



DRAFT PUBLIC COMPLIANCE COMMUNICATION

**DRAFT PUBLIC COMPLIANCE
COMMUNICATION 117 (PCC 117)**
GUIDANCE ON THE INTERPRETATION OF
ITEM 3 OF SCHEDULE 1 TO
THE FINANCIAL INTELLIGENCE CENTRE
ACT, 2001 (Act 38 of 2001)

PCC SUMMARY

Item 3 of Schedule 1 to the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) (FIC Act) lists an estate agent as defined in the Estate Agency Affairs Act 1976 (Act 112 of 1976) (Estate Agency Affairs Act) as an accountable institution.

With the repeal of the Estate Agency Affairs Act, and it being replaced by the Property Practitioners Act, 2019 (Act 22 of 2019) (Property Practitioners Act), the definition of an estate agent as set out in Item 3 of Schedule 1 of the FIC Act, must be interpreted in line with the Interpretation Act, 1957 (Act 33 of 1957) and the Property Practitioners Act, and therefore includes all property practitioners who perform activities, which fall under the now repealed definition of “estate agent”.

The Property Practitioners Act defines property practitioners broadly and as includes persons who perform activities, which fall under the now repealed definition of “estate agent”. In addition, property practitioners include persons such as certain auctioneers, managing agents, business brokers, trustees, bond or mortgage originators and bond brokers, property developers, persons who sell or market time share or fractional ownership as well as the homeowner’s associations.

The FIC is of the view that the broader category of persons now known as property practitioners, does not automatically fall within the ambit of Item 3 of accountable institutions unless the person performs an activity which is equivalent to that of an “estate agent” as defined in the now repealed Estate Agency Affairs Act.

In order for property practitioners to be regarded as accountable institutions, Schedule 1 to the FIC Act must be amended to include those property practitioners that the FIC wants under its scope. This amendment will be considered by the Centre in consultation with the Property Practitioners Regulatory Authority and the industry.

This PCC provides guidance to property practitioners on the continued applicability of the FIC Act in relation to the Property Practitioners Act.

THE AUTHORITATIVE NATURE OF GUIDANCE

The Financial Intelligence Centre (Centre) provides the guidance contained in this PCC in terms of its statutory function in terms of section 4(c) of the FIC Act read together with Regulation 28 of the Money Laundering and Terrorist Financing Control Regulations (the Regulations) issued in terms of the FIC Act.

Section 4 (c) of the FIC Act empowers the Centre to provide guidance on a number of matters concerning compliance with obligations in terms of the FIC Act. Guidance provided by the Centre is the only form of guidance formally recognised in terms of the FIC Act and the Regulations issued in terms of the FIC Act. Accordingly, guidance provided by the Centre is authoritative in nature and must be considered when interpreting the provisions of the FIC Act or assessing compliance of an accountable or reporting institution with the obligations imposed on it by the FIC Act.

It is important to note that enforcement action may emanate as a result of non-compliance with the FIC Act in areas where there has been non-compliance with the guidance provided by the Centre. Where it is found that an accountable or reporting institution has not followed guidance which the Centre has issued, the institution must be able to demonstrate that it has nonetheless complied with the relevant obligation under the FIC Act in an equivalent manner.

DISCLAIMER

The publication of a PCC concerning any particular issue, as with other forms of guidance which the Centre provides, does not relieve the user of the guidance from the responsibility to exercise their own skill and care in relation to the users' legal position. The Centre accepts no liability for any loss suffered as a result of reliance on this publication.

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OBJECTIVE

This PCC provides guidance to property practitioners on the continued applicability of the FIC Act, in relation to the Property Practitioners Act.

1. RELEVANT LEGAL FRAMEWORK REGARDING PROPERTY PRACTITIONERS IN SOUTH AFRICA AND THE APPLICATION OF THE FIC ACT

- 1.1. Item 3 of Schedule 1 to the FIC Act includes an estate agent as an accountable institution, as defined in the Estate Agency Affairs Act. Refer to Annexure A for the full definition of an estate agent in terms of the Estate Agency Affairs Act.
- 1.2. The Estate Agency Affairs Act was repealed by the Property Practitioners Act with effect from 1 February 2022. This resulted in the creation of property practitioners, which term replaces the term estate agent and further includes additional categories of persons. Refer to Annexure B for the full definition of property practitioner in terms of the Property Practitioners Act.
- 1.3. The Property Practitioners Act read together with section 12 of the Interpretation Act, 1957 (Act 33 of 1957) effectively means that when interpreting Item 3 of Schedule 1 to the FIC Act, the reference to “estate agent as defined in the Estate Agency Affairs Act”, now includes “property practitioners as defined in Property Practitioners Act”. However, this is limited to the persons who perform activities as defined in the now repealed definition of estate agent.

