

What you need to know about the new Fica provisions now in force

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On 18 August 2023, the Minister of Finance published Notice 3803 in the Government Gazette on the commencement of sections 6 and 43 of the Financial Intelligence Centre Amendment Act 1 of 2017 (the Act). These sections took effect on the date of publication.



Image source: Getty Images

Section 6 amends the heading of Chapter 3 to the Financial Intelligence Centre Act, 38 of 2001 (Fica). The heading of Chapter 3 now reads: 'Money Laundering, Financing of Terrorism and Related Activities and Financial Sanctions Control Measures'.

Section 43 of the Act amends section 56 of Fica to include subsection (2), which provides that:

“(2) An accountable institution that fails to report to the Centre the prescribed information in respect of an electronic transfer of money in accordance with section 31, is non-compliant and is subject to an administrative sanction.”

Section 31 of Fica, read with Regulations 23D and 24(5) of the Money Laundering and Terrorist Financing Control Regulations, 2002 (Regulations), places an obligation on accountable institutions to file an international funds transfer report (IFTR) with the Financial Intelligence Centre (Fic) when sending or receiving electronic transfers of money from outside or into the Republic involving amounts above R19,999 on behalf of, or on the instruction of another person. The IFTR must be filed with the FIC within three days of the transaction or transfer date. The IFTR must also contain the prescribed particulars stipulated in Regulation 23E.

A failure to file an IFTR in accordance with these provisions constitutes an offence, for which any person or institution, on conviction, could face imprisonment for up to three years or a fine of up to R1m. Any person or institution who fails to file an IFTR within the prescribed period is regarded as non-compliant and will be subjected to an administrative sanction. This sanction may include financial penalties of up to R10m for natural persons and R50m for legal/ juristic persons.



Nedbank slapped with R35m administrative sanction

15 Aug 2022



These amendments are aimed at further strengthening South Africa's anti-money laundering, counter-terrorism financing, and counter-proliferation financing legislative regime.

Public Compliance Communication No. 6A – Guidance on trust and company service providers as Item 2 in Schedule 1 of the Financial Intelligence Centre Act, 2001

On 18 August 2023, the Fic published Public Compliance Communication No. 6A – Guidance on trust and company service providers as Item 2 in Schedule 1 of the Financial Intelligence Centre Act, 2001 (PCC 6A). PCC 6A replaces Public Compliance Communication No. 6 in line with the updated definition of Item 2 of Schedule 1 to Fica which relates to trust and company service providers (TCSPs). PCC 6A intends to provide guidance on the scope and meaning of TCSPs.

A TCSP is defined in Schedule 1 of Fica as:

- a. A person who carries on the business of preparing for or carrying out, transactions for a client, where – the client is assisted in the planning or execution of –
 1. the organisation of contributions necessary for the creation, operation or management of a company, or of an external company or of a foreign company, as defined in the Companies Act, 2008 (Act 71 of 2008);
 2. the creation, operation or management of a company, or of an external company or of a foreign company, as defined in the Companies Act, 2008; or
 3. the operation or management of a close corporation, as defined in the Close Corporations Act, 1984 (Act 69 of 1984.)
- b. A person who carries on the business of –
acting for a client as a nominee as defined in the Companies Act, 2008 (Act 71 of 2008); or
arranging for another person to act for a client such as a nominee.
- c. A person who carries on the business of creating a trust arrangement for a client.
- d. A person who carries on the business of preparing for or carrying out transactions (including as a trustee) related to the investment, safekeeping, control or administering of trust property within the meaning of the Trust Property Control Act, 1998 (Act 57 of 1988).



Accountable institutions

Any person who carries on any one or more of the activities listed under the amended definition of a TCSP in Schedule 1 of Fica is an accountable institution and must comply with the accompanying obligations. The definition is based on the activity that is performed by a person. Different professions are included in this category of accountable institutions.

PCC 6A provides that the word "business" in the phrase "carries on the business" means a commercial activity or institution, as opposed to a charitable undertaking or government institution. Persons who are appointed to provide TCSP functions in a personal capacity, as opposed to doing so on a commercial basis as a feature of their business offering to clients, are not required to register as a TCSP. PCC 6A states that a commercial basis includes where a person offers a TCSP service as part of their service offering to clients, regardless of the number of clients that use it.

Trusts

The word "trust" in Item 2 of Schedule 1 includes trusts created between parties (*inter vivos*) and both local and foreign trusts. However, trusts created by:

- a testamentary disposition (*mortis causa*);
 - a court order;
 - a person under curatorship; or
 - the trustees of a retirement fund in respect of benefits payable to the beneficiaries of that retirement fund,
- are excluded from this item.

It should also be noted that a person could perform either one or a combination of the four TCSP business activities in Item 2. If that person meets the definition of multiple business operations, they must register on the FIC's registration and reporting platform as either a "company service provider" or a "trust service provider" or both.

If a person is registered with the FIC as an accountable institution, under a different Schedule 1 item, and in addition performs the functions of a TCSP, they would be required to register additionally with the FIC as an Item 2 TCSP. This is referred to as dual registration.

PCC 6A also provides guidance on the inherent risks and potential risk indicators relating to TCSPs.

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