

20 December 2022

Mr Pieter Smit

BY EMAIL: Pieter.Smit@fic.gov.za

Dear Mr Smit

SAICA COMMENT LETTER ON THE *DRAFT DIRECTIVE 7 of 2022 – SUBMISSION OF RISK AND COMPLIANCE RETURN*

We refer to the draft Directive 7 of 2022 that was released for public comment and we are submitting this letter in addition to our online submission.

We are concerned with regards to the application of the draft Directive on our membership as we are awaiting clarity on the impact of the amended Schedule 1 and the services mentioned in the schedule and how it would impact our members in their various roles. As previously agreed by the Financial Intelligence Centre (FIC), clarity, in the form of guidance should be provided to the accounting profession to be able to evaluate whether the services provided by accountants and other role players would meet the definition of an accountable institution as set out in the amended Schedule 1, item 2. The lack of clarity in this regard does make it difficult to comment on Directive 7 of 2022.

It also appears based on the tone of the Directive that it is aimed at financial institutions and resonates with the current obligations of the financial services industry. Some of the requirements may not be suitable to accountable institutions in other industries and the Directive should take into account that a “one size fits all” approach may not present the ideal solution in the long term.

We request further consultation or workshops with the FIC and the industry to ensure that the regulation is fit for purpose and achieves its intended objectives.

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.

Our comments have been included in the following sections:

1. General comments
2. Detailed comments



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.

Yours sincerely

(Signed electronically)

Thandokuhle Myoli
Executive: Assurance

Juanita Steenkamp
Project Director: Governance and Non-IFRS Reporting



1. BACKGROUND

- 1.1. SAICA is a membership body with 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.
- 1.2. The SAICA CPC is subject to constant review and must comply with requirements set by the following entities to ensure their recognition:
 - 1.2.1. International Federation of Accountants,
 - 1.2.2. Independent Regulatory Board for Auditors,
 - 1.2.3. South African Revenue Service as relates to tax practitioners,
 - 1.2.4. Company and Intellectual Property Commission relates to Business Rescue Practitioners, and
 - 1.2.5. Australian Tax Practitioners Board as relates to Australian Tax Practitioners.
- 1.3. 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.
- 1.4. The FIC published the amended schedules on 29 November 2022 with an effective date of 19 December 2022.
- 1.5. The Schedules includes the following:
 - '2(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)”

- 1.6. As per our previous engagements, SAICA members and associates are not clear on the interpretation of when they will be classified as an accountable institution. The FIC confirmed that a document with guidance will be released.
- 1.7. At present, it is difficult to comment on the draft Directive 7 of 2022 and the risk and compliance questionnaire as the terminology does not correlate or agree with the terminology used in our industry.

2. GENERAL COMMENTS

2.1. Lack of clarity/ambiguity in the legislation

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

2.1.1.1. 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.

2.1.1.2. 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.



- 2.1.2. Submission: There is a lack of clarity on what types of service offerings fall within the activities proposed in Schedule 1.
- 2.1.3. There is also a lack of clarity on whether the duties of the accountable institution and the Risk and Compliance return only applies to the portion of the practitioners' services that falls within the definition of an accountable institution, specifically Schedule 1
- 2.1.4. SAICA encourages further dialogue to ensure that practitioners are clear on "in-scope" services and the relevant expectations.

2.2. Submitter, entity and institution

- 2.2.1. The directive and risk and compliance return uses the terms submitter, entity name and institution. It is not clear whether this refers to the submitter of the comments or the submitter of the return.
- 2.2.2. SAICA members and associates provide various services to clients and there is no clarity on "entity" and "institution". Where a firm of accountants provides accounting services which may include some of the activities in Schedule 1, some questions arise on how this questionnaire must be completed. For example, which activities are referred to as the firm might be providing registration, accounting advice and tax services to a trust? Which part of the services delivered must be taken into account in the submission of the return?
- 2.2.3. With regards to the submitter of the return, where a firm of accountants again perform services but only 2 of the 10 partners provide any of the services in Schedule 1, who must complete the return, specifically linked to follow up and liability.
- 2.2.4. Practitioners are currently required to evaluate clients through client acceptance procedures and evaluate clients on a continuous basis.
- 2.2.5. 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 are scoped into the due diligence requirements.
- 2.2.6. 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.



2.2.7. Submission: We submit that clarity is required on the completion of the Risk and Compliance Return.

2.3. Transitional provisions

2.3.1. The FIC document setting out the comments received and the responses thereto in respect of the proposed amendments to the Schedules to the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) published for comment by Parliament - 21 July 2022 stated: “Supervisors are sensitive to the fact that new categories of accountable institutions will not be ready to comply with the FIC Act from the outset and set clear expectations for institutions to improve compliance with the FIC Act within reasonable timelines, as was done when the most recent amendments to the FIC Act FIC Amendment Act came into operation in 2017”.

2.3.2. The publication of the amended Schedule 1 and the Draft Directive 7 of 2022 does not indicate or propose any phasing in period. There is also no indication of transitional provisions for the implementation of the Risk and Compliance return. The submission of the return would require changes in how practitioners keep record of clients and the various services would need to be divided in some way and recorded to be able to submit these returns.

