THE FINANCIAL INTELLIGENCE ACT,

ACT 3 OF 2007 (Government Gazette 3880 of 20 July 2007, made operational on 5 May 2009, through Government Notice 73 of 2009, Government Gazette 4253)

AND

THE REGULATIONS TO THE FINANCIAL INTELLIGENCE ACT

AS PER GOVERNMENT NOTICE 74 OF 2009 (Government Gazette 4253 of 5 May 2009).

INFORMATION MANUAL TO LEGAL PRACTITIONER FIRMS

ISSUED BY THE LAW SOCIETY OF NAMIBIA: OCTOBER 2010

This manual is meant to be used as a guide only and should be adapted to suit the needs of each firm.

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1. INTRODUCTION

1.1. Definition of Money Laundering

In broad terms, money laundering is the manipulation of illegally acquired wealth in order to obscure its true nature or source. The IMF estimated in 2002 global money laundering to be in the order of US$600 billion per year. Although no conclusive study has been done in South Africa, it is estimated that between US$2 billion and US$8 billion is laundered through South African institutions annually. The law society is not aware of any survey conducted in Namibia in this regard.

1.2. The money laundering process

Money laundering has both macro and micro levels. Typically, at the macro level, money is laundered through a three-step process as follows:

1.2.1. Placement - The initial stage in the laundering process where money first enters the retail economy or the financial system;

1.2.2. Layering – Illicit proceeds are separated from their source. Complex layers of financial transactions are created to disguise the audit trail;

1.2.3. Integration – The final macro stage which places laundered proceeds back into the economy in such a way was to make them appear as legitimate income.

1.3. Using legal practitioner firms to launder money

1.3.1. Direct placement of funds-

1.3.1.1. The trust deposit: One of the simplest ways to secure the prize of a cheque paid out by the legal practitioner is by way of a deposit in respect of fees for a transaction or series of transactions which, by preconceived plan, will never eventuate. The requested refund of the deposit produces a trust cheque, which is then used as the first layer in a legitimisation process.

1.3.1.2. Business payments: Payments made by legal practitioners against the promise of reimbursements can be used to acquire assets which

are, in turn, disposed of as a second layer laundering operation. The funds paid to settle the legal practitioner's disbursements have effectively been laundered.

1.3.2. Indirect laundering -

The legal practitioner's office may be used to create vehicles which will in turn be used to launder money. So a legal practitioner may be requested to establish companies, close corporations and trusts, all of which will be used as a vehicle for laundering funds.

The services of the legal practitioner will be employed to draft contracts to facilitate the money laundering process. These might include leases, factoring contracts, discounting agreements, loans, mortgages etc.

The legal practitioner's services can be used in the preparation and implementation of contracts involving international trade where over and under invoicing represents a common method of laundering funds.

1.3.3. For examples of unusual transaction see Annexure "A" hereto.

1.4. <u>Introductory comments on Financial Intelligence Act in Namibia</u>

The Financial Intelligence Act, Act 3 of 2007, hereinafter referred to as "the FIA", came into operation on the 5th of May 2009. The regulations to this act were also promulgated on that date. The main purpose of this act is to combat money laundering by imposing a duty on accountable institutions (i.e. legal practitioners) to report certain transaction to the Bank of Namibia. The responsible department within the Bank of Namibia (BoN) to regulate the FIA and to receive and investigate reports in terms of the FIA is the Financial Intelligence Centre, hereinafter referred to as "the FIC". Supervisory bodies (such as the Law Society) also have a duty to report certain information to the FIC.

Apart from the duty to report, a supervisory body must also take all reasonable steps to ensure that accountable institutions under its supervision comply with their obligations as imposed by the FIA. In particular a supervisory body must:

- 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 accountable institution;
- examine and supervise accountable institutions, and regulate and verify, through regular examinations, that an accountable institution adopts and implements compliance programmes;
- issue guidelines to assist accountable institutions in detecting suspicious patterns of behaviour in their clients and these guidelines shall be developed taking into account modern and secure techniques of money management and will serve as an educational tool for reporting institutions' personnel; and
- co-operate with other enforcement agencies and lend technical assistance in any investigation, proceedings relating to any unlawful activity or offence under the FIA.

It must be kept in mind that an accountable institution may not be informed of any pending investigations, and neither may an accountable institution inform a client of a report made (or even a suspicion that a report was made), or investigation being conducted on such client.

The Law Society of Namibia (hereinafter referred to as the "LSN") is included as supervisory body under Schedule 2 to the FIA.

Every "legal practitioner" is included under Schedule 1 to the FIA. The inclusion of all legal practitioners as defined by the Legal Practitioners Act in Schedule 1 appears to be an oversight by the law makers as this definition results in an untenable situation.

