



South African Reserve Bank

## **VOLUNTARY DISCLOSURE PROGRAMME**

### **1 DISCLOSURES AND ADMINISTRATIVE RELIEF**

Pursuant to the announcement by the Minister of Finance in the Budget Speech of 17 February 2010, the Exchange Control Department of the South African Reserve Bank (hereinafter referred to as "Exchange Control") hereby offers an opportunity to South African residents to regularise their exchange control affairs by making a voluntary disclosure to Exchange Control of contraventions of the provisions of the Exchange Control Regulations, 1961 (hereinafter referred to as the "Regulations"), and which contraventions include, inter alia, the ownership of an unauthorised foreign asset(s). The contraventions of the Regulations and which form part of this voluntary disclosure programme are set forth hereunder.

South African residents who have contravened the Regulations, are assured that where a full disclosure is made in the prescribed manner and administrative relief is granted by Exchange Control, no further action against the South African resident involved in such contraventions will be taken or initiated by Exchange Control.

#### **A DISCLOSURE AND REGULARISATION**

Disclosures and declarations under this section must be made to an Authorised Dealer for onward submission to Exchange Control.

- 2 Disclosures and declarations made under this section will not attract any levy pursuant to the provisions of regulation 24 of the Regulations, need not be made in terms of regulation 24 and merely require disclosure and a declaration to an Authorised Dealer –

## 2.1 1.1 Natural persons

### (a) Immigrants

In terms of Section B.2(F) of the Exchange Control Rulings, immigrants are required to declare to an Authorised Dealer whether they are possessed of any foreign assets and if so, are required to give an undertaking to the effect that they will not place such foreign assets at the disposal of any third party normally resident in the Republic.

All immigrants who have not as yet made this formal declaration to an Authorised Dealer must do so before 31 October 2011. Such a declaration would regularise the qualifying resident's possession and retention abroad of such foreign assets.

### (b) Foreign inheritances and legacies

Residents who became entitled to a foreign inheritance, prior to 17 March 1998, were required to declare such foreign assets via an Authorised Dealer to Exchange Control for exemption from the provisions of Exchange Control Regulation 6 and/or 7.

Residents, who have not as yet made such declarations via an Authorised Dealer, must do so before 31 October 2011. Such a declaration would regularise the qualifying resident's possession and retention abroad of such foreign assets.

### (c) Foreign earned income

Residents who earned income abroad prior to 1 July 1997 were, in terms of Exchange Control Regulation 6, required to repatriate such foreign earned income to the Republic. Residents who have not repatriated foreign income earned prior to 1 July 1997 to the Republic are required to declare such income via an Authorised Dealer to

Exchange Control, before 31 October 2011. Such a declaration would regularise the qualifying resident's possession and retention abroad of such foreign assets.

(d) Unauthorised foreign loans

Residents who raised foreign loans abroad with recourse to the Republic in contravention of the Regulations, prior to 28 February 2010 to finance the acquisition of foreign assets must declare such foreign loans before 31 October 2011 via an Authorised Dealer to Exchange Control. Such a declaration would regularise such foreign loans.

**1.2 Corporate entities**

(a) Approved foreign investments

Residents who have foreign investments which have been approved by Exchange Control and/or an Authorised Dealer but who have not, in respect of any period prior to 28 February 2010 contrary to the provisions of an approval obtained –

- (aa) submitted to Exchange Control on an annual basis, financial statements and progress reports with regard to such approved foreign investment(s);
- (bb) lodged share certificates in respect of such approved foreign investments with Authorised Dealers (unless exempted from so doing);
- (cc) placed on record, with Exchange Control, the expansion of their approved foreign investment(s);
- (dd) declared dividends and repatriated such dividends to the Republic prior to 26 October 2004;

(ee) placed on record, with Exchange Control, the disposal of all and/or part of an approved foreign investment (which would include the dilution of the residents interest in such foreign investment by the issue of new shares to a non-resident or other South African resident) and/or where the proceeds of such disposal have not been repatriated to the Republic,

must prior to 31 October 2011 declare such fact to Exchange Control and –

(aa) in respect of financial statements and progress reports, submit all outstanding statements and reports to Exchange Control through an Authorised Dealer;

(bb) in respect of share certificates, lodge such share certificates with an Authorised Dealer or motivate a request to be exempted from such requirement;

(cc) in respect of an expansion of a foreign investment, disclose full details of such expansion, the source of funding relating thereto and any recourse to the Republic in respect thereof;

(dd) in respect of dividends, disclose the value of such dividends and what the dividends, not repatriated to the Republic, have been used for;

(ee) in respect of a dilution/disposal of interest, make full disclosure in respect thereof including the use of the proceeds, if any, regarding such dilution/disposal.

