Withdrawn

Guide

January 2011

A Guide for Registered Auditors

Combating Money Laundering and Financing of Terrorism

Independent Regulatory Board for Auditors
Johannesburg

The purpose of this guide is to provide registered auditors with general guidance relating to combating of money laundering and terrorist financing. This guidance does not serve to provide a complete statement of the requirements and should be read in conjunction with the relevant legislation.

Although reasonable care has been taken to ensure that the information contained in this guide is correct at date of issue, the **Independent Regulatory Board for Auditors** (IRBA) does not take any responsibility for the correctness of any of the interpretations of the law and other information in this guide. Users of this guide should obtain legal advice where necessary.

The Guide is divided into four parts:

- **Part 1** briefly outlines the concepts of money laundering and financing of terrorism and the international and South African framework for anti-money laundering and combating of financing of terrorism.
- **Part 2** focuses on the compliance obligations of registered auditors. Part 2.1 sets out the obligations of those who are not classified as "accountable institutions" under the Financial Intelligence Centre Act, Act 38 of 2001, as amended (FIC Act), while the compliance obligations of those who are accountable institutions are discussed in Part 2.2.
- **Part 3** highlights the supervisory role of the IRBA under the FIC Act.
- **Part 4** briefly addresses the responsibilities of registered auditors when conducting an audit.

Registered auditors should be aware of, and consider this guide, in the context of their responsibilities as registered auditors. A registered auditor who does not apply the guidance in this guide should be prepared to explain how the objective of the legislation discussed in this guide, has been otherwise achieved.

This Guide is effective from 1 January 2011 and the document: "Money Laundering Control: A Guide for Registered Accountants and Auditors", issued June 2003, is hereby withdrawn.

Copies of this Guide may be downloaded free-of-charge from the IRBA website: http:/www.irba.co.za

A guide for registered auditors:

Combating money laundering and financing of terrorism

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Introduction

1. Registered auditors are required to comply with all legislation applicable to them, which include the FIC Act, as well as a range of other Acts. The Financial Intelligence Centre Amendment Act came into force on 01 December 2010. The amendments to the FIC Act broadened the inspection and enforcement powers of regulatory bodies, including the Financial Intelligence Centre (FIC), as well as the IRBA, to conduct inspections at all audit firms. This means that registered auditors need to ensure that they are compliant with all aspects of Anti-Money Laundering (AML) legislation, irrespective of whether they are accountable institutions in terms of Schedule 1 of FIC Act or not.

2. When a registered auditor is assessing his or her compliance with applicable legislation including the FIC Act, it is important to consider not only the general business of the institution, but also the scope of business of any business units and the qualifications and business activities of each of its employees. It is possible that an institution may not be an accountable institution, but that a number of its employees may be accountable institutions on account of their qualifications or specific duties within that institution. Persons who are accountable institutions in their own right may also be working for general business or other accountable institutions.

3. The IRBA is responsible for supervising compliance with the FIC Act by registered auditors who are listed in, or engage in any activity listed in Schedule 1 of the FIC Act as stated above. In terms of section 29 of the FIC Act, it is required that suspicious or unusual transactions are to be reported: for the registered auditor's duty to arise for reporting in terms of this section, s/he must become a party to such a transaction or be abused in any way for money laundering/financing of terror (ML/FT) purposes. This will be the case, for example, where the client is a front for a ML/FT operation and the auditor believes or suspects that the auditor's reputation is being used by the client to legitimize the client's business activities, or that the audit fees received from the client are "tainted" as a consequence of the client's unlawful activities. Furthermore, in terms of section 28 of the FIC Act, registered auditors, must within the prescribed period, report to the FIC particulars concerning cash transactions concluded with a client which is R25 000 or more.

4. It should be noted that, in view of its general regulatory powers and duties under the Auditing Profession Act, Act 26 of 2005, the IRBA has a responsibility to supervise compliance by all registered auditors with their general statutory obligations. As a consequence, the IRBA is also charged with supervisory responsibilities in respect of registered auditors who are not accountable institutions and who only have the compliance obligations set out in part 2.1 of this guide.

   It follows that reporting in terms of either the FIC Act, the Protection of Constitutional Democracy Against Terrorist and Related Activities, Act 33 of 2004, or the Prevention and Combating of Corrupt Activities Act 12 of 2004 applies to every registered auditor.

Purpose of the Guide

5. The South African anti-money laundering (AML) and combating of financing of terrorism (CFT) laws create a comprehensive legal framework for the combating of money laundering (ML) and financing of terrorism (FT). The main AML/CFT laws are the Prevention of Organised Crime Act, Act 121 of 1998 (POCA), Protection of Constitutional Democracy against Terrorist and Related Activities Act, Act 33 of 2004 (POCDATARA) and the Financial Intelligence Centre Act 38 of 2001 (FIC Act). The Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA) also creates a ML offence relating to proceeds of corruption. It is important to read the FIC Act in conjunction with the regulations and exemptions that were published under the

FIC Act. In general, these laws criminalise transactions involving proceeds of unlawful activities[1] or that is aimed at financing terrorist and related activity, and creates compliance obligations for businesses and their employees.

6. Every business and every employee of every business is, for instance, required to report specified unusual and suspicious transactions to the FIC.[2] Further administrative AML/CFT duties attach to persons carrying on specified activities, classified as "accountable institutions" under the FIC Act.[3] Accountable institutions are required to identify their clients and verify their identities before any transaction may be concluded. They have to keep record of specific information, appoint a person responsible for overseeing compliance, draft appropriate internal rules and train their employees in their compliance obligations.[4] An accountable institution must appoint a money laundering control officer (MLCO) whereas a registered auditor who is not an accountable Institution is advised to appoint a compliance officer.[5]
7. These AML/CFT duties affect registered auditors in a number of ways, for example:
    - In general, registered auditors are conducting a business in their own names or are employed by professional firms. In this capacity they have personal statutory duties to report certain unusual and suspicious transactions to the FIC.[6]
    - Some registered auditors have to comply with the additional administrative ML control obligations.[7] The audit function of registered auditors is not listed as accountable institution activity for purposes of the FIC Act. However, in addition to their professional services, some registered auditors carry on commercial activities that bring them within the ambit of these additional obligations.
    - Registered auditors must be able to identify compliance breaches by clients and evaluate the actual or potential impact of such a breach on a client and its stakeholders.[8]
8. The potential consequences of non-compliance with the AML/CFT duties are serious:
    - Penalties for some ML offences range up to R100 million and 30 years imprisonment.
    - Allegations of involvement, whether intentionally or negligently, in ML or FT may result in serious reputational loss and the loss of national and international business relationships.
9. The management of AML/CFT compliance requires resources, planning and time. It is important to view the expenditure as an investment in ethical business practices, as a tangible contribution to the combating of crime and terrorism and as an investment in infrastructure and systems that will bring South African businesses in line with their international counterparts.

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[1] Essentially, unlawful activity refers to crime. The term is discussed in greater detail in paragraph 8.
[2] For more information, see Part 2.1 below.
[3] For more information, see Part 2.2 below as well as Annexure A.
[4] For more information, see Part 2.2 below.
[5] See Annexure H: Compliance Officers for more information on the differentiation between the two appointments.
[6] The reporting duties are discussed in greater detail in Part 2.1 below.
[7] For more information, see Part 2.2 below.
[8] When international clients are being audited, the registered auditor may also have to consider compliance with the AML/CFT laws of other jurisdictions. Guidance on the requirements of foreign legal systems does not fall within the scope of this guide.

Part 1 – Concepts of money laundering, financing of terrorism, the International and South African framework for anti-money laundering and combating of financing of terrorism.

The meaning of money laundering

10. In general, ML refers to any act that disguises the criminal nature or the location of the proceeds of a crime. However, South African legislation broadened this concept to virtually every act or transaction that involves the proceeds of a crime, including the spending of any funds that were acquired illegally.[9]

11. Generally speaking, a ML offence will be committed if the person who commits that act or enters into that transaction knows or ought reasonably to have known that the relevant money or property is the proceeds of a crime.

12. In South Africa, ML is not only limited to acts in connection with the proceeds of drugs or other serious offences. It extends to the proceeds of all types of offences, including tax offences and corruption.[10]

The meaning of financing of terrorism

13. FT refers to the direct or indirect provision of financial or economic benefit to support terrorism or related activity or any person or group engaging in such activity. A person commits an FT offence under POCDATARA if he knowingly engages in such an act or ought reasonably to have known or suspected that the act will result in support for such activities or such persons: section 25 of the Act compels the President of South Africa to give notification of any "specific entity" who had been listed by the Security Council of the United Nations as having attempted to commit, or having committed any terrorist related activity. The objective of POCDATARA, therefore, is to align South Africa's anti-terrorism laws and to ensure that the country complies with its obligations in terms of the United Nations 1999 International Convention for the Suppression of the Financing of Terrorism.[11]

The rationale behind anti-money laundering / financing of terrorism

14. Criminals launder the proceeds of their unlawful activities to evade prosecution and enjoy the fruits of their crime with impunity. Since the 1980s the international community has therefore urged all countries to adopt laws that criminalise the laundering of proceeds of unlawful activities. The legislation generally criminalises the laundering of proceeds by the criminals themselves and by facilitators such as banks, insurance companies, retail businesses, investment advisers, lawyers and estate agents.

15. The South African AML/CFT system requires every business and every employee of every business to file confidential reports on suspicious and unusual transactions that a client may conclude with the business. These reports assist law enforcement in the investigation and prosecution of unlawful activities. In addition, the system requires certain institutions to identify their clients before any business is concluded, to verify and keep record of relevant facts, to train their employees, to draft internal rules and, as mentioned in the introduction to this Guide, to appoint MLCO's or Compliance Officers to manage the compliance obligations of the business. Section 28 of FIC Act requires all accountable institutions and reporting institutions to report cash transactions of R25 000 and above to the FIC. These measures support good

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[9] A detailed analysis of the elements of the key money laundering offences falls outside the ambit of this guide. See, in general, chapter 3 of De Koker South African money laundering and terror financing law (Butterworths LexisNexis (1999) for further information.

[10] Section 20 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 creates an offence of dealing with the proceeds of corruption. This offence overlaps with the general ML offences under POCA. Also note that common law offences, such as receipt of stolen goods, overlap with some of the statutory ML offences.

[11] See annexure F: POCDATARA.

corporate governance and also assist in combating ML/FT. It assists businesses to ensure that they engage in ethical business practices and also support their fraud and other client-related risk management procedures.

16. Terrorists and their funders generally require anonymity and often use strategies that are similar to those employed by money launderers to hide their money flows. As a consequence, the concepts of AML and CFT became fused in the international arena. As funds that are used to finance terrorism are not necessarily proceeds of unlawful activities, the term "reverse laundering" is sometimes used in respect of FT.[12]

International standards in respect of combating money laundering control and terrorist financing

17. South Africa is not alone in its efforts to combat ML and FT. The international community expects all countries to adopt and implement laws that meet international AML/CFT standards and the majority of countries adopted such laws in the past twenty years.

18. The main international standard-setting body for AML/CFT is the Financial Action Task Force (FATF). The membership of FATF represents the major financial centres of the world. FATF co-operates closely with the World Bank, the International Monetary Fund, organs of the United Nations and several FATF-style regional bodies. South Africa became a FATF member in 2003.

19. The FATF adopted a set of standards with regard to ML control in 1990. These standards, generally referred to as the Forty Recommendations, were supplemented in 2001 with revised Special Recommendations relating to funding of terrorism.

