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GUIDANCE NOTE NO 4 OF 2015

**GUIDANCE NOTE ON THE TERM “TRANSACTION” AS
APPLIED TO ACCOUNTABLE AND REPORTING
INSTITUTIONS**

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TABLE OF CONTENTS

A. DEFINITIONS

1. Introduction
 - 1.1 General
 - 1.2 Commencement
 - 1.3 Application of this Guidance Note

2. The Financial Intelligence Centre (FIC)

3. Understanding money laundering, terrorism and proliferation financing activities
 - 3.1 Money Laundering
 - 3.2 Terrorism financing
 - 3.3 Proliferation financing

4. What is meant by the term "Transaction"
 - 4.1 Meaning of "transaction" in relation to client identification duties
 - 4.2 Meaning of "transaction" in relation to suspicious transactions
 - 4.3 Examples of transactions

5. Penalties for non compliance

6. Comments

7. How to contact the FIC

A. DEFINITIONS

“Accountable Institution (AI) or Reporting Institution (RI)” means a person or entity listed in schedule 1 and 3 of the Act. The term “accountable and reporting institutions” in this document refers to all institutions covered by the FIA including financial institutions such as banks and those regulated by NAMFISA and all designated non-financial businesses and professions (DNFBPs), and other persons or entities carrying on a business;

“Act” refers to the Financial Intelligence Act, 2012 (Act No. 13 of 2012);

“CDD” means Customer Due Diligence;

“Client and Customer” have their customary meaning and are used interchangeably;

“Customer due diligence” means a process which involves establishing the identity of a client, the identity of the client’s beneficial owners in respect of legal persons and monitoring all transactions of the client against the client’s profile;

“Enhanced customer due diligence” means doing more than the conventional customer due diligence measures mentioned above and includes, amongst others, taking measures as prescribed by the Centre to identify, as far as reasonably possible, the source of wealth, funds and any other assets of the client or beneficial owners whose activities may pose a risk of ML, TF or PF;

“Establish identity” means a two tier process consisting of ascertainment or collecting of certain identification information, and verification of some of the information against reliable documentation or information;

“FATF” means the Financial Action Task Force;

“FIA” the Financial Intelligence Act, 2012 (Act No. 13 of 2012), as amended (also referred to as the Act)

“FIC” means the Financial Intelligence FIC;

“POCA” refers to the Prevention of Organized Crime Act, 2004 (Act No.29 of 2004), as amended;

“Records” means any material on which information is recorded or marked and which is capable of being read or understood by a person, or by an electronic system or other device;

“Regulations” refer to the regulations made under the provisions of section 67 of the Act and published by Government Notice No. 3 of 2015 promulgated in Government Gazette No. 5658 dated 28 January 2015;

“SAR” refers to a suspicious activity report submitted to the FIC in terms of sections 33 (1) & (2) of the Act;

“STR” refers to a suspicious transaction report submitted to the FIC in terms of sections 33 (1) & (2) of the Act;

1. INTRODUCTION

This Guidance Note is intended for accountable and reporting institutions that are:

- a. financial institutions providing banking services, as regulated by the Bank of Namibia;
- b. financial institutions, providing non-banking financial services and products, including those that are regulated by the Namibia Financial Institutions Supervisory Authority (NAMFISA); and
- c. all other institutions carrying on a business as listed in Schedule 1 and 3 of the Act.

This Guidance Note is issued and published by the FIC in terms of section 9(h) of the Act

1.1 General

This Guidance Note provides general guidelines which all accountable and reporting institutions should apply in order to interpret the term "transaction" in relation to each accountable or reporting institution's obligations to identify and verify the identities of its clients.

It is not the purpose of this Guidance Note to provide a complete definition of the term which could be applied rigidly across all sectors of the financial and non-financial services industry. This Guidance Note is not legal advice and is not intended to replace the Act and the regulations issued under the Act.

1.2 Commencement

This guidance note shall come into effect on date of publication in the Government Gazette.

1.3 Application of this Guidance Note

The FIC has prepared this Guidance Note to assist all accountable and reporting institutions [including financial institutions such as banks and all designated non-financial businesses and professions (DNFBPs)], to meet all their obligations as described in sections 21 to 29, 33, 34, 35, and 39 to 41 of the Act. It provides general guidance on what must be regarded as a transaction, in terms of the Act, in the course of business.

Guidance provided by the FIC (and supervisory bodies listed in Schedule 2 and 4 of the Act) is the only form of guidance formally recognized in terms of the Act and its regulations.

