

18 August 2020

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Dear Ms. Bednar-Giyose

SAICA COMMENT LETTER ON THE *PROPOSED AMENDMENTS TO SCHEDULES TO FINANCIAL INTELLIGENCE CENTRE ACT, 2001*

We refer to your invitation of 19 June 2020 for written comments on the proposed amendments to Schedules of the Financial Intelligence Centre Act, 2001 (FICA). Our comments are in response to the proposed amendments in the Government Gazette¹, but also in the context of the supporting Consultation Paper prepared by the Financial Intelligence Centre (FIC), jointly issued with National Treasury, that sets out the policy rationale for the proposed amendments.

We wish to extend our appreciation for your willingness to engage with us throughout the amendment process and for providing us with an opportunity to convey further 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
3. Questions for consideration

¹ Government Gazette no. 43447 of 19 June 2020.

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

We are available to further discuss and engage with you on our comments and questions.

Yours sincerely

(Signed electronically)

Juanita Steenekamp

Project Director: Non-IFRS Reporting

1. GENERAL COMMENTS

- 1.1. SAICA is concerned to note that corporate 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 improving economic growth.
- 1.2. SAICA comprises a vast membership body of Chartered Accountants, Associate General Accountants and Accounting Technicians who must comply with the *SAICA Code of Professional Conduct*, which includes integrity as one of its Fundamental Principles. SAICA members and associates do not take their public interest responsibility lightly.
- 1.3. SAICA fully supports the objective of the 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), referred to here and in the FIC's Consultation Paper as the "FATF Standards".
- 1.4. 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 which constitute the matters of principle informing our comment:
 - 1.4.1. SAICA members and associates are classified as either members in business or members in practice, known as "practitioners". Members in business are normally employed by entities and perform services as employees in the designation of chief financial officer, financial director, financial manager or company secretary and as such perform accounting, bookkeeping or secretarial work. Members in practice normally have their own firms or are employed by firms which are companies, close corporations, sole proprietors, partnerships or other types of entities. Members in practice (practitioners) provide services to their clients in the form of the following:
 - Specialist corporate and international taxation consulting;
 - Statutory audit;
 - Internal audit;
 - Management and cost accounting;
 - Bookkeeping;
 - Payroll administration;
 - Estate management and planning;
 - Trust services;

- Taxation compliance services;
- Corporate secretarial services;
- Acting as accounting officer of a close corporation;
- Preparation of financial statements;
- Independent review of annual financial statements.

It therefore appears that practitioners may be included in Item 2 of Schedule 1, *List of Accountable Institutions*. The proposed wording of Item 2 is however not clear in this regard.

- 1.4.2. SAICA members and associates are already regulated by various other regulators, and are subject to various other standards and laws depending on the type of services performed. SAICA members and associates are regulated by regulatory bodies such as:
- The South African Revenue Service (SARS) where they are registered tax practitioners,
 - The Independent Regulatory Board for Auditors (IRBA) where they are registered auditors;
 - The Johannesburg Stock Exchange (JSE) for certain services; and
 - The various accredited professional bodies for business rescue practitioners.
- 1.4.3. SAICA members and associates are also required by the *SAICA Code of Professional Conduct* to act on any non-compliance or suspected non-compliance with laws and regulations in line with the Code of Professional Conduct'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;
- 1.4.4. 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 terror financing;
- 1.4.5. The practical implementation and cost of compliance may be too onerous for small practitioners given 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;
- 1.4.6. It appears as though the proposal is more onerous than the recommendations in the FATF Standards;
- 1.4.7. Pursuant to the above is the concern that a practice may have to impose extensive Customer Due Diligence procedures on clients for services that are unrelated to those within the ambit of FICA, for example where a member or

associate provides payroll services to a client it may have the unintended consequence that this client with all the underlying employees unnecessarily be subjected to the due diligence requirements.

- 1.4.8. 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;
- 1.4.9. The lack of certainty in the interpretation of the proposed wording as it relates to “company service providers” in Schedule 1; and
- 1.4.10. Smaller practitioners, who are primarily now working from private homes as a result of the COVID-19 pandemic, now has increased exposure to the vast powers of the FIC in its proposed new oversight and enforcement roles pertaining to access to information.
- 1.4.11. The lack of clarity relating to the supportive role that supervisory bodies and SAICA will play vis-à-vis the FIC in the proposed regulatory regime; and
- 1.4.12. No indication of transitional provisions for the implementation of compliance programmes where required by affected members.

