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12 August 2022

Mr Allan Wicomb
Committee Secretary
Standing Committee on Finance

Ms Teboho Sepanya
Committee Co-ordinator

BY EMAIL: awicomb@parliament.gov.za
tsepanya@parliament.gov.za

Dear Mr Wicomb and Ms Sepanya

**SAICA COMMENT LETTER ON THE AMENDMENTS OF SCHEDULES 1, 2 AND 3 TO
FINANCIAL INTELLIGENCE CENTRE ACT, 2001 (FICA)**

We refer to the Standing Committee of Finance's invitation of 21 July 2022 for written comments on the proposed amendments to Schedules of the Financial Intelligence Centre Act, No. 38 of 2001 (FICA). Our comments are in response to the proposed amendments in the Government Gazette.

We wish to extend our appreciation for providing us with an opportunity to convey our comments and questions prepared by the South African Institute of Chartered Accountants (SAICA).

Our comments have been included in the following sections:

1. General comments
2. Detailed comments

We are confident that we can find workable solutions through continued engagement on our mutual objective to combat money laundering and the financing of terrorism.

We are available to further discuss and engage with the Financial Intelligence Centre to ensure that further consultation and dialogue ensues to better understand the expectations of our members and associates.

With regards to membership, SAICA currently have 53 270 members of which 48 791 are qualified Chartered Accountants, 4 075 Associate General Accountants and 404 Accounting Technicians. SAICA members and associates are employed in over 60 diversified industries



and these include auditing, accounting and tax services, banking, manufacturing, hotels and gambling and various other industries.

We would appreciate the opportunity to address the Standing Committee on Finance on Tuesday, 16 August 2022.

Yours sincerely

(Signed electronically)

A handwritten signature in black ink, reading 'Thandokuhle Myoli'.

Thandokuhle Myoli
Executive: Assurance

A handwritten signature in black ink, reading 'Juanita Steenkamp'.

Juanita Steenkamp
Project Director: Governance and Non-IFRS Reporting



1. BACKGROUND

- 1.1. South Africa has fallen victim to significant instances of corruption, fraud and money laundering over recent years. As a key stakeholder in the fight against these crimes, SAICA strongly supports Government's Programme of Action to intensify efforts to combat crime, build safer communities, and create drivers of economic recovery and thereby improve economic growth.
- 1.2. As mentioned above, SAICA comprises a vast membership body of more than 53 000 members comprising of Chartered Accountants, Associate General Accountants and Accounting Technicians who must comply with the *SAICA Code of Professional Conduct (CPC)*, which includes integrity as one of its Fundamental Principles. SAICA members and associates do not take their public interest responsibility lightly.
- 1.3. The SAICA CPC is subject to constant review and must comply with requirements set by the following entities to ensure their recognition:
 - 1.3.1. International Federation of Accountants
 - 1.3.2. Independent Regulatory Board for Auditors
 - 1.3.3. South African Revenue Service as relates to tax practitioners
 - 1.3.4. Company and Intellectual Property Commission relates to Business Rescue Practitioners
 - 1.3.5. Australian Tax Practitioners Board as relates to Australian Tax Practitioners.
- 1.4. SAICA fully supports the objective of the Financial Intelligence Centre (FIC) to widen the scope of application of FICA by including additional categories of institutions and businesses under the realm of the Schedules to FICA. It is mutually understood, also through discussions that SAICA had with the FIC, that there is a need to bring South Africa's legal framework regarding money laundering and the financing of terrorism in line with the Recommendations of the Financial Action Task Force (FATF).
- 1.5. The FATF was established in July 1989 by a Group of Seven (G-7) Summit in Paris.
- 1.6. The FATF currently comprises 37 member jurisdictions and 2 regional organisations, representing most major financial centres in all parts of the globe and South Africa joined in 2003.
- 1.7. Per its website the key objectives of the FATF are¹:
- 1.8. *Acting as the **global money laundering and terrorist financing watchdog**. The inter-governmental body sets international standards that aim to prevent these illegal*

