



**COMMENTS ON THE FIC  
CONSULTATION ON DRAFT  
PUBLIC COMPLIANCE  
COMMUNICATION 6A –  
webpage submission  
20 January 2023**

## 5. 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 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.

Organisations that provide the services of a TCSP will be considered as an accountable institution, regardless of whether their employees are auditors, accountants or other professionals.

Given the unique nature of the services offered by TCSPs, they are susceptible 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 can be considered by TCSPs.

### Submission:

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 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?

Organisations that provide the services of a TCSP will be considered as an accountable institution, **regardless of whether their employees are auditors, accountants 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 auditors do not perform the activities as described in the draft PCC. In many cases auditors are prohibited by independence requirements and other international standards to perform management functions or be involved in the operations of the auditee.

We propose the following more generic description .....”regardless of whether their employees belong to a specific profession”

## 6. OBJECTIVE

This PCC provides clarity on the interpretation of “a person who carries on the business of a trust and company services 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.

### Submission:

We do appreciate the guidance provided but would request additional guidance for services regularly provided by the accounting profession. As this is the first time that SAICA members and associates would be classified as accountable institutions, we do request clarity on when and who will be scoped in.

7.

## 1. INTRODUCTION

1.1. Schedule 1 to the FIC Act has been amended and has taken 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) 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. A trust and company service provider (TCSP) is listed in item 2 of Schedule 1 of the FIC Act as an accountable institution.

1.4. When reference is made to a person, it refers to both natural persons and legal persons.

### Submission:

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.

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 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, member, shareholder, creditor or investor of the entity under any law applying to the entity or the conduct or management thereof.”

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.

## 8.2. DEFINITION OF A TRUST AND COMPANY SERVICE PROVIDER

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).*

9.2.2. This terminology used in this Item is explained below:

2.2.1 **“A person”** which 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 on an occasional basis, or who perform this function in a personal capacity, as opposed to doing so on a commercial basis as a regular feature of their business for clients are not required to be registered as a TCSP.

2.2.4 **“Creation, operation or management”** should be interpreted as:

2.2.4.1 **Creation** includes the registration or administrative processes with relevant government organisations for the client to commence with trading using the type of institution.

2.2.4.2 **Operation** of the company entails the assisting with the daily operations of the client, and

2.2.4.3 **Management** would entail managing the company, for example, being on the board of management and making management decisions regarding the company.

Submission:

The draft PCC states in “2.2 This terminology used in this \_\_\_ is explained”. The word "guidance" needs to be included.

We propose that specific examples will be helpful in the context of the above paragraph

We propose inserting a reference to paragraph 2.2.3. “This clause should be read with paragraph 2.2.3 below with reference to the commercial basis on which the business is carried on”

The draft PCC identifies “business” as a commercial activity or institution, as opposed to a charitable undertaking or government institution. Therefore, persons who are appointed as providing TCSP functions on an occasional basis, or who perform this function in a personal capacity, as opposed to doing so on a commercial basis as a regular feature of their business for clients are not required to be registered as a TCSP.

The guidance does not explain what the ordinary meaning of the term in the context of FICA is. We propose that the phrase should clarify that the FIC had the primary business of the person in mind and not activities incidental to the primary business of the person. Paragraph 2.2.2 should link to 2.2.3 where the context of business is more fully explained and words such as “regular feature” and “commercial basis” is used.

We propose adding: Where TCSP functions are incidental to the primary business of the person, or does not constitute a regular feature of the business, or are not habitually and regularly performed by the business, persons are not required to be registered as TCSP

An example would be where a practitioner registers a trust for a client that they perform accounting services for, but it is not a regular feature of the business.

SAICA practitioners perform various services for clients and we request clarification on what would be included in the “creation, operation or management” of a company.



Guidance is requested on whether the following would be viewed as “operation:

- actual registering of the company with the CIPC
- drafting of the incorporation documents
- receipt of trust money from a client to set up a company
- transactional services relating to mergers and acquisitions

Operation is defined as “daily operations of the client”.

There is no clarity on “daily operations”. Where an accountant is requested to do the bookkeeping clarity is required on whether that would be included as daily operation.

Management is defined as managing the company, for example, being on the board of management and making management decisions regarding the company.

