

# SUMMARY OF THE FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001 (" FICA" )

The Fica or Money Laundering Act, as it is also known, was enacted to prevent money laundering and places certain duties on what are called "accountable institutions" to disclose money-laundering activities to the Financial Intelligence Centre.

A person who carries on a "long-term insurance business" as defined in the Long-Term Insurance Act, 1998 (Act 52 of 1998).

Life Insurers, Brokers, UMA's, attorneys and estate agents fall under the list of accountable institutions.

It is vital that the provisions of Fica not only be understood but also strictly adhered to as the Act makes provision for imprisonment of 15 years or the imposition of a fine not exceeding R10 Million in the case of certain offences.

## 1. Money Laundering

What does money-laundering mean?

The definition of money laundering or a money laundering activity is the following:

"An activity which has or is likely to have the effect of concealing (hiding) or disguising the

- (i) nature
- (ii) source
- (iii) location
- (iv) disposition (removing from ownership)
- (v) movement

of the proceeds of unlawful activities or, movement of the proceeds of the proceeds of unlawful activities or, any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in terms of Sec 64 of the Act or Section 4, 5, or 6 of the Prevention Act.

The Sections referred to in the definition above are as follows:

### Section 64:

This section states that any person who conducts or causes to be conducted two or more transactions with the purpose or in whole or in part, of avoiding or reporting duty under the Act is guilty of an offence.

Before we look at Section 4, 5 and 6 of the Prevention Act where reference is repeatedly made to property, we need to know what the Act considers as property.

Property is defined in Section 1 of the Prevention Act, which reads as follows:

“money or other moveable (eg furniture etc), immovable (eg. fixed property), corporeal (having physical body), incorporeal (having no physical body – eg. computer software) and includes rights, privileges, claims and securities and any interest therein and all proceeds thereof.”

As can be seen, this definition is extremely wide and covers virtually anything that one can think of.

### **Sections 4, 5 and 6 of the Prevention Act state that money laundering includes the following:**

4. Any person who knows or should reasonably have known that property is or forms part of the proceeds of unlawful activities and –
  - 4.1 enters into any agreement or, engages in any arrangement or transaction with anyone in connection with that property whether the agreement, arrangement or transaction is legally enforceable or not or,
  - 4.2 performs any other Act in connection with such property whether it is performed independently or in concert (together) with any other person, which has or is likely to have the effect of:
    - 4.2.1 concealing or disguising the:
      - (i) nature
      - (ii) source
      - (iii) location
      - (iv) disposition or
      - (v) movementof the property or its ownership or any interest which anyone may have in respect thereof or
    - 4.2.2 of enabling or assisting any person who has committed or commits an offence in the Republic or elsewhere:
      - 4.2.2.1 to avoid prosecution
      - 4.2.2.2 to remove or diminish any property acquired directly or indirectly as a result of the commission of an offence.

Be aware that you can be guilty of an offence in terms of this section not only when you know that the property forms part of an illegal activity but also which you should reasonably have known and you did not report it.

You do not have to be actively involved. The mere concealing or disguising of the source, location etc constitutes an offence. If you assist someone who has committed an offence to avoid prosecution or remove the property directly or indirectly, you are again running a risk of conviction.

### **Section 5 goes further by stating that:**

Any person who knows or should reasonably have known that another person has obtained the proceeds of unlawful activities and who enters into any agreement with anyone or engages in any agreement or transaction whereby:

The retention or the control by or on behalf of the other person of the proceeds of unlawful activities is facilitated, or

The proceeds of unlawful activities are used to make funds available to the other person or to acquire property on his/her behalf or to benefit him/her in any way, shall be guilty of an offence.

Actual knowledge again is not required. You are deemed to know when you should reasonably have known. This clause is aimed at preventing assistance to someone who was engaged in illegal activities or entering into an agreement with such a person to make the funds available to purchase property on his behalf or to benefit him/her in any other way.

### **Section 6**

**This section deals with the acquisition, possession or use of proceeds of unlawful activities:**

Any person who

- (i) acquires;
- (ii) uses, or;
- (iii) has possession of,

property and who knows or should have reasonably known that it is, or forms part of the proceeds of unlawful activities of another person shall be guilty of an offence.

Proceeds of an unlawful activity has just as wide a meaning and is defined as follows in the Act:

- (i) any property
- (ii) any service

- (iii) any advantage
- (iv) any benefit
- (v) any reward

which was

- (i) derived
- (ii) received
- (iii) retained

directly or indirectly, in the republic or elsewhere at any time before or after the commencement of the Act, in connection with or as a result of any unlawful activity carried on by an person, and includes any property representing property so derived.

Not only is this Section worded as wide as possible but also applies to actions that took place before the Act came into operation.

One also has to have regard to the description of what constitutes an unlawful activity. The definition in the Act is as follows:

Conduct which constitutes a crime or which contravenes any law, whether such conduct occurred before or after the commencement of the Act and whether such conduct occurred in the Republic or elsewhere.

