



DIRECTIVE: AML/02/2020

TO:

- FRIENDLY SOCIETIES**
- INVESTMENT MANAGERS**
- MICROLENDERS**
- LONG-TERM INSURERS/REINSURERS**
- SHORT-TERM INSURERS/REINSURERS**
- SPECIAL PURPOSE VEHICLES**
- STOCKBROKERS**
- UNIT TRUST MANAGEMENT COMPANIES**
- UNLISTED INVESTMENT MANAGERS**

SUBJECT: FIT AND PROPER ASSESSMENT IN TERMS OF SECTION 35(15) OF THE FINANCIAL INTELLIGENCE ACT, 2012 (ACT NO. 13 OF 2012)

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1 Acronyms and Definitions

“Als and RIs” Accountable Institutions and Reporting Institutions as listed under Schedules 1 & 3 of the Financial Intelligence Act, 2012 (Act No.13 of 2012).

“beneficial owner” means -

- (a) a natural person who owns or effectively controls a client, including the natural person on whose behalf a transaction is conducted; or
- (b) a natural person who exercises effective control over a legal person or trust, and a natural person is deemed to own or effectively control a client when the person –
 - (i) owns or controls, directly or indirectly, including through trusts or bearer share holdings for any legal person, 20% or more of the shares or voting rights of the entity;
 - (ii) together with a connected person owns or controls, directly or indirectly, including through trusts or bearer share holdings for any legal person, 20% or more of the shares or voting rights of the entity;
 - (iii) despite a less than 20% shareholding or voting rights, receives a large percentage of the person’s declared dividends; or
 - (iv) otherwise exercises control over the management of the person in his or her capacity as executive officer, non-executive director, independent non-executive director, director, manager or partner.

“CEOs”	Chief Executive Officers
“CoC”	means a Certificate of Conduct obtainable from the Namibia Police Criminal Record Centre, as well as from corresponding authorities in foreign jurisdictions. It has a validity of 12 months.
“director”	includes any person occupying the position of director or alternate director of a company, by whatever name that person may be designated, as defined in terms of the Companies Act, 2004 (Act No 28 of 2004).
“FIA”	refers to the Financial Intelligence Act, 2012 (Act No. 13 of 2012) as amended.
“fit and proper test”	is a test undertaken at market entry, as well as on a continuous basis, taking into account deviance conduct of key persons to avoid persons who are not fit and proper from controlling, or participating, directly or indirectly, in the directorship, management or operation of AIs or RIs.
“key persons”	key persons are individuals appointed by AIs or RIs as principal officers, portfolio managers, compliance officers, CEOs/MDs or directors. Key persons also refer to beneficial owners of AIs and RIs.
“MDs”	Managing Directors
“NAMFISA”	refers to the Namibia Financial Institutions Supervisory Authority established in terms of section 2 of the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001).

“PACOTPA” Prevention and Combating of Terrorist and Proliferation Activities Act, 2014 (Act No. 4 of 2014).

“portfolio manager” means a natural person who is employed by an investment manager or unlisted investment manager to perform investment management functions on behalf of the investment manager or unlisted investment manager.

“principal officer” is a person appointed by an AI or RI who is authorized to act for such AI or RI in all matters in so far as may be necessary to ensure compliance by such AI or RI with the provisions of the applicable Acts.

“UNSC” United Nations Security Council

2 Introduction

- a. NAMFISA is a designated supervisory body in terms of Schedule 2 of FIA. In terms of section 35(2) NAMFISA has the mandate to supervise, monitor and enforce compliance by AIs and RIs under its purview, with the FIA and any regulation, order, notice, circular, determination or directive issued in terms of FIA.
- b. Similarly, NAMFISA has the powers in terms of Section 54(2)(d) of the FIA to issue directives to AIs and RIs or any other person to whom FIA applies to, perform acts necessary to meet obligations imposed by FIA.
- c. Section 35(15) of FIA requires NAMFISA to –