Logic predicts that only legal practitioners practicing for their own accounts with a Fidelity Fund Certificates should have been included in the definition as only legal practitioners practicing as such may receive trusts monies in their professional capacity. It is believed that the FIC will initiate action to bring about amendments to the FIA.

For reasons of practicality, this document is an information manual to legal practitioner firms instead of individual legal practitioners.

The Prevention of Organised Crime Act of 2004 (POCA) also deals with money laundering, this document will not deal with POCA, and the LSN will deal with that legislation on another forum.

2. REGULATORY FRAMEWORK

The FIA apply to proceeds of unlawful activities which is much wider than process of crime.

Unlawful activity for the purposes of the POCA and the FIA is defined as "*conduct which constitutes a crime or which contravenes any law, whether such conduct occurred before or after the commencement of [the act] and whether such conduct occurred in the Republic or elsewhere*".

Proceeds of unlawful activities is defined as "*any property or any service, advantage, benefit, or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of [the act], in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.*"

POCA criminalises money laundering, assisting another to launder the proceeds of unlawful activity, the acquisition, use or possession of laundered property. For certain deemed-knowledge crimes POCA prescribes a maximum penalty of N$1 Billion or 100 years imprisonment or both.

Accountable institutions (i.e. legal practitioner firms, as dealt with in this document) are obliged to:

- **Identify** and **verify** new and existing clients;
- **Keep records** of identities of clients and transactions entered into with clients;
- **Report** certain transactions to the FIC;
- Formulate and implement **internal rules**;

- **Train** Employees;
- Appoint a responsible person to **monitor compliance**.

3. MEMORANDUM OF UNDERSTANDING

The LSN is still considering a draft Memorandum of Understanding between the LSN and the FIC. The FIC proposed a memorandum and the original thereof has already been substantially amended after expert opinion and numerous consultations by Council. Legal Practitioners were also requested to provide input.

The scope of this memorandum is to promote co-operation between the LSN and the FIC in exchanging information relating to money laundering transactions and also to record that the LSN will be informed and involved in actions taken by the FIC against legal practitioners or firms, insofar as the FIA allows for such co-operation. In this regard it must be noted that the FIA contains several clauses that criminalise the sharing of information, even by the FIC to supervisory bodies.

It goes without saying that the provisions of FIA will prevail over the terms of this memorandum and also anything contained in this document. In protecting the rights of the LSN, legal practitioners, legal practitioner firms and the clients of legal practitioners and legal practitioner firms, it is included in the memorandum that:

- it shall create no binding rights or obligations for any of the parties thereto;
- it cannot affect any rights of any legal practitioner or legal practitioners firm or any client of a legal practitioner or legal practitioner's firm; and,
- without derogating from the generality of the reservation of rights mentioned above, any right to approach any court of law by any party in under any law and procedure currently applicable is be specifically reserved.

It must be reiterated that the FIA criminalises the disclosure of certain information and practitioners must study these circumstances to fully understand when the LSN will be prohibited to disclose information to firms (or any other party). It will for instance be a criminal offence in terms of the FIA if any party suspecting that a report was made to the FIC makes such suspicion known to any other party. In general, the maximum penalties

prescribed by the FIA are, second to the POCA, the harshest penalties prescribed in Namibian statutes.

4. INTERNAL RULES

4.1. Scope and Purpose of Internal Rules

The purpose of these rules is to provide clear guidance for the minimum procedures which must be followed by legal firms in the discharge of their compliance obligations as an accountable institution in terms of the FIA. The regulations to the FIA require all accountable institutions to implement a compliance programme and implement internal compliance rules. Failure to do so is a criminal offence. This document should be used by firms as guideline to implement such programmes and rules. It goes without saying that this document, and any other compliance programme and rules must comply with the FIA.

The rules must be made available to every employee involved in transactions to which the FIA applies and, on request, also to the FIC. Each employee receiving a copy of the internal rules of the firm is required to acknowledge receipt of a hard copy thereof in writing.

Training must be provided to all relevant employees to enable them to comply with the FIA and the internal rules.

4.2. Informing Clients of the FIA

At each meeting with a client, both new and existing clients should be informed of the firm's obligations in terms of the FIA. In particular, the firm must ensure that the client knows and understands when information disclosed to him or her will be protected by legal professional privilege, and when not. There remains no such thing as legal professional privilege in civil matters with regards to FIA anymore.