Read in the context of the Companies Act, 2008, where section 66 refers to the fact that the business and affairs of a company must be managed by or under the direction of its board would independent directors be scoped in?

The term management should potentially clarify that ailing or insolvent companies who are in the process of being rescued or wound down by administrators and liquidators should not register as TCSP's. Although a liquidator is for example potentially regarded as “management” we submit that the intention of the law is not to focus on this type of activity. In terms of the Companies Act, a person appointed as a business rescue practitioner is appointed to manage a company whilst under business rescue. Section 128(1)(b) states that when in business rescue the company is under the temporary supervision of the practitioner and the BRP is managing its affairs, business and property.

Another example could be a labour broker providing a management employee to a client on a temporary basis with specific expertise. We submit that it is not the intention of the law to cater for this type of scenario and it is our submission the registration in this instance would not be required.

How would businesses that outsource staff, such as CFOs be impacted as well as the business that uses the outsourced CFO.

With regards to tax services provided, there are numerous questions on when a person providing tax services would be classified as an accountable institution and which tax services would be scoped in.

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.



10.2.3. The following trusts are excluded from the TCSP definition, as read with section 1 of the FIC Act:

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

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

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

2.4.2. 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.

2.4.3. The TCSP also often acts as the intermediary.

2.5. “**Trusts**” include trusts created between parties (*inter vivos*) and includes trusts established locally and for trusts established outside of South Africa.

Submission:

With regards to trusts the Schedule refers to the person who carries on the business of creating a trust arrangement. We would like to request guidance on whether this would only include the registration of the trust or the preparation of the trust deed including tax advice / tax structuring.

With regards to carrying out of transactions for the trust would that include the independent trustee?

Section 2.5 also states that trusts include trusts created between parties (*inter vivos*) and includes trusts established locally and for trusts established outside of South Africa.

We would request clarity on trusts established outside of South Africa as the definition in the Schedule only refers to “investment, safe keeping, control or administering of trust property within the meaning of the Trust Property Control Act”.

### 11.3. REGISTRATION CONSIDERATIONS

3.1. TCSP acts as a nominee for an entity, that entity will be deemed to be their client. 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. The TCSP also often acts as the intermediary. The definition of a TCSP contains four specific business operations that could be performed by a person.

3.2. A person could perform either only one of the four business operations or a combination of all of these four business operations. Where a person meets the definition of multiple business operations, they need only register once as an accountable institution under Item 2.

3.3. A person is considered to be a TCSP where they meet the definition of item 2, regardless of the profession of the person undertaking such services.

3.4. 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 as an item 2 with the Centre. This is known as dual registration. Please see draft PCC 5D which explains an accountable institution's registration obligations.

#### **Example 1 where a person meets the definition of more than one schedule item**

Attorney X provides TCSP 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 TCSP 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.



## 12.4. INHERENT RISKS AND POTENTIAL RISK INDICATORS RELATING TO TCSPs

4.1. TCSPs are included as an accountable institution given their susceptibility to exploitation by those looking for methods to launder criminal proceeds or raise funds for terrorist activity.

4.2. The knowledge and expertise in creating, administering and managing trusts and other business entities is particularly attractive to potential abuse. The use of legal persons (business entities) can be used to attempt disguising beneficial ownership, and the TCSP's involvement therein could provide an appearance of legitimacy and creating an air of respectability for their customers and their newly created corporate vehicles.

4.3. TCSPs are also considered to be gatekeepers in providing access points into the financial system, through which potential criminals could pass, to do business with financial institutions without revealing their own identities.

4.4. 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 be part of such ML, TF and PF attempts.

4.5. A TCSP should be reviewed holistically, to take into account all of the services provided by the institution. Where a TCSP offers multiple different services relating to the entity's business, such as using auditing, legal services, accounting as well as entity creation (legal person or trust), administration and management. Such engagements could intensify the disguising of the entity or trust to such an extent that the identity is mainly linked to the TCSP themselves.

### Submission:

Section 4.5 refers to the fact that a TCSP should be reviewed holistically and taking into account all of the services provided and reference is made to auditing, accounting, administration etc, the question arises on whether only the clients that the specific services as defined should be evaluated. We request clarity whether other clients for which services are provided that are not included in Schedule 1 would not have to be evaluated.