2.3.3. 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.

2.3.4. The compliance requirements on newly scoped in accountable institution should be applied in a phased approach, similarly to what happened when the Act became effective initially, as the compliance burden on smaller persons and organisations may be onerous to implement the first time round.

2.3.5. SAICA is available to assist with further consultation and guidance in this regard.

3. DETAILED COMMENTS

Section 6.2

- 3.1. Section 6.2 states that the draft Directive applies to all accountable institutions listed in Schedule 1 of the FIC Act.
- 3.2. 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.



3.3. The wording imposes a personal responsibility on practitioners to register as accountable institutions, in their individual capacity. These may include trainees and other junior staff depending on the nature of the services provided.

3.4. Submission: We recommend that clarity is provided on the services identified in Schedule 1, Item 2.

3.15 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 wording of “assisting in creation, operation or management” creates a very broad and imprecise scope as to who and what is included.

3.16 In this regard *guidance is required as to what services provided by practitioners that would be classified in 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. As per the FIC submission in Parliament, dated 22 July 2022 these services are excluded from the ambit of FICA and we 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”.

3.17 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’.

3.18 Guidance is also required as to who may be regarded as accountable institutions in instances where only some practitioners in a practice perform the activities described in Schedule 1.

Risk and compliance return in terms of section 43A of the Financial Intelligence Centre Act

3.19 The risk and compliance return requires details of the submitter and the entity name. The questions around this were addressed in section 2.2.

Client risk

3.20 Section 5 deals with client risk. SAICA members and associates practice in various forms, from sole proprietor, private companies, personal liability companies, close corporations and partnerships.



- 3.21 Where the questionnaire refers to clients, the question is asked to which clients are being referred to as the practitioner / firm provides services to a wide range of clients. Question 1.1 request the practitioner to state what percentage of his / her clients are natural persons. Should the questions be answered in line with the clients that the services as set out in Schedule 1 are provided to. This will initially create an administrative burden as clients are not currently dividedt in this fashion. The practitioner would need to first identify the clients that fall within the scope of Schedule 1 and then identify the legal form being used. This would have to be done for all clients and would be labour and time intensive initially.
- 3.22 Various questions in section 5, refers to whether the “entity” has conducted business with trusts, companies or partnerships. Practitioners / firms do not conduct business, as they provide services such as the preparation of annual financial statements, submission of tax returns etc. The question arises as to what “conducting business” refers to? Would this include where a practitioner bought items, such as physical assets from another company?

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| 3.23 <u>Submission:</u> The questionnaire should be amended to deal with the type of transactions or services provided by practitioners. |
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Transaction risk

- 3.24 Section 6 deals with transaction risk. SAICA members and associates as mentioned provide services and do not normally classify the services as transactions. This section seems to be more applicable to financial services environments and needs to be adapted.
- 3.25 Question 2.2 requests information on percentage of transactions in your institution concluded in cash. Again the practitioner or firm might have received cash but is this cash only required in terms of Schedule 1, therefore how must a practitioner classify which transactions was concluded in cash, for his own business or the client.
- 3.26 Question 2.3 requests the percentage of transactions involving third parties acting on behalf of clients. Practitioners / firms could be acting on behalf of the client, and therefore there is no clarity on what transactions this refers to.
- 3.27 Question 2.4 refers to cancelled transactions where money paid was refunded. Does this refer to Schedule 1 and whether money was refunded by the practitioner to the client or by the practitioners’ client to another client?
- 3.28 Question 2.5 refers to where a practitioner acted as an agent. There is no clarity on what this would mean. Practitioners often are appointed to deal with the UIF or Compensation Fund on behalf of the client or when appointed as a tax practitioner they would have authority to act on the client’s behalf.



3.29 Submission: Guidance is requested on the definition of transaction risk and the impact thereof on new accountable institutions per the new amended Schedule 1.

Distribution channel risk

3.30 Questions 3.1 to 3.5 deals with distribution channel risk. Again, the question arises on which transactions this applies to. Practitioners would contract with a client and thereafter perform the services based on the contract / agreement. There is no requirement to engage face-to-face with the client for every transaction.

3.31 Practitioners do not on board / orientate clients as they sign an engagement letter or contract via the contracting process.

3.32 Practitioners do not normally have sales and marketing staff as they would advertise their services and the clients would contact them directly.

3.33 Submission: Guidance and clarity is requested on the application of distribution channel risk.

Product and service

3.34 Section 8.4 refers to products and services. Again, it seems to be specific to the financial services industry. Practitioners does not provide products. The services provided would include preparation of financial statements, completion of tax returns, etc and the practitioners are still not clear on what services that they are providing would be viewed as a service that falls within the definition of Schedule 1.

3.35 Submission: Guidance and clarity is requested on the products and services to be rendered.

Geographic risk

3.36 Section 9.5 deals with geographic risks.

3.37 Practitioners often deal with clients from other geographical regions. As this is new requirement for SAICA members and associates they would first need to clarify which services fall within scope and thereafter identify the geographic risk.