¹ [About - Financial Action Task Force \(FATF\) \(fatf-gafi.org\)](http://fatf-gafi.org)

*activities and the harm they cause to society. As a policy-making body, the FATF works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. With more than 200 countries and jurisdictions committed to implementing them. **The FATF monitors countries to ensure they implement the FATF Standards fully and effectively, and holds countries to account that do not comply.....***

*The FATF **identifies jurisdictions with weak measures** to combat money laundering and terrorist financing (AML/CFT) in two FATF public documents **that are issued three times a year**. The FATF's process to publicly list countries with weak AML/CFT regimes has proved effective. As of February 2020, the FATF has reviewed over 100 countries and jurisdictions and publicly identified 80 of them.*

- 1.9. In 2021, FATF performed a country review of South Africa and issued its report in October 2021². It made 12 key findings and 40 recommendations.
- 1.10. South Africa was given till **October 2022** to make significant improvement with some findings including:
 - 1.10.1. Some financial sectors, Designated Non-Financial Business and Professions (DNFBP), and Virtual Asset Service Providers are yet to be subject to most Anti money Launderings/Terrorist Financing (AML/CFT) obligations and their exclusion is not justified based on risk.
 - 1.10.2. The identified risk pertaining to cash, particularly cross border cash transactions, and the fact that the FIC is not routinely receiving reports on cash courier activity, as well as the low volume of reporting from high risk DNFBPs, indicate that significant gaps in financial intelligence exist.
 - 1.10.3. Overall, DNFBP's understanding of ML risks and AML/CFT obligations is underdeveloped and mitigating measures are not risk-based, with casinos as a positive outlier. The high-risk estate agents and attorneys have a poor understanding of risks and obligations.
 - 1.10.4. While fit and proper criteria are in place for many sectors, these often do not apply to beneficial owners (BO). Even though there was an isolated case where a bank application was rejected due to BO issues, the authorities could not demonstrate that they implement adequate controls to prevent criminality from infiltrating Financial Institutions (FIs) and DNFBPs. Most regulators rely to a large extent on self-disclosure, and there is little verification done by competent authorities on criminal record checks.

² [MUTUAL EVALUATION REPORT OF SOUTH AFRICA \(treasury.gov.za\)](https://www.treasury.gov.za/external/amlcft/mutual_evaluation_report_of_south_africa.pdf)



- 1.10.5. DNFBPs such as attorneys, other trust and company service providers , estate agents, and DPMS, are inherently vulnerable to misuse. Insufficient corporate ownership transparency also represents an acute vulnerability in South Africa; companies and trusts are misused often for ML or to carry out predicate crimes and there is no comprehensive framework for accessing accurate and up-to-date BO information.
- 1.10.6. The **main domestic ML threats including, *inter alia*, corruption, tax related crimes, and fraud, are understood consistently by the main AML/CFT authorities, but the authorities' understanding of the relative scale of such threats is questionable.** The basis for considering these threats high-risk is more how significant the impacts are, the analysis of which sometimes is rather narrowly focused (for instance, the impacts of fraud on the banking sector), rather than the scale of the proceeds generated. Corruption is identified as a main concern for its role as an “enabler” of other predicate offenses and ML, including by undermining some key AML/CFT agencies, less so for the scale of proceeds generated, which the authorities indicated was not as high as that of tax crimes or drug trafficking. The basis of this assertion about the relative scale of proceeds is unclear. The authorities highlighted VAT fraud as a main tax-related offense and also recognized evasion of income taxes as a concern.
- 1.10.7. South Africa should develop national AML/CFT policies to address higher risks for: (i) Beneficial Ownership; (ii) use of cash and its cross-border movement physically and through illegal MVTs; (iii) third-party ML; (iv) foreign predicate crimes; and (v) TF, including by fully integrating it into the NCTS. **South Africa should also ensure all FIs, DNFBPs and Virtual Assist Service Providers (unless they are assessed as posing a proven low risk), in particular those with potentially higher risk such as Dealers in Precious Metals and Stones (DPMS) and Company Service Providers (CSP), are subject to AML/CFT obligations and supervision or monitoring.**

