

# CONSULTATION FEEDBACK NOTE

Relating to the draft public compliance  
communication 6A on the interpretation of trust  
and company service providers as item 2 of  
Schedule 1 to the Financial Intelligence Centre  
Act

**August 2023**

## INTRODUCTION

1. The Financial Intelligence Centre (Centre) issued draft public compliance communication 6A (draft PCC 6A) for consultation and the provision of comments by accountable institutions in terms of section 42B of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) (FIC Act).
2. The period for consultation started on Thursday, 15 December 2022 until Friday, 20 January 2023. Comments were received from banks, financial service providers, industry associations and consultants.
3. The FIC has further engaged with the accounting industry associations through workshops and written inputs received during May and June 2023.
4. The final version of the draft PCC6A has been issued as public compliance communication 6A (PCC 6A).

## CONSULTATION FEEDBACK

Feedback on the consultation comments received are noted below:

### PCC 6A – Trust and company service providers

Comment	Response
As the draft PCC indicates that a person includes both a natural person and a legal person, we require additional guidance on who would be required to register as an accountable institution. Where a firm offer a wide range of external services to clients that are provided as “stand-alone” services or in combination with other services, some of the services may be performed by a	The obligation to register with the FIC and to comply with all the other requirements of the FIC Act applies to the accountable institution and not individually to each of the professionals in the employ of the entity that is an accountable institution.

division or a team in a firm, or by only one individual in a firm, depending on the particular expertise of the individual and the service offering. External services can also be offered in combination with other services. Service offerings include but are not limited to offerings related to tax type services, financial consulting services, estate and trust planning, secretarial services and services within the realm of internal and external audit. The question arising is, “if one person employed by a legal person provides the services, who would be expected to register as an accountable institution?” i.e. is it the firm or the individual providing the service?

The sentence above refers to “TCSPs being accountable institutions regardless of whether the employees are auditors, accountant or other professionals”. We respectfully propose that the specific reference and emphasis on auditors and accountants are removed so as to not create the impression early in the document that they are scoped in. For example, registered auditors do not perform the activities as described in the draft PCC. In many cases registered auditors are prohibited by independence requirements and other international standards to perform management

The TCSP definition is dependent on the activity a person performs. As such, a person that performs the business of a TCSP, regardless of the professional accreditation they hold, is considered to be an accountable institution and must register as a TCSP with the FIC. In practice, this means that financial institutions, legal professionals and accountants, among others, can meet the definition of a TCSP.

Text amendments have been made to clarify TCSP activities.

<p>functions or be involved in the operations of the auditee.</p> <p>We propose the following more generic description: "...regardless of whether their employees belong to a specific profession"</p>	
<p>We appreciate the guidance provided but would request additional guidance for services regularly provided by the accounting profession. As this is the first time that many SAICA members and associates would be classified as accountable institutions, we do request clarity on when and who will be scoped in.</p>	<p>Text amendments have been made to clarify TCSP activities, including both what the definition includes and does not include.</p>
<p>As noted, the amendments to the Schedules came into effect on 19 December 2022. TCSPs as defined must therefore apply the Schedule with effect from 19 December 2022. The publication of the draft guidance note and the commentary period was only published after the effective date.</p> <p>A formal transition must be communicated by the FIC. If our contention is correct most persons who fall within the ambit of the schedules are technically non-compliant currently, rendering the FIC open to significant criticism from a regulatory perspective. Certain reporting obligations apply to for example auditors and accountants (EG Reportable Irregularities and NOCLAR). In the absence of formalised transitional arrangements</p>	<p>The draft public compliance communication (PCC) 6A was published on 13 December 2022. The obligation to register with the FIC is not dependent on guidance issuance.</p> <p>Please refer to the media release dated 30 November 2023 detailing the transitional period for the impacted schedule items: <a href="#">Media release - Schedule amendments - Final (002).pdf (fic.gov.za)</a></p>

reports are potentially required to be filed whilst guidance is also still in draft.

Registered Auditors (RA), Chartered Accountants, Associate General Accountants and Accounting Technicians that do not comply with these requirements would be in breach of the SAICA Code of Professional Conduct and the IRBA Code of Professional Conduct (in the case of RAs).

