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INTRODUCTION

The Financial Intelligence Centre (the **FIC**), established in 2003 following the promulgation of the Financial Intelligence Centre Act No. 38 of 2001 (the **FIC Act**), is South Africa's national centre for the gathering, analysis and dissemination of financial intelligence. Over recent years, the regulatory framework for South Africa's anti-money laundering and counter-financing of terrorism programs has widened its scope and imposed onerous obligations on accountable institutions including, and more particularly for the purpose of this article, legal practices.

HISTORY AND BACKGROUND

The FIC Act, together with the Prevention of Organised Crime Act No. 121 of 1998 (the **POC Act**) and the Protection of Constitutional Democracy against Terrorist and Related Activities Act No. 33 of 2004 (the **POCDATARA Act**), combats and criminalises money laundering and the financing of acts of terrorism.

Following its promulgation in 2003, the FIC Act has undergone numerous amendments:

1. in 2010, legislative changes enacted the requirement for accountable and reporting institutions to submit cash threshold reports and the authorisation of supervisory bodies to conduct inspections and apply sanctions where they find non-compliance with the FIC Act;
2. in 2017, the second tranche of amendments to the FIC Act were introduced in terms of the Financial Intelligence Amendment Act No. 1 of 2017 (the **FIC Amendment Act**). The FIC Amendment Act implemented measures to strengthen the transparency and integrity of the South African financial system in its objectives to combat financial

crimes and concomitantly brought South Africa's anti-money laundering and counter-terror financing legislation in line with the international standards of the Financial Action Task Force (the **FATF**), of which South Africa is a member. The amendments included, *inter alia*, the following:

2.1. identification of beneficial owners to prevent natural persons from misusing legal entities for *mala fide* purposes;

2.2. identification of domestic prominent influential persons and foreign prominent public officials;

2.3. adoption of a risk-based approach, as opposed to a rules-based approach, in the identification and assessment of money laundering and terrorist financing risks. Factors to consider when identifying and/or treating risk include:

2.3.1. products and services (third-party payments, cash/EFT, cross border flow of money and duration of relationship/transaction);

2.3.2. delivery channels (direct relationship and working through intermediary, face to face or non-face to face);

2.3.3. location (South Africa/foreign jurisdiction, high risk countries, client confidentiality in foreign jurisdiction and countries with weak regulatory oversight);

2.3.4. client type (natural/legal person, complex structures, politically exposes, prominence, adverse information, negative media, money laundering findings and transactional pattern); and

2.3.5. other factors (money laundering approach, sanctions, strategy of entity, regulatory fines in similar industries and learnings/typologies);

2.4. inspection powers for regulatory compliance purposes in accordance with the Constitution; and

2.5. implementation of United Nations Security Council Resolutions; and

3. in 2019, the FIC Act was further amended to widen the scope of the application of the FIC Act by, *inter alia*:

3.1. including additional categories of accountable institutions and businesses that fall under the FIC's scope;

3.2. enabling the FIC to take over the responsibility of overseeing and enforcing compliance with the FIC Act in respect of the non-financial sector activities involving estate agents, gambling institutions, trust and company service providers and legal practitioners; and

3.3 implementing targeted financial sanctions.

FUNCTIONS OF THE FIC

The responsibilities and/or functions of the FIC can be broadly outlined as follows:

1. processing, analysing and interpreting information reports;
2. monitoring and giving guidance to accountable institutions; and
3. supervising and enforcing compliance with the FIC Act. The supervisory bodies for legal practitioners are the Legal Practice Council (the **LPC**) and the FIC.

COMPLIANCE OBLIGATIONS OF ACCOUNTABLE INSTITUTIONS

Accountable Institutions have the following compliance obligations:

1. **customer due diligence** – the accountable institution must verify the identity of

prospective clients and identify all persons authorised to act on behalf of such clients. Accountable institutions must understand and obtain information on the nature of the business relationship, the intended purpose of the business relationship and the source of funds. The nature and extent of verification is to be determined in accordance with the risk management and compliance program (**RMCP**). **Accountable institutions may not do business with an anonymous client or a client with an apparent false or fictitious name.** Importantly, accountable institutions must scrutinise prospective client's information against the targeted sanctions lists published in terms of section 26A of the FIC Act and section 25 of the POCDATARA Act. **An accountable institution may not establish a business relationship with and/or conduct single transactions on behalf of sanctioned persons.**

When dealing with legal persons, trusts and partnerships, additional due diligence measures apply (e.g. nature of the client's business, identification of beneficial owner(s) i.e. ownership and control structure of the client):

1.1. accountable institutions must obtain the following information when dealing with a **partnership** (whether originating in South Africa or elsewhere):

1.1.1. name of the partnership;

1.1.2 identity of every partner;

1.1.3 identify the person who exercises control over the partnership; and

1.1.4 identify the person who is authorised to transact on behalf of the partnership.