1.11. As to who the FATF saw as DNFBP it noted the below:

Table 1.3. South Africa Designated Non-Financial Businesses and Professions (March 2019)

Type	No.	No. licensed/ registered	FATF Glossary Activities	Subject to AML/CFT?	AML/CFT supervisor or SRO
Casinos	39	39	a)	Y	NGB/PLA
Estate Agents	44,874	44,874	b)	Y	EAAB
DPMS	Unknown	NA	c), d)	N	NA
Among which, KRDs	Unknown ¹	NA	c)	Partially	FIC
Attorneys (practicing only, including notaries)	19,119	19,119	e)	Y	LPC
Accountants	9,928	9,928	e)	Partially	FSCA
Auditors	4,152	4,152	e)	Partially	FSCA
TSPs	300 ²	NA	f)	Y	FIC
CSPs	Unknown	Unknown	f)	N	NA

Source: South African Authorities

Note 1: 223 are registered with the FIC.

Note 2: This is an estimate, there are 74 registered with the FIC.

1.12. As relates to “Accountants”, the above only represents those registered with the FIC who also conduct relevant regulated transactions and does not cover the broader concept of “accountant” as relates to providing “company services”. There may be more than 80 000 – 100 000 “accountants” in South Africa though many may not be registered with any professional society or body.

1.13. Whilst SAICA provides its full support to the FIC in its efforts to combat money laundering and terrorist financing, SAICA and its members (and associates) are concerned about the following unintended consequences of the proposed amendments as set out below.

2. GENERAL COMMENTS

2.1. Regulating people or services

- 2.1.1. Many of the key findings of the FATF were in respect of monitoring and enforcement rather than the lack of actual AML/CFT frameworks.
- 2.1.2. The expansion of certain AML/CFT reporting requirements to DNFBP’s will also require effective monitoring and enforcement of compliance.
- 2.1.3. In this regard the proposal also splits regulation between the holding of certain positions and the rendering of certain services.

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| 2.1.4. | <u>Submission</u> : This begs the question whether this can be effectively achieved if FIC intends to regulate specific transactions carried on or positions held by both regulated and unregulated persons, the latter for which detection risk is the first hurdle? |
| 2.1.5. | SAICA acknowledges that regulation comes at a cost which must be considered as well, but given the impact of not achieving proper regulation, we recommend that steps be proposed to reduce the detection risk by ensuring FIC are aware who the persons are that render these services or hold these positions. |

2.2. Lack of clarity/ambiguity in the legislation

2.2.1. SAICA members and associates are classified as either “Members in Business” or “Members in Public Practice”, known as “practitioners”.

2.2.1.1. Members in Business are employed as employees of an organisation, in the capacity of, for example, chief financial officer, financial director, financial manager or company secretary and as such perform *inter alia* internal accounting, bookkeeping or secretarial work in terms of their employment agreement.

2.2.1.2. Members in Public Practice normally have their own firms as sole proprietors or are directors of private or personal liability companies, members of close corporations, or partners in partnerships (collectively referred to as “firms”). Firms 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 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.

2.2.2. The identification of persons, for example “accountants” for which these services are habitually rendered, is therefore not helpful as the scope of services transverse a much broader spectrum than the capturing of financial information for the purposes of financial reporting.

2.2.3. In the FATF October 2021 report at paragraph 133 it states:

*The authorities intend to publish sanitized versions of the ML NRA and TF NRA upon their conclusion. **A high-level summary of the preliminary findings of ML NRA has been shared with representatives of some private sectors in a few workshops while preliminary findings of TF NRA have not been shared***

with the private sector. The SARB:PA and the FSCA have shared the SRAs or their high-level summaries with some entities and intend to publish the SRAs. SRAs of DNFBPs have not been shared with the private sector. Preparation of some SRAs involved the private sector only to a limited extent. The sectors not yet covered have not been shared with any information of the NRAs.

