



Financial
Intelligence Centre

PUBLIC COMPLIANCE COMMUNICATION

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No. 6A

GUIDANCE ON TRUST AND COMPANY
SERVICE PROVIDERS AS ITEM 2 IN
SCHEDULE 1 OF THE FINANCIAL
INTELLIGENCE CENTRE ACT, 2001 (ACT 38
OF 2001).

PCC SUMMARY

A trust and company service provider (TCSP) is any person in the ordinary course of business who assists their client in the creation, operation and management of a company, or of an external company, a foreign company, a close corporation or a trust. This includes attending to the registration of the business entity with the relevant authority.

A person who performs the activities of a TCSP, regardless of the professional accreditation they hold, is an accountable institution and must register as a TCSP with the Financial Intelligence Centre (Centre). TCSPs can include accountants, attorneys or other professionals.

Given the unique nature of the services they offer, TCSPs are vulnerable to abuse by entities seeking to misuse corporate structures to facilitate the movement of illicit funds. There are several listed money laundering (ML), terrorist financing (TF) and proliferation financing (PF) risk indicators that TCSPs should consider.

THE AUTHORITATIVE NATURE OF GUIDANCE

The Centre provides the draft guidance contained in this PCC in terms of its statutory function in terms of section 4 (c) of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) (FIC Act) read together with Regulation 28 of the Money Laundering and Terrorist Financing Control Regulations (the Regulations) issued in terms of the FIC Act.

Section 4 (c) of the FIC Act empowers the Centre to provide guidance in relation to a number of matters concerning compliance with the obligations in terms of the FIC Act. Guidance provided by the Centre is the only form of guidance formally recognised in terms of the FIC Act and the Regulations. Accordingly, guidance provided by the Centre is authoritative in nature and must be taken into account when interpreting the provisions of the FIC Act or assessing compliance of an accountable or reporting institution with its obligations imposed on it by the FIC Act.

It is important to note that enforcement action may result should there be non-compliance with the FIC Act in areas on which the Centre has provided guidance. Where it is found that an accountable or reporting institution has not followed guidance which the Centre

has issued, the institution must be able to demonstrate that it has complied with the relevant obligation under the FIC Act in an equivalent manner, nonetheless.

DISCLAIMER

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OBJECTIVE

This PCC provides clarity on the interpretation of “a person who carries on the business of a trust and company service provider” as designated in amended item 2 of Schedule 1 to the FIC Act. Further, the PCC highlights vulnerabilities faced by TCSPs and provides risk indicators that can be considered by a TCSP when determining ML, TF and PF risks presented in their client engagements.

1. INTRODUCTION

- 1.1. Schedule 1 to the FIC Act has been amended and took effect from Monday, 19 December 2022.
- 1.2. The definition of item 2 of Schedule 1 to the FIC Act has been changed through these amendments, and as such public compliance communication 6 (PCC 6), which was developed before 19 December 2022, is no longer applicable. This PCC 6A replaces PCC 6 to take into consideration the updated definition of item 2 of Schedule 1.

- 1.3. Any person that carries on any one or more than one of the listed activities under amended item 2 of Schedule 1 is an accountable institution and is collectively referred to as a trust and company service provider (TCSP). Given that the TCSP definition is based on the activity that is performed by a person, it means that different professions are included in this category.
- 1.4. Accountable institutions should take note of the Financial Action Task Force (FATF) Recommendation 22 which sets out which institutions, including TCSPs, are regarded as designated non-financial businesses and professions (DNFBPs) and are required to be regulated from an anti-money laundering, combating terrorist financing and proliferation financing (AML, CFT and CPF) perspective.

2. DEFINITION OF ITEM 2

2.1. A TCSP is defined in Schedule 1 of the FIC Act as:

- (a) *A person who carries on the business of preparing for or carrying out, transactions for a client, where-*
- (i) *the client is assisted in the planning or execution of-*
 - (aa) *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);*
 - (bb) *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
 - (cc) *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-*
- (i) *acting for a client as a nominee as defined in the Companies Act, 2008 (Act 71 of 2008); or*
 - (ii) *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, safe keeping, control or administering of trust property within the meaning of the Trust Property Control Act, 1998 (Act 57 of 1988).*

2.2. *The general terminology used in the Schedule 1; item 2 is explained below:*

2.2.1 **“A person”** includes both natural persons and legal persons.

2.2.2 **“Carries on the business of...”** this term is not defined in the FIC Act. The ordinary meaning of the term, within the context of the FIC Act is applied.

2.2.3 **“Business”** is that of a commercial activity or institution, as opposed to a charitable undertaking or government institution. Therefore, persons who are appointed as providing TCSP functions in a personal capacity, as opposed to doing so on a commercial basis as a feature of their business for clients, are not required to be registered as a TCSP. A commercial basis includes where a person offers such TCSP activities to be conducted as part of their service offering, regardless of the number of clients that take up this service.