1.2. accountable institutions must obtain the following information when dealing with a **trust** (whether originating in South Africa or elsewhere):

1.2.1. name and number of the trust;

- 1.2.2. address of the Master of the High Court where the trust is registered;
 - 1.2.3. identity of the founder;
 - 1.2.4. identity of the trustees;
 - 1.2.5. identity of the person who is authorised to transact on behalf of the trust;
 - 1.2.6. identity of each beneficiary named in the trust deed; and
 - 1.2.7. where no beneficiaries are named in the trust deed, obtain the particulars of how beneficiaries are determined.
- 1.3. when dealing with a **foreign prominent public official, a high risk domestic prominent influential person and/or family member or known close associates of such persons**, an accountable institution must:
- 1.3.1. obtain senior management approval to establish a business relationship;
 - 1.3.2. establish the source of wealth; and
 - 1.3.3. conduct enhanced due diligence monitoring of the business relationship.
2. **record keeping** – the accountable institution must keep records (hardcopy or electronic) of client and transaction information, business relationships and reports submitted to the FIC for a period of five years from the date of termination of the business relationship, the conclusion of a transaction and/or the submission of a report to the FIC;
 3. **compliance officer** – the accountable institution must have a compliance function and assign a person with sufficient competence and seniority to ensure the effectiveness of the compliance function;
 4. **RMCP** – the accountable institution must develop a risk management and compliance

programme, which is a document setting out how the accountable institution will, *inter alia*, collect information from prospective clients, keep records of client transactions and report information to the relevant authorities. The underpinning of the RMCP is the risk-based approach, introduced by the FICA Amendment Act, in terms of which an accountable institution has discretion to evaluate whether, and the extent to which, prospective clients introduce a money laundering and financing of terrorism risk to such institution;

5. **reporting** – the accountable institution must report:

5.1. cash transactions (cash, coins, paper money and travellers' cheques) of R24 999.99 (twenty four thousand, nine hundred and ninety nine Rand and ninety nine Cents) and above (or such amount in excess of the prescribed amount from time to time) within the prescribed time periods from time to time;

5.2. property which it has in its possession or under its control owned by or controlled by or on behalf of, or at the direction of a terrorist and/or a sanctioned person; and

5.3. suspicious and unusual transactions (e.g. the proceeds of unlawful activity, facilitating the transfer of proceeds of unlawful activity, transactions with no apparent business or lawful purpose, offence related to the financing of terrorist and related activities);

6. **training of employees** – the accountable institution must provide ongoing training to their employees in compliance with the FIC Act and its RMCP; and

7. **registration with the FIC** – the accountable institution is required to register with the FIC.

THE FIC ACT AND NON-COMPLIANCE BY LEGAL PRACTITIONERS

The FIC recently issued a report to the LPC on the inspection and compliance reviews conducted by the FIC in terms of a memorandum of understanding signed between the FIC

and the LPC during November 2019 wherein the FIC is delegated the supervisory responsibilities of the LPC.

The FIC conducted two hundred and seven compliance inspections between the period 1 April 2020 and 31 March 2021 in order to assess the level of compliance by legal practitioners supervised in terms of the memorandum of understanding and the FIC Act (the **Inspections**).

Having regard to the Inspections, approximately 80% (eighty Percent) of legal practitioners were found to be non-compliant, with the most common non-compliances relating to the failure to:

1. register with the FIC;
2. have a RMCP;
3. conduct customer due diligence; and
4. report to the FIC.

The FIC found that the majority of the reports submitted to the FIC by legal practitioners were cash threshold reports indicating that cash is used to pay for legal services, which **increases the money laundering risks of the industry.**

The FIC further advised that it will be referring matters to the LPC, where legal practitioners have been found to be non-compliant with their FIC Act obligations, for the imposition of administrative fines.

Legal practitioners could potentially face disciplinary charges for breach the Code of Conduct for all legal practitioners, candidate legal practitioners and juristic entities in terms of section 18.17 thereof:

“take all such steps as may be necessary from time to time to ensure compliance at all times as an accountable institution with the requirements of Financial Intelligence Centre Act, 38 of 2001.”

In terms of section 45C(3) of the FIC Act, the LPC, as a supervisory body, may impose one or more of the following administrative sanctions when a legal practitioner has failed to comply with the provision of the FIC Act:

1. a caution not to repeat the conduct which led to the non-compliance;
2. a reprimand;
3. a directive to take remedial action or to make specific arrangements;
4. the restriction or suspension of certain specified business activities; or
5. a financial penalty not exceeding R10 000 000.00 (ten million Rand) in respect of natural persons and R50 000 000.00 (fifty million Rand in respect of any legal person.

CONCLUSION

The FIC Act, although onerous on accountable institutions and their customers, supports economic growth by ensuring that South Africa remains part of the global financial system. To avoid administrative sanctions, legal practitioners are cautioned to ensure compliance with their obligations in terms of the FIC Act.

VALUE

Many natural and legal persons are unaware of the obligations imposed on them in respect of the FIC Act. This article serves as an overview of the FIC Act and a guideline for legal practitioners.

Please note: this article is for general public information and use. It is not to be considered or construed as legal advice. Each matter must be dealt with on a case by case basis and you should consult an attorney before taking any action contemplated herein.



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