20. During 2008 the FATF visited South Africa for a formal inspection and it is envisaged that regular ad hoc inspections will be conducted. In overseeing South Africa's compliance with the International Guidelines as these relate to the local laws, the FATF expressed a number of concerns as these relate to the risks that accountants and registered auditors are exposed to, given the nature of their profession. This Guide does not deal with the risks of accountants per se, but in striving to adhere to recommendations made by the FATF, it would be prudent for any registered auditor to consider the recommendations as applicable.

The South African anti-money laundering and terrorist financing control framework

21. Three Acts of Parliament provide the framework for AML/CFT in South Africa, namely the Prevention of Organised Crime Act 121 of 1998 (POCA), the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (POCDATARA) and the Financial Intelligence Centre Act 38 of 2001 (FIC Act).

Prevention of Organised Crime Act, Act 121 of 1998

22. POCA creates serious offences relating to ML. These offences include involvement in a money laundering transaction, the rendering of assistance or advice to a criminal to assist him to control the proceeds of unlawful activities[13] and the acquisition, use or possession of the proceeds of unlawful activities of another. The offences can also be committed negligently by third parties who assist criminals to conclude transactions that launder proceeds of unlawful activities.[14]

23. These offences carry serious penalties. Fines range up to R1 billion and offenders may be imprisoned for life.

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[12] The application of this legal terminology goes beyond the scope of this Guide and is not dealt with here.
[13] The Act uses the term "unlawful activities" to refer to crime.
[14] A detailed analysis of the elements of the key money laundering offences fall outside the ambit of this guide. See, in general, chapter 3 of De Koker South African money laundering and terror financing law (Butterworths LexisNexis (1999) for further information.

Financial Intelligence Centre Act 38 of 2001

24. The FIC Act established the Financial Intelligence Centre (FIC). The Centre, which falls under the auspices of the Minister of Finance, receives all reports filed by businesses and employees of businesses in terms of the FIC Act, analyses them and disseminates information to the relevant investigating authorities.

25. The FIC Act also gives rise to a duty for all businesses and every employee of a business to report a transaction with the business if it is known to involve, or is suspected of involving the proceeds of a crime or tax evasion or if it does not have an apparent lawful or business purpose (so called "suspicious and unusual transactions").

26. The FIC Act creates additional duties for two specific groups of institutions, called "accountable institutions" and "reporting institutions". Institutions which are classified as accountable institutions are listed in Schedule 1 of the FIC Act. This schedule lists, amongst others, attorneys, banks, brokers, insurers, estate agents and trustees as accountable institutions.[15] Reporting institutions are listed in Schedule 3 of FICA.[16] Currently only dealers in motor vehicles and dealers in Kruger Rands are listed as reporting institutions.

27. Reporting institutions have a limited duty to report all transactions involving cash amounts in excess of a prescribed amount.[17] This duty applies in addition to their general duty to report suspicious and unusual transactions under the FIC Act. Accountable institutions have a broader duty in this regard as they also have a duty to report the international conveyance, and international electronic transfers, of money in excess of prescribed amounts.

28. In addition to the reporting obligations, the FIC Act and the Money Laundering and Terrorist Financing Control Regulations[18] under the FIC Act create detailed duties for accountable institutions in respect of the following:

    - customer identification, verification and record-keeping;
    - ensuring compliance; and
    - providing limited access to information by relevant authorities.

29. In conjunction with the regulations, a set of exemptions were published under the FIC Act. The regulations and the exemptions were subsequently amended and further, more detailed exemptions have also been published. Registered auditors are advised to ensure that they have access to current copies of these regulations and exemptions as they must be consulted to determine a client's compliance obligations.[19]

30. Furthermore, all accountable institutions and reporting institutions must register with the FIC before 1 March 2011.

31. A person convicted of certain offences in terms of Chapter 4 of the FIC Act is liable to imprisonment for a period not exceeding 15 years or to a fine not exceeding R100 000 000.

32. In addition, amendments to the FIC Act provide for a range of administrative sanctions that may be administered by the Centre or a supervisory body in an

[15] This list is reproduced in Annexure A.
[16] See Annexure A.
[17] See Regulation Gazette as published in Government Gazette no 24176 (vol 450) dated 20 Dec 2002 available on the IRBA website.
[18] See the FIC website for texts of the regulations as amended from time to time: www.fic.gov.za.
[19] The relevant Regulations referred to in this Guide, as published by Government Gazette, are available on the IRBA website.

instance of non compliance by an institution or person. The sanctions include, among others:-

- a caution not to repeat a particular conduct;
- a reprimand;
- a directive to take remedial action;
- a financial penalty not exceeding R10 million in respect of natural persons and R50 million in respect of a legal person.

Protection of Constitutional Democracy Against Terrorist And Related Activities Act 33 of 2004

33. POCDATARA addresses a broad range of issues relevant to the combating of terrorism. The provisions of the Act must be read in conjunction with the relevant provisions of POCA and the FIC Act. POCDATARA also amended the FIC Act and POCA to ensure that these laws not only support the combating of organised crime and ML, but also the combating of terrorism and FT.

34. POCDATARA creates its own reporting obligations but also amended the FIC Act by inserting a new reporting provision in respect of property associated with terrorism and related activities. The duty to report suspicious and unusual transactions under FICA was also extended to transactions that are known to be, or suspected of being, linked to terrorist financing.[20]

35. The FT provisions of POCTADARA criminalise commercial acts that are aimed at, or in some cases are likely to, support the commission of terrorism and related activities. POCDATARA is a highly complex and technical law.[21] Registered auditors are urged to consult POCDATARA to determine the impact of this Act on their activities[22]. Section 18(1)(c) of POCDATARA provides penalties for contravention of section 4. A person who is convicted of such an offence is liable, in the case of a sentence to be imposed by a High Court or a regional court, to a fine not exceeding R100 million or to imprisonment for a period not exceeding 15 years. If the sentence is imposed by a magistrate's court, the maximum fine is R250,000 and the maximum term of imprisonment is five years.

Enforcement of the Money Laundering and Financing of Terrorism laws

36. Various cases of money laundering have been prosecuted successfully in South Africa and a number of individuals have been imprisoned for these offences.[23]

37. The FIC Act empowers various supervisory bodies such as the IRBA, the Financial Services Board and the Registrar of Banks to supervise compliance with the FIC Act by accountable institutions under their control. Accountable institutions that fail to comply with their obligations may therefore be subjected to corrective action by their supervisory body in addition to being prosecuted for the offences linked to non-compliance.

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[20] Section 28A of the FIC Act.
[21] See Annexure F: POCDATARA.
[22] For legal perspectives on these offences see chapter 4 of De Koker South African money laundering and terror financing law (Butterworths LexisNexis (1999) for further information.
[23] Early in 2008 a chartered accountant and his firm were also successfully prosecuted for money laundering and for the failure to ensure that the commercial activities of the accounting firm complied with FICA. S v Maddock Incorporated and Maddock **Case** SH7/17/08 The firm was fined R50 million, suspended for five years, for the ML offences and R10 million, suspended for five years, for non-compliance with FICA. The chartered accountant was sentenced to ten years imprisonment of which five years were suspended for five years, for money laundering and six years imprisonment of which three years were suspended for five years, for the failure to report suspicious and unusual transactions. The fines and imprisonment were suspended on condition that similar offences were not committed during the suspension period. It is, however, important to note that only a portion of the term of imprisonment of the chartered accountant was suspended.

Part 2 – Anti-money laundering/combating of financing of terrorism obligations of registered auditors

Classification

38. The nature and extent of the applicable AML/CFT obligations depend on the classification of a person, business or an institution for purposes of the FIC Act and POCDATARA:

    - Any person who has reason to suspect that another person intends to commit a terrorist offence or FT offence under POCDATARA or who knows the whereabouts of such a person, must report that suspicion, or cause it to be reported, as soon as possible, to a police official.[24]
    - A person who is carrying on a business or is managing, in charge of or employed by a business, has a duty under section 29 of the FIC Act to report certain unusual and suspicious transactions to the FIC.[25]
    - A person who is listed in Schedule 1 as an accountable institution as well as Schedule 3 of the FIC Act as a "reporting institution" has, in addition to the section 29 reporting obligation, the duty to report certain transactions involving cash amounts exceeding a threshold amount of R25 000: this would include reporting in respect of all transactions including domestic and foreign notes and coins, as well as travellers cheques.[26]
    - A person who is listed in Schedule 1 of the FIC Act as an accountable institution has, in addition to the section 29 reporting obligation, a full set of compliance obligations.[27] This includes the duty under section 28A of the FIC Act to file a report with the FIC when it possesses or controls property linked to FT.

39. The reporting duties described in the above paragraphs can be delegated to the MLCO or Compliance Officer to report to the reporting official or reporting body.[28]

40. The duties under section 29 of the FIC Act apply to all citizens. The additional duties of reporting under section 28 of the FIC Act apply to all accountable institutions and reporting institutions. This guide focuses on the remaining two categories, namely the duties of general businesses and accountable institutions.

Part 2.1 - General businesses

The duty to report suspicious and unusual transactions

Introduction

41. In *Standard General Insurance Company v Hennop* 1954 4 SA 560 (A) the Appellate Division accepted the following as a definition of "business":[29]

> "Anything which occupies the time and attention and labour of a man for the purpose of profit is business".

42. Applied to the nature of business for the registered auditor, it means that the practice of a registered auditor would be interpreted as a "business" for purposes of applying AML laws, particularly the FIC Act.

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[24] Section 3 of POCDATARA.
[25] For more information, see Part 2.1 below.
[26] These special reporting duties apply to Reporting Institutions: apart from these and the reporting duties mentioned in respect of all citizens, this guide focuses on the remaining two categories, namely the duties of general business and accountable institutions.
[27] For more information, see Part 2.2 below.
[28] See annexure H: Guideline for Compliance officers; the IRBA differentiates between reporting duties of external Compliance Officers and (Internal) MLCO's.
[29] Standard General Insurance Co v Hennop 1954 4 560 (A) 565, following an earlier dictum.

Duty to report a transaction

43. Section 29 of the FIC Act stipulates that any person:

- who carries on a business (for instance, a sole proprietor, partner, trustee, company, close corporation, cooperative, farmer, chartered accountant, lawyer etc.);
- who is in charge of or manages a business (for instance as a director or senior manager); or
- who is employed by a business;

has a duty to file a report with the FIC if the person knows, suspects, or ought reasonably to have suspected that:

- the business has received or is about to receive the proceeds of unlawful activities or property connected or the financing of terrorist or related activity;
- a transaction[30] or series of transactions which the business is party to:
  - facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities or property connected or the financing of terrorist or related activity;
  - has no apparent business or lawful purpose;
  - is conducted for the purpose of avoiding giving rise to a duty to report a suspicious transaction or a transaction involving the specified threshold in terms of the FIC Act; or
  - 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 ("SARS"); or
  - the business has been used or is about to be used in any way for ML purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities.

44. It is important to understand some core definitions in POCA, the FIC Act and POCDATARA to appreciate the ambit of the reporting obligation:[31]

- "Unlawful activity" is generally any conduct which constitutes a crime or contravenes any law, whether it was committed before or after 1999 in South Africa or elsewhere.
- "Proceeds of unlawful activity" is any property or any service, advantage or benefit which was derived, received or retained, directly or indirectly, before or after 1999, in South Africa or elsewhere, in connection with or as a result of any unlawful activity carried on by any person and includes any property representing such property.
- "Property" is defined by POCA as "money or any other movable, immovable, corporeal or incorporeal thing, and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof".

45. The result of these intertwined definitions is that any money, property or interest which was derived from, or can be linked to, an offence committed in South Africa or elsewhere, is tainted property that may require a report to be filed for AML purposes.

[30] "Transaction" is defined in section 1 of the FIC Act as a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution.
[31] See section 1 of the FIC Act read with section 1 of POCA.

