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FICA REQUIREMENTS FOR ESTATE AGENTS

Introduction

The Financial Intelligence Centre Act, 38 of 2001 (FICA), came into effect on 1 July 2003. FICA was introduced to fight financial crime, such as money laundering, tax evasion, and terrorist financing activities. The FICA Amendment Act 1 of 2017 amends the existing Financial Intelligence Centre Act to strengthen South Africa's ability to fight illicit financial flows and other forms of financial crimes, which include money laundering, corruption, terrorism financing and tax evasion. FICA aims to ensure that financial / accountable institutions know with whom they are doing business. In terms of FICA, accountable institutions are required to preserve the paper trails of all transactions and are obliged to report any possible money laundering to the investigation authorities.

Although the FIC Act and the Regulations do not expressly make reference to a risk-based approach, these measures allow for a limited scope to apply a risk-based approach to the verification of certain client particulars. Guidance Note 1 indicates that application of a risk-based approach to the verification of the relevant particulars implies that an accountable institution can accurately assess the risk involved. It also implies that an accountable institution can take an informed decision on the basis of its risk assessment as to the appropriate methods and levels of verification that should be applied in a given circumstance. Guidance Note 1 further states that the assessment of these risk factors should best be done by means of a systematic approach to determine different risk classes and to identify criteria to characterise clients and products.

Definitions

- An **accountable institution** includes an estate agent, as defined in the Estate Agency Affairs Act, 112 of 1976.
- The term “client” is not defined in the FIC Act and reference is made to the Code of Conduct for Estate Agents issued in terms of section 8(b) of the Estate Agency Affairs Act, Act 112 of 1976. In terms of section 1(c) of the Code of Conduct, a **client** is a person who has given an estate agent a mandate, provided that should an estate agent have conflicting mandates in respect of a particular immovable property, the person whose mandate has first been accepted by the estate agent, is regarded as a client.
- A **business relationship** is defined in the FIC Act as an arrangement between a client and accountable institution in accordance with the type of business carried on by that accountable institution.
- A **transaction** as defined in the FIC Act is “a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution”. A transaction can therefore be performed either in the course of a business relationship or as a single transaction. Applying the provisions of the Code of Conduct in the context of the FIC Act, the duty to identify clients in terms of

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section 21 of the FIC Act will therefore apply to buyers, sellers, lessors and lessees where an estate agent is concerned.

When to obtain FICA

Section 21 in conjunction with Chapter 1 of the Regulations, and specifically Regulations 2 to 16 deals with the establishment and verification of the identity of different types of clients. Part 1 of Chapter 3 of the FIC Act together with Section 21 deal with the identification of clients and other persons.

Section 21 prohibits accountable institutions from establishing a business relationship or entering into a single transaction with their clients unless they have established and verified the identities of their clients, or persons representing their clients.

Exemption 2 of the exemptions to the FIC Act made in terms of section 74 of the FIC Act softens the prohibition by Section 21 of FIC Act, by allowing accountable institutions to accept a mandate from a client to establish a business relationship or to conclude a single transaction, or take any similar preparatory steps with a view to transacting with the client, before completing the verification of the identity of that prospective client.

This is however subject to the condition that the accountable institution will have completed all steps which are necessary in order to establish and verify the identity of that client in accordance with section 21 of the FIC Act before the institution:

- **concludes a transaction in the course of the resultant business relationship, or**
- **performs any act to give effect to the resultant single transaction.**

In practice the exemption allows an estate agent to accept a mandate from a prospective client, for example to market his/her property with a view to concluding a sale or lease agreement in respect of the client's property, without fully complying with the provisions of section 21 of the FIC Act and the relevant Regulations applicable to the type of client. It is imperative, however, that the estate agent will have completed the prescribed steps in terms of Section 21 of the FIC Act and the relevant Regulations to establish and verify the identity of the client upon concluding the sale or lease agreement.