2. REGISTRATION OBLIGATIONS IN TERMS OF THE FIC ACT

- 2.1. All property practitioners who perform “estate agent” activities fall within the ambit of Item 3 of Schedule 1 to the FIC Act and must register as accountable institutions with

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the Centre, in the manner as set out in Public Compliance Communication 5C (PCC 5C) as published on the Centre's website.

3. BROADER CATEGORY OF PROPERTY PRACTITIONERS

- 3.1. The Property Practitioners Act defines a property practitioner very widely, which includes the traditional "estate agents". In addition, the term property practitioner includes certain auctioneers, managing agents, business brokers, trustees, bond or mortgage originators and bond brokers, property developers who market or sell properties, persons who market or sell timeshare or fractional ownership, and homeowners associations.
- 3.2. The broader category of persons who are now known as property practitioners, do not automatically become accountable institutions unless the person performs an activity which is equivalent to that of an "estate agent" as envisioned in the now repealed Estate Agency Affairs Act. In order for all property practitioners to be regarded as accountable institutions, Schedule 1 to the FIC Act will have to be amended to include "property practitioners".
- 3.3. The Minister of Finance, may in terms of section 73 of the FIC Act, propose the amendment of Schedule 1 to the FIC Act. Where a category of persons or institutions will be affected by the proposed amendment. The Minister must consult the Centre and by notice in the Gazette give persons or institutions belonging to that category at least 60 day's written notice to submit written representations to the Minister.

4. CONSULTATION

- 4.1. Before issuing guidance to accountable institutions, supervisory bodies and other persons regarding their performance, duties and obligations in terms of the FIC Act, the Centre must in accordance with section 42B of the FIC Act—
 - 4.1.1. Publish a draft of the guidance by appropriate means of publication and invite submissions

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4.1.2. Consider submissions received.

4.2. Commentators are invited to comment on the draft guidance by submitting written comments via the online comment's submission link [here](#). Any questions or requests relating to this draft PCC 117 may be sent to the Centre only at consult@fic.gov.za. Submissions will be received until Friday, 19 August 2022, by close of business.

5. COMMUNICATION WITH THE CENTRE

5.1. The Centre has a dedicated compliance contact centre geared to assist accountable institutions to understand their registration obligations in terms of the FIC Act. Please call the compliance contact centre on 012 641 6000 and select option 1.

5.2. Compliance queries may also be submitted online by clicking on: <http://www.fic.gov.za/ContactUs/Pages/ComplianceQueries.aspx> or visiting the Centre's website and submitting an online compliance query.

Issued By:

The Director

Financial Intelligence Centre

29 July 2022

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Definition of estate agents in terms of the Estate Agency Affairs Act, 1976 (Act 112 of 1976)

“Estate agent”

a) means any person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person--

i) sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or purchaser therefore; or

ii) lets or hires or publicly exhibits for hire immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor; or

iii) collects or receives any moneys payable on account of a lease of immovable property or any business undertaking; or

iv) renders any such other service as the Minister on the recommendation of the board may specify from time to time by notice in the Gazette;

b) for purposes of section 3(2)(a), includes any director of a company or a member who is competent and entitled to take part in the running of the business and the management, or a manager who is an officer, of a close corporation which is an estate agent as defined in paragraph (a);

c) for purposes of sections 7, 8, 9, 12, 15, 16, 18, 19, 21, 26, 27, 30, 33 and 34B, includes--

i) any director of a company, or a member referred to in paragraph (b), of a close corporation which is an estate agent as defined in paragraph (a); and

ii) any person who is employed by an estate agent as defined in paragraph (a) and performs on his behalf any act referred to in subparagraph (i) or (ii) of the said paragraph;

cA) for the purposes of section 7, 9(1)(a), 16, 26, 27, 28 and 33, includes any

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person who is employed by an attorney or a professional company as defined in section 1 of the Attorneys Act, 1979 (Act No. 53 of 1979), otherwise than as an attorney or an articulated clerk, and whose duties consist wholly or primarily of the performance of any act referred to in subparagraph (i) or (ii) of paragraph (a) on behalf of such attorney or professional company;

d) does not include an attorney who, on his own account or as partner in a firm of attorneys or as member of a professional company, as defined in section 1 of the Attorneys Act, 1979 (Act No. 53 of 1979), or an articulated clerk as defined in the said section of that Act, who performs any act referred to in paragraph (a), in the course of and in the name of and from the premises of such attorney's or professional company's practice: Provided that such an act is not performed--

i) in partnership with any person other than a partner in the practice of that attorney as defined in section 1 of the Attorneys Act, 1979 (Act No. 53 of 1979); or

ii) through the medium of or as a director of a company other than such professional company;

e) for the purposes of section 30(2), (3), (4), (5), (6), (7) and (8) and of regulations made under section 33(1)(h), includes any person who was an estate agent at the time when he or she was guilty of any act or omission which allegedly constitutes conduct deserving of sanction referred to in section 30:

Provided that, for the purposes of this definition, "advertise" does not include to advertise in compliance with the provisions of any law;

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Definition of property practitioner in terms of the Property Practitioners Act, 2019 (Act 22 of 2019).