The definition of "property" also applies to POCDATARA for FT purposes. In the case of FT, however, the taint derives from the destination of the property (that is, its intended use) rather than its criminal origin.

46. FICA not only requires the reporting of suspicious or unusual transactions that were actually carried out. A person who knows or suspects that any transaction about which enquiries are made, may have caused any of the consequences that would have rendered it suspicious or unusual, must report that attempted transaction under section 29 even though the transaction was not actually concluded.

Knowledge and suspicion

47. The report has to be filed whenever a person knows or ought reasonably to have known or suspected that a transaction meets the section 29 reporting requirements.

48. A person is deemed to know a fact for purposes of the FIC Act if he or she actually knows the fact or wilfully turns a blind eye to that fact.[32] "Suspicion" was defined in *Shaaban Bin Hussein v Chong Fook Kam* [1969] 3 ALL ER 1627 (PC) at 1630 as follows:

> "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."

49. Although a suspicion may sometimes be formed in the absence of clearly-definable grounds or on the basis of totally spurious grounds, the FIC Act requires at least some foundation, grounds or reasons for a suspicion before a duty to report a transaction will arise.[33] It is important to note that a person who reasonably ought to have known or suspected that any of the facts triggering a section 29 reporting obligation exist and who negligently fails to file the required report, commits an offence under section 52(2) of the FIC Act.

50. Section 52(2) should be read together with section 29, and a report should be filed if a person subjectively believes or suspects that a transaction must be reported in terms of section 29 and has some grounds or foundation for that belief or suspicion; or a person has grounds upon which another person with his or her expertise and background would reasonably form such a belief or suspicion.

Filing of a report, non-disclosure and further assistance

51. No person who made or must make or who knows or suspects that a suspicious transaction report (STR) has been made or is to be made under section 29 may disclose that fact to the client or any other person, unless such disclosure is allowed by the FIC Act. This duty is to be distinguished from the registered auditor's reporting duty in terms of section 45 of the APA where the client is to be notified.

52. Regulation 24(3) of the Money Laundering and Terrorist Financing Control Regulations stipulates that a STR must be reported to the FIC as soon as possible, but not later than fifteen business days[34] after the reporter has become aware of a fact concerning a transaction on the basis of which a report must be filed. The regulation allows the FIC to approve that a STR is filed after the expiry of this period. The report must provide prescribed information about the reporter, the transaction

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[32] Section 1 (2) (b) of the FIC Act - see, for instance, Frankel Pollak Vindirine Inc v Stanton [1996] 2 All SA 582 (W) 596c-d: "Where a person has a real suspicion and deliberately refrains from making inquiries to determine whether it is groundless, where he or she sees red (or perhaps amber) lights flashing but chooses to ignore them, it cannot be said that there is an absence of knowledge of what is suspected or warned against." In such a case, depending on the facts, a court may infer that the person had actual knowledge of the facts that were suspected or may impute knowledge of those facts to the person.

[33] Section 29(2), for instance, requires a person to report the grounds for the knowledge or suspicion as part of the report that has to be filed with the FIC. See also section 32(2) and (3) as well as regulation 23(6)(a).

[34] Saturdays, Sundays and public holidays are excluded by regulation 24.

and the client[35] and be filed by means of the internet-based portal of the FIC at http://www.fic.gov.za. All accountable institutions are required to register with the FIC and upon registration, a registration code will be provided for use when a STR is filed.

53. The FIC Act requires the reports to be filed directly with the FIC. Section 69 does allow those who are employees, directors or trustees of, or partners in, accountable institutions to report a transaction to a MLCO or a superior[36] under certain circumstances. The MLCO or superior then has to file that report with the FIC. However, this exemption only applies to accountable institutions. Reporters in general businesses therefore have to ensure that their reports are filed directly with the FIC.[37]

54. In addition to avoiding committing the offence of non-reporting, filing a report holds benefits for the reporter. A person who files a report may possibly have committed an ML or FT offence by processing or concluding the problematic transaction. If that person is subsequently charged with committing an ML offence under section 2(1)(a) or (b) or section 4, 5 or 6 of POCA or section 4 of POCDATARA, the reporter may raise as a defence the fact that the transaction was reported in terms of section 29 of the FIC Act.[38]

55. A reporter may be approached by the FIC or by official investigators with a request to furnish them with any additional information regarding the report and the grounds for the report that they may reasonably require to perform their duties. If the person requesting such information has the authority in terms of the FIC Act to make such a request and the information is reasonably required, the information must be furnished without delay.[39]

The Financial Intelligence Centre's guidance on suspicious transaction reporting

56. The FIC issued guidance on suspicious transaction reporting.[40] The guidance addresses the reporting obligations under the FIC Act. It explains matters such as reporting timelines, how reports have to be sent to the FIC, what information has to be included in these reports and how to use the electronic reporting mechanism. It also provides some indicators of suspicious and unusual transactions. Registered auditors are advised to familiarise themselves with this guidance note.

The duty to report under POCDATARA

57. In terms of section 12(1) of POCDATARA a person has a duty to file a report when he has reason to suspect that any other person intends to commit or has committed an offence of terrorism and related offences, including FT, or is aware of the presence at any place of any other person who is so suspected.

58. This report has to be filed as soon as is reasonably possible with any police official. The police official must take down the report in a prescribed format and forthwith provide the reporter with an acknowledgement of receipt of that report.

59. It is important for registered auditors to note that POCDATARA allows a person who realises that he is processing a problematic transaction to continue with the

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[35] Regulation 23 of the Money Laundering and Terrorist Financing Control Regulations: see Government Gazette no 24176 (vol 450) dated 20 December 2002, available on the IRBA website.

[36] In the context of an audit firm, a "superior" would most likely equate to the reporting to be done by the designated individual such as the Risk Management Partner or person with a similar portfolio.

[37] Failure to report as required or allowed by the FIC Act, may deprive a reporter of the benefit of the defence against a charge of ML under section 7A of POCA.

[38] Section 7A of POCA and section 17(6) of POCDATARA. It is important to note that the section 7A defence is not a complete defence against all charges that may be brought. A reporter may, for instance be charged on common law grounds as an accessory after the fact to the crime that gave rise to the proceeds of unlawful activities. Section 7A does not provide a defence against such common law charges.

[39] Section 32 of the FIC Act.

[40] Refer to Guidance Note 4 on Suspicious Transaction Reporting, General notice R301, Government Gazette 30873 (Vol513) dated 14 March 2008, available on IRBA website.

transaction.[41] As long as he acts in good faith and reports the suspicion in terms of section 12 of POCDATARA or in terms of section 29 of the FIC Act, as the case may be, he will have a defence against a charge of contravening section 4.

60. The failure to file a report in accordance with section 12 is an offence for which a High Court or a Regional Court may impose a sentence of imprisonment for a maximum period of 5 years. The mere fact that the suspected terrorist activity did not or does not occur is no defence to such a charge.

61. This reporting duty applies in addition to any other reporting duty that may apply, for instance the duty to file a report under section 29 of FIC Act. The duty to file more than one report is discussed below.

The duty to report under PRECCA

62. Chapter 2 of PRECCA created a host of offences relating to corrupt activities. Section 34 of PRECCA creates a reporting obligation for a person in a so-called "position of authority" and failure to report is an offence. Section 34 lists these various persons in a "position of authority" as follows:

- the Director-General or head, or equivalent officer, of a national or provincial department;
- in the case of a municipality, the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act 117 of 1998;
- any public officer in the Senior Management Service of a public body;
- any head, rector or principal of a tertiary institution;
- the manager, secretary or a director of a company as defined in the Companies Act 61 of 1973;
- a member of a close corporation as defined in the Close Corporations Act 69 of 1984;
- the executive manager of any bank or other financial institution;
- any partner in a partnership;
- any person who has been appointed as chief executive officer or an equivalent officer of any agency, authority, board, commission, committee, corporation, council, department, entity, financial institution, foundation, fund, institute, service, or any other institution or organisation, whether established by legislation, contract or any other legal means;
- any other person who is responsible for the overall management and control of the business of an employer;
- any person in any of the above categories who has been appointed in an acting or temporary capacity.

63. Any such person who knows or ought reasonably to have known or suspected that any other person has committed an offence under PRECCA or the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion, or cause it to be reported, to any police official. The police official must take down the report and forthwith provide the person who made the report with an acknowledgment of receipt of such report.

[41] Section 12(5) of POCDATARA.

64. Failure to file such a report is an offence. The maximum penalty for this offence is a fine or imprisonment for a period not exceeding 10 years.

65. The PRECCA and FIC Act reporting obligations may overlap. For example, if a director of an estate agency company suspects that a client is laundering proceeds of crime by purchasing property, the director has an obligation to file a report in terms of section 29 of the FIC Act. If, given the profile of the client, the director suspects that the crime that may have generated the proceeds is one listed in section 34 (1) of PRECCA, the director must also report it in terms of section 34 or cause such a report to be filed.

The Financial Intelligence Centre's guideline on cash transaction reporting

66. The guideline details the steps to be followed for the submission of cash threshold reports electronically to the FIC. The obligation to report in terms of section 28 of the FIC Act arises when a transaction is concluded with a client by means of which cash of R25 000 and above:[42]

    - *is paid by the accountable institution or reporting institution to the client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or*
    - *is received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting.*

Managing the compliance obligations of a general business

67. Ordinary businesses have less AML/CFT compliance obligations than accountable institutions. Their compliance duties are, however, complex and compliance with these duties should be properly managed if they wish to mitigate their risk of non-compliance. A well-managed non-accountable institution should consider appointing a Compliance Officer who could take charge of the compliance function within that business and could assist the management of the business to discharge their compliance obligations.[43] Such a Compliance Officer could, amongst others:

    - determine the business' compliance risk profile;
    - draft appropriate compliance policies, management plans and internal rules;
    - draft and monitor client acceptance and continuance procedures;[44]
    - draft a plan and prepare a budget for the implementation of measures to ensure compliance with the AML/CFT obligations;
    - ensure appropriate training for relevant employees;
    - assist employees to file suspicious transaction reports with the FIC and the SAPS;
    - manage any requests for further information from the FIC and the SAPS; and

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[42] Section 28 of the FIC Act.
[43] This can be an internal appointment of a staff member with sufficient seniority to ensure compliance. Also see the discussion in Annexure E: Compliance Officers.
[44] In this respect the officer should also ascertain the current level of compliance by the business and its employees with international obligations to vet clients in terms of the international lists of undesirable clients. The United Nations, the European Union and a number of countries impose economic sanctions on entities and individuals on the basis of their involvement in crimes such as drug trafficking and terrorism or on the basis of foreign policy. Such sanctions may even extend to countries and territories. Any person or institution that concludes transactions in breach of such sanctions may be exposed to international penalties under the relevant sanction scheme. In addition, international standards are evolving regarding business relationships with persons who hold political office, their family members and their close associates. The aim of these standards is to prevent the possible laundering of proceeds of corruption. Businesses should therefore check their existing and prospective clients to ascertain whether they are black-listed or classified as politically sensitive. The business relationship with those clients must then be managed with care and circumspection.

- monitor compliance by the business and its employees with the relevant policies, internal rules and statutory obligations.

68. In terms of the Compliance Officer's duties to draft policies and procedures the registered auditor may be guided to some extent by regulation 27 of the FIC Act regulations. This regulation requires the internal rules of accountable institutions to address the following aspects relating to the reporting of suspicious and unusual transactions:

    - the necessary processes and working methods which will cause suspicious and unusual transactions to be reported without undue delay;
    - the necessary processes and working methods to enable staff to recognise potentially suspicious and unusual transactions or series of transactions;
    - the responsibility of management in respect of compliance with the Act, the regulations and the internal rules;
    - the allocations of responsibilities and accountability to ensure that staff duties concerning the reporting of suspicious and unusual transactions and cash transactions are complied with; and
    - disciplinary steps against the relevant staff members for non-compliance with the Act, the regulations and the internal rules.

