

PUBLIC COMPLIANCE COMMUNICATION

PUBLIC COMPLIANCE COMMUNICATION No 36 (PCC 36)
OBLIGATIONS ARISING FROM THE FINANCIAL INTELLIGENCE
CENTRE ACT (ACT NO. 38 OF 2001), PERTAINING TO THE 2016
SPECIAL VOLUNTARY DISCLOSURE PROGRAMME

The Financial Intelligence Centre (the Centre) provides the guidance contained in this Public Compliance Communication (PCC) in terms of its statutory function in terms of section 4(c) of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001, 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 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 under the FIC Act. Guidance provided by the Centre is authoritative in nature. An accountable institution must comply with guidance issued by the Centre, or explain the reasons for non-compliance if prompted by the Centre or supervisory body. It is important to note that enforcement action may emanate as a result of non-compliance with the FIC Act where it is found that there has been non-compliance with the guidance issued by the Centre.

PCC Summary

A Special Voluntary Disclosure Programme (SVDP) has been announced by the Minister of Finance during the 2016 Budget Speech (the 2016 SVDP). Accountable institutions assisting clients in making use of the 2016 SVDP must comply with FIC Act obligations relating to establishing and verifying of clients' identities, record keeping and reporting. The obligation to report suspicious or unusual transactions in terms of section 29 of the FIC Act does not arise where clients are assisted in regularising their affairs by making use of the 2016 SVDP in connection with income and/or foreign assets which were derived from known legitimate sources.

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Objective

The objective of this PCC is to clarify the obligations of accountable institutions and other persons assisting clients in making use of the 2016 Special Voluntary Disclosure Programme.

Application of this PCC

This PCC applies to accountable institutions rendering advice to clients making use of the 2016 SVDP relating to tax matters and/or matters concerning the Exchange Control Regulations, 1961 (Excon Regulations). Such accountable institutions may include but are not limited to accountants, auditors, attorneys and financial service providers, etc. The 2016 SVDP is meant for South African residents who have not in the past disclosed tax and/or exchange control defaults in relation to offshore assets.

1. Introduction

- 1.1. The Minister of Finance announced a SVDP during the 2016 Budget Speech. This SVDP will be implemented in terms of Regulation 24 of the Excon Regulations and Part B of Chapter 16 of the Tax Administration Act, 2011 (Act No. 28 of 2011) in respect of offshore assets and income referred to in Part II of the Rates and Monetary Amounts and Amendment of Revenue Laws Act, 2016 which is yet to be promulgated. The SVDP will be open for applications from 01 October 2016 until 30 June 2017, when it will terminate. More information is available here: [SARS](#) and [South African Reserve Bank](#).
- 1.2. The objective of the 2016 SVDP is to provide a window of opportunity to South African residents to regularise undisclosed or unauthorised foreign assets (excluding bearer instruments) and income in contravention of the Excon Regulations and tax legislation by making a voluntary disclosure to the Special Voluntary Disclosure Programme Unit jointly operated by the Financial Surveillance Department (FinSurv) of the South African Reserve Bank (SARB) and the South African Revenue Service (SARS).
- 1.3. It is the view of the Centre that the 2016 SVDP serves an important objective by allowing persons to regularise their tax and/or exchange control situation without fear of punishment for past breaches of their legal obligations.