Clients should not be allowed to act under the misapprehension that all communication with a legal practitioner will be kept confidential when, by virtue of the provisions of the FIA, the attorney may be obliged to disclose certain confidential information. Legal practitioners must advise existing and new clients, as a matter of course, of the nature and extent of the reporting duties which the

practitioner has in terms of the FIA and of the distinction between privileged and confidential information.

See also the comments under the section headed "Reporting duty not affected by confidentiality rules". It is advisable to inform the client early on that a legal practitioner may not inform the client that he has been reported to the FIC.

4.3. Establishment and Verification of Identities

In terms of the FIA a legal practitioner may not establish a **business relationship** or conclude a single transaction with a client or prospective client unless he/she has taken the certain prescribed steps to **establish** AND **verify** the identity of the client or prospective client.

Identification of the "principal" and "agent" and proof of authority are required where the client is acting on behalf of someone, or someone is acting on behalf of the client. The firm may not conclude a further transaction with an existing client unless the firm has taken the prescribed steps to **establish** and **verify** the identity of the client, the client's agent or the client's principal, whichever is applicable.

A client's identity must be established and verified before the "instruction" or business mandate has been concluded.

A **business relationship** is defined as an arrangement between a client and an accountable institution for the purpose of concluding transactions on a regular basis. The duty of a firm to obtain and verify the identity of a prospective client is applicable before a **business relationship** is established **OR** before a **single transaction** is concluded.

Transaction means a transaction concluded between a client and an accountable institution (legal firm) in accordance with the type of business carried on by that institution. The transaction is therefore not limited to transactions involving the flow of money.

4.4. Identification and Verification Procedures – New Clients

As early as possible and preferably at or before the first meeting with a new client, a legal practitioner must ascertain what information and documentation should be obtained from the client in order to establish and verify the client's identity. The process of verification of identity entails that the practitioner should compare the identifying particulars provided by the client with other available information in order to establish whether the particulars provided by the client accurately and correctly reflect the client's identity.

The duty to obtain and verify the identity of a client is not limited to certain transactions as is the case in South Africa, and Namibian legal practitioner firms therefore have a duty in respect of every transaction applicable to legal practitioner firms and irrespective of whether the intention is a business relationship involving regular transactions, or only a single transaction.

There are different identification and verification requirements depending on whether the client or prospective client is a company (foreign or local), close corporation, partnership, trust or individual (resident or foreigner). **Annexure "B"** is a summary of the regulations that prescribes the required documentation and verification methods.

If a legal practitioner has obtained information or documentation about a client without contact in person with the client or a representative of the client, the practitioner must take reasonable steps to establish the existence of, or to establish and verify the identity of, the client.

If a firm employing more than one legal practitioner, each legal practitioner in that firm will be responsible to ensure that his/her client furnishes the required information and documentation.

In South Africa there is a prohibition against the raising of fees in respect of time spent to comply with FICA. There appears to be no such prohibition in Namibia.

4.5. <u>Keeping of Records</u>

Firms are required to keep the following records for at least five years:

- The identity of the client;
- If the client acted in behalf of another party, the identity documents of that other party as well as the authority enabling that person to act on behalf of that party;
- The manner in which the identity above was verified;
- The nature of the business relationship;
- All accounts pertaining to the relevant transactions;
- The name of the person who was responsible for collecting all of the abovementioned records;
- All reports made to the FIC.

These records may be kept in electronic format.

An authorised representative of the FIC has access to any records kept by an accountable institution in terms of the FIA and may examine, make extracts from or copies of any such documents. The FIC does not require a warrant to have access to such records (as is the situation in South Africa {where documents are not public documents}).

A legal practitioner in possession of any information required by the FIC must, without delay, give all reasonable assistance to any authorised persons seeking access to the relevant records. Failure to provide such assistance is an offence punishable by a maximum fine of N$500,000 or 30 years imprisonment or both such fine and imprisonment.

Each legal practitioner firm must nominate a Compliance Officer that will be responsible for dealing with all the enquiries from the FIC and must inform all employees of such appointment. It is important however to remember that the making of a report to the FIC may not be shared with any party, and the way the FIA currently reads, such report may not be shared with other partners or staff in the firm.

A practitioner that fails to keep a report secret commits an offence punishable by N$500,000 or 30 years imprisonment or both such fine or imprisonment. Disclosure

of a report to the client so reported is also punishable by N$500,000 or 30 years imprisonment or both such fine or imprisonment.