3.38 Practitioners can be appointed to prepare financial statements and provide tax advice to a group of companies. In some cases services that might fall within the ambit of Schedule 1 might be requested. Clarity is sought on how this would then impact the geographic risk evaluation and what metric would be used to decide whether a client is a high risk for money laundering and terrorist financing purposes where only one branch is in another country and none of the Schedule 1 services are provided to that branch.

3.39 Submission: Guidance and clarity is requested on the evaluation of geographic risks.



Terrorist Financing risk

3.40 Section 10 refers to terrorist financing risks. SAICA members and associates as mentioned provide services and do not normally classify the services as transactions. This section seems to be more applicable to financial services environment and needs to be adapted.

3.41 SAICA members and associates do not normally do business with non-profit organisations but they could provide services to non-profit organisations by compiling financial statements.

3.42 Submission: The questionnaire needs to be adapted to the various types of services provided by accountable institutions.

Compliance: registration and RCMP

3.43 The questions related to registration and RCMP requests whether the “institution” has branches. In some cases practitioners might have a head office in one town and also have a branch in another town. The branches would not necessarily be registered with the FIC as it would depend on whether persons at these branches provide the services as set out in Schedule 1. Accounting and auditing firms can also form part of a network firm. The various firms may not necessarily have the relevant knowledge on whether the other network firms provide the services and are registered with the FIC.

3.44 Submission: It is submitted that the various branches would not have to register with the FIC as Schedule 1 refers to services provided and therefore only the relevant person would have to be registered. Clarity is sought by SAICA and our members and associates on the registration and RCMP requirements.

Governance of anti-money laundering and terrorist financing

3.45 Section 12.8 refers to the governance of anti-money laundering and terrorist financing and whether the institution has a compliance function and appointed the compliance function. Scalability is required as explained in section 2.1.1.2. Practitioners can practice in a company or close corporation and there might only be one or two directors. There is no clarity yet as to what is required from such legal persons.

3.46 Submission: It is submitted that clarity is required on the requirement to have a compliance function.



Training related to anti-money laundering and counter terrorist financing compliance.

3.47 Section 13.9 refers to training related to anti-money laundering and counter terrorist financing compliance. Questions are asked as to whether new employees are allowed to deal with the public prior to receiving training on the FIC Act. We request clarity on whether broader AML/TF training related to AML/TF risks and risk mitigations (i.e. practical ML/TF training) will suffice or must this training be specifically on the FIC Act (i.e. theoretical training). There is also no clarity on whether only the employees and practitioner that perform the services as classified under Schedule 1 must receive the AML/TF training or all the employees and practitioner in the firm that are providing accounting services.

3.48 Submission: It is submitted that there is no clarity on the training requirement and whether all employees at a firm must receive training or only the employees that deal with the transactions as included in Schedule 1.

Risk and Compliance Programme (RMCP)

3.49 Section 14.10 refers to risk and compliance programmes. The newly included accountable institutions would require guidance and time to draft this RMCP.

3.50 Submission: It is submitted that the newly included accountable institutions would need guidance and time to draft the RMCP.

Customer due diligence

3.51 Question 11.5 deals with the nature of the business relationship, intended purpose of the business relationship and the source of funds. This seems to refer to financial services. Practitioners and firms do not normally receive funds on behalf of clients. In terms of the CPC, section 350 professional accountants are required to comply with the fundamental principles when assuming custody of client assets, including money. It is also expected of the professional accountant to make inquiries on the source of the assets and to consider legal and regulatory obligations. Practitioners or firms might receive funds from a client to pay money over to SARS or the CIPC or the Labour department.

3.52 Question 11.7 deals with ongoing due diligence and refers to unusual patterns of transactions. This is more applicable to the banking sector and not to audit and accounting firms / practitioners. Question 11.7(b) refers to "CIV" documents.

3.53 Submission: Clarity is required on whether the source of these funds needs to be questioned as it might not be linked to a service as set out in Schedule 1. We request a definition of "CIV" as this is not a known term in the accounting profession.



Duty to keep records

3.54 As Schedule 1 has been amended with effect from 19 December 2022, practitioners or firms would have normal records that they would keep but the requirement to keep specific records in line with the FIC Act would not have been adhered to.

3.55 Submission: Practitioners and firms that now perform services as defined in Schedule 1 would have to implement new retention policies in line with the requirements and might not have relevant records for the period that the services was previously provided.

Terrorist Property and Financial Sanctions report

3.56 The questions related to section 20 dealing with terrorist property and financial sanctions report request whether the institution screens its clients against the United Nations 1267 list. The question arises on whether all clients of the practitioner or firm must be screened or only clients that the services as per Schedule 1 must be screened.

3.57 Submission: Clarity is required on which clients must be screened.

Conclusion

In conclusion, we request further engagements with the FIC to discuss the application and implementation of the proposed changes to the accounting profession. Our members and associates would require guidance on which services that they provide would lead to them being accountable institutions and how the changes needs to be implemented. We also request additional time to allow our members and associates to implement these requirements.