2. DETAILED COMMENTS

2.1. 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 activities²:

- *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.*

2.2. SAICA agrees with the wording of the FATF Standards. 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. This is so because the corresponding wording in the FATF standard

² Section 22(e) of the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation – The FATF Recommendations, updated June 2019

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. The proposed amended wording in Item 2 pertaining to “company services” in the amended Schedule 1 is however activity based and contrary to the approach taken by the FATF. The consequence of this mismatch between the FATF Standard and the proposed amendment is evident from the myriad of questions that arise in Section 3 of our comment letter. There is legal uncertainty as to whether the activity falls within the scope of the wording or not.

- 2.3. The proposed wording as reflected in the amendment is categorised as “company services” in the FIC’s Consultation Paper and will for the sake of brevity be referred to as such in this comment letter. “Company services” collectively include the proposed services listed in Item 2 of the amendments to Schedule 1 of FICA as follows:

‘A person who carries on a business of preparing for or carrying out transactions for a client where-

- a) a client is assisted in the planning or execution of-*
 - (i) 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);*
 - (ii) 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);*
 - (iii) the operation or management of a close corporation, as defined in the Close Corporations Act, 1984 (Act 69 of 1984); or*
 - (iv) the creation, operation or management of a trust or of a similar structure outside the Republic, except for a trust established by virtue of a testamentary writing or court order; or*
- b) a client is assisted in acting as or arranging for another person to act as a nominee, as defined in the Companies Act, 2008 (Act 71 of 2008).*

The term “person”

- 2.4. 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:

- 2.5. 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.”

- 2.6. A contextual interpretation of FICA/ reveals that wherever the term “person” is used, the intention of the legislature is to refer to a “natural person” as opposed to a “legal person” as defined.
- 2.7. 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.
- 2.8. The wording imposes a personal responsibility on practitioners to register as accountable institutions, as individuals. These may include trainees and other junior staff.
- 2.9. SAICA members and associates in practice perform services in an incorporated company, a close corporation, a partnership or as a sole proprietor. It would seem as if only a sole proprietor, as a natural person, would be scoped in and not a company, close corporation, trust or partnership.
- 2.10. The proposed amendment also emphasises the inconsistent use of the term “person” in FICA and more particularly in the definition of “accountable institution”. The definition suggests that only natural persons can be accountable institutions if the contextual interpretation of the Act is applied. In another instances, reference is also made to “juristic person” as opposed to legal person as defined in FICA. If various entities provide services, the question of who would be classified as the “person” that should be registered as the accountable institution remains.
- 2.11. We recommend that clarity is provided on the intention of the legislature.

The phrase “carries on a business”

Practitioners performing accounting and tax services relating to financial statements

- 2.12. *Confirmation is required that practitioners providing accounting and tax services are excluded from the ambit of “company services”.* The majority of practitioners primarily perform accounting and tax services in relation to financial statements. These services are subject to regulation and/or standards and are not described or included in the proposed amendments to Schedule 1 as “company services”. We submit that these services are excluded from the ambit of FICA and request confirmation from the legislature on this aspect.
- 2.13. *Confirmation is required that where company services are ancillary and not primary to accounting and tax services, practitioners are not regarded as “carrying on a business” that falls under “company services”.* 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, whilst it is debatable whether they are “carrying on a business” as such. We recommend that where only an insignificant portion of the practitioners’ business represents services other than

accounting and tax services, and these services satisfy the requirements of “company services”, practitioners be excluded from the ambit of Schedule 1.

- 2.14. *Confirmation is required of who are regarded as accountable institutions where only some practitioners in a practice perform primarily “company services”. Pursuant to the above, where some of the primary services fall within the ambit of the description of “company services”, the question arises whether the entire business will be considered to be an accountable institution, or only that part of the business that renders the services as defined. Where only certain practitioners in a practice in the form of partners or directors may perform “company services”, it is inconceivable that the entire business may be subject to the compliance obligations brought about by the proposed amendments.*

Members in business performing accounting and tax services relating to financial statements

- 2.15. *Confirmation is required that individuals employed by organisations to perform accounting and tax services are not regarded as “company service providers”.*

Members in business performing “company services”

Confirmation is required that individuals employed by organisations to perform “company services” are not regarded as “carrying on a business” or “persons” or “accountable institutions”. Some SAICA members in business are natural persons employed by entities who may not be accountable institutions in their own right. The word “person” may inadvertently scope in financial or accounting officers employed as such, but in their individual capacity.