2. THE FINANCIAL INTELLIGENCE CENTRE (FIC)

The principal objects of the FIC are to help the Government of the Republic of Namibia combat ML,TF and PF activities in collaboration with the other law enforcement agencies and relevant stakeholders. In furtherance of this objective, the FIC, amongst others, receives STRs and SARs from accountable and reporting institutions, analyze such reports and disseminate the financial intelligence gathered on suspected money laundering, terrorist and proliferation financing activities to law enforcement agencies, both domestic and international, for further investigation and possible prosecution.

The FIC is further empowered to conduct compliance audits/inspections on accountable and reporting institutions in order to enhance compliance with the provisions of the Act. Issuing guidance such as this document is another effort to enhance the compliance behaviour of stakeholders.

3. UNDERSTANDING MONEY LAUNDERING, TERRORISM AND PROLIFERATION FINANCING ACTIVITIES

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UNDERSTANDING MONEY LAUNDERING, TERRORISM AND PROLIFERATION FINANCING ACTIVITIES

3.1 Money laundering

In simple terms, money laundering is the Act (or attempt to) of disguising the true source of proceeds of unlawful activities. The Act further defines “money laundering” or “money laundering activity” as the act of a person who -

- i. engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;
- ii. acquires, possesses or uses or removes from or brings into Namibia proceeds of any unlawful activity; or
- iii. conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity;

3.2 Terrorism financing

3.2.1 The meaning of terrorism

Whilst no acceptable international definition on terrorism exists, it is generally described as the execution of acts of violence against persons or property, or a threat to use such violence, with the intent to intimidate or coerce a Government, the public, or any section of the public to achieve or promote any tribal, ethnic, racial, political, religious or ideological objectives¹.

3.2.2 Understanding the financing of terrorism

Financing of terrorism involves the provision of funds to enable the commission of terrorism or terrorist activity. It may involve funds raised from legitimate sources, such as personal donations and profits from businesses and charitable organizations, as well as funds derived from criminal activity, such as drug trafficking, illegal diamond smuggling, the smuggling of weapons and other goods, fraud, kidnapping and extortion. Recent trends indicate that terrorism activities are also funded by proceeds from artefacts, social media fund raising activities, selling of oil etc.

3.2.3 Understanding how financing of terrorism is committed

Terrorists use techniques similar to those used by money launderers in order to evade the attention of the authorities and to protect the identity of their sponsors and of the ultimate beneficiaries of the funds. Financial transactions associated with terrorist financing tend to be in smaller amounts than is the case of money laundering, and when terrorists raise funds from legitimate sources, the detection and tracking of these funds are difficult. Those involved in acts of terrorism or financing of terrorism, move their funds by using the formal banking system, money transfer services, informal value-

¹ See full definition of “terrorist activity” as provided for in section 1 of the Prevention and Combating of Terrorist and Proliferation Activities Act, 2014 (Act No. 4 of 2014)(PACOTAPAA)

transfer systems like the Hawalas, the physical cross border transportation of cash, uncut diamonds, gold and other valuables such as the sale of artefacts, oil and fundraising in other means such as social media. It has been noted in some countries that, in what seem to be an effort to conceal the final destination of funds suspected of being used for terrorist financing, money is moved to countries that has major financial hubs. For example, remittances made for non-existent or fictitious imports. It has also come to the fore that large amounts of money are remitted to certain jurisdictions on the basis of highly inflated invoices.

3.2.4 Targeted financial sanctions related to terrorism and terrorist financing

Countries, Namibia included, are required to implement targeted financial sanctions regimes to comply with United Nations Security Council resolutions relating to the prevention and suppression of terrorism and terrorist financing. The resolutions require Namibia and other countries who are UN member states to freeze without delay the funds or other assets of, and to ensure that no funds or other assets are made available, directly or indirectly, to or for the benefit of, any person or entity either:

- i. designated by, or under the authority of, the mandatory United Nations Security Council Resolutions issued under Chapter VII of the Charter of the United Nations, including in accordance with resolution 1267 (1999) and its successor resolutions; or
- ii. designated by that country pursuant to resolution 1373 (2001)².

