



Republic of Namibia

Financial Intelligence Centre

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DIRECTIVE NO 02 OF 2018

**REGISTRATION OF DIVIDEND ACCESS TRUSTS - ESTABLISHED
FOR GIVING ACCESS TO NAMIBIAN SHAREHOLDERS TO
DIVIDENDS DECLARED BY COMPANIES WITH PUBLICLY LISTED
SHARES**

JULY 2018

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 Sections 9(1)(f) and 9(2)(g) 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* is creating an implementation impossibility as far as the registration of Dividend Access Trusts are concerned

2. PURPOSE

The purpose of this Directive is to –

- 2.1 highlight the implementation impossibility when applying Section 5 (2) of the FIA to Dividend Access Trusts;
- 2.2 direct the Master of High Court to register Dividend Access Trusts without prescribed information of the beneficiaries being available at the time of registration/lodgement;
- 2.3 direct the trustees of a Dividend Access Trusts to provide the Master of High Court with the above-mentioned prescribed beneficiary information as soon as the ultimate beneficiaries has been identified/dividends has been declared,

and before the beneficiaries can receive any benefit from the trust or exercise any vested rights or institute a claim for their benefits.

3. BACKGROUND INFORMATION TO THIS DIRECTIVE

- 3.1 On 31 January 2018 the FIC received an application for exemption from an Accountable Institution (AI) for an exemption from certain obligations under the Financial Intelligence Act, 2012 (Act No. 13 of 2012) in respect of beneficiaries of a Dividend Access Trust which they intended to register in Namibia. The application also requested a partial exemption on the part of the Master of the High Court, in respect of section 5(2) of the FIA.
- 3.2 The FIC was informed that the mother company of the AI was in the process of listing its shares on the Johannesburg Stock Exchange by way of primary listing, on an international Stock Exchange by way of standard listing and on southern and eastern African Stock Exchanges by way of secondary listings.
- 3.3 The Dividend Access Trust that the AI intended to register in Namibia was to, amongst others, enable dividend pay-outs to Namibian shareholders of the AI. The beneficiaries of this trust will be the Namibian shareholders at the time when dividends are declared.
- 3.4 As per the standard letter of "Acceptance of Trust as Trustee" (Form T9), the Master of the High Court requires the Trustees to provide and update annually the information on the trustees, founder and beneficiaries as prescribed by the FIA.
- 3.5 A Dividend Access Trust, by its very nature, is not in a position to identify its beneficiaries from the outset as the beneficiaries are shareholders of a public company listed on a Stock Exchange.
- 3.6 The FIC realised that this implementation impossibility will arise in respect of all other AIs with head offices/branches/affiliates in other jurisdictions that may decide in future to publicly list their shares on Stock Exchanges.

4 IMPLEMENTATION IMPOSSIBILITY

- 4.1 As stated above, a Dividend Access Trust by its very nature cannot disclose the beneficiaries in the trust deed from the outset. The shareholders of a public company listed on a Stock Exchange are the beneficiaries of such a trust.
- 4.2 As is common with shares listed on a Stock Exchange, it is traded on a daily basis and, as such, shareholders can also change on a daily basis. Once a public company declares dividends, the shareholders in possession of those shares at that time is entitled to a dividend pay-out, and they become the beneficiaries of the Dividend Access Trust.
- 4.3 Upon registration of the Dividend Access Trust, the prescribed information regarding the beneficiaries may not be available. This by no means implies that this type of trust 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.”

- 4.4 The availability of beneficial ownership information, such as that of the founder, the trustees and each natural person that exercises ultimate effective control over the trust is sufficient for the Master of the High Court to register a Dividend Access Trust for FIA purposes, provided that the trustees provide all the prescribed beneficiary information to the Master as soon as dividends has been declared (and thus the ultimate beneficiaries has been identified), and before the beneficiaries 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 Dividend Access Trusts, even if the prescribed information regarding the ultimate beneficiaries are not available at the time of lodgement/registration; with a proviso that the trustees provides the prescribed beneficiary information as soon as the ultimate beneficiaries has been identified upon declaration of dividends, and before the beneficiaries can receive any benefit from the trust or exercise any vested rights or institute a claim for their benefits.

Appointed Trustees of a Dividend Access Trust are hereby directed to:

- 5.2 Provide to the Master of High Court with a list containing the prescribed beneficiary information in respect of the shareholders within seven (7) working days of the dividends being declared, and before the beneficiaries can receive any benefit from the trust or exercise any vested rights or institute a claim for their benefits.

Application of this Directive:

- 5.3 This Directive only applies when the purpose of setting up a trust is to provide Namibian shareholders with access to dividend pay-outs declared by companies with publicly listed shares.
- 5.4 This Directive is only applicable to Dividend Access Trusts registered or to be registered in Namibia; holding a bank account/s at a commercial bank/s in Namibia.

5.5 This Directive is only applicable where dividend pay-outs are to be effected from the Namibian bank account/s of the Dividend Access Trust into the individual bank accounts of the Namibian shareholders held at a commercial bank in Namibia.

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 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 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 first issued: **13 July 2018**

Director: Financial Intelligence Centre