- 1.4. Former and current South African residents will be allowed to disclose such foreign assets held as at 29 February 2016 and administrative relief may be granted after payment of a levy, based on the market value of such assets.
- 1.5. Residents include individuals, sole proprietorships, partnerships, deceased estates, insolvent estates, South African trusts, close corporations and companies. It is to be noted that settlors, donors and beneficiaries of foreign discretionary trusts (including deceased estates) may participate in the 2016 SVDP for tax and exchange control purposes if they elect to have the trust's offshore assets and income deemed to be held by and accrued to them.
- 1.6. The 2016 SVDP does not apply to South African residents who are subject to pending and/or current investigations by FinSurv into their contraventions of the Excon Regulations. Similarly, the 2016 SVDP is not available to taxpayers who are subject to an audit or pending audit in relation to a tax non-disclosure.
- 1.7. Applications for administrative relief must be made using the SARS eFiling platform, to the SVDP unit, which is jointly operated by FinSurv and SARS.
- 1.8. It is the view of the Centre that accountable institutions can play an important role in ensuring the success of the 2016 SVDP by assisting clients in making use of the 2016 SVDP. The Centre wishes to pre-empt uncertainty as to the relationship between the 2016 SVDP and the role of accountable institutions in promoting the objectives of the 2016 SVDP on the one hand, and the obligations flowing from the FIC Act on the other. For this reason the Centre believes that it is necessary to issue this PCC to formally express its views on the application of the FIC Act in relation to the 2016 SVDP and to make known its expectations of persons assisting clients to benefit from the 2016 SVDP.

2. Identification of clients and record-keeping of transactions

- 2.1 Accountable institutions are subject to the obligations under section 21 of the FIC Act to establish and verify the identities of their clients when engaging in single transactions or entering into business relationships with such clients. The obligation on an accountable institution to establish and verify a client's identity arises at the outset of a business relationship or at the time when the accountable institution is approached by a prospective client to conduct a single transaction.
- 2.2 Accountable institutions must keep records of their clients' identities and transaction activities in terms of section 22 of the FIC Act. These obligations apply to engagements with clients in relation to the 2016 SVDP as they would in the case of any other engagement between an adviser and a client.
- 2.3 An accountable institution which is approached by a client for assistance in using the 2016 SVDP in the course of an existing business relationship will not be required to repeat the establishment and verification of the client's identity if that was done at the outset of the relationship.
- 2.4 In cases where the accountable institution does not have an existing business relationship, in other words where a new business relationship is formed or where a single transaction is conducted with the view of providing assistance in making use of the 2016 SVDP, the accountable institution will have to take the necessary steps to establish and verify the prospective client's identity.
- 2.5 Once the verification of the client's identity is completed, the accountable institution must retain the information concerning the client's identity as well as the information referred to in section 22 of the FIC Act concerning transactions with the client.

3. Reporting implications

3.1. The issue to consider in determining whether a reporting duty in terms of section 29 of the FIC Act arises in relation to the 2016 SVDP is the following:

Does the seeking of assistance by a client from an accountable institution in connection with the 2016 SVDP amount to a transaction between the adviser and the client which:

- may facilitate the transfer of proceeds of unlawful activities or property which is connected to an offence relating to terrorist and related activities, or
- has no apparent business purpose, or
- is conducted for the purpose of avoiding giving rise to a reporting duty under the FIC Act, or
- may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, or
- relates to the financing of terrorist or related activities, or
- may be an attempt to abuse the adviser's business in any way for money laundering or terrorist financing purposes?

3.2. The obligation to report suspicious or unusual transactions relates to reports being made in connection with the proceeds of unlawful activities and money laundering or terrorist financing offences as opposed to criminal activity in general. This implies that accountable institutions should evaluate matters concerning the business in question and transactions involving the business, in relation to what seems appropriate and is within normal practices in the adviser's line of business, and bring to bear on these, factors such as the knowledge the accountable institutions may have of the client.

3.3. This should involve an application of the accountable institution's knowledge of the client's business, financial history, background and behaviour.

3.4. General guidance on the application of the reporting obligations under section 29 of the FIC Act is provided in Guidance Note 4 which was issued by the Centre in March 2008.

4. How does the 2016 SVDP become relevant to an accountable institution?

4.1. The 2016 SVDP may become relevant to accountable institutions in the following three scenarios:

4.1.1. Persons may approach accountable institutions to establish whether they qualify for the 2016 SVDP and to obtain assistance in submitting their applications for voluntary disclosure relief to SARS and/or SARB.