Registered Auditors might be required to report reportable irregularities in terms of section 45 of the Auditing Profession Act, 2005. A reportable irregularity is defined as:

“Any unlawful act or omission committed by any person responsible for the management of an entity, which:

(a) has caused or is likely to cause material financial loss to the entity or to any partner, member, shareholder,

creditor or investor of the entity in respect of his, her or its dealings with that entity; or

(b) is fraudulent or amounts to theft;  
or

(c) represents a material breach of any fiduciary duty owed by such person to the entity or any partner,

<p>member, shareholder, creditor or investor of the entity under any law applying to the entity or the conduct or management thereof.”</p> <p>The SAICA and IRBA Code of Professional Conduct requires members to comply with relevant legislation. Where non-compliance has been identified, the necessary action should be taken. Without formal transitional provisions many members might already be in breach and could face disciplinary consequences.</p>	
<p>Are FSP Nominee companies included in the definition of TCSP. An FSP nominee does keep in safe custody assets of clients and could hold assets of a trust, but the FSP will be responsible for the onboarding of the clients.</p>	<p>The nominee referred to in item 2 must be read with the definitions as set in the Companies Act.</p> <p>The PCC has been updated to provide greater clarity on the definition of nominees.</p>
<p>2.2.3. Trust advocates practice independently. What is the difference if a tax practitioner, auditor, trust service provider also practices independently. Yet you have not closed this loophole for AML and other corrupt activities. I do believe that the companion legislation, Prevention and Combating of Corrupt Activities Act should be located under the administration of FIC.</p>	<p>If a person provides one of the services of a TCSP and is a sole practitioner, then they would be able to register as an accountable institution on the FIC’s registration and reporting platform.</p> <p>A person refers to both a natural and juristic person.</p>
<p>2) As the amended listing's reference to the definition in the Companies Act for “nominee” refers to Securities Services Act</p>	<p>2. These comments are noted.</p> <p>Commentators are reminded that the determination of beneficial ownership</p>

(which had been repealed by the Financial Markets Act, 2012, would therefore be nominee shareholders and could have a bearing on beneficial ownership interests. It would be appreciated if the FIC could clarify the status of nominee directors or other office bearers of a legal entity, who may not be shareholders, and are involved in 'control through other means' or management? Several of the past few years' case studies such as the Panama Papers and Pandora Papers (and others) highlighted the use and role of nominee directors. It is recommended that the FIC consider in future amending the definition of "nominee" in Item 2(b) to include nominee directors and other office bearers of legal entities to address the known deficiencies as pointed out in global case studies as follows:

"A person who carries on the business of (i) acting for a client as a nominee in any capacity, whether in respect of securities or a corporate function; or (ii) arranging for another person to act for a client such as a nominee in any capacity, whether in respect of securities or a corporate function."

1) Institution A proposes that for certainty and clarification, the FIC references the definition of "retirement fund" as per the applicable Act.

remains an obligation for all accountable institutions as part of their customer due diligence and ongoing due diligence obligations in relation to their clients and are not limited to TCSPs. The instance of nominee directors could serve as a heightened ML/TF/PF risk indicator.

Text amendments have been made in the PCC regarding activities that relate to entities that provide custodial services as required by law.

2. Retirement fund is not specifically defined in the FIC Act, and as a result the dictionary meaning of retirement fund, within context of the industry should be applied.