- 2.2.4. Consultation with the private sector is in our experience usually best done when risks and proposed interventions are being formulated. The reason for this is to ensure that what authorities perceive as to what is being done or better understand such and that it is aligned to what is actually being done within a particular profession or service. This reduces challenges when actual regulations are formulated and implemented.

2.2.5. Submission: There is a lack of clarity on what types of service offerings fall within the activities proposed in Schedule 1.

2.2.6. SAICA would encourage further dialogue to ensure that practitioners are clear on “in-scope” services. SAICA is available to further consult with the FIC to ensure clarity and legal certainty on the interpretation of the activities described in Schedule 1.

Role of current regulators

- 2.2.7. SAICA members and associates are regulated by various other regulators and are subject to the standards and laws of these regulators depending on the type of services performed. SAICA members and associates are *inter alia* regulated by regulatory bodies such as:

1. The South African Revenue Service (SARS) where they are registered tax practitioners;
2. The Independent Regulatory Board for Auditors (IRBA) where they are registered auditors;
3. The Johannesburg Stock Exchange (JSE) for certain services; and
4. The various accredited professional bodies for business rescue practitioners; and
5. The CIPC where independent reviews and other company services are performed.

- 2.2.8. SAICA members and associates are also required by the SAICA CPC to act on any non-compliance or suspected non-compliance with laws and regulations (NOCLAR) in line with the SAICA CPC's requirements and to report such non-compliance, where appropriate. Registered auditors are required to report Reportable Irregularities to the IRBA (in terms of Section 45 of the Auditing

Profession Act, 2005) which in turn reports the Reportable Irregularities to the applicable regulators.

2.2.9. In this regard it should be noted that over the last decade or so the regulation model of many regulators has changed. The traditional model is for a statutory regulator who directly regulates persons whereas a newer hybrid model seems to be favoured by many regulators.

2.2.10. In the hybrid model the regulator may either indirectly regulate via approved private bodies, for example, as SARS does with tax practitioners via its Recognised Controlling Body model or even a hybrid model like IRBA where certain matters are directly regulated in respect of auditors and others are referred to the accredited professional body.

2.2.11. This status quo directly impacts any proposal to be considered when considering the role of supervisory bodies.

2.2.12. In addition, the key findings of the FATF include:

Designated Non-Financial Businesses and Professions (DNFBPs) are focused on compliance, not on identifying and understanding risks. TF risk is understood by the private sector to some extent. Overall, the risk-based approach (RBA) is inadequately implemented. Basic customer due diligence (CDD) is applied by many accountable institutions (AIs) satisfactorily but BO requirements only to some extent.

2.2.13. Therefore as relates to DNFBP, this is not a finding of malice and non-compliance but rather of lack of understanding and knowledge. This cannot be corrected by mere regulation and enforcement but requires a concerted effort of education and raising of competency levels.

2.2.14. This is a role that no traditional statutory supervisory body has ever fulfilled and requires careful consideration.

- 2.2.15. Submission: The supportive role that supervisory bodies and professional bodies like SAICA will play *vis-à-vis* the FIC in the proposed regulatory regime needs further consideration and discussion.
- 2.2.16. There is also a fundamental risk of scope creep and overlap between supervisory bodies and challenges in coordination and alignment to avoid duplication and wasteful cost increases for duplicate compliance process and reporting.
- 2.2.17. As noted above there is also significant detection risks. Practitioners registered with various professional bodies are easy to detect and made to comply with the regulatory requirements, by virtue of their affiliation with their respective member bodies. Unregistered practitioners not necessarily affiliated with a regulator or member body like SAICA, performing Schedule 1 activities, may not necessarily comply with the requirements of accountable institutions. This may result in regulatory “inequity” or arbitrage.
- 2.2.18. Although we are supportive of the FIC’s endeavours to align with the FATF Standards, it should be ensured that all persons performing the activities in Schedule 1 are equally regulated and that the additional compliance requirements are not placed disproportionately on those who are currently already regulated by virtue of their membership affiliation with SAICA or other member bodies.
- 2.2.19. Furthermore, the proposals by FIC and the FIC itself should also ensure that all persons within the intended scope should be supported through a properly devised competence framework and providing of access to appropriate learning and development interventions. This would be particularly important to smaller entities which, as FATF notes, will not just have to focus on compliance but have to understand and be able to implement and apply the risk based assessment process within their businesses.