Such a declaration(s) (and compliance with that set forth above) would regularise such contravention(s). No levy will be payable in respect of such declaration and regularisation save and unless the act results in some other contravention of the Regulations not specifically referred to above. A declaration relating to the failure to declare dividends and

which have not been repatriated to the Republic and where such dividends were not used for purposes of the business operations of the approved foreign investment and/or the dilution/disposal of an interest in an approved foreign investment the proceeds of which were not repatriated to the Republic, must be disclosed and dealt with pursuant to section C below and may attract the payment of the levy contemplated therein.

(b) Unauthorised foreign loans

Residents who raised foreign loans abroad with recourse to the Republic in contravention of the Regulations, prior to 28 February 2010, must declare such foreign loans before 31 October 2011 via an Authorised Dealer to Exchange Control. Provided the terms of such foreign loans, including the interest payable thereon and terms of repayment accord with the exchange control policy applicable to foreign loans, such declaration would regularise such foreign loans.

(c) Unauthorised foreign investments

Residents who have acquired foreign investments prior to 28 February 2010 and who have not obtained approval from Exchange Control and/or an Authorised Dealer for such foreign investment must declare such foreign investments and provide full details with regard thereto before 31 October 2011 via an Authorised Dealer to Exchange Control. Provided such foreign investment accords with the exchange control policy applicable to such foreign investments, such declaration would regularise the contravention. Where such foreign investment does not accord with the exchange control policy applicable to foreign investments, then such foreign investment must be disclosed and dealt with pursuant to section C below and may attract the payment of the levy contemplated therein.

**B ADMINISTRATIVE RELIEF FOR LOOP STRUCTURES AND DONORS TO DISCRETIONARY TRUSTS**

Applications under this section must be made to an Authorised Dealer for onward submission to Exchange Control.

3 2. Applications made under this section are to be made pursuant to the provisions of regulation 24 of the Regulations -

(a) Re-investment of foreign assets or the proceeds thereof into the Republic ("Loop Structures"/ "74/26 Structures")

(aa) Pursuant to regulation 24 of the Regulations Exchange Control will grant administrative relief to qualifying residents (both natural persons and corporate entities) who have, prior to 28 February 2010, entered into a transaction or a series of transactions (hereinafter referred to as "Transactions"), the purpose, and/or effect of which is to export capital, directly or indirectly from the Republic. These Transactions, which contravene the Regulations, including, *inter alia*, Regulation 10(1)(c), invariably entail the formation by (or at the instance of) a resident of an offshore structure (hereinafter referred to as "Offshore Structure") which, by a re-investment into the Republic, acquires shares or some other interest in a South African resident company or a South African asset.

4 (bb) The most prevalent Transaction(s) utilised in this regard usually result(s) in the so-called "74/26 Structure" in terms of which (subject to deviations from case to case which do not alter the impact thereof on the Regulations) –

(i) the resident, either directly or indirectly, procures a non-resident company or entity in which the resident or a non-resident trust, also procured at the direct or indirect instance of the resident, acquires a substantial or total shareholding;

- (ii) the non-resident company or the non-resident trust would acquire 74 per cent or some lesser substantial shareholding in a resident company in which the resident referred to in (i) above (or his/her family) holds the remaining shareholding; and
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  - (iii) the resident would thereafter dispose of certain carefully selected South African growth assets to the resident company in (ii) above, on the basis that the consideration for such disposal would be discharged by means of raising a loan account in the resident company. Alternatively a loan would be advanced to the resident company by the resident for purposes of acquiring such assets.
- 5 (cc) Exchange Control regards the above-mentioned Transactions (and various derivatives thereof) as a contravention of the Regulations, in that these Transactions result in and/or have the potential to result in the direct or indirect export of capital abroad (by the resident company to the non-resident company or other relevant non-resident trust or entity for the ultimate benefit of a resident, of dividends including dividends arising from increased profits, revenue reserves and/or capital reserves accruing from the introduction of the assets in 4.1 above, to the resident company).
- 6 (dd) Exchange Control investigations in connection with these types of Transactions have revealed that-
  - 6.1 (i) certain residents have transferred, from the Republic or have accumulated abroad, funds (irrespective of whether or not such transfer or accumulation has taken place in contravention of the Regulations) which have been utilised to establish an Offshore Structure

(hereinafter referred to as "Transaction Establishment Funds");

6.2 (ii) after the establishment of the Offshore Structure and the Offshore Structure's investment into the Republic has taken place, (including the shareholding in the resident company contemplated in (bb)(ii) above) funds (including dividends, profits and/or loans) would have been exported from the Republic to the Offshore Structure (hereinafter referred to as "Transaction Funds"); and

6.3 (iii) the Transaction Funds may, as a consequence of their investment or other economic application offshore, have resulted in an accretion value over and above the nominal value of those Transaction Funds (hereinafter referred to as "Transaction Growth Funds").