69. In addition, the internal rules should reflect any relevant guidance that was given by the FIC. If a Compliance Officer is appointed it is important to ensure that he is equipped with the necessary knowledge and skills to assist management effectively.

70. The IRBA does not require registered auditors who are not accountable institutions to appoint such a Compliance Officer but supports the appointment of such an officer where appropriate. Registered auditors must consider the need for such a Compliance Officer in their practices and those who decide not to appoint such a functionary, should be able to justify their decision to the IRBA.

Part 2.2 - Registered auditors as accountable institutions

71. Persons are accountable institutions under the FIC Act if they or their business activities are listed in Schedule 1 of the FIC Act[45]. The business activities of a specific person or business must therefore be compared to the listed persons and activities to determine whether that person or business is an accountable institution under the FIC Act.

72. It is important to consider not only the general business of the particular institution, but also the scope of business of any business units and the qualifications and business activities of each of its employees. It is possible that an institution may not be an accountable institution, but that a number of its employees may be accountable institutions on account of their qualifications or specific duties within that institution. Persons who are accountable institutions in their own right may also be working for general businesses or other accountable institutions.

73. Registered auditors are not listed as accountable institutions in their capacity as registered auditors. However, a registered auditor will be an accountable institution if the registered auditor engages in a business activity that is listed in Schedule 1. For instance, item 12 of schedule 1 lists as an accountable institution:

> "A person who carries on the business of a financial services provider requiring authorisation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002), to provide advice and intermediary

[45] This schedule is reproduced in Annexure A.

services in respect of the investment of any financial product (but excluding a short term insurance contract or policy referred to in the Short-term Insurance Act, 1998 (Act 53 of 1998) and a health service benefit provided by a medical scheme as defined in section 1(1) of the Medical Scheme Act, 1998 (Act 131 of 1998)."

74. Institutions and persons who qualify as accountable institutions under item 12 of Schedule 1 may enjoy the benefit of exemption 7 that was granted in terms of the FIC Act. This exemption is reproduced as Annexure B to this guide. Exemption 7 only applies in respect of the duty to identify certain clients and to keep record of their particulars. It is not of direct general importance to registered auditors because it was mainly written for the benefit of insurers and for brokers and advisors who render services in respect of unit trusts and linked product investments.

75. Item 2 of Schedule 1 may also be of importance to some registered auditors. It lists as an accountable institution:

> "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 (Act 57 of 1988)."

In essence, item 2 covers all trustees of trusts *inter vivos* and of trusts *mortis causa*.

76. Exemption 10(2) relates to accountable institutions which are accountable institutions by virtue of item 2. They are exempted, in respect of those functions, from compliance with the client identification, verification and record-keeping duties in respect of every business relationship or single transaction concerning—

- the preparation of a testamentary writing;
- the administration of a deceased estate, as executor of that estate;
- the administration of trust property, as trustee of a trust established by virtue of a testamentary writing or court order; or
- the administration of trust property as trustee of a trust established to administer funds payable from an employees' benefit fund for the benefit of a nominated beneficiary or dependant of a deceased member of such an employees' benefit fund.

77. However, these accountable institutions will still have to comply with all the other compliance obligations.

78. In addition to these two items, all registered auditors are urged to study all other items in Schedule 1 of the FIC Act. It is important to consider each item and every business activity of the particular registered auditor or their business before a conclusion is reached regarding the correct status under the FIC Act.[46] In cases of uncertainty, it will be important to obtain legal advice.

79. It is possible that a registered auditor who is classified as an accountable institution works as an employee for, or is in partnership with another person. In such a case exemption 3 of the exemptions published under the FIC Act is helpful. It provides that a natural person who is an accountable institution and who performs the functions of an accountable institution referred to in Schedule 1 of the FIC Act in a partnership with another natural person, or in a company or close corporation, is exempted from client identification and verification procedures as well as from the duty to write internal rules, train employees and appoint a MLCO or Compliance Officer, provided that those duties are complied with by another person employed by the partnership,

[46] The IRBA is aware that some registered auditors are acting as estate agents. They will therefore qualify as accountable institutions under item 3 of Schedule 1.

company or close corporation, in which the natural person practises. However, such persons must still comply with the duty to report suspicious and unusual transactions in terms of sections 28A and 29 of the FIC Act.

General compliance obligations of accountable institutions

80. Persons and institutions that are classified as accountable institutions share the general obligation to report suspicious and unusual transactions with general businesses. As a result, accountable institutions must ensure that they as well as their managers and employees comply with their reporting obligations under section 29 of the FIC Act, section 12 of POCDATARA and section 34 of PRECCA. In addition, they have an obligation to file reports under section 28A of the FIC Act. Accountable institutions also have a duty to report certain transactions involving cash in the amount of R25 000 or more, as well as to perform certain customer due diligence procedures, keep specific records and ensure that certain compliance processes and rules are in place.

Filing reports under section 28A of FICA

81. Section 28A requires an accountable institution to file a report with the FIC when it possesses or controls property owned or controlled by any entity that engages or attempts to engage in, or facilitates, terrorism and related activities or specific entities identified in a notice issued by the President under section 25 of POCDATARA. This notice publishes any names listed by the United Nations Security Council for purposes of sanctions it imposed in respect of individuals and entities belonging or related to the Taliban, Osama Bin Laden and the Al-Qaida organisation.

82. The report must be sent to the FIC as soon as possible but not later than 5 days after the relevant facts were established, unless the FIC has approved of the report being sent after the expiry of this period.[47]

Filing a report under section 28 of the FIC Act

83. Regulation 22B of the Regulations sets the prescribed amount for cash threshold reporting. The prescribed limit in terms of section 28 of the FIC Act is R24 999.99 (twenty four thousand nine hundred and ninety nine rands and ninety nine cents) or the equivalent foreign denomination value calculated at the time that the transaction is concluded. This means that all cash transactions exceeding R24 999.99 (being R25 000 or more) must be reported to the FIC in terms of section 28 of the FIC Act. Accountable and reporting institutions must report aggregates of smaller amounts which, when combined, add up to the prescribed amount, in cases where it appears to the accountable or reporting institution concerned that the transactions involving those smaller amounts are linked in such a way that they should be considered fractions of one transaction. Accordingly, the threshold amount can be a single cash transaction to the value of R25 000 or more, or an aggregation of smaller amounts with a combined value of R25 000 or more. While the aggregation period is not specified, the Centre requests that a period of at least 24 hours be applied when considering aggregation. Indications of when a series of smaller amounts combine to form a "composite" transaction that exceed the prescribed threshold are the following:

- the period within which such a series of smaller transactions take place;

[47] See FIC Guidance Note 4 Suspicious Transaction Reporting, Government Gazette no 30873 (vol 513) dated 14 March 2008, available on the IRBA website.

- the fact that the series of transactions consists of a repetition of the same type of transaction e.g. cash payments or cash deposits;

- the smaller amount transactions involve the same person or account holder ,or relates to the same account.

Customer identification, verification and record-keeping

84. In terms of section 21(1) of the FIC Act 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:
    - to establish and verify the identity of the client;
    - if the client is acting on behalf of another person or entity, to establish and verify:
        - the identity of that other person or entity; and
        - the client's authority to establish the business relationship or to conclude the single transaction on behalf of that other person; and
    - if another person is acting on behalf of the client, to establish and verify:
        - the identity of that other person; and
        - that other person's authority to act on behalf of the client.
85. An accountable institution is also prohibited from knowingly establishing or maintaining a business relationship or conducting a single transaction with a client who is entering into that business relationship or single transaction under a false name.
86. An accountable institution must:
    - identify a new client by obtaining prescribed information (for instance, the full name, identity number and residential address of the client) and verify the correctness of certain information that the client supplies to it by comparing the information with documentation and other records;[48] and
    - keep record of prescribed details of clients and their transactions.[49]
87. The detailed requirements regarding customer identification, verification and record-keeping are set out in the regulations under the FIC Act.[50] The relevant regulations differentiate among the following types of clients:
    - natural South African citizens and residents;
    - natural foreign nationals;
    - close corporations and South African companies;
    - foreign companies;
    - other legal persons;
    - partnerships; and
    - trusts.

[48] Section 21 of the FIC Act.
[49] Section 22 of the FIC Act.
[50] See chapter 1-3 of the FICA regulations; a template comprising the requirements of the Regulation is included as annexure G to the Guide.

88. The regulations require accountable institutions to obtain the income tax and value added tax numbers, if any, that have been issued by SARS to a client. However, an exemption from this duty was created by exemption 6(2). The IRBA advises registered auditors to consider including tax information as part of their client identification and record-keeping policies and procedures. If this information is not obtained in respect of new clients, they will have to be contacted to obtain this information once the exemption is withdrawn.

Ensuring compliance

89. An accountable institution must:[51]

- write and implement internal rules to ensure that its employees take the necessary steps to ensure that they, as well as the institution, comply with their AML/CFT duties;[52]
- appoint an officer (Money Laundering Control Officer) who is responsible for ensuring compliance by the institution and its employees;[53] and
- train its employees to enable them to comply with their AML/CFT obligations.

Access to information

90. Accountable institutions are also required to allow investigators that act in terms of the FIC Act, to access certain information of the accountable institution. Examples of provisions of the FIC Act that allow investigators access to information held by the business include the following:

- An authorised representative of the FIC may require an accountable institution to disclose whether a specified person is or has been a client of the institution or is acting or has acted on behalf of any client or whether a client is acting or has acted for a specified person.[54]
- An authorised representative of the FIC may obtain a warrant that allows the person to view and copy customer identification records of the business during normal business hours.[55]
- If a transaction was reported to the FIC the business may receive a request for further information concerning the report and the grounds for the report.[56]

Management of anti-money laundering / combating financing of terrorism obligations by registered auditors

91. Registered auditors who are accountable institutions will qualify as such because they carry on specified listed activities. Where these activities are carried on in addition to their professional services, the majority of their AML/CFT control obligations will not necessarily extend to all of their clients. If the specified business activity can be separated and distinguished from their other business services, it is the view of the IRBA that the AML/CFT control obligations that are unique to accountable institutions will only affect the specified business activity of those registered auditors.

92. Registered auditors who are accountable institutions and who have not yet appointed a MLCO are advised to do so. Once the MLCO has been appointed, such person will have to:[57]

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[51] Sections 42 and 43 of the FIC Act.
[52] Chapter 5 of the FIC Act regulations details the content of the internal rules: this is available on the IRBA website.
[53] This is a formal appointment and the FIC requires a formal letter of appointment.
[54] Section 27 of the FIC Act.
[55] Section 26 of the FIC Act.
[56] Section 32 of the FIC Act.

- become familiar with the AML/CFT laws and the particular compliance risks that the business faces;
- ascertain the current level of compliance by the business and its employees with the duty to report suspicious and unusual transactions;
- draft a compliance risk management plan, policy documents, appropriate internal rules, forms and training material;
- train employees on the law and the relevant internal rules;
- implement the compliance risk management plan; and
- monitor compliance and report to management on compliance.

93. The role of the MLCO is essentially to assist the management of the business to ensure compliance. The MLCO should have the necessary resources and support to operate effectively and to assist management to ensure that the business is able to meet all the relevant compliance obligations. In view of the crucial role of the MLCO, this role should be performed by a competent person who can demonstrate a sufficient level of knowledge of the AML/CFT laws to serve the management of the particular business effectively.