“property practitioner”—

(a) means any natural or juristic person who or which for the acquisition of gain on his, her or its own account or in partnership, in any manner holds himself, herself or itself out as a person who or which, directly or indirectly, on the instructions of or on behalf of any other person—

(i) by auction or otherwise sells, purchases, manages or publicly exhibits for sale property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvas a seller or purchaser in respect thereof;

(ii) lets or hires or publicly exhibits for hire property or any business undertaking by electronic or any other means or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor in respect thereof;

(iii) collects or receives any monies payable on account of a lease of a property or a business undertaking;

(iv) provides, procures, facilitates, secures or otherwise obtains or markets financing for or in connection with the management, sale or lease of a property or a business undertaking, including a provider of bridging finance and a bond broker, but excluding any person contemplated in the definition of “financial institution” in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990);

(v) in any other way acts or provides services as intermediary or facilitator with the primary purpose to, or to attempt to effect the conclusion of an agreement to sell and purchase, or hire or let, as the case may be, a property or business undertaking, including, if performing the acts mentioned in this subparagraph, a home ownership association, but does not include—

(aa) a person who does not do so in the ordinary course of business;

(bb) where the person is a natural person and that person in the ordinary course of business offers a property for sale which belongs to him or her in his or her personal capacity;

(cc) an attorney or candidate attorney as defined in section 1 of the Attorneys Act, 1979 (Act No. 53 of 1979); or

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(dd) a sheriff as defined in section 1 of the Sheriffs Act, 1986 (Act No. 90 of 1986), when he or she performs any functions contemplated in paragraph (a) of this definition, irrespective of whether or not he or she has been ordered by a court of law to do so; or

(vi) renders any other service specified by the Minister on the recommendation of the Board from time to time by notice in the Gazette;

(b) includes any person who sells, by auction or otherwise, or markets, promotes or advertises any part, unit or section of, or rights or shares, including time share and fractional ownership, in a property or property development;

(c) includes any person who for remuneration manages a property on behalf of another;

(d) includes a trust in respect of which the trustee, for the acquisition of gain on the account of the trust, directly or indirectly in any manner holds out that it is a business which, on the instruction of or on behalf of any other person, performs any act referred to in paragraph (a);

(e) for the purposes of sections 34, 46, 48, 59, 60, 61 and 65 includes—

(i) any director of a company or a member of a close corporation who is a property practitioner as defined in paragraph (a);

(ii) any person who is employed by a property practitioner as envisaged in paragraph (a) and performs on his, her or its behalf any act referred to in subparagraph (i), (ii), (iv), (v) or (vi) of that paragraph;

(iii) any trustee of a trust which is a property practitioner as envisaged in paragraph (d);

(iv) any person who is employed by a property practitioner as envisaged in paragraph (b) and performs on its behalf any act referred to in subparagraph (i), (ii), (iv), (v) or (vi) of paragraph (a); and

(v) any person who is employed by a property practitioner contemplated in paragraph (a) or (b) to manage, supervise or control the day-to-day operations of the business of that property practitioner;

(f) includes any person who is employed by or renders services to an attorney or a professional company as defined in section 1 of the Attorneys Act, 1979, other than an attorney or candidate attorney, and whose duties consist wholly or primarily of the performance of any act referred to in subparagraph (i), (ii), (iii), (iv), (v) or (vi) of paragraph

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(a), on behalf of such attorney or professional company whose actions will be specifically covered by the Attorneys' Fidelity Fund and not the Property Practitioners Fidelity Fund;

(g) for the purposes of section 61 and any regulation made under section 70, includes any person who was a property practitioner at the time when he or she was guilty of any act or omission which allegedly constitutes sanctionable conduct referred to in section 62, but does not include an attorney who, on his own account or as a partner in a firm of attorneys or as a member of a professional company, as defined in section 1 of the Attorneys Act, 1979, or a candidate attorney as defined in that section, who performs any act referred to in paragraph (a), in the course of and in the name of and from the premises of such attorney's or professional company's practice, provided that such an act may not be performed—

- (i) in partnership with any person other than a partner in the practice of that attorney as defined in section 1 of the Attorneys Act, 1979; or*
- (ii) through the medium of or as a director of a company other than such professional company; and....*