5. REPORTING SUSPICIOUS AND UNUSUAL TRANSACTIONS

5.1. The duty to report

The FIA requires a legal practitioner to report to the FIC suspicious and unusual transactions relating to the proceeds of unlawful activities. Accordingly, a report may need to be made to the FIC where the legal practitioner knows or suspects that the firm:

5.1.1. Has or is about to receive an amount higher than the prescribed amount. The threshold of this amount is still to be advised by the FIC;

5.1.2. Has or is about to receive the proceeds of unlawful activities;

5.1.3. Is used or is about to be used in any other way for money laundering purposes;

5.1.4. Is a party to a transaction that resulted or is likely to result in the transfer of the proceeds of unlawful activities.

5.2. Reporting duty not affected by confidentiality

No duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance with a provision of the FIA.

The only circumstances where a legal practitioner may now refuse to report a client to the FIC without committing an offence punishable with N$500,000 or 30 years imprisonment, is in respect of information communicated to the legal practitioner so as to enable the practitioner to provide advice to the client, defend the client, or render other legal assistance to the client in connection with an offence with which the client is charged with, has been arrested or summoned to appear in court, or in respect of which an investigation is being conducted against the client.

5.3. Advising Clients

As already stated, a legal practitioner is prohibited from informing his client that a report has been made to the FIC. Doing so will be an offence punishable by up to 30 years imprisonment.

If it becomes evident from a consultation with the client that his intended action may result in a criminal offence, the legal practitioner is not precluded from advising the client that the proposed course of conduct is unlawful and should not be persisted with.

5.4. The Right to Withdraw

The FIA does not impact on a legal practitioner's ethical right and duty not to accept an unlawful mandate from a client or to withdraw from a matter and should a legal practitioner decide to withdraw before the conclusion of any transaction, no reporting duty can arise.

5.5. Duty to Report Limited to Professional Relationship

The duty imposed on a legal practitioner to report a transaction to the FIC is limited to the professional capacity in which the legal practitioner provides legal services. Dinner table or change room gossip imposes no reporting duty.

5.6. Internal Reporting

In order to avoid the difficulties with the concepts "knows", "suspects" and "ought reasonably to have known" and the severe penalties for failure to report a suspicion to the FIC, each firm must appoint a Compliance Officer to whom any doubtful issue is reported.

A report must be made within 15 days after the suspicion or belief arose.

No other person than the Compliance Officer may report to the FIC and no other employee or partner will have access to the website of the FIC. All subsequent correspondence from the FIC must be dealt with by the same Compliance Officer.

The client may under no circumstances be informed by any person that a report on his transaction was made to the FIC, even if there is just a suspicion that a report was made.

6. PROTECTION OF PERSONS MAKING REPORTS

No action, whether criminal or civil, lies against any person making a report. A person who made a report, or contributed in any way to a report that was made, is competent, but not compellable to give evidence in criminal proceedings arising from the report. No evidence concerning the identity of a person who made a report or furnished additional information concerning the report is admissible as evidence in criminal proceedings unless such person testifies at those proceedings.

7. DUTY TO IMPLEMENT INTERNAL RULES

The duty on legal firms to implement customer acceptance policies, internal rules, programmes, procedures and controls and the minimum content of such rules and programmes is set out in section 25 of the FIA and amplified by regulation 21 to the FIA.

Most important is that all firms adopt internal rules, ensure proper training of staff, appoint a Compliance Officer, adopt compliance programmes, and adopt audit functions to ensure efficiency of the procedures in place. Failure to do so is a criminal offence.

ANNEXURE "A"

Examples of unusual transactions

- A transaction involving an unusually large cash amount given the profile of the client.
- The depositing into several related accounts that are then aggregated into one account or disbursed to a common recipient or recipients.
- The purchasing of securities which are held on behalf of a client, where such a transaction does not seem appropriate given the client's profile.
- Buying or selling securities with no clear purpose.
- A frequent change of small bills to large bills.
- Transactions involving frequent deposits and withdrawals of large amounts of currency for no apparent personal or business reason.
- The payment of commissions or agents fees that appears excessive in relation to those normally payable.
- Purchase of commodities at prices significantly above or below market price.

- The intensive use of a previously inactive account for no apparent legitimate personal or business reason.
- The repayment of a long past due debit with no plausible explanation.
- Regularly buying securities and selling them for little profit or even at a loss.
- Trusts accounts that show substantial cash deposits and immediate withdrawals.

ANNEXURE "B"

Summary of Regulations 4 to 11 to the FIA (GN 74 of 2009, Gazette No. 4253)

Natural persons – Namibian citizens (Regulation 4)	**PART A**
Natural persons – Non-Namibian citizens (Regulation 4)	**PART B**
Companies and Close Corporations (Regulation 5)	**PART C**
Associations and Other Entities (Regulation 6)	**PART D**
Partnerships (Regulation 7)	**PART E**
Trusts	**PART F**

Where a person purports to act on behalf of any person or entity that seeks to establish a business relationship, reasonable steps should be taken to ensure such person has authority, and the information and verification as per PART A or PART B, whichever is applicable, must be obtained and made in respect of that person.