Part 3 - The role of IRBA and FIC as supervisory bodies under the FIC Act

94. The IRBA is a supervisory body under the FIC Act. A supervisory body is responsible for supervising compliance with the provisions of the FIC Act by each accountable institution regulated or supervised by it.[58] The IRBA is therefore responsible for supervising compliance with the FIC Act by registered auditors who are listed in, or engage in any activity listed in, Schedule 1 of the FIC Act.

95. The amendment to the FIC Act provides that the FIC is mandated in a supervisory role to oversee compliance of accountable institutions with the FIC Act. This means that the oversight for monitoring compliance with the FIC Act, is now mandated both to the FIC as well as the IRBA. However, the supervisory role of the FIC over registered auditors only relates to in instances where the supervisory body fails to take any action against an accountable institution who is non compliant.

96. In addition to the IRBA's supervisory role in respect of Accountable Institutions, it has general regulatory powers and duties under the Auditing Profession Act, Act 26 of 2005, which imposes a responsibility to supervise compliance by all registered auditors with their general statutory obligations. As a consequence, the IRBA is also charged with supervisory responsibilities in respect of registered auditors who are not accountable institutions and who have the compliance obligations set out above in Part 2.1.

97. The IRBA views the following as key elements of its AML/CFT supervisory role:

- The IRBA may provide guidance to registered auditors regarding compliance with POCA, POCDATARA, FICA and PRECCA.
- Compliance with POCA, POCDATARA, the FIC Act and PRECCA will be reviewed as part of the normal process of inspections in terms of section 47 of the Auditing Profession Act, Act 26 of 2005.[59]
- The IRBA may request registered auditors to provide it with information regarding their compliance with POCA, POCDATARA, the FIC Act and PRECCA.

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[57] These duties should be considered in conjunction with the reporting duties listed in paragraph 38-65 above.
[58] Section 45 (1) of the FIC Act.
[59] Registered Auditors should take note of the content of ISA 250 in respect of compliance in this regard.

- If the FIC refers a matter to the IRBA regarding possible non-compliance by a registered auditor or a possible ML offence,[60] the IRBA will investigate the matter and may, after consultation with the FIC, take such steps within the scope of its powers as it considers appropriate to remedy the matter.[61] Such steps may include disciplinary steps.
- Under appropriate circumstances, as set out in the FIC Act, the IRBA must provide information to the FIC regarding the involvement of a registered auditor in any suspicious or unusual transaction.[62]
- The FIC and the IRBA have powers to conduct inspections at accountable institutions to ensure compliance with the FIC Act: some of the powers of an inspector include directing a registered auditor to appear for questioning, and entering and inspecting premises where the registered auditor conducts business. A range of administrative penalties may be applied should a registered auditor be found to be non-compliant.
- An accountable institution may lodge an appeal to consider actions taken by the FIC or IRBA.[63]

98. To enable the IRBA to fulfil this function effectively, the IRBA, from time to time, requests all registered auditors to inform it whether they are accountable institutions or not and provide information about meeting their compliance obligations under the FIC Act.

Part 4 - Responsibilities of registered auditors when conducting an audit

General responsibilities

99. The registered auditor conducts an audit of financial statements in accordance with the International Standards on Auditing (ISA). These standards require the registered auditor to:
    - Comply with ethical requirements;
    - Obtain reasonable assurance that the financial statements taken as a whole are free of material misstatement, whether due to fraud or error;
    - Evaluate the appropriateness of accounting policies used and the reasonableness of accounting estimates made by management;
    - Evaluate the overall presentation of the financial statements; and
    - Issue a registered auditor's report containing a clear expression of the registered auditor's opinion on the financial statements taken as a whole.

100. Misstatements in financial statements may be as a result of fraud, error or non-compliance with the applicable laws and regulations. Intentional or negligent engagement in ML or FT is an offence and constitutes non-compliance with laws and regulations. These offences are often also linked to fraud, for instance identity fraud. Although the registered auditor does not have a statutory responsibility to perform procedures specifically to detect ML or FT, the registered auditor needs to consider the possibility of ML or FT when carrying out audit procedures relating to fraud and non-compliance with laws and regulations. In addition, the registered auditor should consider general non-compliance with the FIC Act, POCA, PRECCA and POCDATARA, for instance the failure to report suspicious transactions, when carrying out procedures relating to non-compliance with laws and regulations.

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[60] Section 36 (2) of the FIC Act.
[61] Section 44 read with section 45(2) of the FIC Act.
[62] Section 36 of the FIC Act.
[63] A fee of R10 000 is payable when lodging an appeal.

101. An audit conducted in order to express an opinion on the fair presentation of financial statements taken as a whole does not provide assurance on the adequacy of the entity's systems or on the actual incidence of fraud and error or non-compliance with laws and regulations, including ML and FT. Where those charged with the governance of an entity have particular concerns they may engage the registered auditor to perform a more detailed investigation, outside of the scope of the audit.

Conduct of the audit

Acceptance of appointment as auditor

102. The registered auditor is required to only undertake or continue relationships and engagements where the registered auditor:

- has considered the integrity of the client and does not have information that would lead it to conclude that the client lacks integrity;
- is competent to perform the engagement and has the capabilities, time and resources to do so; and
- can comply with ethical requirements.

103. The registered auditor is required to obtain such information as is necessary in the circumstances before accepting an engagement with a new client, when deciding whether to continue an existing engagement, and when considering acceptance of a new engagement with an existing client. ISA 210, "Agreeing the terms of audit engagements"[64] deals with the auditor's considerations when accepting an audit. This could include that the registered auditor consider the possibility that the client is engaged in FT and ML or is wilfully non-compliant with its AML/CFT obligations.

Understanding the entity and its environment and assessing the risks of material misstatement

104. The conduct of an audit is not an activity for which a person is classified as an "accountable institution" under the FIC Act. A registered auditor that is an accountable institution because he engages in additional non-audit work is therefore not required to perform the FIC Act identification procedures in respect of audit clients. However, ISA 315, "Identifying and assessing the risks of material misstatement through understanding the entity and its environment" requires the registered auditor to understand the entity and its environment.[65]

A registered auditor's understanding of the client and its environment includes an understanding of the following:

- Industry, regulatory, and other external factors, including the applicable financial reporting framework.
- Nature of the entity, including the entity's selection and application of accounting policies.
- Objectives and strategies and the related business risks that may result in a material misstatement of the financial statements.
- Measurement and review of the entity's financial performance.
- Internal control.

105. An entity may be subject to a higher inherent risk of ML/FT due to the nature of the sector or industry in which it operates or, the registered auditor's assessment of

[64] Effective for audits of financial periods beginning on or after December 15, 2009.
[65] Effective for audits of financial periods beginning on or after December 15, 2009.

control risk as high may be indicative of an increased overall risk of fraud and error. An assessment that there is a high risk of ML/FT is, however, not equivalent to suspecting ML/FT. When designing audit procedures the registered auditor takes into account the assessment of the risk of fraud or error and non-compliance with laws and regulations, including ML/FT.

106. The knowledge obtained may alert the registered auditor to factors indicating a possibility of ML/FT and, where this is the case, the registered auditor assesses the registered auditor's reporting responsibilities in light of the information to which the registered auditor has access.

Going Concern

107. When planning and performing the audit, the registered auditor is required to consider whether there are events or conditions which may cast significant doubt upon the client's ability to continue as a going concern. The register auditor should consider ISA 570, "Going Concern"[66] and in this regard it is also important to consider the impact of non-compliance with laws and regulations if the penalties for the breach of such laws and regulations could threaten the viability and sustainability of the business. POCA, for instance, provides for fines that range up to R100 million and, in the case of offences related to racketeering, even R1 billion. POCA also enables the State to confiscate assets by means of confiscation and forfeiture procedures.[67] A conviction for an ML offence could therefore result in the entity ceasing to continue as a going concern.

Fraud

108. ISA 240 "The auditor's responsibilities relating to fraud in an audit of financial statements"[68] requires the registered auditor to consider the risks of material misstatement in the financial statements due to fraud when planning and performing the audit to reduce audit risk to an acceptably low level.

109. The appendices to ISA 240 include examples of fraud risk factors that the registered auditor may be faced with in a broad range of situations. A close connection exists between the factors giving rise to an increased risk of fraud and those indicating ML.

110. When the registered auditor identifies such circumstances, the registered auditor applies professional judgement in evaluating the circumstances of the case and assesses the possibility of a breach of law relating to ML as well as that of fraud.

Laws and regulations

111. ISA 250 "Consideration of law and regulations in an audit of financial statements"[69] requires the registered auditor to recognise that non-compliance with laws and regulations may materially affect the financial statements. In addition the registered auditor is required to understand the legal and regulatory framework applicable to the entity and how the entity is complying with that framework. The registered auditor is further required to obtain sufficient appropriate audit evidence about compliance with those laws and regulations generally recognised by the registered auditor to have an effect on the determination of material amounts and disclosures in the financial statements.

112. As discussed in ISA 250, whether an act constitutes non-compliance with laws or regulations, is a legal determination that is ordinarily beyond the registered

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[66] Effective for audits of financial periods beginning on or after December 15, 2009.
[67] A business that stands accused of ML may also suffer reputational loss, a loss of business and business relationships and, when convicted, may in certain cases, lose a business licence.
[68] Effective for audits of financial periods beginning on or after December 15, 2009.
[69] Effective for audits of financial periods beginning on or after December 15, 2009.

auditor's professional competence. However, the registered auditor's training, experience and understanding of the entity and its industry may enable the registered auditor to recognise some activities that may constitute non-compliance with the ML laws and regulations.

113. The registered auditor determines whether the entity is required to comply with the administrative ML control duties, i.e. whether the entity is an accountable or reporting institution under the FIC Act. If the entity is not an accountable or reporting institution it will only be obliged to report suspicious and unusual transactions. The registered auditor reviews the steps taken by the entity to comply with the FIC Act and its regulations, as part of the registered auditor's assessment of compliance with laws and regulations.

Factors which may indicate that Money Laundering is occurring

114. The registered auditor may encounter circumstances during the audit which may indicate that the financial statements are materially misstated as a result of ML. When the entity is knowingly involved in ML, these circumstances are likely to be similar to those indicating an increased risk of fraud.

115. An illustrative list of factors which may be indicative of both fraud and ML is given in section A of Annexure C to this guide. Factors that may indicate a risk that ML is taking place may not come to the registered auditor's attention if they are insignificant or immaterial in the context of the financial statements, nor is the presence of an individual factor necessarily sufficient in itself to give rise to a suspicion of ML, as legitimate reasons arising in the ordinary course of business may give rise to many of the circumstances. However, the registered auditor remains alert to circumstances in which a combination of factors may give rise to suspicion of ML and, when suspicion arises, the registered auditor determines whether the matter is to be reported.

Procedures where possible Money Laundering is discovered

116. ISA 200 "Overall objectives of the independent auditor and the conduct of an audit in accordance with international standards on auditing"[70] requires the registered auditor to maintain an attitude of professional scepticism throughout the audit. Accordingly, the registered auditor considers whether a transaction or transactions or set of circumstances appears unusual or out of context and raises suspicions that ML or non-compliance with ML laws is taking place. In these circumstances the registered auditor establishes whether there is a suspected contravention of the ML laws and considers the consequences for other aspects of the audit, the report on the financial statements as well as the requirements of ISA 240, ISA 250 and the Auditing Profession Act, Act No. 26 of 2005, specifically section 45.[71]

117. In accordance with the IRBA's Code of Professional Ethics[72], the registered auditor shall not use or disclose any confidential information concerning the affairs of a client without proper and specific authority or unless there is a legal or professional right or duty to disclose.