In instances where there is an open mandate, the provisions of the exemption can also apply. Multiple agencies that accept the same mandate from a client may rely on this exemption. However, the estate agency that concludes the single transaction or establishes a business relationship with the client must establish and verify the identity of the client in terms of section 21 of the FIC Act and the relevant Regulations applicable to the type of client.

Acceptance of Funds

Further, it is in contravention with the FIC Act for an accountable institution to accept funds from a prospective client prior to completing the client identification and verification requirements in terms of Section 21 of the FIC Act and the applicable Regulations.

The term acceptance in the context is used to indicate the intention of an accountable institution to receive the funds from the prospective client for the purpose of the business relationship to be formed or a single transaction being concluded. An accountable institution incurs increased money laundering and terrorist financing risk when it receives funds from an unidentified person, who may or may not become a prospective client.

An accountable institution must therefore take care to mitigate risks by, for example, not enabling a prospective client to provide funds to the accountable institution that may have to be returned before the accountable institution has made a decision to on-board the prospective client. The Centre's view is that only once a prospective client has

been satisfactorily identified and verified, and the accountable institution has then taken a decision to accept the prospective client as a client, can they accept funds from the client in respect of the single transaction or business relationship. Therefore, an accountable institution can only make a decision to on board a client after the client identification and verification measures have been successfully completed. The Centre recommends that the accountable institution includes measures to reduce the possibility of the receipt of funds from an unidentified person or entity.

An accountable institution should not request funds from a prospective client before it has completed the process of establishing and verifying that person's identity and has made a decision to enter into a business relationship with that prospective client. The Centre strongly recommends that accountable institutions not make their bank account details public, e.g. by including the institutions banking details on application forms or by placing them on websites or in advertising material, so as to minimise the possibility that prospective clients may take the initiative to deposit funds into their accounts of the accountable institution prior to the identification and verification process being completed.

Accordingly, the Centre recommends that the accountable institution's bank account details be communicated to the client only in the acceptance communication sent to the client. **Should it happen that a person takes the initiative to deposit funds into the bank account of the accountable institution prior to the client identification and verification process being completed, the Centre strongly advises that the accountable institution consider this behaviour and must report the transaction or activity to the Centre in terms of section 29 of the FIC Act if it appears to be suspicious or unusual.**

The practice of depositing unsolicited funds into an accountable institution's bank account can easily be manipulated to perpetrate money laundering or terror financing. In conclusion and to ensure that the risk of the receipt of funds prior to identification and verification of the client, the accountable institution should ensure that they do not make their banking details available to prospective clients at any time.

Reporting

All accountable and reporting institutions have a duty in terms of section 28 of the FIC Act to report the particulars concerning a cash threshold transaction (CTR) concluded with a client if such transaction involves an amount of cash received or paid that is in excess of the prescribed amount of R24 999.99, or aggregated transactions over a business day that is in excess of the prescribed amount of R24 999.99. Such transactions must be reported to the Centre in the prescribed format and as soon as possible, but no later than two days after becoming aware of such cash transaction.

Identification and Verification (Natural Persons Only)

The Regulations define an identification document in respect of a natural person who is a citizen of, or resident in, the Republic of South Africa, as an official identity document. The Department of Home Affairs describes an official identity document as a green bar-coded identity document or smart card identity document. The Regulations furthermore define an identification document in respect of a natural person who is not a citizen of the Republic and not resident in the Republic as a passport issued by the country of which that person is a citizen.

Face-to-Face

Regulation 4 of the Regulations concerning the verification of a person's identity is based on a view that the client is met face-to-face when his or her particulars are obtained. **Copies of documents may be relevant in cases when**

client information is received in a face-to-face situation, the relevant documents will be sighted as part of the verification process. The accountable institution must then record that the originals, were sighted as part of the verification process, this shall be done in the form of a declaration by the accountable institution confirming the verification process has been completed. It is good business practice to date documents relating to the verification of a client. This is an indicator that the account opening and verification of the client was done simultaneously.