3. QUESTIONS FOR CONSIDERATION

- 3.1. What supportive role will supervisory bodies play vis-à-vis the FIC in the proposed regulatory regime?
- 3.2. What are the transitional arrangements for the implementation of compliance programmes where required by affected SAICA members or associates.
- 3.3. Regarding the proposed wording for Item 2...

‘A person who carries on a business of preparing for or carrying out transactions for a client where-

(a) client is assisted in the planning or execution of-

(i) 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);

...confirmation is sought from the FIC on whether the above includes the following activities:

- 3.3.1. The raising of capital for a client;
- 3.3.2. The receipt of trust money from a client to set up a company; and/or

3.3.3. Transactional services relating to mergers and acquisitions.

3.4. Regarding the proposed wording for Item 2...

ii) 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);

iii) the operation or management of a close corporation, as defined in the Close Corporations Act, 1984 (Act 69 of 1984); or

iv) the creation, operation or management of a trust or of a similar structure outside the Republic, except for a trust established by virtue of a testamentary writing or court order; or

...the FIC's Consultation Paper refers to "creation, operation or management" of the entities stated above. We take note of the fact that this is the verbatim wording used by the FATF but we would like to request more clarity as follows:

3.4.1. Does "creation" constitute the actual registering of the entity?

3.4.2. Does "management" constitute managing the business or performing a management function within the company? This is 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.

3.4.3. Is an independent trustee included?

3.4.4. Would independent directors be scoped in, as we cannot ascertain whether they would be viewed as management of a company?

3.4.5. How is the registered auditor impacted by this section?

3.4.6. How is the internal accountant affected in comparison to the independent accountant? This would specifically relate to the provision of accounting services such as:

3.4.6.1. Preparing management accounts.

3.4.6.2. Compilation of financial statements.

3.4.6.3. Preparation and submission of tax returns, PAYE and VAT on behalf of a client or employer, as we cannot ascertain whether this would be interpreted as "operation" of a company. Would the fact that SARS correspondence is sent to the tax practitioner be viewed as "operation or management"?

3.4.7. Is a person providing a tax opinion to a client excluded?

3.4.8. Is a person appointed as a business rescue practitioner excluded as a business rescue practitioner is appointed to manage a company whilst under business rescue?

3.4.9. Point (iv) refers to the "creation, operation or management of a trust or of a similar structure outside the Republic". We question whether this includes the management of a trust outside of the Republic as well as what would be included in the definition of "similar structure".

3.4.10. We note that there is no reference to entities such as public benefit organisations, non-profit organisations, body corporates, home owners' associations or clubs and we question whether this was intentional or if it should be included as "similar structure" but then only applicable outside the Republic.

3.5. Regarding the proposed wording for Item 2...

b) a client is assisted in acting as or arranging for another person to act as a nominee, as defined

...the term "nominee" is not defined but implies an intermediary or representative acting on behalf of another. Confirmation is required on this interpretation.

3.6. Questions emanating from section 2, "Detailed comments", of our comment letter:

3.6.1. Confirmation is required that practitioners providing accounting and tax services are excluded from the ambit of "company services".

3.6.2. Confirmation is required that where company services are ancillary and not primary to accounting and tax services, practitioners are not regarded as "carrying on a business" that falls under "company services".

3.6.3. Confirmation is required of who are regarded as accountable institutions where only some practitioners in a practice perform primarily "company services".

3.6.4. Confirmation is required that individuals employed by organisations to perform accounting and tax services are not regarded as "company services providers".

3.6.5. Confirmation is required that individuals employed by organisations to perform "company services" are not regarded as "carrying on a business" or "persons" or "accountable institutions".

3.7. Credit provider:

A person who carries on the business of a credit provider as defined in the National Credit Act, 2005 (Act 34 of 2005), excluding credit providers who extend credit under a credit facility as provided for in section 8(3) of that Act.

3.7.1. The FIC's Consultation Paper includes "credit providers" excluding credit providers who extend credit in terms of section 8(3) of the Act. 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, 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.

3.7.2. Confirmation 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.