Reporting a reportable irregularity in terms of the Auditing Profession Act

118. Registered auditors that identify non-compliance with the AML/CFT laws and regulations should ensure that they comply with any statutory duties that they might have, including their professional duties in terms of section 45 of the APA and the

[70] Effective for audits of financial periods beginning on or after December 15, 2009.
[71] Section 45 directs the registered auditor to notify the IRBA of a Reportable Irregularity where the registered auditor through the conduct of the audit, discovers any unlawful act or omission committed by the person responsible for the management of an entity.
[72] See IRBA Rules regarding Improper Conduct and Code of Professional Conduct for Registered Auditors, issued 1 June 2010.

guidance issued by IRBA relating to reportable irregularities.[73] In a number of cases the registered auditor may not have a duty to file a report under the FIC Act or POCDATARA but the client may have. The failure of the client to file such a report may, however, give rise to a reportable irregularity report by the registered auditor.

Section 45(1) prescribes as follows:

- An individual registered auditor referred to in section 44(1)(a) of an entity that is satisfied or has reason to believe that a reportable irregularity has taken place or is taking place in respect of that entity must, without delay, send a written report to the Regulatory Board.
- The report must give particulars of the reportable irregularity referred to in subsection (1)(a) and must include other information and particulars as the registered auditor considers appropriate.

Guidance is provided on the interpretation and compliance with the remainder of section 45 in the IRBA Guide on Reportable Irregularities.

Reporting in terms of the FIC Act, POCDATARA and PRECCA

Section 29 of the FIC Act

119. Section 29 of the FIC Act requires suspicious or unusual transactions to be reported in terms of the Act.[74] The reporting duties are limited to the circumstances set out in these provisions. In essence, it requires a person who carries on a business or is in charge of or manages a business or who is employed by a business, to file such a report if the person knows or suspects that:

- the business has received or is about to receive the proceeds of unlawful activities;
- a transaction or series of transactions to which the business is a party meets any of the criteria set out in section 29(1)(b); or
- the business has been used or is about to be used in any way for ML purposes.

120. A registered auditor who obtains evidence that a client has entered into a suspicious or unusual transaction with a third party will not ordinarily have a duty to report that fact in terms of the section 29, because the registered auditor and his business will not be a party to that transaction. However, the registered auditor may, in certain rare circumstances, be required to report such a transaction in terms of section 29 of the FIC Act.[75] For the duty to arise, the registered auditor must become a party to such a transaction or be abused in any way for ML/FT purposes. This will be the case if, for example, the client is a front for a ML/FT operation and the registered auditor believes or suspects that the registered auditor's reputation is being used by the client to legitimise the client's business activities, or that the audit fees or other fees received from the client are "tainted" as a consequence of the client's unlawful activities.

121. In these circumstances, the registered auditor who reports and any person who knows or suspects that a report has been or will be made in terms of section 29, may not disclose the facts relating to the report or the contents of such a report to any other person other than:

- in the scope of that person's powers and duties in terms of any legislation;

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[73] IRBA Reportable Irregularities: A Guide for Registered Auditors, issued 30 June 2006.
[74] See the discussion of the duty in Part 2.1 above.
[75] This discussion is limited to ML activity involving a client and which is identified during an audit that is performed for that client. The auditor has a normal reporting duty in terms of section 29 of the FIC Act if the auditor becomes a party to a suspicious or unusual transaction while engaging in any other business activity.

- for the purposes of carrying out the provisions of the FIC Act;
- for the purposes of legal proceedings; or
- in terms of an order of court.

122. The registered auditor therefore takes care not to tip-off anyone by disclosing information in contravention of section 29 of the FIC Act. However, normal enquiries as part of the audit to obtain sufficient appropriate audit evidence to support the opinion on the financial statements, steps taken and reports filed in compliance with the procedures set out in section 45 of the APA and modifications to the registered auditor's report on the financial statements, do not amount to a contravention of the tipping-off provisions. These enquiries and disclosures are made in compliance with the duties of the registered auditor in terms of legislation such as the Companies Act 61 of 1973 and the APA, to serve the public interest. However, in cases of doubt, legal advice has to be obtained.

123. In terms of Section 38(1) statutory immunity is granted from any legal action for breach of confidence arising from having reported suspicions of ML to the FIC, provided the report is made in good faith.

124. The FIC Act allows for the FIC or an investigating authority to request such additional information and the grounds for the report as the FIC or investigating authority may reasonably require for the performance of its functions in terms of the FIC Act. If the registered auditor receives such a request it is recommended that the registered auditor ensures that the request meets the requirements of the FIC Act and is reasonable before complying with the request. The auditor shall request the FIC or investigating authority to produce a subpoena if the audit working papers are required.

Section 28A of the FIC Act

125. Section 28A sets out further reporting requirements relating to property associated with terrorism and related activities. An accountable institution must file a report with the FIC if it has in its possession or under its control property owned or controlled by or on behalf of, or at the direction of a person or entity involved in terrorism or FT or which was identified in a notice issued by the President under section 25 of POCDATARA.

126. An auditor who obtains evidence that a client possesses or controls such property will normally not have a duty to file a report under section 28A as the auditor will (i) generally not be an accountable institution in his capacity as auditor and (ii) will not be the party possessing or controlling such property. The failure by the client to file such a report with the FIC may, however, amount to a reportable irregularity that should be reported by the auditor in terms of section 45 of the APA.

Section 28 of the FIC Act

127. Section 28 of the FIC Act requires that accountable and reporting institutions, as described in Schedule 1 and Schedule 3 of the FIC Act, must within the prescribed period, report to the Centre the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of the prescribed amount:

(a) is paid by the accountable institution or reporting institution to the client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or

(b) is received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting.

Section 12 of POCDATARA

128. In terms of section 12(1) of POCDATARA a person has a duty to file a report when he has reason to suspect that any other person intends to commit or has committed an offence of terrorism and related offences, including FT, or is aware of the presence at any place of any other person who is so suspected.

129. A registered auditor that suspects that a client has committed or intends to commit such an offence has an obligation to file a report as soon as is reasonably possible with any police official. In addition, the client's involvement in those activities may amount to a reportable irregularity that should be reported in terms of section 45 of the APA.

Section 34 of PRECCA

130. Any person in a position of authority who knows or ought reasonably to have known or suspected that any other person has committed an offence under PRECCA or the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion, or cause it to be reported, to any police official. The police official must take down the report and forthwith provide the person who made the report with an acknowledgment of receipt of such report.

131. Registered auditors that find evidence that theft or another relevant offence was committed by or against a client must ascertain whether the persons who are in a position of authority in that client, for instance the directors of a corporate client, complied with their obligations in terms of section 34 of PRECCA. A failure to comply with those duties may give rise to a reportable irregularity that should be reported in terms of section 45 of the APA.

The registered auditor's report on financial statements

132. If it is known or suspected that ML or FT occurred, the registered auditor would have regard to the materiality of the matter in the context of the financial statements on which the registered auditor is reporting in determining the appropriate modification to the registered auditor's report on the financial statements.

Internal procedures and training

133. The audit firm or practice should have internal reporting procedures that can be followed when any individual involved in an audit has knowledge or suspicion of ML or FT. These procedures should be communicated to all personnel. Clear procedures are necessary, as often the junior audit staff may be the first to obtain evidence indicative of ML or FT. Where a firm has a Compliance Officer, staff members should be guided to report their knowledge and suspicions of ML or FT to that person to assist him in complying with his reporting obligations. However, staff of audit firms that are not accountable institutions should be informed that where ML or FT suspicions are to be reported in terms of section 29 of the FIC Act, (as dealt with in Part 2.1 above), the onus rests on the person who suspects or knows that a transaction is suspicious or unusual to report it directly to the relevant authorities.[76]

134. Training is required for all levels of professional staff in the requirements of the legislation, the possible indicators of ML and FT and what to do when they suspect that ML or FT has occurred. The extent of training depends on the role of the

[76] See Defences in terms of section 69 of the FIC Act as well as section 7A (2) of POCA.

individual in the firm. Training would as a minimum be expected to emphasise the basic provisions and requirements of the FIC Act, POCA, POCDATARA and PRECCA, compliance procedures, the risks of tipping-off, procedures for reporting suspicions, the ML and FT offences and the advisability of obtaining legal advice in situations where there is doubt about the legal framework and requirements.

135. Care is to be taken in the documentation of risk assessments relating to ML and FT and any suspicions that arise during the audit. Staff members are to be aware of the importance of satisfactorily clearing any concerns raised during the audit.

Annexure A: List of accountable institutions, supervisory bodies, and reporting institutions

Schedule 1: Accountable institutions

1. A practitioner who practices as defined in section 1 of the Attorneys Act, 1979 (Act 53 of 1979).
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 (Act 57 of 1988).
3. An estate agent as defined in the Estate Agency Affairs Act, 1976 (Act 112 of 1976).
4. An authorised user of an exchange as defined in the Securities Services Act, 2004 (Act 36 of 2004).
5. A manager registered in terms of the Collective Investment Schemes Control Act, 2002 (Act 45 of 2002) but excludes managers who only conduct business in Part VI of the Collective Investment Schemes Control Act (Act 45 of 2002).
6. A person who carries on the 'business of a bank' as defined in the Banks Act, 1990 (Act 94 of 1990).
7. A mutual bank as defined in the Mutual Banks Act, 1993 (Act 124 of 1993).
8. A person who carries on a 'long-term insurance business' as defined in the Long-Term Insurance Act, 1998 (Act 52 of 1998).
9. A person who carries on the business of making available a gambling activity as contemplated in section 3 of the National Gambling Act, 2004 (Act 7 of 2004) in respect of which a license is required to be issued by the National Gambling Board or a provincial licensing authority.
10. A person who carries on the business of dealing in foreign exchange.
11. A person who carries on the business of lending money against the security of securities.
12. A person who carries on the business of a financial services provider requiring authorisation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act 37 of 2002) to provide advice and intermediary services in respect of the investment of any financial product (but excluding a short term insurance contract or policy referred to in the Short-term Insurance Act, 1998 (Act 53 of 1998) and a health service benefit provided by a medical scheme as defined in section 1(1) of the Medical Schemes Act, 1998 (Act 131 of 1998).
13. A person, who issues, sells or redeems travellers' cheques, money orders or similar instruments.
14. The Postbank referred to in section 51 of the Postal Services Act, 1998 (Act 124 of 1998).
15. The Ithala Development Finance Corporation Limited.
16. A person who carries on the business of a money remitter.

Schedule 2: Supervisory Bodies

1. The Financial Services Board established by the Financial Services Board Act, 1990 (Act 97 of 1990).
2. The South African Reserve Bank in respect of the powers an duties contemplated in section 10(1) (c) in the South African Reserve Bank Act, 1989 (Act 90 of 1989) and the Registrar as defined in sections 3 and 4 of the Banks Act, 1990, (Act 94 of 1990) and the Financial Surveillance Department in terms of Regulation 22.E of the Exchange Control Regulations, 1961.

3. The Estate Agency Affairs Board established in terms of the Estate Agency Affairs Act, 1976 (Act 112 of 1976).
4. The Independent Regulatory Board for Auditors established in terms of the Auditing Profession Act, 2005 (Act 26 of 2005).
5. The National Gambling Board established in terms of the National Gambling Act, and retained in terms of the National Gambling Act, 2004 (Act 7 of 2004).
6. A Law society as contemplated in section 56 of the Attorneys Act, 1979 (Act 53 of 1979).
7. A provincial licensing authority as defined in section 1 of the National Gambling Act, 2004 (Act 7 of 2004).

Schedule 3: Reporting Institutions

1. A person who carries on the business of dealing in motor vehicles.
2. A person who carries on the business of dealing in Kruger Rands.