Compliance costs

- 2.2.20. FATF approach as noted in their report is one of risk based.
- 2.2.21. In this regard it notes that certain DNFBP’s are high risk as they are not subject to AML/CFT obligations or supervision.
- 2.2.22. Given that a risk based approach is recommended, it also means that the proposed regulations should evaluate the risk as relates to smaller DNFBP’s who are in fact subject to certain AML/CFT obligations or supervision and operate in regulated professions such as smaller tax advisors, accountants and auditors (i.e. practitioners) etc.



- 2.2.23. Practitioners are currently required to evaluate clients through client acceptance procedures and evaluate clients on a continuous basis.
- 2.2.24. Pursuant to the above a firm may have to impose extensive Customer Due Diligence procedures for services that are unrelated to those within the ambit of FICA. Where for example, a practitioner provides payroll services to a client, this may have the unintended consequence that the underlying employees of the client is scoped into the due diligence requirements.
- 2.2.25. Furthermore, if the intention is that persons who carry on the business of giving tax advice, for instance, are to fall into the definition of “accountable institution” as described in paragraph 3.22 below, then an unnecessary duplication would exist in that the persons involved in the business of actually setting up the company or trust would be accountable institutions in their own right.
- 2.2.26. Submission: It is questionable whether the added administrative burden of registering numerous small practitioners and individual accountants as accountable institutions will enhance the FIC’s endeavours to curb money laundering and terrorist financing.
- 2.2.27. Overburdening the accounting profession with compliance obligations disproportionate to the core services it provides, may cause the accounting profession to become an unattractive option to upcoming talent.
- 2.2.28. We submit that the practical implementation and cost of compliance may be too onerous for small practitioners given the current difficult economic environment. Practitioners will be required to incur the high and ongoing cost attached to regulatory compliance, even though the defined services may be ancillary to their primary services or are only performed by some individuals in a small practice.
- 2.2.29. We further submit that it would not be necessary to place the very onerous and costly administrative burden of being an accountable institution on persons who merely give tax advice in relation to the company or trust.
- 2.2.30. It is recommended that SMME’s should be subject to at most a lesser requirement and that those who are already subject to some form of regulation be differentiated from those who are not. Other mechanisms such as transaction value etc. could be used to manage risk relating to reporting obligations and ensuring material risks remain within scope.

- 2.2.31. Not only will the proposed changes increase the burden for small practitioners, but it will also increase the burden on the FIC as the protector of the integrity of South Africa's financial system and it should therefore be ensured that the FIC is prepared and will be able to cope with the increased number of accountable institutions that will be required to register. Failure by the FIC to appropriately monitor the compliance with the final legislation will render any changes introduced as meaningless and this will not assist in ensuring that South Africa remains off the FATF 'grey list'.
- 2.2.32. The context to this is also the number of persons as there are more than 24 000 registered tax practitioners (and quite a few unregistered) and probably nearly 100 000 "accountants" (both regulated and unregulated).
- 2.2.33. As noted above, it is not just about enforcement and monitoring but about support, and who is going to provide this support and development to these smaller practitioners and at what cost?

Transitional provisions

- 2.2.34. There is no indication of transitional provisions for the implementation of the compliance obligations required for accountable institutions.