Regulation 4(3) of the Regulations sets out instances in which the residential address of a natural person needs to be verified. **The most secure form of verification of a residential address would be achieved if a staff member and/or agent of the accountable institution were to visit the residential address of such a natural person to confirm that the person resides at the particular residential address. However, it would be sufficient to review the original document and to obtain a copy of a document that offers a reasonable confirmation of the information in question. In both instances the accountable institution must then record that the originals, were sighted or property visited as part of the verification process, this shall be done in the form of a declaration by the accountable institution confirming the verification process has been completed** Since the documentation must be current, a good practice would be to require documentation that is less than three months old.

Non Face-to-Face

Regulation 18 of the Regulations provides for instances in which client information is obtained in a **non face-to-face situation**. In such cases, accountable institutions “must take reasonable steps” to confirm the existence of the client and to verify the identity of the natural person involved. The accountable institutions should apply equally effective client identification procedures and ongoing monitoring standards for non face-to-face clients. According to the Core Principles, examples of measures to mitigate risk include - **certification of documents presented**, obtaining copies of documents that have been certified by a suitable certifier. Consideration should be given as to whether the certifying person is regulated or is otherwise a professional person subject to some sort of regulation or fit and proper person test who can easily be contacted to verify their certification of the documents. This implies that documents that are certified as true copies of originals may be accepted.

Record Keeping

Section 22 of the Financial Intelligence Centre Act No 38 of 2001 (FIC Act) refers to records kept by accountable institutions in respect of the identification and verification process undertaken by that accountable institution, whenever it establishes a business relationship or concludes a transaction with a client, whether that transaction is a single transaction or a transaction concluded in the course of the business relationship.

Section 23 of the FIC Act is clear on the point that these records should be kept. **The records must be kept for at least five years from the date on which the business relationship was terminated or at least five years from the date that a transaction was concluded.**

In addition to the above requirement, please note that Section 26 of the FIC Act authorises the Centre to access the records kept by the accountable institution in terms of Section 22 for the purposes of, among others, obtaining further information in respect of reports. Further, Section 32 of the FIC Act authorises the Centre to request the accountable institution to furnish additional information (which may include documentary records) concerning a report made to the Centre. The need to maintain adequate records for at least five years to give effect to provisions of the FIC Act and to assist the ultimate investigation and prosecution of crime is essential.

Politically Exposed Persons

A Politically exposed person or PEP is the term used for an **individual who is or has in the past been entrusted with prominent public functions in a particular country, as well as a family member or closely associated person to that PEP.**

The following examples serve as aids in defining PEPs: Heads of State, Heads of Government and cabinet ministers; influential functionaries in nationalised industries and government administration; senior judges; senior party functionaries; senior and/or influential officials, functionaries and military leaders and people with similar functions in international or supranational organisations; members of ruling or royal families; senior and/or influential representatives of religious organisations (if these functions are connected to political, judicial, military or administrative responsibilities). Further, the term “families” includes close family members such as spouses, children, parents and siblings and may also include other blood relatives and relatives by marriage. The category of “closely associated persons” includes close business colleagues and personal advisers/consultants to the PEP as well as persons, who obviously benefit significantly from being close to such a person.

An accountable institution should conduct proper due diligence on both a PEP and the persons acting on his or her behalf, families of PEPs and closely associated persons to the PEP. Specific action should be taken in relation to PEPs as a category of high-risk client. In addition to performing customer due diligence measures, accountable institutions should put in place appropriate risk management systems to determine whether a customer, a potential customer or the beneficial owner is a PEP. In addition **accountable institutions should obtain senior management approval for establishing business relationships with a PEP.** When the client has been accepted, the accountable institution should be required to obtain senior management approval to continue the business relationship; should take reasonable measures to establish the source of wealth and the source of funds of customers and the beneficial owners identified as PEPs.