- (a) adopt the necessary measures to prevent or avoid having any person who is not fit and proper from controlling, or participating, directly or indirectly, in the directorship, management or operation of an AI or RI;
- (b) make a determination in accordance with any Act applicable to it as to whether a person is fit and proper to hold office in an AI or RI, taking into account any involvement, whether directly or indirectly, by that person in any non-compliance with FIA or any regulation, order, notice, circular, determination or directive made in terms of FIA, or any involvement in –
 - (i) any money laundering activity; or
 - (ii) any terrorist or financing of terrorism related activity.
- d. In light of the above NAMFISA adopted, amongst others, the submission of a Certificate of Conduct (CoC) by AIs and RIs as part of its fit and proper test criteria to avoid having any person who is not fit and proper from controlling, or participating, directly or indirectly, in the directorship, management or operation of an AI or RI.
- e. NAMFISA further adopted the on-going fit and proper assessment of key persons post market entry by AIs and RIs, as part of the measures to prevent or avoid having any person who is not fit and proper from controlling, or participating, directly or indirectly, in the directorship, management or operation of an AI or RI.

3 Submission of CoCs as a registration requirement

- 3.1. At market entry, key persons are subjected to a fit and proper test, and as such, certified copies of CoCs (CoCs not older than 12 months) are required as one of the requirements to determine their fitness and propriety.

3.2 Whenever there is a change of key persons, certified copies of CoCs for new key persons are required in order for NAMFISA to determine the fitness and propriety of key persons entering the market.

4 On-going fit and proper assessment of key persons by AIs and RIs

4.1 Potential changes in behaviour, conduct or roles, elevate the need for the on-going fit and proper assessment of key persons by AIs and RIs to determine their fitness and propriety post market entry.

4.2 AIs and RIs must, on an on-going basis, establish the fitness and propriety of key persons in terms of the criteria under paragraph 4.5 below, and if a key person is no longer fit and proper, such key person must be reported to NAMFISA within 24 hours of establishing the unfitness and impropriety of such person.

4.3 When AIs and RIs are informing NAMFISA of the unfitness and impropriety of a key person, the following information should be availed to NAMFISA:

- Background information relating to the behaviour, conduct or change that renders a key person unfit and improper;
- certified copy of the identification document (ID)/passport;
- certified copy of a valid Police Certificate of Conduct from the Namibian Police Service;
- any other documents or information that may be useful in relation to the unfitness and impropriety of a key person.

4.4 In the process of conducting on-going fit and proper assessment of key persons post market entry, AIs and RIs must screen key persons against the UNSC sanctions lists as and when the sanctions lists are updated. AIs and RIs must perform the following acts, pursuant to a freezing order issued in terms of

section 23(1)(b) of PACOTPAA, whenever they have established that a key person is on the sanctions lists:

4.4.1 freeze the funds or assets held by or on behalf of such key person;

4.4.2 apply to the High Court for -

- the appointment of a *curator bonis* to do, subject to the directions of the High Court, any one or more of the following on behalf of the person against whom the freezing order has been made:
 - (i) to assume control over the funds or assets;
 - (ii) to take care of the funds or assets;
 - (iii) to administer the funds or assets and to do any act necessary for that purpose; and
 - (iv) where the funds or assets are a business or undertaking, to carry on, with due regard to any applicable law regarding the business or undertaking.
- an order requiring any person holding funds or assets subject to the freezing order to surrender as soon as possible, or within such period as the Court may determine, such funds or assets into the custody of the *curator bonis*.

4.4.3 In the circumstances where the acts described/listed in paragraph 7.4.2 are not necessary, AIs or RIs may-

- (a) assume control over the funds or assets;
- (b) take care of the funds or assets;

- (c) administer the funds or assets and do any act necessary for that purpose; and
- (d) where the funds or assets are a business or undertaking carry on, with due regard to any applicable law, the business or undertaking.