- 2.2.35. Submission: Transitional provisions should be provided to allow for practitioners to evaluate whether the requirements apply to them, and if applicable, to provide time to implement the compliance requirements.
- 2.2.36. Though we note the time sensitive nature of these proposals, we are also aware that this roll out will take some time given it's not just a compliance process roll out but a whole new risk based assessment methodology that needs to be developed, understood and deployed by various sectors.
- 2.2.37. SAICA is available to assist with further consultation and guidance in this regard.

3. DETAILED COMMENTS

Schedule 1 - List of accountable entities – Item 2 “A person”

- 3.1. The FATF Standards, which are supported by SAICA, suggest that anti-money laundering and anti-terror financing country-specific legislation regulates trust and company service providers in instances where they prepare for or carry out transactions for a client concerning the following activities³:

³ Section 22(e) of the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation – The FATF Recommendations, updated June 2019

- *acting as a formation agent of legal persons;*
- *acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;*
- *providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;*
- *acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement;*
- *acting as (or arranging for another person to act as) a nominee shareholder for another person.*

- 3.2. Whilst SAICA supports alignment with international best practice and standards, the proposed changes to Schedule 1 of FICA, which are the primary focus of our detailed comments, elicit further discussion and debate and appear to be more onerous than the FATF Standards.
- 3.3. This is so because the corresponding wording in the FATF standard pertaining to “company services” is specified *inter alia* as acting as company formation agents, directors, secretaries, trustees and nominee shareholders. The FATF wording evolves around designations and creates a degree of legal certainty in that designations can be attributed to specific offices or functions in or outside a company.
- 3.4. The proposed wording as reflected in in Item 2 of the amendments to Schedule 1 of FICA is as follows and appears wider in scope than what is required from the above wording:

- ‘(a) A person who carries on a 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 (Act 71 of 2008);*

- (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, or
 - (ii) arranging for another person to act for a client as such 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, 1988 (Act 57 of 1998)"

- 3.5. Submission: It is recommended that the scope of the requirements set by FIC better align to the lesser and clearer scope of FATF, even if just initially.

Schedule 1 - List of accountable entities – Item 2: The term “person”

- 3.6. The amendment refers to a “person who carries on a business of preparing for or carrying out transactions for a client” concerning certain specified activities:
- 3.7. FICA in Section 1 does not define the term “person” but defines the term “legal person” instead as:

“Any person, other than a natural person, that establishes a business relationship or enters into a single transaction, with an accountable institution, and includes a person incorporated as a company, close corporation, foreign company or any other form of corporate arrangement or association, but excludes a trust, partnership or sole proprietor.”

- 3.8. SAICA members and associates in business are natural persons employed by companies who may not be accountable institutions in their own right. The wording may inadvertently scope in financial or accounting officers employed as such, but in their individual capacity.
- 3.9. The wording imposes a personal responsibility on practitioners to register as accountable institutions, as individuals. These may include trainees and other junior staff.

- 3.10. Submission: We recommend that clarity is provided on the intention of the legislature.
- 3.11. People merely employed at accountable institutions should not themselves also be accountable institutions. Individuals should only be accountable institutions where they trade as sole proprietor or in partnership.



Schedule 1 - List of accountable entities – Item 2: The meaning of “*carries on a business*”

- 3.12. The proposed inclusion refers to the “person” carrying on a business” and concerns are raised as to when “a person is carrying on a business”.
- 3.13. Where the specific service is provided infrequently, or only by a few individuals in a larger firm, it is unclear where the parameters are drawn to satisfy the requirements for the carrying on of a business. Will compliance be triggered when a person enters into one transaction that is in scope even if the value is incidental to the main business of the person?