Annexure B: Exemptions for Insurance and Investment Providers [77]

Exemption from Parts 1 and 2 of Chapter 3 of Act 38 of 2001.

1. Every accountable institution which performs the functions of an accountable institution referred to in items 5, 8, and 12 of Schedule 1 to the Act is exempted, in respect of those functions, from compliance with the provisions of Parts 1 and 2 of Chapter 3 of the Act in respect of every business relationship or single transaction concerning—

    a) any long term insurance policy which is a fund policy or a fund member policy as defined in the Long-term Insurance Act, 1998 and the regulations thereto and in respect of which the policyholder is a pension fund, provident fund or retirement annuity fund approved in terms of the Income Tax Act, 1962;

    b) any unit trust or linked product investment effected by a pension fund, provident fund or retirement annuity fund approved in terms of the Income Tax Act, 1962, including an investment made to fund in whole or in part the liability of the fund to provide benefits to members or surviving spouses, children, dependants or nominees of members of the fund in terms of its rules;

    c) any annuity purchased as a compulsory annuity in terms of the rules of a pension fund, provident fund or retirement annuity fund approved in terms of the Income Tax Act, 1962;

    d) any reinsurance policy issued to another accountable institution;

    e) any long-term insurance policy classified in terms of the Long-term Insurance Act, 1998 as an assistance policy;

    f) any long term insurance policy which provides benefits only upon the death, disability, sickness or injury of the life insured under the policy;

    g) any long-term insurance policy in respect of which recurring premiums are paid which will amount to an annual total not exceeding R25 000,00, subject to the condition that the provisions of Parts 1 and 2 of Chapter 3 of the Act have to be complied with in respect of every client—

        (i) who increases the recurring premiums so that the amount of R25 000,00 is exceeded;

        (ii) who surrenders such a policy within three years after its commencement; or

        (iii) to whom that accountable institution grants a loan or extends credit against the security of such a policy within three years after its commencement;

    h) any long term insurance policy in respect of which a single premium not exceeding R 50 000,00 is payable, subject to the condition that the provisions of Parts 1 and 2 of Chapter 3 of the Act have to be complied with in respect of every client—

        (i) who surrenders such a policy within three years after its commencement; or

        (ii) to whom that accountable institution grants a loan or extends credit against the security of such a policy within three years after its commencement;

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[77] Extract from the FICA exemptions (GNR 1596 of 20 December 2002: Exemptions in terms of the Financial Intelligence Centre Act, 2001).

i) any contractual agreement to invest in unit trust or linked product investments in respect of which recurring payments are payable amounting to an annual total not exceeding R 25 000,00, subject to the condition that the provisions of Parts 1 and 2 of Chapter 3 of the Act have to be complied with in respect of every client who liquidates the whole or part of such an investment within one year after the making of the first payment;

j) any unit trust or linked product investment in respect of which a once-off consideration not exceeding R 50 000,00 is payable, subject to the condition that the provisions of Parts 1 and 2 of Chapter 3 of the Act have to be complied with in respect of every client who liquidates the whole or part of such an investment within one year after the making of the first payment;

k) any other long term insurance policy on condition that within the first three years after the commencement of the policy the surrender value of the policy does not exceed twenty per cent of the value of the premiums paid in respect of that policy.

2. Every accountable institution which performs the functions of an accountable institution referred to in items 4, 15, 17 and 18 is exempted, in respect of those functions, from compliance with the provisions of Parts 1 and 2 of Chapter 3 of the Act in respect of transactions in securities listed on a stock exchange (as defined in the Stock Exchanges Control Act, 1985) or a financial market (as defined in the Financial Markets Control Act, 1989) for a pension fund, provident fund or retirement annuity fund approved in terms of the Income Tax Act, 1962, including investments in such securities made to fund in whole or in part the ability of the fund to provide benefits for members, surviving spouses, children, dependants or nominees of members of the fund in terms of its rules."

Annexure C: Circustances where ML may occur [Combine this with GN 4 indicators][78]

The items listed represent factors which may indicate an increased risk of ML occurring. The occurrence or absence of one or more of these factors in no way indicates that ML is or is not occurring. Similarly, other factors not listed may indicate an increased risk of ML. The auditor exercises professional judgement in evaluating the circumstances of each case.

A. Where client may be involved

- Transactions which lack commercial logic (such as selling and re-purchasing the same assets).
- Transactions conducted outside of the normal course of business or where the method of payment/receipt is not usual business practice, such as mail or wire transfers or payments in foreign currency.
- Transactions where there is a lack of information or explanations or where explanations are unsatisfactory.
- Transactions at amounts that are undervalued or overvalued, including double billing.
- Transactions with companies whose identity or beneficial ownership is difficult to establish.
- Unusually complex group structures where complexity does not appear to be warranted.
- Abnormally extensive or unusual related party transactions.
- Unusual numbers of cash transactions for substantial amounts or a large number of small transactions that add up to a substantial amount.
- Payment for unspecified services.
- The formation of companies or trusts with no apparent commercial or other purpose.
- Long delays in the production of company or trust accounts for no apparent reason.

B. Where client may be unknowingly a party to ML

- A customer establishing a pattern of small transactions and then having one or two substantially larger ones.
- Unusual transactions or a pattern of trading with one customer that is different from the norm.
- Requests for settlement of sales in cash.
- Taking out of single premium life assurance policies, with subsequent early cancellation and encashment.
- A customer setting up a transaction that appears to be of no commercial advantage or logic.
- A customer requesting special arrangements for vague purposes.
- Unusual transactions with companies registered overseas.
- Requests for settlement in bank accounts or jurisdictions, which would be unusual for a normal commercial transaction.
- Excessive overpayment of accounts, subsequently requesting a refund.

[78] FIC Guidance Note 4 on Suspicious Transaction Reporting available on IRBA website.

Annexure D: Reporting if registered auditor is not accountable institution

The compliance obligations of the registered auditor who is not registered as an accountable institution are no less significant, even though they may be less onerous, than those for the registered auditor who is registered as an accountable institution. These obligations emanate from the different anti-money laundering laws, as well as the IRBA's Guide on anti-money laundering and financing of terrorism.

The main distinction between the compliance in respect of the legislation, between the accountable institution, and the registered auditor that is not an accountable institution, is that the accountable institution needs to ensure that specific procedures are in place as required by the FIC Act: one of these is that the accountable institution must have a money laundering control officer formally appointed by the registered auditor (the FIC requires a letter of appointment). The registered auditor that is not an accountable is not required to have this designated person, but the IRBA requires that a compliance officer is appointed to oversee compliance with the AML laws and guidelines.[79]

In terms of specific reporting, the registered auditor who is not an accountable institution, by law, is not required to have reporting procedures in place: however, non reporting could amount to a criminal offence: hence the IRBA's emphasis on appointing a dedicated person to oversee compliance. In order to assist the registered auditor who is not an accountable institution, a summary of other applicable Acts is provided in this annexure: however, legal advice is to be obtained in the event of any uncertainty and/or specific application within the registered auditor's firm.

Section 29 Financial Intelligence Centre Act 38 of 2001 (FICA)

The registered auditor must report a transaction if is suspected, or is known, to involve the proceeds of crime or tax evasion, or if it does not have an apparent lawful or business purpose. Although section 45 of the Auditing Profession Act prescribes how Reportable Irregularities are to be considered and dealt with in the context of an audit, consideration may have to be given to the situation where the auditor's practice also renders other services outside of audit, which may include consulting services, tax services, etcetera. When considering the application of the two different pieces of legislation, the distinction must be made very clearly so that the application of section 29 is not overlooked because a general reliance is placed on the applicability of section 45.

From 1 December 2010, Cash Transaction Reporting (CTR) to the FIC became enforceable for amounts of R25 000 or more. The obligation is in respect of reporting institutions as well as accountable institutions and the registered auditor who is not an accountable institution needs to be aware of the extent to which this is to be taken notice of in respect of its own clients.[80]

Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (POCDATARA)

The IRBA website offers a separate guideline on the application of POCDATARA[81], and so the applicable sections from this Act are not quoted nor discussed in detail here. Suffice to say that the necessary awareness covering all the various sections all need to be created but the main focus of POCDATARA is that reporting obligations in respect of property associated with terrorist and related activities now have a greater emphasis and it follows that the registered auditor needs to ensure that he or his firm is updated with the persons or organizations who may be implicated in relation to such properties. The FIC expects of the registered auditor to be aware of the United Nations list of such clients and therefore it

[79] See annexure E: Compliance Officers.
[80] For more information refer to the FIC guideline on the IRBA website.
[81] See annexure F.

should be made available within the firm. POCDATARA provides that it will be a criminal offence if commercial activities are related to such properties as defined in the Act.

It is important to note that reporting is to be done to a Police Official: in this regard, for reporting on behalf of the firm, the registered auditor is advised to consult the IRBA's guideline on compliance officers.

Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA)

The main objective of PRECCA is to provide for the recording and registration of tender defaulters, and how the law deals with such offenders.

PRECCA is not listed on the FIC's website as one of the Acts directly applicable in terms of AML. However, the FATF (Financial Action Task Force) expects the IRBA as the Regulatory Body to oversee compliance with the general guidelines applicable to the auditing profession and this would include implementing the recommendations made in the Phase 2 OECD report (Organisation for Economic Cooperation and Development). It is essential that an understanding of the crime of corruption and foreign bribery is cultivated in the auditing profession and therefore the reporting obligations in terms of PRECCA are to be taken note of.

The two sections to which the IRBA would want to draw attention in respect of creating awareness, is sections 28 and 34. Section 34 is in respect of a person in position of authority, who may be involved in a variety of offences: this includes dealing in government tenders while on the Department of Treasury's Register. The implication of this is that a registered auditor who has a client, for example in the public sector, who is listed as such, and who fails to report such client for still conducting business despite being prohibited from doing so when his details are listed in the Register, could be charged with contravention in terms of section 34 of PRECCA as such dealings could amount to corrupt transactions. It follows that the registered auditor who has clients who may potentially be listed in the Register, needs to keep updated with the details of the Register.

Prevention of Organised Crime Act 121 OF 1998 (POCA)

POCA creates a number of offences which relate to money laundering: the implication of this is that where an alleged offence had been committed, the prosecutor has much broader powers to frame a charge sheet to cover various aspects of wrongdoing in order to obtain a conviction. This could for instance result in a charge sheet being drawn with more than one charge in the alternative in order to provide for one conviction on a given set of facts.

As discussed in paragraphs 21-37, there are various possible offences that the registered auditor can be charged with: it would be prudent to include sufficient training on the implications of the Act in broad terms. In addition the administrative penalties that can be enforced are discussed in paragraph 32.

Annexure "1" Financial Intelligence Centre Act 38 of 2001 (FIC Act)

Section 29: Suspicious and unusual transactions

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 suspects that—*

(a) the business has received or is about to receive the proceeds of unlawful 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;

(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

(c) the business has been used or is about to be used in any way for money laundering purposes, 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.

(2) 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 suspects that a transaction or a series of transactions about which enquiries are made, may, if that transaction or those transactions had been concluded, have caused any of the consequences referred to in subsection (1) (a), (b) or (c), 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.

(3) No person who made or must make a report in terms of this section may disclose that fact or any information regarding the contents of any such report to any other person, including the person in respect of whom the report is or must be made, otherwise than—

(a) within the scope of the powers and duties of that person in terms of any legislation;

(b) for the purpose of carrying out the provisions of this Act;

(c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or

(d) in terms of an order of court.

(4) No person who knows or suspects that a report has been or is to be made in terms of this section may disclose that knowledge or suspicion or any information regarding the contents or suspected contents of any such report to any other person, including the person in respect of whom the report is or is to be made, otherwise than—

(a) within the scope of that person's powers and duties in terms of any legislation;

(b) for the purpose of carrying out the provisions of this Act;

(c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or

(d) in terms of an order of court.