What FICA Documents are required

A. **PERSONAL CAPACITY – SOUTH AFRICAN CITIZENS**

1. Identity book / Smart card (both sides of the card required). If the client has lost their ID then a Passport will suffice;
2. Proof of residence reflecting the client’s physical address, not older than 3 months to the date of the acceptance of the Offer to Purchase. **Such proof of residence must reflect the same address as provided in the Offer to Purchase. This is to be the client’s residential address where they currently reside.**
3. Proof of the client’s income tax number on a SARS document, if applicable.

B. **PERSONAL CAPACITY – FOREIGN NATIONALS**

1. Passport;
2. Permanent / Temporary Visa Permit;
3. Foreign Nationals who reside in South Africa must supply proof of address not older than 3 months to the date of the acceptance of the Offer to Purchase. Proof of residence on Company letterhead, if Foreign

National is living in a property paid for by Company. If such Foreign National does not live in South Africa proof of address is not required.

4. Letter from Company, if Foreign National is working in South Africa;
5. Proof of the client's income tax number on a SARS document, if applicable.

C. **CLOSE CORPORATIONS**

Please check and ensure that all members of the CC are FICA verified. Such members must be fully FICA compliant whether they are Individuals, Trusts or Companies.

1. All CIPC documents, including –
 - CK1 (Founding Statement and Certification of Incorporation);
 - CK2 (Amended Founding Statement, if applicable);
2. Proof of business address not older than 3 months to the date of the acceptance of the Offer to Purchase;
3. Document reflecting the CC trading name, if applicable;
4. All FICA for the members and duly authorised representatives, if applicable;
5. Proof of CC Income Tax and VAT registration numbers on a SARS document, if applicable;
6. Signed Resolution.

D. **COMPANIES**

Please check and ensure that all directors of the Company are FICA verified. Such directors must be fully FICA compliant whether they are Individuals, Trusts or Companies.

1. All CIPC Document including –
 - COR14.3 / CM46 (Registration Certificate)
 - COR15.1 / CM1 (Memorandum and Articles of Association)
 - COR21 / CM22 (Notice of change of registered address, if applicable)
 - COR39 / CM29 (Notice of change of company directors, if applicable)
2. Proof of business address not older than 3 months to the date of the acceptance of the Offer to Purchase;
3. Document reflecting the Company trading name, if applicable;
4. All FICA for the directors, duly authorised representatives and shareholders holding 25% or more of the voting rights at a general meeting of the Company concerned. if applicable;
5. Proof of Company Income Tax and VAT registration numbers on a SARS document, if applicable.
6. Signed Resolution.

E. **TRUSTS**

1. Letters of Authority;
2. Trust Deed;
3. Proof of address for the Trust not older than 3 months to the date of the acceptance of the Offer to Purchase;
4. All FICA for the Founder/Donor and all Beneficiaries as mentioned in the Trust Deed;
5. All FICA for the Trustees as mentioned in the Letters of Authority, and duly authorised representatives, if applicable.
6. Proof of Trust Income Tax and VAT registration numbers on a SARS document.
7. Signed Resolution.

F. **DECEASED ESTATES**

1. Death Certificate;
2. Letters of Executorship;
3. All FICA for the Executor/s signing the Offer to Purchase.

IMPORTANT INFORMATION FOR YOUR ATTENTION:

1. Obtain all FICA documents **prior to** acceptance of a Sale / Lease Agreement;
2. Do not provide banking details until such time that a Purchaser / Lessee FICA documents are in order. Purchaser / Lessee FICA documents well as the FICA documents of any other party who is paying money into the Trust Account, must be in place before funds can be accepted.

Please advise your clients to avoid depositing cash into our trust account for the following reasons –

- i) *Applicable bank charges incurred are deducted from cash deposits;*
- ii) *All cash transactions exceeding the above amount must be reported to FICA.*
3. Report cash transactions exceeding R24 999.99 immediately;
4. Identification and verification of natural persons face-to-face – copies of documents together with agents declaration form, or certified copies of the document;
5. Identification and verification of natural persons non face-to-face –certified copies of the documents;
6. Identification and verification of juristic persons – certified copies of the documents.