Not included in the understanding of a “business”

2.2.4 A **trustee** in the context of item 2, relates only to when the trust services activity performed by a person is done as part of a business undertaking, and does not include when a trustee is acting in their personal capacity. As such, trustees acting in their personal capacity do not meet the definition of “business”.

2.2.5 **“Client”** is defined in section 1 of the FIC Act as, ‘a person who has entered into a business relationship or a single transaction with an accountable institution’.

Not included in the understanding of a “client”

2.2.6 A person who performs a TCSP activity in the capacity of an employee for their employer’s legal structure, would not be considered to be providing a service to a client.

Example 1: Where a person does not meet the TCSP definition

Mr X is the accounting officer for Company Y. Mr X is a full-time employee of Company Y.

Although Mr X performs TCSP activities, he is not performing these activities for a client.

Mr X would not meet the definition of a TCSP in this scenario.

2.3. *The general terminology used in the Schedule 1, item 2 (a) (i) which specifies that the TCSP activity under this subsection relates to “preparing for”, “carrying out”, “assisted”, “planning” and “execution”.* These terms can be understood taking into consideration the normal dictionary* meaning, which includes:

2.3.1 **“Preparing for”** to make something or somebody ready to be used or to do something

2.3.1 **“Carrying out”** to do and complete a task

2.3.2 **“Assisted”** to help something to happen more easily / to help somebody do something

2.3.3 **“Planning”** the act or process of making plans for something

2.3.4 **“Execution”** the act of doing a piece of work, performing a duty, or putting a plan into action.

*The Oxford Dictionary meanings have been included.

2.4 In this context, the activities described below are wide reaching and can include many different product or service offerings to clients and cut across different professions.

2.5 *The terminology used in Schedule 1, item 2(a)(i) (aa), (bb) and (cc) relating to organisation of contributions and creation, operation or management could include:*

2.5.1 **Organisation of contributions** could include, and is not limited to, assisting clients to raise capital or funding for the client’s business, either through advising on the sourcing of funding or liaising with donors and investors.

2.5.2 **Creation** can include, and is not limited to, assisting a client on the registration or administrative processes to register a particular legal person/corporate vehicle, with relevant government organisations for the client to commence with trading as this registered legal person/corporate vehicle. This can include advising on legal requirements associated with the legal structure or creation of an entity, drafting of any formation, or formation related documentation, and any form of secretarial or facilitation of the registration process.

2.5.3 **Operation** of the particular legal person or corporate vehicle entails the assisting with the ongoing operations of the client. This includes any function that relates to planning or execution of any of the client's operations.

2.5.4 **Management** includes performing any active role, or making decisions for the client's business, where such activity or decision-making steers the direction of the client's operations or business.

2.6 *The terminology used in Schedule 1, item 2(a)(i) (aa), (bb) and (cc) relating to operation or management DOES NOT include:*

2.6.1 Activities that relate solely to the recording, or capturing of company data or information, including book-keeping functions.

2.6.2 The administrative submissions of information or data for legislative purposes, such as the filing of tax returns.

2.6.3 Activities that do not amount to decision-making within the client's business activities.

2.6.4 Activities that do not steer, impact or influence the client's business operations.

2.6.5 The fulfilling of a statutory function, specifically the liquidation of an entity or the functions of business rescue, is not considered to meet the definition of operations or management of a client. However, if the client undergoing such a statutory application is themselves an accountable institution in terms of Schedule 1 to the FIC Act, this

client would remain an accountable institution, and the appointed liquidator or business rescue practitioner would be required to make sure their client applies the full provisions of the FIC Act in relation to their (the client's) business activities.

2.7 *The terminology used in Schedule 1, item 2(b) – Nominee*

2.7.1 **“Nominee”** is a person approved to act as a holder of securities or an ownership interest in the entity on behalf of other persons.

2.7.1.1 Where the TCSP acts as a nominee for an entity, that entity will be deemed to be their client.

2.7.1.2 Where the TCSP arranges for a nominee to act on their client's behalf, both the client and the person acting as the nominee are considered to be the TCSP's client.

2.7.1.3 This could include where the TCSP acts as the intermediary.

2.7.2 Reference to nominees in item 2 of Schedule 1 is limited to the definition as set in the Companies Act. This definition of nominee means:

“a person that acts as the registered holder of securities or an interest in securities on behalf of other persons”

Not included in the understanding of a “nominee”

2.7.3 The definition of a nominee as used in item 2 of Schedule 1 does not cover the scenario where an entity provides custodial services as required by law on behalf of a financial services provider, as required in the Financial Sector Regulation Act, 2017 (Act 9 of 2017) and associated standards and guidelines.

