirement under the FIA and the recording of appointment of trustees (and consequential issuance of a trust certificate) under the Trust Moneys Protection Act are two different processes under two different pieces of legislation. The issuance of a trust certificate cannot be refused on the basis of the fact that the beneficiary is not determined or determinable¹ at the time of lodging of the trust deed and appointment letters of trustees.

4 IMPLEMENTATION IMPOSSIBILITY

- 4.1 Discretionary trusts by its very nature does not disclose the beneficiaries in the trust deed from the outset. Beneficiaries can be identifiable as a class or category of persons, and can be described in rather wide terms. This will include charitable trusts as well as trusts with social, health, education or environmental benefits as its objectives. The discretion to select a beneficiary may be left to a trustee if that class of beneficiaries/category of persons are sufficiently defined, e.g. beneficiaries are identified in the trust deed as "Final year LLB students at the University of Namibia". Where the class of beneficiaries are described in broad terms it is the **duty** of the trustee to use his/her discretion to decide which particular individual qualifies or falls within the described terms. Where discretionary trusts are charitable trusts they are phrased in a particular benevolent manner to ensure that it does not fail in its objective².

¹ This is a FIA requirement.

² See Honoré, The South African Law of Trust, Third Edition, pages 116 – 124

4.2 Upon registration of discretionary or charitable trusts, the prescribed information regarding the beneficiaries may not be available. This by no means implies that discretionary trusts has now been abolished by the FIA. Having due regard for the content of FIA Regulation 10(3) it is clear that it was not the intention of the legislature to do away with this age old legal phenomenon that we inherited from Roman-Dutch law.

“Ascertainment of information concerning trusts

10. (3) If beneficiaries of the trust are designated by characteristics or class, the accountable or reporting institution should obtain sufficient information concerning the beneficiaries to satisfy itself that it will be able to establish the identity of the beneficiaries at the time of a pay-out or at the time when the beneficiaries intend to exercise their vested rights or claim their benefits.”

4.3 The availability of beneficial ownership information, such as that of the founder and the trustee is sufficient for the Master of the High Court to register the discretionary trust for FIA purposes, provided that the trustee provide all the prescribed beneficiary information to the Master as soon as the ultimate beneficiary has been identified, and before the beneficiary can receive any benefit from the trust or exercise any vested rights or institute a claim for their benefits.

5 DIRECTIVE

The Master of High Court is hereby directed to:

5.1 Register discretionary trusts, even if the prescribed information regarding the ultimate beneficiaries are not available at the time of lodgement/registration; with a proviso that the trustee provides the prescribed beneficiary information as soon as the ultimate beneficiary has been identified, and before the beneficiary can receive any benefit from the trust or exercise any vested rights or institute a claim for their benefits.

Appointed Trustees of Discretionary Trusts are hereby directed to:

- 5.2 Provide to the Master of the High Court with the prescribed beneficiary information as soon as the ultimate beneficiary has been identified, and before the beneficiary can receive any benefit from the trust or exercise any vested rights or institute a claim for their benefits.

The Trustees/Trust Practitioners/Administrators/Agents of all Trusts, as captured under Item 3(c) & (d) of Schedule 1 to the FIA, are hereby directed to:

- 5.3 Register their particulars, as Accountable Institutions (AIs) with the FIC in terms of section 39(2), read with regulation 25 of the FIA.

6 NON-COMPLIANCE WITH THE PROVISIONS OF THIS DIRECTIVE

- 6.1 Any non-compliance with the directions and specifications contained in this Directive is a criminal offence in terms of section 63 (f) of the FIA. As such, non-compliance will inevitably also be met with administrative sanctions and penalties in terms of section 56 of the FIA.
- 6.2 The criminal penalty for the above-mentioned offence, upon conviction, is a fine not exceeding N\$100 million or, where the commission of the offence is attributable to a representative of the AI or the trust, to such fine or imprisonment for a period not exceeding 30 years, or to both such fine and such imprisonment.

The information contained in this document is intended to provide only a summary and a general overview on these matters and may not be comprehensive.

This document may contain statements of policy which reflect the FIC's administration of the legislation in carrying out its statutory functions.

The Directive can be accessed at www.fic.na.

Date issued: **12 September 2017**

Director: Financial Intelligence Centre