4.4.3 In terms of Regulation 3 of the regulations issued under PACOTPAA, inform NAMFISA and the Financial Intelligence Centre (FIC), within 24 hours of any assets frozen or any actions taken in terms of a freezing order.

4.4.4 The on-going fit and proper assessment of key persons by AIs and RIs and effectiveness thereof will be tested by NAMFISA through the normal supervisory and monitoring interventions.

4.5 AIs & RIs must use the following criteria for ongoing fit and proper assessment of key persons:

4.5.1 A key person is not fit and proper if, it is established, through fit and proper assessment, that the key person is not of good character, competent, honest, financially sound, or does not discharge his/her responsibilities with due care, skill and diligence.

4.5.2 A key person is not fit and proper if such person –

- a) is found guilty in any civil or criminal proceedings by a court of law or employer of having acted fraudulently, dishonestly, unprofessionally, dishonourably or in breach of a fiduciary duty;

- b) is found guilty by any professional body or financial services industry body of an act of dishonesty, negligence, incompetence or mismanagement, unprofessional or unworthy conduct sufficiently serious to impugn the honesty and integrity of the key person;
- c) has been denied membership of any professional body or financial services industry body on account of dishonesty, negligence, incompetence or mismanagement, unprofessional or unworthy conduct sufficiently serious to impugn the honesty and integrity of the key person;
- d) is subject to a pending investigation or disciplinary proceeding by a regulatory or supervisory authority or professional body or financial service body or government body / agency including the Namibian Police or employer relating to having acted fraudulently, dishonestly, unprofessionally, dishonourably or in breach of a fiduciary duty sufficiently serious to impugn the honesty and integrity of the key person;
- e) has been discharged or dismissed from office on account of misconduct relating to fraud or the misappropriation of money;
- f) has been declared a habitual criminal or has a criminal record that makes them eligible for such declaration;
- g) has been convicted of an offence under the FIA or the Prevention of Organized Crime Act, No. 29 of 2004 ("POCA") or the Prevention and Combating of Terrorist and Proliferation Activities Act, No. 4 of 2014 ("PACOTPA") or under any similar or comparable laws in another jurisdiction;

- h) has been involved in the management of a business that was declared insolvent or was liquidated or placed under judicial management;
- i) has not been rehabilitated as per the rehabilitation procedures set out in the disqualification and rehabilitation Directive of 2017 as amended;
- j) is on the UNSC sanctions lists.

4.5.3 In order to ascertain the above considerations AIs and RIs the following actions must be undertaken:

- obtain a COC from the Namibian Police Service annually, for purposes of conducting fit and proper assessments of key persons;
- gather and assess records of professional misconduct in respect of a key person where applicable;
- gather and assess adverse media reports on key persons' conduct related to dishonesty, negligence, incompetence or mismanagement of a financial institution where applicable;
- obtain character references from independent third parties such as current/former employer, business partner etc, where applicable;
- screen key persons against the UNSC sanctions lists as and when the sanctions lists are updated; and

- establish whether a key person has been rehabilitated in terms of the disqualification and rehabilitation Directive of 2017 as amended.

5 Application

This Directive applies to existing and prospective AIs and RIs under NAMFISA's supervision, and any other person to whom FIA applies, where applicable, to perform acts prescribed herein.

6 Effective date

This Directive shall come into effect on the date of issue.


7 Non-compliance with this Directive

AIs or RIs or person that fails to comply with this Directive commit an offence and are liable to a fine not exceeding N\$10 million or, where the commission of the offence is attributable to a representative of the AI or RI, to such fine or imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment in terms of Section 54(5) of FIA.

8 General

This Directive may not be exhaustive and can be supplemented and/or amended when necessary.

ISSUED BY:



KENNETH S. MATOMOLA
CHIEF EXECUTIVE OFFICER

DATE: 17 December 2020

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