4.1.2. Persons may approach accountable institutions to obtain generic tax and/or exchange control advice without referring specifically to the 2016 SVDP. During the consultation it may become apparent to the accountable institution that the person has previously failed to comply with his or her tax and/or exchange control obligations, qualifies for voluntary disclosure relief in terms of the legislative framework and wishes to submit an application for voluntary disclosure relief.

4.1.3. Persons may approach accountable institutions in circumstances which lead the adviser to suspect that his or her services will be abused to conceive of, carry out or perpetuate a scheme to conceal the source or the nature of proceeds of unlawful activities or in connection with terrorist financing activities.

5. When would a reporting obligation not arise?

5.1 The Centre's assumption is that the income and/or foreign assets that may be relevant to an application for voluntary disclosure relief was derived from a known source which did not ***in itself*** amount to an unlawful activity as defined in the Prevention of Organised Crime Act, 1998.

Scenarios 4.1.1 and 4.1.2 above:

5.2 In cases such as these an accountable institution assisting a client in obtaining voluntary disclosure relief is assisting the person to absolve himself or herself legitimately from criminal liability which would otherwise have arisen from past non-compliance with the person's tax and/or exchange control obligations.

- 5.3 The Centre is of the view that in cases such as these where the income and/or foreign assets in question was derived from known legitimate sources, the advice on making use of the 2016 SVDP and assistance in applying for voluntary disclosure relief does not facilitate the transfer of proceeds of unlawful activities or property which is connected to an offence relating to terrorist and related activities, nor does it amount to a transaction that has no apparent business purpose, or is conducted for the purpose of avoiding giving rise to a reporting duty under the FIC Act, or may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax and/or exchange control, or relates to the financing of terrorist or related activities.
- 5.4 It is the Centre's view further that the provision of advice on making use of the 2016 SVDP and assistance in applying for voluntary disclosure relief in respect of income and/or foreign assets derived from known legitimate sources does not amount to an attempt to abuse the services of an accountable institution for money laundering or terrorist financing purposes.
- 5.5 As a result the Centre is of the view that no reporting obligation arises from a situation described in 4.1.1 and 4.1.2 above, where an accountable institution assists a client in connection with an application for voluntary disclosure relief in terms of the 2016 SVDP in respect of income and/or foreign assets from known legitimate sources, since the adviser is not engaging in a transaction which falls within the ambit of section 29(1) the FIC Act. Although it is not expected of an accountable institution to take extraordinary steps to ensure that a client has actually applied for relief under the 2016 SVDP, a reporting obligation may arise if it becomes clear to the adviser that the client has consulted with respect to the 2016 SVDP merely to defeat a reporting obligation that would otherwise arise or has no intention of applying for relief under the 2016 SVDP.

6. When would a reporting obligation arise?

Scenario in 4.1.3 above:

- 6.1. Transactions of this nature would fall outside of the scope of the 2016 SVDP. In addition, in such cases an accountable institution would be involved in a transaction which may facilitate the transfer of proceeds of unlawful activities or property which is connected to an offence relating to terrorist and related activities, or relates to the financing of terrorist or related activities.

6.2. Alternatively, engagements of this nature would amount to attempts to abuse the services of accountable institutions for money laundering or terrorist financing purposes. This would include engagements which entail the seeking of advice or assistance to structure clients' activities in such a manner that the detection of the nature, source, location, disposition or movement of property or the ownership thereof or any interest in the property derived from criminal activities can be avoided.

6.3. The Centre is of the view that a reporting duty indeed arises in cases of this nature.

7. Conclusion

7.1 Queries on this and other compliance matters can be logged via the web portal on the Centre's website [CLICK HERE](#) or call 0860 222 200.

Issued By:

**THE DIRECTOR
FINANCIAL INTELLIGENCE CENTRE
28 SEPTEMBER 2016**