



South African Reserve Bank

Memorandum on the objects of Regulation 24 and the Voluntary Disclosure Programme

PART I: Regulation 24

1 Objects of Regulation 24

- 1.1 Regulation 24 will supplement the Exchange Control Regulations of 1961 ("Regulations") in order to achieve the following objectives –
 - 1.1.1 to allow Treasury, or a person authorised by Treasury, the right to regularise contraventions of the Regulations;
 - 1.1.2 to allow Treasury, or a person authorised by Treasury, to invite by providing written notice, applications for the regularisation of certain types of contraventions of the Regulations;
 - 1.1.3 to set out the procedures, processes and requirements applicable to, authorising the regularisation and the subsequent application for and regularisation of contraventions of the Regulations;
 - 1.1.4 to address the consequences under the Regulations of the regularisation of a contravention of the Regulations;
 - 1.1.5 to prohibit the regularisation of contraventions of the Regulations in certain instances;

- 1.1.6 to provide for the payment of or exemption from the payment of a levy relating to the regularisation of contraventions of the Regulations;
- 1.1.7 to allow for the withdrawal or setting aside of a decision to regularise any contravention of the Regulations based on material non-disclosure;
- 1.1.8 to allow for objections against the refusal of an application for regularisation or the subsequent withdrawal or setting aside of a decision to regularise a contravention; and
- 1.1.9 to provide for matters incidental to that above.

2 Clause by clause analysis

Subregulation 1

Subregulation 1 allows the Treasury, or a person authorised by the Treasury, to authorise the regularisation of any contravention of the Regulations by allowing disclosure of contraventions. This will result in disclosure and regularisation of a contravention taking place under the Regulations and pursuant to procedures, processes and requirements set forth in the Regulations.

Subregulation 2

Subregulation 2 allows for Treasury, or a person authorised by Treasury, to invite (by issuing a written notice such as the Voluntary Disclosure Programme in Part II hereof) persons who are subject to the Regulations and who may have contravened the provisions of the Regulations, to disclose such contraventions on application and by the making of a sworn affidavit or solemn declaration. This is the basis upon which regularisation of contraventions will take place.

Subregulation 2 further contemplates that the contravention of the Regulations (and in respect of which persons who are subject to the Regulations are invited to apply to regularise contraventions of the Regulations) must have occurred prior to a date which will be prescribed (such as in the Voluntary Disclosure Programme in Part II hereof).

The manner in which any foreign asset and which relates to a contravention, is to be disclosed and the valuation thereof is set out in this subregulation.

Subregulations 3, 4 and 5

These subregulations relate to circumstances in which persons, (i) will be prohibited from applying to regularise and from regularising any contraventions of the Regulations by them, namely if there is an investigation pending into their affairs at the relevant time or if an investigation into their affairs has commenced; (ii) may apply, notwithstanding (i) above, for regularisation of any contravention and where it would be in the interests of administration to grant such regularisation of a contravention.

Subregulation 5 constitutes a deeming provision relating to when a person is deemed to be aware of any pending or current investigation into their affairs.

Subregulation 6

This subregulation allows a person to seek a non-binding opinion on eligibility for relief from any contravention of the Regulations.

Subregulations 7, 8 and 9

These subregulations deal with the circumstances in which regularisation of a contravention must be granted and the consequences thereof and which relate to, not pursuing criminal prosecution relating to such contravention, granting of relief with regard to the payment of a levy or imposing a levy, the granting of

credit in respect of the unutilised portion of a foreign investment allowance and other conditions applicable thereto.

Provision is also made for delivery of a notice regarding the granting or refusal of relief in respect of a contravention of the Regulations; and if relief is granted the conditions to be included in such notice.

Subregulation 10

This subregulation deals with the withdrawal of any approval granted and declaring any approval void where there has been material non-disclosure in any application for regularisation of a contravention of the Regulations. In such circumstances, reasons are to be provided, levies paid will not be refunded but used as payment against any further levy imposed and criminal prosecution may be initiated. Reliance may, however, not be placed on any information disclosed in any application pursuant to Regulation 24 in a subsequent prosecution of a contravention of the Regulations.

Subregulations 11 and 12

These subregulations relate to the lodging of objections against a decision to refuse an application for regularisation or the subsequent withdrawal of an application for regularisation of a contravention and the procedures application thereto.

