

PUBLIC COMPLIANCE COMMUNICATION

DRAFT PUBLIC COMPLIANCE COMMUNICATION

No. 6A

GUIDANCE ON TRUST AND COMPANY
SERVICE PROVIDERS FOR THE PURPOSE
OF SCHEDULE 1 OF THE FINANCIAL
INTELLIGENCE CENTRE ACT, 2001 (ACT 38
OF 2001).

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.

THE AUTHORITATIVE NATURE OF GUIDANCE

The Financial Intelligence Centre (the Centre) provides the draft guidance contained in this PCC in terms of its statutory function in terms of section 4 (c) of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001), as amended, (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 in relation to a number of matters concerning compliance with the 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 taken into account when interpreting the provisions of the FIC Act or assessing compliance of an accountable or reporting institution with its 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

FOR CONSULTATION PURPOSES ONLY

followed guidance which the Centre has issued, the institution must be able to demonstrate that it has complied with the relevant obligation under the FIC Act in an equivalent manner, nonetheless.

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.

COPYRIGHT NOTICE

This PCC is copyright. The material in a PCC may be used and reproduced in an unaltered form only for personal and non-commercial use within your institution.

Apart from any use permitted under the Copyright Act 1978, (Act 98 of 1978) all other rights are reserved.

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.

FOR CONSULTATION PURPOSES ONLY

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.

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.*

FOR CONSULTATION PURPOSES ONLY

- (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).*

2.2. This terminology used in this 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.

FOR CONSULTATION PURPOSES ONLY

- 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.

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.

FOR CONSULTATION PURPOSES ONLY

- 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.

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.

FOR CONSULTATION PURPOSES ONLY

- 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.
- 4.6. Based on the nature of the business offering provided by a TCSP, the following could be considered as inherent ML or TF risks posed by the TCSP sector. It is important to first understand the ML and TF risks that the industry faces before considering specific indicators. Such ML or TF risks could include:
- 4.6.1. Disguising ultimate beneficial owners through a corporate structure, to limit the detection of a sanctioned or designated person, an associated sanctioned person, a politically exposed person (PEP), such as a foreign prominent public official (FPPO) or domestic prominent influential person (DPIP), or a person linked to criminal activity.
 - 4.6.2. Facilitating the movement of illegal proceeds from a foreign client's country to South Africa. This is the primary reason why sufficient care and application of the mind is used to scrutinise client details to ensure that they are not a FPPO or DPIP.
 - 4.6.3. Companies based in foreign countries hiding the origin of their money, while attempting to distance themselves from the source of funds and to avoid paying for tax in South Africa.

FOR CONSULTATION PURPOSES ONLY

- 4.7. The risk indicators shown below may be helpful when evaluating risk in the ordinary course of business for a TCSP. If one or more of these risk factors are present, the TCSP should consider this as a heightened risk indicator when assessing client risk. The list is not exhaustive and does not intend to cover every situation.

Services offering risk indicators:

- 4.7.1. The client is using multiple companies or trusts which add layers of complexity to the ownership where those layers seem unnecessary e.g. trusts where the beneficiary of a trust is another trust.
- 4.7.2. Other professionals are assisting customers to use schemes that can disguise income, assets or ownership of such assets.
- 4.7.3. The number of intermediaries or professionals used seems unnecessary, or at the outset it is apparent that there is no need for a professional trust company and service provider.
- 4.7.4. Establishing a business primarily for the purpose of collecting funds from various sources, which are then transferred to local or foreign bank accounts that have no apparent ties to the legal entity.
- 4.7.5. The transfer of funds in the form of “forgivable loans” to individuals from trusts and shell companies but, the loans make little or no business sense, or the loan repayments are for comparatively small amounts to the amount loaned, or for excessively long periods of time, for example where the repayment is over the course of 10 or 15 years.) (*a forgivable loan is a form of loan in which its entirety or a portion of it can be forgiven or deferred for a period of time by the lender when certain conditions are met*)
- 4.7.6. Multiple appearances of the same parties in multiple different transactions within a short period of each other. Specifically, where it would make no business sense or logically impossible to enter into such transactions within a short time.
- 4.7.7. The purchase of companies that have no obvious commercial purpose.
- 4.7.8. Companies which continuously make substantial losses.

FOR CONSULTATION PURPOSES ONLY

Client risk indicators:

- 4.7.9. A company is registered by a non-resident with no links or activities in South Africa or the jurisdiction where the company is established.
- 4.7.10. The parties are native to, resident in or incorporated in a high-risk geographic area.
- 4.7.11. The money flow generated by a company is not in line with its underlying business activities.
- 4.7.12. The client is unwilling or refuses to provide information including documentary evidence of himself or beneficial owners of trusts or companies.
- 4.7.13. The client is involved with transactions for themselves or on behalf of a company that does not match their background.
- 4.7.14. The beneficial ownership is veiled in complexity making it impossible to determine who the ultimate beneficial owner is.
- 4.7.15. The client is secretive about the reasons for and the way a company structure is being set up.
- 4.7.16. Searches on a client or close associates show adverse media attention, or they have been disqualified from professions due to convictions of dishonesty or association with bribery in relation to contract procurement or tenders.
- 4.7.17. Where the client is or appears to be acting on behalf of another person but is unwilling to provide the names of the person they are acting on behalf of.
- 4.7.18. The person acting as a director or representative does not appear to be a suitable representative or does not appear to have the expertise that the role requires.
- 4.7.19. Clients whose owners or directors that have a lavish lifestyle that appears to exceed known sources of income.
- 4.7.20. Frequent changes in ownership, officers, beneficiaries, or trustees.
- 4.7.21. Irregularity or limited duration of the client relationship. Once-off engagements for the establishment of complex trust, company or other arrangements involving legal entities without ongoing involvement from the client.

FOR CONSULTATION PURPOSES ONLY

- 4.7.22. Where there is a suspicion that the client's directors or the ultimate beneficial owner are designated individuals on a targeted financial sanctions list or a resolution of the United Nations Security Council (UNSC.)
- 4.7.23. Where the customer requests that a company or legal entity is registered with a designated person (designated in terms of TFS list or UNSCR) being registered as the director, trustee or any other beneficial owner of such entity.

5. CONSULTATION

5.1. Before issuing guidance to accountable institutions, supervisory bodies and other persons regarding their performance, duties and obligations in terms of the FIC Act or any directive made in terms of the FIC Act, the Centre must in accordance with section 42B of the FIC Act—

5.1.1. Publish a draft of the guidance by appropriate means of publication and invite submissions.

5.1.2. Consider submissions received.

5.2. Commentators are invited to comment on the draft guidance by submitting written comments via the [online comments submission link only](#). Any questions or requests relating to this draft PCC 6A may be sent to the Centre only at **consult@fic.gov.za**. Submissions will be received until **Friday, 20 January 2023**, by close of business.

6. COMMUNICATION WITH THE CENTRE

FOR CONSULTATION PURPOSES ONLY

- 6.1 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.
- 6.2 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

15 December 2022