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| <p>3.15 <u>Submission:</u> Guidance is required on when practitioners would be regarded as “carrying on a business”.</p> <p>3.16 It is proposed that where company services are ancillary or incidental to the main activities portrayed in the schedules, practitioners are not regarded as falling within the scope of “carrying on a business”.</p> <p>3.17 Relevant to this aspect is also the significance of the activity in relation to the overall service offering of a firm that should align with the risk-based approach.</p> |
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Schedule 1 - List of accountable entities – Item 2: The meaning of “*creation, operation or management*”

- 3.18 The requirement is for a person who carries on a business where the client is assisted in creation, operation or management of a company, etc to be classified as an accountable institution.
- 3.19 For example, are you assisting in managing by providing internal audit services to management to manage risks or are you assisting in operating the company by providing ongoing education and learning to the finance team to enhance their performance?
- 3.20 Furthermore, where some of the activities fall within the ambit of the description guidance is required on whether the entire business will be considered to be an accountable institution, or only that part of the business that performs the activities as described. Where only certain practitioners in a firm perform the activities as described, it is inconceivable that the entire business may be subject to the compliance obligations brought about by the proposed amendments.

- 3.21 Submission: Practitioners perform various services for clients and we request clarification on what would be included in the “creation, operation or management” of a company. The broad wording of “assisting in creation, operation or management” creates a very broad and imprecise scope as to who and what is included.
- 3.22 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. These services are subject to regulation and/or standards. With regard to tax services, practitioners prepare and submit tax returns, PAYE and VAT schedules on behalf of employers. We submit that these services are excluded from the ambit of FICA and request confirmation from the legislature on this aspect. With regard to specialised tax services, such as tax opinions we request clarity on whether this would be seen as “creation, operation or management”.
- 3.23 For instance, we do not believe that if one merely advises on the tax consequences of a trust arrangement for a client, that one would be ‘creating a trust arrangement for a client’.
- 3.24 *We submit that where services are ancillary and not primary to accounting and tax services, practitioners are not regarded as “carrying on a business”*. Any other services provided by practitioners that primarily perform accounting and tax services are ancillary to the primary business they carry on. Ancillary services normally represent a small or insignificant portion of the work performed by practitioners. In these instances, where practitioners perform ancillary services (other than accounting and tax services) they can inadvertently be scoped into the compliance obligations imposed by FICA.
- 3.25 Guidance is also required of as to who are regarded as accountable institutions where only some practitioners in a practice perform the activities described in Schedule 1.

Schedule 1 - List of accountable entities – Item 2: carries out the business of creating a trust arrangement

- 3.26 The reference to “*business of creating a trust arrangement*” also needs further guidance and consideration.
- 3.27 The previous version of the proposed Schedule amendments specifically referred to the “*creation, operation or management of a trust.... except for a trust established by virtue of a testamentary trust or court order*”.

3.28 Submission: As this wording was not carried over but changed, we request clarity on whether this would include testamentary trusts or only “inter vivos” trusts or all trust as identified by the South African Revenue Services⁴.

Schedule 1 - List of accountable entities – Item 2: reference to “including as a trustee”

3.29 Submission: Guidance is required on whether the intention is to scope independent trustees into the schedules.

Schedule 1 - List of accountable entities – Item 11: reference to credit providers

3.30 Item 11 of Schedule 1 includes the a person who carries on the business of a credit provider as defined in the National Credit Act, 2005) and a person who carries on the business of providing credit in terms of any credit agreement that is excluded from the application of the National Credit Act, 2005.

3.31 We question whether this will include credit providers who are registered credit providers but only extend credit on an *ad-hoc* basis and where this credit extension is not part of the core business of the entity.

3.32 For example, in the instance where a firm provides staff loans to its employees. The National Credit Regulator has in the past expressed the view that staff loans are in scope for purposes of the definition of a credit provider and that registration as a credit provider is required. Firms may inadvertently be scoped in as accountable institutions in instances where their core business is accounting or auditing services, but they do provide staff loans too.

3.33 Submission: Guidance is required that where the extension of credit is ancillary to the services or does not constitute the core business of a firm, these persons are excluded from the ambit of Schedule 1.

⁴ [SARS type of trusts](#)