CLARIFICATION OF CERTAIN SECTIONS OF THE FINANCIAL INTELLIGENCE CENTRE ACT

Introduction

.01 This circular seeks to assist SAICA members in obtaining an understanding of certain provisions of the Financial Intelligence Centre Act No. 38, 2001 (FICA), in respect of which SAICA has received a number of queries.

.02 This circular was prepared by the Money Laundering Interest Group (MLIG) of SAICA. The MLIG has, where appropriate, sought the input of the Financial Intelligence Centre (FIC) in regard to this circular.

.03 This circular does not serve to provide a complete statement of the requirements of FICA and should be read in conjunction with the relevant legislation and the *Money Laundering Guide for Registered Auditors*, issued by the Independent Regulatory Board for Auditors (IRBA).

.04 Although reasonable care has been taken to ensure that the information contained in this circular is correct, neither SAICA nor the contributors to the circular take responsibility for the correctness of any interpretations of the law and other information in the circular. Users of this circular should obtain legal advice where necessary.

The Financial Intelligence Centre Act of 2001 (FICA)

.05 In assessing a person's or business's obligations in terms of FICA, the following should be noted:

- Accountable institutions are those institutions listed in Schedule 1 to FICA and which are required to comply with all of the provisions of FICA that govern accountable institutions.
- In addition to the duties it imposes on accountable institutions, FICA also imposes duties on other businesses and persons (i.e. non-accountable institutions). In other words, there are certain sections

of FICA that apply to accountable and non-accountable institutions, such as section 29, whereas some sections apply to accountable institutions only.

Carrying on the business of rendering investment advice and investment broking services

.06 In terms of paragraph 12 of schedule 1 of FICA a member of SAICA may be an accountable institution if they carry on the business of rendering investment advice or investment broking services..

.07 The terms "*investment advice*" and "*investment broking services*" have not been defined in FICA. In this regard, it is suggested that members look to the provisions of the Financial Advisory and Intermediary Services Act No. 37, 2002 (FAIS), the stated purpose of which is to regulate the rendering of certain financial advisory and intermediary services to clients.

.08 It is also suggested that a person or business registered with the Financial Services Board for purposes of FAIS may serve as a strong indicator that the person or business is an accountable institution in terms of FICA for the purposes of paragraph 12 of Schedule 1 to FICA.

.09 During 2005, the IRBA sought clarification from the FIC on the issue of rendering investment advice and investment broking services for auditors. The IRBA's conclusions were as follows (*Money Laundering: Frequently Asked Questions*):

- "*The FAIS definition reflects the intention of FICA in so far as investment advice and investment broking services are concerned. Although the definition is broader in FAIS, once the service falls within the definition of FAIS, it will almost certainly fall within the ambit of FICA. This means that registration with the Financial Services Board (FSB) in terms of FAIS can be used as a criterion to determine whether a service falls within the ambit of FICA.*

- *The FIC is still awaiting comments on the recommendation to use the FAIS definition for FICA (FAIS came into force after FICA), but there is a possibility that the FIC will adopt the FAIS definition.*
- *Members should therefore refer to the FAIS definition for guidance.*
- *Although there are no hard and fast rules, one needs to consider all circumstances and in particular matters such as:*
  - *Is the rendering of investment advice or investment broking services a common feature of the business?*
  - *How regular are these transactions?*
  - *What percentage of fees is generated by these services?*
- *In multidisciplinary practices, investment services could be ring-fenced provided the clients to which such services are provided can be clearly identified and separated from other clients. Therefore, where investment services are rendered to any audit client on an ad hoc basis, and whenever the client needs such service, it may be more appropriate to classify the whole practice as an accountable institution.*"

.10 SAICA has also issued two circulars to assist its members to determine whether they are required to register as financial service providers under FAIS. These are Circular 6/2004 – *Guidance for Chartered Accountants in Respect of Financial Advisory and Intermediary Services Act*, and Circular 3/2005 – *Clarification of Certain Audit Related Activities in Relation to the Financial Advisory and Intermediary Services Act*.

Trustees as accountable institutions

.11 The list of accountable institutions in Schedule 1 of FICA includes in paragraph 2 "*A board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act, 1988*".

.12 Several chartered accountants provide the services of trustees. A trustee, other than an executor or administrator of a deceased estate, is considered an accountable institution if he/she falls within the definition

of paragraph 2 of Schedule 1 of FICA. This paragraph can be interpreted to mean that acceptance of even a single trusteeship will bring a person within the ambit of an "*accountable institution*", as contemplated by paragraph 2 of Schedule 1. However, the FIC is of the view that acting as trustee must be a regular feature of one's business before a person or business will be classified as an accountable institution.

A person or business that holds itself out to be an accountable institution even if it is not

.13 Entities that are not accountable institutions (i.e. those institutions that are not listed in Schedule 1 of FICA), may choose to adopt all of the requirements of FICA for the purposes of best practice or risk management and therefore operate as if they are accountable institutions. However, should a person or business choose to do this, it should be noted that the defence for an employee of an accountable institution contained in section 69 may not apply to employees of such a person or business and will not safeguard them from prosecution if such employees report suspicious and unusual transactions to, for example, the entity's compliance officer in terms of the entity's internal rules, and not to the FIC as required in terms of section 29 of FICA. Such employees will also not have the same "*internal reporting defence*" in terms of section 7A of the Prevention of Organised Crime Act, No. 121, 1998, as this applies only to employees of accountable institutions.