7 (ee) Residents who have entered into these Transactions –

(i) must apply for regularisation of the transactions enumerated under points (dd)(i) to (dd)(iii) before 31 October 2011;

(ii) must within a period of one hundred and eighty (180) days reckoned from the date of submission of the application, provide suitable documentary evidence to the effect that the shares or other interests in the South African company (see (bb)(ii) above) held by a non-resident within any of the foregoing structures had been disposed of at historic cost (original Rand amount introduced) to a resident. A levy of an amount equal to 10 per cent will be charged on the transaction establishment funds, transaction funds and the transaction growth funds, where applicable. With regard to the payment of

the levy, the provisions of section C.3(d) hereunder will apply; and

- (iii) may object against a decision of Exchange Control to refuse an application for regularisation (or to subsequently withdraw or declare void any application previously approved) in the manner and on the basis contemplated in section C.3(c) hereunder.

(b) Special rules for donors to discretionary trusts

(aa) A resident who is a donor (or the deceased estate of a donor) in relation to a discretionary trust which is not a resident, may elect that any foreign asset contemplated in subsection (bb) below which was held by that discretionary trust on 28 February 2010, must be deemed to be held by that resident.

(bb) Subsection (aa) above applies in respect of a foreign asset of a discretionary trust which –

- (i) was acquired by that discretionary trust by way of a donation made by the qualifying resident contemplated in subsection (aa) above;
- (ii) has been wholly or partly derived from any unauthorised asset or from any amount not declared by the donor to the Commissioner as required by the Estate Duty Act, 1955 (Act No. 45 of 1955) or Income Tax Act, 1962 (Act No. 58 of 1962); and
- (iii) has not at the time of that election vested in any beneficiary of that discretionary trust.

(cc) Where a resident has made an election as contemplated in subsection (aa) above in relation to a foreign asset that resident must be deemed to have held the foreign asset for purposes of this administrative relief, from the date that the discretionary trust acquired that foreign asset until that foreign asset is

disposed of by that discretionary trust to any other person, in which case that person shall be deemed to have disposed of that foreign asset for consideration equal to its market value on the date of disposal.

- (dd) In order to make the election contemplated in subsection (aa) above, the resident must make application before 31 October 2011 and the resident must submit the founding document (including any amendments, codicils and addendums) of the discretionary trust as at 28 February 2010 together with the application.
- (ee) A levy equal to 10 per cent of the value of the foreign asset(s) disclosed will be payable. The market value, in the foreign currency of the foreign asset, shall be that on 28 February 2010. The provisions of section C.3(c) and (d) hereunder are applicable to applications in terms hereof.

## **C GENERAL ADMINISTRATIVE RELIEF**

Applications under this section must be made to Exchange Control directly or through an Authorised Dealer for onward submission to Exchange Control.

- 8 Applications made under this section are to be made pursuant to the provisions of regulation 24 of the Regulations.

### Contraventions of Exchange Control Regulations

- (a) Pursuant to regulation 24 of the Regulations, Exchange Control will grant administrative relief to a person (both natural persons and corporate entities) who has contravened the provisions of the Regulations, at any time prior to 28 February 2010, and which contraventions include, inter alia, the ownership of an unauthorised foreign asset(s) provided that -

- (aa) persons who have so contravened the Regulations must apply for the regularisation of such contraventions before 31 October 2011; and
  - (bb) persons may apply, whether in a personal, representative or other capacity for such administrative relief;
  - (cc) a levy of an amount equal to 10 per cent of, the market value of the unauthorised foreign asset disclosed as at 28 February 2010 or where no foreign assets remain, a levy of 12 per cent on the amount exited in contravention of the Regulations;
  - (dd) persons may not apply for the relief or the regularisation, pursuant to this voluntary disclosure programme, of any asset which constitutes a bearer instrument.
- (b) With regard to the regularisation of contraventions contemplated in (a) above, it is recorded that such contraventions would include, but will not be limited to -
  - (aa) the sale, cession or assignment by residents of intellectual property, owned or developed by South African residents, to approved foreign investments or other non-residents without having obtained Exchange Control approval. In this regard full disclosure of the sale or assignment will be required including the identity of the parties involved and royalties paid by residents pursuant to any disposal;
  - (bb) foreign liabilities incurred by residents with recourse to the Republic and where South African assets were used as collateral, without having obtained Exchange Control approval. In this regard full disclosure of the underlying transaction relating to the liability will be required, including details of the liability itself and the parties involved;