Subregulations 13, 14, 15, 16 and 17

These subregulations deal with, the payment of a levy, the amount thereof (which will be prescribed at the relevant time), the funds to be used to pay such levy (which must be foreign funds), the possibility of using local funds to pay a levy where there are no foreign funds available but subject to the imposition of an additional levy, as prescribed, the conversion of foreign funds into Rand for

purposes of payment of the levy (using the ruling spot rate on the date of payment) and the payment of all levy amounts to an account with the Corporation for Public Deposits for subsequent transfer to the National Revenue Fund.

Subregulation 18

This subregulation is a deeming provision regarding the regularisation of contraventions and which will then be deemed not to have been contraventions of the Regulations.

Subregulation 19

This subregulation confirms that Regulation 24 may not be relied upon for relief claimed thereunder in respect of any contravention of the Regulations unless authorised by the issue of a notice and in accordance with the provisions of such notice.

PART II: Voluntary Disclosure Programme

1 Objects of the Voluntary Disclosure Programme

The Voluntary Disclosure Programme is a programme authorised by Treasury and implemented by Exchange Control pursuant to the Regulations in order to achieve the following objectives –

- 1.1 to allow persons who are subject to the Regulations and who have contravened any provision of the Regulations, the opportunity to regularise such contravention(s);
- 1.2 to ensure maximum disclosure by residents of their foreign assets;

- 1.3 to enable persons who have contravened the provisions of the Regulations to deal with their assets freely (once such contravention is regularised);
- 1.4 to extend the tax base by disclosing previously unreported foreign assets and accordingly this Voluntary Disclosure Programme shall support the programme initiated by the South African Revenue Services regarding contraventions of the Income Tax Act.

2 **Section by section analysis**

Section A

The section allows residents (both natural persons and corporate entities) who have contravened certain specified provisions of the Regulations to regularise such contraventions by declaring and disclosing such contraventions. Declarations and disclosures pursuant to this section attract no levy and are made through and Authorised Dealer. In addition residents making declarations and disclosures under the section need not complete an application as contemplated in Regulation 24 of the Regulations but need merely make a declaration and disclosure to an Authorised Dealer providing the information requested and such declaration and disclosure will regularise such contravention(s).

Such declarations and disclosures, in respect of natural persons, relate to the declaration by –

- 2.1 and who are immigrants, by 31 October 2011, of their foreign assets;
- 2.2 who earned income abroad prior to 1 July 1997 and who have not repatriated such income to the Republic, of such income prior to 31 October 2011;

- 2.3 who raised foreign loans with recourse to the Republic in contravention of the Regulations, prior to 28 February 2010, to finance foreign assets, of such foreign loans prior to 31 October 2011;

Such declarations and disclosures, in respect of corporate entities, relate to residents –

- 2.4 who have foreign investments which have been approved, but who have not, in contravention of an approval obtained, (i) submitted financial statements and progress reports; (ii) lodged share certificates; (iii) placed on record the expansion of their foreign investments; (iv) declared dividends and/or repatriated dividends to the Republic prior to 26 October 2004; and (v) placed on record the disposal of all and/or part of an approved foreign investment, declaring such irregularities and rectifying the irregularity by 31 October 2011;
- 2.5 who have raised foreign loans with recourse to the Republic in contravention of the Regulations, prior to 28 February 2010, declaring such foreign loans prior to 31 October 2011. Provided the terms of such loan accords with Exchange Control policy, such declaration regularises the contravention;
- 2.6 who have acquired unauthorised foreign investments, prior to 28 February 2010, declaring such investments prior to 31 October 2011 and providing full details with regard thereto. Provided the foreign investment accords with Exchange Control policy, such declaration would regularise the contravention.

Where residents have contravened the provisions of the Regulations and the contravention does not fall within the category (and accords with the conditions) prescribed in this Section A, then the resident must disclose such contravention and apply for the administrative relief in terms of Section C of the Voluntary Disclosure Programme.