2.8 *The terminology used in Schedule 1, item 2 (c) and (d) – Trusts*

2.8.1 **“Trusts”** include trusts created between parties (*inter vivos*) and includes trusts both established locally (i.e. in South Africa) and foreign trusts (i.e. trusts established outside of South Africa).

2.8.2 The following **trusts** are excluded from the TCSP definition, as read with section 1 of the FIC Act

2.8.2.1 Trusts created by a testamentary disposition

- 2.8.2.2 Trusts created by a court order
- 2.8.2.3 Trusts created for person under curatorship
- 2.8.2.4 Trusts created by the trustees of a retirement fund in respect of benefits payable to the beneficiaries of that retirement fund.

3. PROFESSIONS AS TCSPS, INCLUDING ACCOUNTANTS, ATTORNEYS ETC.

- 3.1 A TCSP in terms of item 2 of Schedule 1 to the FIC Act, is dependent on the activity performed. As such, a person that performs the business of a TCSP, regardless of the professional accreditation they hold, is 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.
- 3.2 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.

4. REGISTRATION CONSIDERATIONS

- 4.1 A person could perform either only one or a combination of the four TCSP business activities detailed in item 2. Where a person meets the definition of multiple business operations, they must register as either a “**company service provider**” or a “**trust service provider**” or both on the Centre’s registration and reporting platform.
- 4.2 A person is a TCSP where they meet the definition of item 2, regardless of the profession of the person undertaking such services.
- 4.3 The obligation to register with the Centre 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 employment of the entity. For example, each accountant in the employ of an accountable institution is not considered as an individual accountable institution and does not have to register separately.

Dual registration

- 4.4 If a person is registered with the Centre as an accountable institution, under a different Schedule item, and in addition performs the functions of a TCSP, they would be required to register additionally with the Centre, as an item 2 (TCSP). This is known as dual registration. Please [see draft PCC 5D](#) which explains an accountable institution's registration obligations.

Example 2: Where a person meets the definition of more than one Schedule item

Attorney X provides trust services, as defined in item 2 to Schedule 1 of the FIC Act as part of their normal business operations.

Attorney X must register as a trust services provider in terms of the FIC Act.

Attorney X is also considered to be an accountable institution in terms of item 1 of Schedule 1 of the FIC Act and must additionally register as a legal practitioner.

5 INHERENT RISKS AND POTENTIAL RISK INDICATORS RELATING TO TCSPs

- 5.1 TCSPs are included as accountable institutions given their susceptibility to exploitation by those looking for methods to launder criminal proceeds or raise funds for terrorist activity.
- 5.2 The knowledge and expertise in creating, administering and managing trusts and other business entities is particularly attractive to potential abuse. Legal persons i.e. business entities, can be used to attempt to disguise beneficial ownership, and the TCSPs involvement therein could provide an appearance of legitimacy and create an air of respectability for these customers and their newly created corporate vehicles.
- 5.3 Criminals may seek opportunities to retain control over criminally derived assets while frustrating the ability of law enforcement to trace the origin and ownership of the assets by using TCSPs' services. Criminals see companies – often trusts and similar legal arrangements – as potentially useful vehicles to achieve this outcome. While shell or shelf companies which do not have ongoing business activities or assets may

be used for legitimate purposes such as serving as a transaction vehicle, they may also be used to conceal beneficial ownership, or enhance the perception of legitimacy.

5.4 Criminals may also try to misuse shelf companies, which can be formed by accountants, by seeking access to companies that have been “sitting on the shelf” for a long time. This may be in an attempt to create the impression that the company is reputable and trading in the ordinary course because it has been in existence for many years. Shelf companies can also add to the overall complexity of corporate structures, further concealing the underlying beneficial ownership of information.

5.5 TCSPs are considered to be gatekeepers in providing potential access points into the financial system for criminals to do business with financial institutions without revealing their own identities.

5.6 Although the business of the TCSP may be legitimate, crime syndicates or individual criminals may seek out their services in the facilitation of ML, TF and PF. A TCSP may unwittingly become part of such ML, TF and PF attempts.

5.7 A TCSP should review all services they provide holistically. This is especially true where a TCSP offers multiple different services to their clients relating to the clients business, such as using auditing, legal services, accounting as well as entity creation (legal person or trust), administration and management. Multiple engagements across different services could intensify the disguising of a potential criminal entity or trust to such an extent that the client's identity is mainly linked to the TCSP themselves.