Again the wording is extremely wide and is retrospective (i.e. before the Act came into operation), relates to the contravention of any law, and even where the Act was committed outside the borders of the Republic.

We also need to be aware of what the Act means by having knowledge of a fact.

**The Act defines it as follows:**

- 1 the person who has Actual knowledge of that fact or
- 2 the Court is satisfied that:
  - 2.1 the person believes that there is a reasonable possibility of the existence of the fact
  - 2.2 the person fails to obtain information or confirm or refute the existence of the fact.

The above speaks for itself.

As far as word descriptions go, we must look at what it means that you should reasonably have known or suspected a fact.

The Act says if the conclusions that he/she should have reached are those which would have been reached by a reasonably diligent and vigilant person having both:

1 the general knowledge, skill, training and experience

that may reasonably be expected of a person in his/her position: and

2 the general knowledge, skill, training and experience that he/she in fact has

The Act carries on by defining what is meant by suspicious and unusual transactions:

1 A person who carries on business or is in charge of or manages a business or who is employed by a business and who knows or suspects that:

1.1 the business has received or is about to receive the proceeds of unlawful activities;

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

1.2.1 facilitated or is likely facilitate the transfer of proceeds of unlawful activities;

1.2.2 has no apparent business or lawful purpose;

1.2.3 is conducted for the purpose of avoiding giving rise to a reporting duty under the Act (e.g. front company)

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

1.2.5 the business has been used or is about to be used in any way for money laundering purposes, must within the prescribed period after which knowledge was acquired or suspicion arose, report to the centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transactions.

Please note that even a person employed by a business who gets suspicious or knows about an attempted money laundering activity or even tax evasion has a duty to report it to the Centre, failing which you are guilty of an offence.

The Act for interest sake does away with the confidentiality and privilege between attorney and client for purposes of investigations etc in terms of the Act. An attorney can thus not deny the Centre access to client's files on the basis that the information is privileged.

Persons making reports are protected and no claim whether civil or criminal lies against any person complying in good faith with the provisions of the Act.

A duty to identify clients rests upon all agents, attorneys and other accountable institutions.

The Act provides that an accountable institution may not establish a business relationship or conclude a single transaction with a client unless the accountable institution has taken the prescribed steps:

- 1 to establish and verify the identity of the client;
- 2 if the client is acting on behalf of another person to establish and verify -
  - 2.1 the identity of the other person;
  - 2.2 the clients authority to establish the business relationship or concludes the single transaction.

If the accountable institution established a business relationship with a client before the Act took effect, the accountable institution may not conclude a transaction in the course of that business relationship unless the above steps have been taken.

The accountable institution has to keep record of e.g. the identity of the client, nature of business relationship, amount involved in transaction, parties to the transaction etc (Sec 22 of the Act).

The records must be kept for at least 5 years after business relations is terminated, or after a transaction was concluded.

Accountable institutions have to advise the Centre of clients if so requested and all cash transactions over the prescribed limit within the prescribed period.

The Act sets out a whole series of measures to promote compliance, inter alia, formulation and implementation of internal rules concerning establishment and verification of identity, record keeping, manner and place where records are to be kept and steps to be taken to determine reportable transactions.

The rules must comply with prescribed requirements and a copy must be made available to each employee. The rules must on request be made available to the Centre or supervisory body.

As far as training and monitoring of compliance the Act requires that an accountable institution appoint a person who is responsible for ensuring compliance by the employees with provisions of the Act and internal rules.

The Act (in Sec 46) sets out the offences and penalties, which I only list without elaborating:

- 1 Failure to identify persons;
- 2 Failure to keep records;
- 3 Destroying or tampering with records;
- 4 Failure to give assistance;
- 5 Failure to advise Centre of client;
- 6 Failure to report cash transaction;
- 7 Failure to report suspicious or unusual transactions;
- 8 Unauthorized disclosure;

- 9 Failure to report conveyance of cash into or out of the Republic;
- 10 Failure to send report to Centre;
- 11 Failure to report electronic transfers;
- 12 Failure to comply with request;
- 13 Failure to comply with direction by Centre;
- 14 Failure to comply with monitoring order;
- 15 Misuse of information;
- 16 Failure to formulate and implement internal rules;
- 17 Obstructing, hindering and threatening of an official or representative of Centre in performance of duties;
- 18 Conducting transactions to avoid reporting duties;
- 19 Conducting transactions to avoid reporting duties;
- 20 Unauthorised access to computer system or application or data;
- 21 Unauthorised modification of contents of computer system.

The severe penalties for the above contravention have already been dealt with.

The information contained herein is only a summary of the Sections of the Act that we feel are the most relevant and important.

The Act however is far more comprehensive and we suggest that this information be used purely as guidelines and that, in the event of doubt, the Act be studied or that legal assistance be sought.

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