Section B

This section allows residents who have contravened the provisions of the Regulations by, (i) entering into so called loop structures, prior to 28 February 2010 and/or; (ii) acquiring or holding foreign assets through a discretionary trust, which is not a resident, prior to 28 February 2010, to regularise such contraventions on application to Exchange Control. Applications in terms of this section must be made to an Authorised Dealer for onward submission to Exchange Control, are made pursuant to the provisions of Regulation 24 and are subject to the payment of a levy.

Applications under this section will be in a form to be prescribed and which will be made available by Exchange Control on its website. Applicants will be required to make a sworn affidavit or solemn declaration regarding the contravention and which will further address the aspects contemplated in Regulation 24.

With regard to loop structures which include the so-called "74/26 Structure" (the details of which are set forth in the Voluntary Disclosure Programme), applicants must apply for regularisation of the transaction establishment funds, the transaction funds and the transaction growth funds (all as defined in the Voluntary Disclosure Programme), unwind such transactions within 180 days of the application and pay a levy of an amount equal to 10 per cent of the transaction establishment funds, the transaction funds and the transaction growth funds. The payment of the levy is dealt with in Section C hereunder.

Applicants may object against a decision, to refuse an application for regularisation or to subsequently withdraw or declare void an application previously approved, in the manner set forth in Section C hereunder.

With regard to residents who are donors (or the deceased estate of a donor) in relation to a discretionary trust, they may elect that a foreign asset(s) held by that trust be deemed to be held by the resident. The founding document of the trust, as at 28 February 2010, must be submitted together with the application.

A levy equal to 10 per cent of the value of the foreign asset will be payable. The market value will be that on 28 February 2010. The payment of the levy is dealt with in Section C hereunder.

Applicants may object against a decision to refuse an application for regularisation or to subsequently withdraw or declare void an application previously approved, in the manner set forth in Section C hereunder.

All applications under this section for regularisation must be made by 31 October 2011.

Section C

This section allows residents (both natural persons and corporate entities) who have contravened the provisions of any of the Regulations (not specifically addressed with in Section A and B above), at any time prior to 28 February 2010 and which contraventions include, inter alia, the ownership of an unauthorised foreign asset(s), to regularise such contravention on application to Exchange Control.

The only contravention of the Regulations which may not be regularised and therefore does not form part of the Voluntary Disclosure Programme, is a contravention relating to an asset which constitutes a bearer instrument. Persons who have contravened the Regulations must apply for regularisation of such contraventions before 31 October 2011. Applications in terms of this section can be made directly to Exchange Control or to Exchange Control via an Authorised Dealer. Applications are made pursuant to the provisions of Regulation 24 and are subject to the payment of a levy.

Applications under this section will be in a form to be prescribed and which will be made available by Exchange Control on its website. Applicants will be required to make a sworn affidavit or solemn declaration regarding the contravention and which will further address the aspects contemplated in Regulation 24.

A levy equal to 10 per cent of the market value, as at 28 February 2010, of the foreign asset disclosed or amount involved in the contravention of the Regulations is payable.

This section also highlights certain types of contraventions which may form the subject matter of an application for regularisation such as, (i) the sale, cession or assignment by residents of intellectual property without approval; (ii) foreign liabilities incurred without approval and with recourse to the Republic; and (iii) the acquisition, whether directly or indirectly, of foreign assets by unlawfully retaining funds abroad or irregularly remitting such funds abroad, but does not thereby exclude applications in respect of any other contravention(s) of the Regulations.

With regard to an objection against a decision to refuse an application for regularisation or to subsequently withdraw or declare void any application previously approved, this section details the procedure applicable thereto. Objections are to be lodged with the Head of Department of Exchange Control and will be reviewed by a panel of not less than three members. Reasons for a decision will be provided. This part applies equally to objections under Section B.

With regard to the payment of a levy, a levy of 10 per cent is payable and must be introduced from funds held abroad, save that where there are no offshore funds the amount of the levy will increase to 12 per cent and can be paid from local funds. Payments must be made no later than three months after receiving

notification of administrative relief. This part applies equally to objections under Section B.

As these applications are regulated by Regulation 24, certain provisions of Regulation 24 are recorded herein for information purposes. These are however addressed in Part I hereof and are therefore not again analysed in this section. The provisions of Regulation 24 which are recorded in this section relate to subregulation (2) and subregulation (8). This should not however be interpreted as an indication that the other subregulations of Regulation 24 are not applicable to such applications.