PART A

ESTABLISHMENT AND VERIFICATION OF IDENTITY OF A NATURAL PERSON – NAMIBIAN CITIZENS (Regulation 4)

INFORMATION TO BE OBTAINED	METHOD OF VERIFICATION
Full names Nationality Identity or passport number or date of birth Contact particulars Occupation or source of income Nature and location of business activities The source of funds involved in the transaction All the above also in respect of persons assisting legally incompetent persons	Official identification document of that person, i.e. ID document or passport, OR Document bearing photograph of the person, his or her names or initials an surname, date of birth and identity number i.e. a driving license, AND Information obtained from any other independent source i.e. birth certificate. Contact particulars need not be verified.

Residential address	Any utility containing confirmation of the person's residential address.

PART B

ESTABLISHMENT AND VERIFICATION OF IDENTITY OF A NATURAL PERSON: NON-NAMIBIAN CITIZENS (Regulation 4)

INFORMATION TO BE OBTAINED	METHOD OF VERIFICATION
Full names Nationality National identity or passport number or date of birth Contact particulars Occupation or source of income Nature and location of business activities The source of funds involved in the transaction All the above also in respect of persons assisting legally incompetent persons	Passport from the country of which that person is a citizen, AND Information obtained from any other independent source. Contact particulars need not be verified. Residential address need not be verification.

Residential address	

PART C

ESTABLISHMENT AND VERIFICATION OF COMPANIES AND CLOSE CORPORATIONS (Regulation 5)

INFORMATION TO BE OBTAINED	METHOD OF VERIFICATION
Registered name The name under which it conducts business Its registration number The address from which it operates	In respect of a company, the most recent versions of:- Certificate of Incorporation (CM1) AND Notice of Registered Office and Postal Address (CM 22), both bearing the stamp of the Registrar of Companies and signed by the company secretary, AND
In the case of a foreign company, the name under which it conducts business in Namibia and the registered address in the country where it is incorporated The nature of its business Income and VAT registration numbers	Information obtained from an independent source The memorandum of association in the case of a company The founding statement in the case of a close corporation
The information as set out in PART A or PART B, whichever is applicable, for each of the following natural persons:	With regards to the natural persons, the same as PART A or PART B, whichever is

The manager of a company or, in the case of a close corporation, each member; Each natural person who purports to establish a business relationship on behalf of the company or close corporation; Each person holding 25% or more of the voting rights in a company. If the entity seeking to establish a business relationship on behalf of the close corporation or company is not a natural person, the information required in the relevant PART dealing with such entity must also be obtained and verified	applicable

PART D

ESTABLISHMENT AND VERIFICATION OF ASSOCIATIONS AND OTHER ENTITIES (Regulation 6)

INFORMATION TO BE OBTAINED	METHOD OF VERIFICATION
Registered name of the entity Place of business Its registration number Principle activities The information as set out in PART A or PART B, whichever is applicable, for the person who seeks to establish a business relationship on behalf of that entity.	Constitution or other founding documents of such entity, AND Information obtained from an independent source With regards to each natural person purporting to represent the entity, the same as PART A or PART B, whichever is applicable

PART E

ESTABLISHMENT AND VERIFICATION OF PARTNERSHIPS (Regulation 7)

INFORMATION TO BE OBTAINED	METHOD OF VERIFICATION
Name of the partnership Place of business Where applicable, the registration number The information as set out in PART A or PART B, whichever is applicable, for each partner, including silent partners and partners *en commandite*, and every other person who seeks to establish a business relationship on behalf of the partnership	Partnership agreement With regards to each natural person purporting to represent the entity, the same as PART A or PART B, whichever is applicable

PART F

ESTABLISHMENT AND VERIFICATION OF TRUSTS (Regulation 8)

INFORMATION TO BE OBTAINED	METHOD OF VERIFICATION
Registered name of the trust, if any Registered number, if any The country where the trust was set up The management company of the trust, if any The full name, if available, The information as set out in PART A or PART B, whichever is applicable, for each person who seeks to establish a business relationship on behalf of the trust. In respect of each trustee, each beneficiary if named in the trust deed and the founder of the trust, the following:- id number or passport number or date of birth;	The deed of trust or any other founding document by which the trust was established The authorisation from the Master of the High Court given to each trustee to act on behalf of the trust, OR In the case of a foreign trust, the document from that country reflecting these particulars Identification documents sufficient to verify the natural persons identity number, passport number or date of birth