5.8 Based on the nature of the business offering provided by a TCSP, the following could be considered as inherent ML, TF or PF risks posed by the TCSP sector. It is important to first understand the ML, TF and PF risks that the industry faces before considering specific indicators. Such ML, TF or PF risks could include:

5.8.1 Disguising ultimate beneficial owners through a corporate structure, to limit the detection of a sanctioned or designated person, an associated sanctioned

person, a politically exposed person (PEP), such as a foreign politically exposed person (FPEP) or domestic politically exposed person (DPEP), a prominent influential person (PIP) or a person linked to criminal activity.

- 5.8.2 Facilitating the movement of illegal proceeds from a foreign client's country to South Africa. This is the primary reason why sufficient care and application of the mind is used to scrutinise client details to identify whether they are not a FPEP or DPEP. In these instances, a TCSP should satisfy themselves that adequate information is available to assess a client's source of funds and source of wealth as legitimate, with a degree of certainty that is commensurate with the risk profile of the client.
- 5.8.3 Companies based in foreign countries hiding the origin of their money, while attempting to distance themselves from the source of funds and to avoid paying tax in South Africa.

5.9 The risk indicators shown below may be helpful when evaluating risk in the ordinary course of business for a TCSP. If one or more of these risk factors are present, the TCSP should consider this as a heightened risk indicator when assessing client risk. The list is not exhaustive and does not intend to cover every situation.

Services offering risk indicators:

- 5.9.1 The client is using multiple companies or trusts which add layers of complexity to the ownership where those layers seem unnecessary e.g. trusts where the beneficiary of a trust is another trust.
- 5.9.2 Other professionals are assisting customers to use schemes that can disguise income, assets or ownership of such assets.
- 5.9.3 The number of intermediaries or professionals used seems unnecessary, or at the outset, it is apparent that there is no need for a professional TCSP.
- 5.9.4 Establishing a business primarily for the purpose of collecting funds from various sources, which are then transferred to local or foreign bank accounts that have no apparent ties to the legal entity.
- 5.9.5 The transfer of funds in the form of "forgivable loans" to individuals from trusts and shell companies but the loans make little or no business sense. The loans repayments may be for comparatively small amounts to the

amount loaned or for excessively long periods of time (e.g. repayment is over the course of 10 or 15 years.) A forgivable loan is a form of loan in which its entirety or a portion of it can be forgiven or deferred for a period of time by the lender when certain conditions are met.

- 5.9.6 Appearance of the same parties in multiple transactions within a short period of each other. Specifically, where it would make no business sense or logically impossible to enter such transactions within a short time.
- 5.9.7 The purchase of companies that have no obvious commercial purpose.
- 5.9.8 Companies which continuously make substantial losses.

Client risk indicators:

- 5.9.9 A company is registered by a non-resident with no links or activities in South Africa or the jurisdiction where the company is established.
- 5.9.10 The parties are native to, resident in, or incorporated in a high-risk geographic area.
- 5.9.11 The money flow generated by a company is not in line with its underlying business activities.
- 5.9.12 The client is unwilling or refuses to provide information including documentary evidence of himself or beneficial owners of trusts or companies.
- 5.9.13 The client is involved with transactions for themselves or on behalf of a company that does not match their background.
- 5.9.14 The beneficial ownership is veiled in complexity, making it impossible to determine who is the ultimate beneficial owner.
- 5.9.15 The client is secretive about the reasons for and the way a company structure is being set up.
- 5.9.16 Searches on a client or close associates show adverse media attention, or they have been disqualified from professions due to convictions of dishonesty or association with bribery in relation to contract procurement or tenders.
- 5.9.17 Where the client is or appears to be acting on behalf of another person but is unwilling to provide the names of the person they are acting on behalf of.

- 5.9.18 The person acting as a director or representative does not appear to be a suitable representative or does not appear to have the expertise that the role requires.
- 5.9.19 Clients whose owners or directors that have a lavish lifestyle that appears to exceed known sources of income.
- 5.9.20 Frequent changes in ownership, officers, beneficiaries, or trustees.
- 5.9.21 Irregularity or limited duration of the client relationship. Once-off engagements for the establishment of complex trust, company or other arrangements involving legal entities without ongoing involvement from the client.
- 5.9.22 Where there is a suspicion that the client's directors or the ultimate beneficial owner are designated individuals on a targeted financial sanctions list or a resolution of the United Nations Security Council (UNSC.)
- 5.9.23 Where the customer requests that a company or legal entity is registered with a designated person (in terms of a targeted financial sanctions list or UNSC resolution) as the director, trustee or any other beneficial owner of such entity.

6. COMMUNICATION WITH THE CENTRE

- 6.1 The Centre has a dedicated compliance contact centre geared to assist accountable institutions to understand their registration obligations in terms of the FIC Act. Please call the compliance contact centre on 012 641 6000 and select option 1.
- 6.2 Compliance queries may 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

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