The various lists of persons or entities designated by, or under the authority of the mandatory United Nations Security Council Resolutions issued under Chapter VII of the Charter of the United Nations can be accessed on the FIC website (www.fic.na) or on <https://www.un.org/sc/suborg/>

² The International standards on combating money laundering and the financing of terrorism & proliferation, the Financial Action Task Force (FATF) recommendations, February 2012

3.3 Proliferation financing

3.3.1 Understanding Proliferation financing

Proliferation financing is defined by Financial Action Task Force (FATF)³ as the act of providing funds or financial services which are used, in whole or in part, for the manufacture, acquisition, possession, development, export, trans-shipment, brokering, transport, transfer, stockpiling or use of nuclear, chemical or biological weapons and their means of delivery and related materials (including both technologies and dual use goods used for non-legitimate purposes), in contravention of national laws or, where applicable, international obligations⁴.

3.3.2 Background on Proliferation financing

Proliferation financing facilitates the movement and development of proliferation-sensitive items and as such, can contribute to global instability and potentially catastrophic loss of life if weapons of mass destruction (WMD) are developed and deployed. Proliferators operate globally and mask their acquisitions as legitimate trade. They exploit global commerce, for example by operating in countries with weak export controls or utilising free-trade zones, where their illicit procurements and shipments are more likely to escape scrutiny.

Proliferators abuse both the formal and informal sectors of the international financial system or resort to cash in order to trade in proliferation relevant goods. It should be noted that organized networks, which make use of the formal international financial system, may be easier for authorities to detect than those using informal sectors. When abusing the formal international financial system, purchases must appear legitimate to elude suspicions, as proliferation-sensitive goods and services may be purchased on the open market. Proliferation networks also use ordinary financial transactions to pay

³ Combating proliferation financing: A status report on policy development and consultation, FATF Report, February 2010

⁴ Also see the definitions of “funding of proliferation” and “proliferation activity” as provided for in section 1 of the PACOTAPAA

intermediaries and suppliers outside the network. Proliferation support networks therefore use the international financial system to carry out transactions and business deals, often acting through illicit intermediaries, front companies and illegal trade brokers. These procurement networks have become significantly more complex over time, increasing the probability that the true end-users of proliferation sensitive goods will avoid detection. Financial institutions are usually unwitting facilitators of proliferation.

3.3.3 Targeted financial sanctions related to Proliferation

Namibia has implemented targeted financial sanctions to comply with United Nations Security Council resolutions relating to the prevention, suppression and disruption of proliferation of weapons of mass destruction and its financing. These resolutions require Namibia (along with other countries) to freeze without delay the funds or other assets of, and to ensure that no funds and other assets are made available, directly or indirectly, to or for the benefit of, any person or entity designated by, or under the authority of, the mandatory United Nations Security Council Resolutions issued under Chapter VII of the Charter of the United Nations.

On a practical level, all Accountable and Reporting Institutions should observe the various United Nations Sanctions Lists, which contain lists of designated persons and entities. The institutions should then compare their client database to these lists and if matches are identified, business activities with such clients should cease immediately and such matches should immediately be reported to the FIC. These lists can be accessed on the FIC website (www.fic.na) or directly on <https://www.un.org/sc/suborg/> .

4. WHAT IS MEANT BY THE TERM “TRANSACTION”

4.1 Meaning of "transaction" in relation to client identification duties

Accountable and Reporting institutions are prevented by section 21 of the Act from concluding certain transactions unless they have established the identities of their clients. The term "transaction" is defined in the Act as follows:

“transaction” means a transaction concluded between a client and an accountable or reporting institution in accordance with the type of business carried on by that institution, and includes attempted transactions”

While this definition does not attribute a particular meaning to the term "transaction", it conveys the concept that the term may have different meanings depending on the type of business undertaken by different accountable and reporting institutions and may be applied differently among them. In short, the term must be applied in each instance in accordance with the nature of the business carried on by the accountable or reporting institution in question.

This definition also indicates that the term refers to activities which take place between an accountable or reporting institution and a client. The dictionary meaning of the term "transaction", as taken from the Concise Oxford Dictionary, includes "management of business" and "piece of especially commercial business done". Applying this definition, a transaction can therefore generally be described as an instance of commercial activity between two or more parties. Transactions are concluded on the basis of agreements between the parties to a transaction.

Following the definition of the term "transaction" in the Act, as well as the dictionary meaning of the term, these agreements must be aimed at a piece of business done between an accountable institution and a client, in accordance with the nature of the business carried on by the institution concerned. A basic guideline, which can be

inferred from this, is that any instruction or request by a client to an accountable or reporting institution to perform some act to give effect to the business relationship between them can be regarded as a transaction.