- (cc) the acquisition of a direct or indirect interest in a foreign asset (including foreign cash balances) resulting from the retention of funds abroad which should have been repatriated to the Republic or by irregularly remitting funds abroad in contravention of the regulations or any approval granted. Such transactions include, but are not limited to, the acquisition of foreign securities (including unauthorised share swaps), the retention abroad of export proceeds, over and under invoicing and unauthorised spending on credit cards. In this regard full disclosure of the transaction, including any underlying transactions will be required and details of all the parties involved therein are to be provided.
- (c) With regard to any objection against a decision of Exchange Control to refuse an application for regularisation (or to subsequently withdraw or declare void any application previously approved) -:
- (aa) an applicant aggrieved by such decision, may lodge an objection with the Head of Department of Exchange Control and must deliver a notice of such objection within thirty days of the date of delivery of a notice from Exchange Control refusing administrative relief or withdrawing or declaring void relief previously granted. The form of the notice of objection will be made available by Exchange Control on its website;
  - (bb) the Head of Department must refer the matter to a review panel consisting of not less than three members, two of whom must be in a senior management position within the Exchange Control Department of the South African Reserve Bank;
  - (cc) the review panel shall, deliver a notice of its decision to the applicant and in such notice shall provide the reasons for its decision;

- (dd) should the review panel overturn the original decision of Exchange Control, then the review panel shall issue the notice contemplated in subregulation 9 of regulation 24 of the Regulations.
- (d) With regard to the payment of the levy:
- (aa) the levy of 10 per cent payable must be introduced from funds held abroad;
  - (bb) where a person, granted administrative relief, has no offshore funds, a local payment will be permitted subject to payment of an additional levy of 2 per cent, which would then result in a total levy of 12 per cent;
  - (cc) levy payments must be paid by a person to whom administrative relief has been granted by no later than three months after receipt of notification advising of such administrative relief;
  - (dd) Authorised Dealers must pay levies received in terms of (cc) above, into an account held for that purpose at the Corporate for Public Deposits established in terms of section 2 of the Corporation for Public Deposits Act, 1984 (Act No 46 of 1984).

With regard to the applications contemplated in sections B and C above, the following provisions of regulation 24 of the Regulations should be noted. However, this does not exclude any of the other provisions of regulation 24 which remain applicable.

- (a) With regard to applications made pursuant to regulation 24 of the Regulations, these shall be made on the basis that -
  - (aa) the affidavit or declaration made by such person must be made voluntarily;

- (bb) the affidavit or declaration must be in respect of a contravention by such person of the Regulations prior to 28 February 2010;
- (cc) such person, when making application in respect of any foreign asset, must –
  - (i) disclose the market value of that foreign asset in the foreign currency of the country in which the foreign asset is situated
  - (ii) include a description of the identifying characteristics and location of that foreign asset;
  - (iii) submit, in respect of the market value, in the foreign currency of that foreign asset, as at 28 February 2010 –
    - (a) a valuation certificate by a valuator of the country where that foreign asset is located; and/or
    - (b) a valuation by a sphere of government of the country where that foreign asset is located;
    - (c) which constitutes a financial instrument, an original or certified copy of a statement of account indicating the balance or market value;
    - (d) any other form of proof of value of that foreign asset as the Treasury may on good cause shown allow to be submitted;
- (dd) such person, when making application in respect of any contravention of the Regulations, must provide such additional information relating to such contravention, as may be required in terms of the voluntary disclosure programme.

- (b) With regard to the regularisation of contraventions pursuant to this voluntary disclosure programme, Exchange Control will not pursue a criminal prosecution but may -
  - (aa) grant to such person 100 per cent relief in respect of any levy payable by such person resulting from the contravention of the provisions of the Regulations; and/or
  - (bb) grant a credit in respect of the unutilised portion of the foreign invest allowance of such person; and/or
  - (cc) impose a levy in respect of contraventions of the provisions of the Regulations; and/or
  - (dd) impose any other conditions as may be prescribed.

An application form, which will constitute the prescribed form, will be made available by Exchange Control on its website and which will apply to all applications to be made for administrative relief.

Applications for administrative relief will be disclosed to the South African Revenue Service, where such is relevant for administration of tax legislation. The concessions in terms of this voluntary disclosure programme shall not absolve such qualifying resident from having to apply for tax relief, if applicable and will not regularise any other unlawful activity or contravention of any other law.

The Head of Department of Exchange Control shall, within twelve months of the conclusion of the period for administrative relief, provide the Minister of Finance with a summary of all administrative relief granted during the period which summary shall be in a format which does not disclose the identity of the person applying for administrative relief.

Authorised Dealers are requested to encourage their effected clients to take the necessary steps to apply for the relief contemplated in terms hereof prior to 31 October 2011. Exchange Control will clarify any aspect of the voluntary disclosure programme on enquiry by any Authorised Dealer on behalf of its affected clients.

This voluntary disclosure programme will also be published on the South African Reserve Bank web site.

**HEAD OF DEPARTMENT**