Duty to report suspicious or unusual transactions in terms of section 29 of FICA

.14 In terms of section 29(1) "*A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or ought reasonably to have known or suspected that –*

a) the business has received or is about to receive the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;

b) a transaction or series of transactions to which the business is a party –

i) facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;

ii) has no apparent business or lawful purpose;

iii) is conducted for the purpose of avoiding giving rise to a reporting duty under this Act; or

iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service; or

v) relates to an offence relating to the financing of terrorist and related activities; or

c) the business has been used or is about to be used in any way for money laundering purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities,

must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions."

Section 29(1) prescribes the circumstances under which a reporting duty arises and, therefore, an obligation to report a suspicious and unusual transaction will only arise where the matter in question falls within the categories of activities specified. It should be noted that section 29(l) applies only when it is the business itself that has received, or is about to receive, tainted proceeds or is itself party to a tainted transaction. .15

There are a number of aspects of section 29 that are unclear and subject to interpretation. For the purposes of this circular, these are: .16

- The use of "*suspicious and unusual*" as the header to section 29.
- The meaning of "*know or suspects* or *knowledge or suspicion*".
- The meaning of "*a transaction or a series of transactions to which the business is a party*".

Suspicious and unusual

.17 The header to section 29 refers to suspicious and unusual transactions whereas the words "*suspicion*" and "*suspected*" have been used in the section itself. In this regard, writers on this subject have submitted that, in order for a transaction to fall within the parameters of section 29, it must be both suspicious and unusual: a mere suspicion is insufficient because suspicion is a subjective state of mind and, as such, the suspicion must be based on some grounds, being the "*unusual*" component of the transaction/s in question. In this regard, it has been suggested that Regulation 23 of the Regulations (issued in terms of FICA), which regulates what information must be reported to the FIC, provides some context as to what may constitute a suspicious and unusual transaction. This information includes, for example:

- The date and time of the transaction, or in the case of a series of transactions, the period over which the transactions were conducted.
- A description of the type of transaction or series of transactions.
- The manner in which the transaction or series of transactions was conducted.
- If the transaction or series of transactions involved funds, a description of the types of funds involved.
- If the transaction or series of transactions involved property, a description of the type of property and all identifying characteristics of the property.
- The amount of the funds, or the estimated value of the property involved in the transaction or series of transactions.
- The amount or the value of the property involved.
- The currency in which the transaction was conducted.
- The method in which the transaction was conducted.
- The method in which the funds or property were disposed of.

- The currency in which the transaction or series of transactions were conducted.
- The purpose of the transaction.
- Any remarks, comment or explanations that the person conducting the transactions may have made or given.

Knows

In terms of section 1(2) of FICA, a person has knowledge of a fact if: .18

(a) "*the person has actual knowledge of that fact; or*

(b) *the court is satisfied that (i) the person believes that there is a reasonable possibility of the existence of that fact; and (ii) the person fails to obtain information to confirm or refute the existence of that fact.*"

Suspicion

"*Suspicion*" has not been defined in FICA. However, the following can serve as a guideline in gaining an understanding of what it means to "*suspect*" or have a "*suspicion*": .19

- "*Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but I cannot prove.' Suspicion arises at or near the starting point of an investigation of which obtaining of prima facie proof is the end.*"
- FICA requires at least some foundation, grounds or reasons for a suspicion before a duty to report a transaction will arise.[1]

Party to a transaction

Section 29(1)(b) triggers a reporting duty in terms of the circumstances prescribed in sections 29(1)(b)(i) to (iv) regarding "*a transaction or a series of transactions to which the business is a party*". The question then arises, for example, as to circumstances in which accounting firms will be regarded as being a party to a transaction or a series of .20

[1] See IRBA *Money Laundering Control: A Guide for Registered Accountants and Auditors*, issued June 2003 at pages 17 – 18.

transactions when furnishing advice to a client. In this regard there are differing views from a legal perspective. It is proposed that should any members have a concern about whether a particular transaction falls within the ambit of section 29, the member should obtain a legal opinion in relation to whether any reporting obligations arise.

Other sections of application

.21 In terms of section 29(2), a transaction about which enquiries are made must also be reported if the person concerned knows or suspects that it might have caused any of the consequences as set out in section 29(l) had the transaction in question been concluded. It does not matter that the transaction has not been concluded.

.22 If any person referred to in section 29(1) or 29(2) ought reasonably to have "*known or suspected*" that any of the circumstances referred to above exist, and negligently fails to make the required report to the FIC he/she is also guilty of an offence in terms of section 52(2).

.23 In terms of section 68(1), a person who fails to make a report in terms of section 29 in circumstances where he/she ought to have done so is liable to imprisonment for a period not exceeding 15 years or to a fine not exceeding R10 000 000.

Legal privilege

.24 In terms of section 37 of FICA, reporting to the FIC is obligatory unless there is a common law right to legal professional privilege as between an attorney and the client of the attorney in respect of certain communications. Such communications include:

- "*The attorney and the attorney's client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or*
- *A third party and an attorney for the purpose of litigation which is pending or contemplated or has commenced.*"

Information that comes into the possession of accountants, therefore, is not subject to legal professional privilege.

Johannesburg **IS Sehoole**
March 2006 **Executive President**