4.2 Meaning of "transaction" in relation to suspicious transactions

In view of the framework and scope of the provisions of section 33 of the Act, the concept of transaction as applied in that context has a broader connotation. It also includes transactions that are conducted between persons who are not designated as accountable or reporting institutions but are carrying on a business and transact with their clients. See also the definition of transaction in the Regulations under the Act.

4.3 Examples of transactions

For the purpose of the obligation to establish clients' identities as referred to in this Guidance Note, the term 'transaction' is understood not to include activities which happen automatically, or which an intermediary will perform automatically, without instructions from the client. These consequences include, for example, periodic contractual payments by clients to institutions and periodic automatic increases in such payments, as well as further business that accountable and reporting institutions may do with others in the course of giving effect to the clients' original mandate.

Examples of what might be regarded as "transactions" for the purposes of client identification in respect of the accountable institutions. This is not an exhaustive list of "transactions" performed by the relevant accountable institutions, but is intended to provide an indication of the types of activities which should be regarded as transactions.

(a) Collective investment schemes

- The giving of a mandate to invest in any collective investment scheme;
- Any amendment in the original investment mandate of the client;

- An instruction to transfer or switch the investment to another collective investment scheme;
- The offering of participating interests for repurchase;
- The repayment of participants' interests following the closure of a fund or portfolio.

(b) Real estate agents

- Providing services that help the buying and selling of properties;

(c) Attorneys

- Facilitating the transfer of property or providing conveyancing services;
- Facilitating the transfer of ownership or interest in legal persons.

(d) Services provided by banks

- Deposits and withdrawals;
- Online transfers, electronic fund transfers (EFTs);
- Remittances for import payments;
- Provision of loans to account holders;
- Once off loans provided by banks to non-account holders;
- Any instruction from client/account holder to be executed by the bank on his/her behalf.

(e) Long-term insurance

- The entering into a new long-term insurance policy;
- An amendment or variation of the terms and conditions of a long-term insurance policy, including a change in the beneficiary or policyholder;
- An instruction by the client to the long-term insurer to switch or reinvest the underlying assets of a linked policy with linked investment service providers or investment managers;
- Termination (including the lapsing and surrender), withdrawal, or reinvestment of a long term insurance policy;

- The above activities apply both to the intermediary and service provider.

(f) Investment managers

- The entering into a new investment contract;
- Additional amounts invested in terms of an investment mandate with a client;
- An amendment or variation of the terms and conditions of an investment mandate;
- An instruction by the client to switch or reinvest the investment to other linked investment service providers or investment managers;
- An instruction by the client for a partial withdrawal of investment and the subsequent repayment of the investment in any form;
- Termination or withdrawal of an investment mandate and the subsequent repayment of the investments in any form.

(g) Linked investment service providers (LISP's)

- The entering into a new investment contract;
- Additional amounts invested in terms of an investment mandate with a client;
- An amendment or variation of the terms and conditions of an investment mandate;
- An instruction by the client to switch or reinvest the investment to other linked investment service providers or investment managers;
- Termination or withdrawal of an investment mandate and the subsequent repayment of the investments in any form;
- An instruction by the client for a partial withdrawal of investment and the subsequent repayment of the investment in any form.

(h) Brokers trading securities (including derivatives) on the stock exchange

- A trading instruction by a client to buy or sell securities or derivatives;
- An amendment or variation of a trading instruction from a client;

- The receipt from, or payment of money (including a dividend) to, a client in giving effect to a mandate.

(i) Brokers trading financial instruments on the bond exchange

- A trading instruction from a client to buy or sell a financial instrument;
- An amendment or variation of a trading instruction from a client;
- The receipt from or payment of money (including a coupon payment) to, a client in giving effect to a mandate.

5. PENALTIES FOR NON COMPLIANCE

An accountable or reporting institution which contravenes or fails to comply client identification and record keeping as prescribed by the Act commits an offence and is liable to a fine not exceeding N\$100 million or, where the commission of the offence is attributable to a representative of the accountable or reporting institution, to such fine or to imprisonment for a period not exceeding 30 years, or to both such fine and such imprisonment.

Any non-compliance with the directions and guidance contained in this Guidance Note is an offence in terms of section 63 of the FIA, and may also attract administrative sanctions and penalties.

6. COMMENTS

The contents of this Guidance Note shall be reviewed from time to time. Accountable and reporting institutions will be notified of any aspect that may necessitate revoking or amending any guidance set out in this Guidance Note.

7. HOW TO CONTACT THE FIC

All Correspondence and enquiries must be directed to:

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