<p>We do not agree with this requirement. that attorneys are already registered as Accountable Institutes and therefore it does not make sense to do a new registration as a TCSP. FIC should cater for this a “tick box” on our profile we can chose this as an optional service and answer any questions in this regard. To do a new registration for 4 branches to say we do register trusts or attend to a few trust matters, is unreasonable, and require extra resources to be allocated which is unfeasible in the current economic conditions.</p> <p>The type of matters handled by an attorney can be added as a subcategory when registering for the first time or added on as a new tab on our current portfolio, this can then be viewed when we login in. I propose that FIC amend their website so that we can have this type of functionality.</p> <p>These questions can be posed for new registrations and for accountable institutions who are already registered, it can be added onto our existing profile.</p>	<p>Accountable institutions that provide the services of a TCSP should additionally register as such on the FIC’s registration and reporting platform. This is known as dual registration. The differentiation of registration profiles allows for accurate reporting to be received by the FIC. This in turn will allow for focused analysis.</p> <p>The principle is applied across all schedule items and is not limited to particular professions.</p>
<p>Noted, but this does not mean that attorneys who are already registered as accountable institutions should go through the process of registration for a second time. What if other sections are added onto FIC in the near future, then would attorneys</p>	<p>Attorneys and other institutions should be registered for each of the items in Schedule 1 that would apply to them. See above on the discussion of dual reporting.</p>



<p>be required to register each time for the different types of services they provide?</p>	
<p>1. Given the prominence given to Proliferation Financing in the FATF MER, TCSPs are not only susceptible to AML/CFT abuse, but also to be abused for purposes of proliferation financing – this need to be mentioned specifically.</p> <p>4.5 By whom should the TCSP be "reviewed"? Possibly rephrase "A TCSP should review its business operations holistically..."?</p>	<p>1. Proliferation financing has been added.</p> <p>4.5. Noted, text amended to allow for greater clarity.</p>
<p>If a company has multiple divisions and only 1 fall into an accountable institution, then does the whole company have to comply or just the division that qualifies? Do the requirements apply to the entire practice or only the specific services</p>	<p>The TCSP is only considered an accountable institution in respect of the clients that fall within the TCSP activities. As such, all FIC Act obligations are limited in respect of these clients.</p>
<p>What is the position in relation to:</p> <ul style="list-style-type: none"> <li>• Staff being outsourced (e.g. the CFO is outsourced)</li> <li>• When an employee working for the organisation performs TCSP functions</li> <li>• If an accounting firm uses an independent company to register companies and trusts.</li> </ul>	<p>The item 2 is determined based on TCSP activity performed. The FIC is not in a position to confirm specific activities. The PCC has, however, been enhanced to provide greater clarity on how to determine such activities.</p> <p>Item 2 refers to where a person performs this activity for a client. The PCC has been enhanced to discuss where an activity is being performed by an employee. Please refer to public compliance</p>

	communication 12A (PCC 12A) on outsourcing arrangements.
<p>With regards to tax services provided there is numerous questions on when a person providing tax services would be classified as an accountable institution and which tax services would be scoped in.</p> <p>In this regard guidance is required as to whether practitioners providing accounting, auditing and tax services (completion and submitting of tax returns) are excluded from the ambit of “operation or management”. The majority of practitioners primarily perform accounting and tax services in relation to financial statements, including the preparation of management accounts, compilation of annual financial statements. With regard to tax services, practitioners prepare and submit tax returns, PAYE and VAT schedules on behalf of employers which services might be viewed as operational. With regard to specialised tax services, such as tax opinions we request clarity on whether this could be seen as “creation, operation or management”. As previously discussed we submit that these services are excluded from the ambit of FICA and request confirmation from the FIC on this aspect.</p>	<p>The PCC has been updated to clarify the FIC’s understanding of activities that do not meet the definition of management and operations. Such activities relate to the recording, or capturing of company data or information, including book-keeping functions, administrative submissions of information or data for legislative purposes (i.e. filing of tax returns), activities that do not amount to decision making within the client’s business activities or activities that do not steer, impact or influence the client’s business operations.</p>

## CONCLUSION

5. The Centre thanks all commentators and notes that all comments received have been considered and incorporated in the final PCC 6A where appropriate.
6. The final PCC 6A has been issued on 18 August 2023.

## COMMUNICATION WITH THE CENTRE

7. Queries can be directed to the compliance contact centre on 012 641 6000 and select option 1. Queries can also be submitted online by clicking on <http://www.fic.gov.za/ContactUs/Pages/ComplianceQueries.aspx> or visiting the Centre's website and submitting an online compliance query.

### **Issued By:**

The Director Financial Intelligence Centre

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CENTURION

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