Annexure "2" Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA)

34. Duty to report corrupt transactions.—*(1) Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed—*

(a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2; or

(b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.

(2) Subject to the provisions of section 37 (2), any person who fails to comply with subsection (1), is guilty of an offence. (Date of commencement of sub-s. (2): 31 July, 2004.)

(3)(a) Upon receipt of a report referred to in subsection (1), the police official concerned must take down the report in the manner directed by the National Commissioner, and forthwith provide the person who made the report with an acknowledgment of receipt of such report.

(b) The National Commissioner must within three months of the commencement of this Act publish the directions contemplated in paragraph (a) in the Gazette.

(c) Any direction issued under paragraph (b), must be tabled in Parliament before publication thereof in the Gazette.

(4) For purposes of subsection (1) the following persons hold a position of authority, namely—

(a) the Director-General or head, or equivalent officer, of a national or provincial department;

(b) in the case of a municipality, the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);

(c) any public officer in the Senior Management Service of a public body;

(d) any head, rector or principal of a tertiary institution;

(e) the manager, secretary or a director of a company as defined in the Companies Act, 1973 (Act No. 61 of 1973), and includes a member of a close corporation as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984);

(f) the executive manager of any bank or other financial institution;

(g) any partner in a partnership;

(h) any person who has been appointed as chief executive officer or an equivalent officer of any agency, authority, board, commission, committee, corporation, council, department, entity, financial institution, foundation, fund, institute, service, or any other institution or organisation, whether established by legislation, contract or any other legal means;

(i) any other person who is responsible for the overall management and control of the business of an employer; or

(j) any person contemplated in paragraphs (a) to (i), who has been appointed in an acting or temporary capacity.

28. Endorsement of Register.—

(1) (a) A court convicting a person of an offence contemplated in section 12 or 13, may, in addition to imposing any sentence contemplated in section 26, issue an order that—

(i) the particulars of the convicted person;

(ii) the conviction and sentence; and

(iii) any other order of the court consequent thereupon, be endorsed on the Register.

(b) If the person so convicted is an enterprise, the court may also issue an order that—

(i) the particulars of that enterprise;

(ii) the particulars of any partner, manager, director or other person, who wholly or partly exercises or may exercise control over that enterprise and who was involved in the offence concerned or who knows or ought reasonably to have known or suspected that the enterprise committed the offence concerned; and

(iii) the conviction, sentence and any other order of the court consequent thereupon,

be endorsed on the Register.

(c) The court may also issue an order contemplated in paragraph (a) in respect of—

(i) any other enterprise owned or controlled by the person so convicted; or

(ii) the particulars of any partner, manager, director or other person, who wholly or partly exercises or may exercise control over such other enterprise,

and which—

(aa) enterprise, partner, manager, director or other person was involved in the offence concerned; or

(bb) partner, manager, director or other person knew or ought reasonably to have known or suspected that such other enterprise was involved in the offence concerned.

(d) Whenever the Register is endorsed as contemplated in paragraph (a), (b) or (c), the endorsement applies, unless the court directs otherwise, to every enterprise to be established in the future, and which enterprise will be wholly or partly controlled or owned by the person or enterprise so convicted or endorsed, and the Registrar must, in respect of every such enterprise, endorse the Register accordingly.

(2) Where a court has issued an order under subsection (1), the registrar or clerk of such court must forthwith forward the court order to the Registrar and the Registrar must forthwith endorse the Register accordingly.

(3) (a) Where the Register has been endorsed in terms of subsection (2), in addition to any other legal action, the following restrictions may or must, as the case may be, be imposed;

(i) The National Treasury may terminate any agreement with the person or enterprise referred to in subsection (1) (a) or (b): Provided that—

(aa) in considering the termination of an agreement, the National Treasury must take into account, among others, the following factors, namely—

(aaa) the extent and duration of the agreement concerned;

(bbb) whether it is likely to conclude a similar agreement with another person or enterprise within a specific time frame;

(ccc) the extent to which the agreement has been executed;

(ddd) the urgency of the services to be delivered or supplied in terms of the agreement;

(eee) whether extreme costs will follow such termination; and

(fff) any other factor which, in the opinion of the National Treasury, may impact on the termination of the agreement; and

(bb) if that agreement involves any purchasing authority or Government Department, such restriction may only be imposed after consultation with the purchasing authority or Government Department concerned;

(ii) the National Treasury must determine the period (which period may not be less than five years or more than 10 years) for which the particulars of the convicted person or the enterprise referred to in subsection (1) (a), (b), (c) or (d) must remain in the Register and during such period no offer in respect of any agreement from a person or enterprise referred to in that subsection may be considered by the National Treasury; or

(iii) during the period determined in subparagraph (ii), the National Treasury, the purchasing authority or any Government Department must—

(aa) ignore any offer tendered by a person or enterprise referred to in subsection (1) (a),(b), (c) or (d); or

(bb) disqualify any person or enterprise referred to subsection (1) (a), (b), (c) or (d), from making any offer or obtaining any agreement relating to the procurement of a specific supply or service.

(b) A restriction imposed under paragraph (a) only comes into effect after any appeal against the conviction or sentence or both has been finalised by the court: Provided that if the appeal court sets aside, varies or amends the order referred to in subsection (1), the National Treasury must, if necessary, amend the restrictions imposed under paragraph (a) accordingly.

(c) Where the National Treasury has terminated an agreement in terms of paragraph (a) (i), iat may, in addition to any other legal remedy, recover from the person or enterprise any damages—

(i) incurred or sustained by the State as a result of the tender process or the conclusion of the agreement; or

(ii) which the State may suffer by having to make less favourable arrangements thereafter.

(4) The National Treasury—

(a) may at any time vary or rescind any restriction imposed under subsection (3) (a) (i) or (ii); and

(b) must, when the period determined in terms of subsection (3) (a) (ii) expires, remove the particulars of the person or enterprise concerned, from the Register.

(5) When the National Treasury imposes a restriction under subsection (3) (a) (i) or (ii), or amends or rescinds such a restriction, it must within 14 days in writing notify—

(a) the person whose particulars have been so endorsed;

(b) any purchasing authority on which it may decide; and

(c) all Government departments,

of any resolution or decision relative to such restriction or the amendment or rescinding thereof, and request such authorities and departments to take similar steps.

(6) (a) Any person whose particulars, conviction and sentence have been endorsed on the Register as contemplated in this section and who has been notified as contemplated in subsection (5) (a), must in any subsequent agreement or tender process involving the State, disclose such endorsement, conviction and sentence.

(b) Any person who fails to comply with paragraph (a), is guilty of an offence.

(7) For purposes of this section—

*(a) **"agreement"** includes an agreement to procure and supply services, to arrange the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the State;*

*(b) **"enterprise"** includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity;*

*(c) **"Registrar"** means the Registrar of the Register designated under section 30; and*

*(d) **"Register"** means the Register established under section 29.*

***"dealing"** includes—*

(a) any promise, purchase, sale, barter, loan, charge, mortgage, lien, pledge, caveat, transfer, delivery, assignment, subrogation, transmission, gift, donation, trust, settlement, deposit, withdrawal, transfer between accounts or extension of credit;

(b) any agency or grant of power of attorney; or

(c) any act which results in any right, interest, title or privilege, whether present or future or whether vested or contingent, in the whole or in part of any property being conferred on any person

***"gratification",** includes—*

(a) money, whether in cash or otherwise;

(b) any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;

(c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;

(d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;

(e) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(f) any forbearance to demand any money or money's worth or valuable thing;

(g) any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;

(h) any right or privilege;

(i) any real or pretended aid, vote, consent, influence or abstention from voting; or

(j) any valuable consideration

"principal", *includes—*

(a) any employer;

(b) any beneficiary under a trust and any trust estate;

(c) the estate of a deceased person and any person with a beneficial interest in the estate of a deceased person;

(d) in the case of any person serving in or under a public body, the public body; or

*(e) in the case of a legal representative referred to in the definition of "**agent**", the person represented by such legal representative;*

Annexure E: Compliance Officers

A registered auditor needs to consider the appointment of a person responsible for overseeing compliance with anti-money laundering (AML) legislation. The first criterion, against which the decision is to be considered, is whether the registered auditor is an accountable institution, or not. Registered auditors who are uncertain whether they are to register as accountable institutions are referred to the definition in terms of Schedule 1 of the FIC Act.[82]

Should the registered auditor be an accountable institution, a money laundering control officer (MLRO) is to be appointed in terms of the FIC Act, which states the following:

Training and monitoring of compliance

43. An accountable institution must—

> *(a) provide training to its employees to enable them to comply with the provisions of this Act and the internal rules applicable to them;*
>
> *(b) appoint a person with the responsibility to ensure compliance by—*
>
> > *(i) the employees of the accountable institution with the provisions of this Act and the internal rules applicable to them; and*
> >
> > *(ii) the accountable institution with its obligations under this Act.*

Failure to provide training or appoint compliance officer

62. An accountable institution that fails to—

> *(a) provide training to its employees in accordance with section 43(a); or*
>
> *(b) appoint the person referred to in section 43(b),*

is guilty of an offence.

In the instance where a registered auditor is not an accountable institution, it is recommended that a compliance officer be appointed, either on a full-time or part-time basis, to oversee compliance with the AML legislation. For obvious reasons, a comprehensive framework for the mandate of such a compliance officer cannot be provided, but the registered auditor needs to ensure that at a minimum, the following is seen to be complied with:

1. Implementation of the IRBA's Guide on anti-money laundering and financing of terrorism; this could entail the following:
    a. Visibility within the firm for example on portal, link on website etc.
    b. Reference to compliance with AML laws in existing control sheets for example at the conclusion of an audit.
2. Compilation and enforcement of training and awareness programmes.
3. Reporting policies and procedures to ensure AML reporting: more specifically these should cover the following:
    a. Reporting to Police Official in terms of POCDATARA.
    b. Reporting to FIC in terms of the FIC Act.
    c. Reporting to Police Official in terms of PRECCA.

It is important to note that reporting to other law enforcement agencies or Regulatory Bodies, such as the SAPS or FIC, is to be conducted through authorized channels within the firm. It is recommended that an employee of the firm, if the compliance officer is not employed by the firm, be specifically designated for such reporting. Depending on the risk management

[82] See Annexure A.

policies of the firm, for example whether there is a (centralised) risk management committee or a risk management partner or similar person, this role is to be communicated within the firm in order for staff to appreciate the relevance of a designated person complying on behalf of the firm. A risk could be created if a staff member is to act on own initiative in the event of uncertainty and consequently, a possible personal risk for complying with legislation.

A distinction is to be made between reporting Reportable Irregularities in terms of Section 45 of the Auditing Profession Act (Act 26 of 2005), and reporting suspicious transactions in terms of AML guidelines. The criteria for RIs are specific and it is suggested that a distinction be made in terms of the awareness created, along the following guidelines:

1. The reporting of suspicious transactions is to be considered where an RI would not be considered, for instance where the Act would not apply in a specific instance. This could be where, for example, a fraudulent or suspicious transaction is discovered outside of the audit environment;
2. A transaction or factual situation could fit the definition of a suspicious transaction that could amount to money laundering and could fit within the definition of other AML acts, such as POCDATARA or PRECCA.

As a reportable situation could arise out of various different possible scenarios, it is imperative for the registered auditor to ensure that sufficient awareness is created in respect of the reporting duties that could apply in a given situation. The definition of a suspicious transaction needs to be dealt with appropriately in training and awareness programmes. The registered auditor is also referred in this regard to the FIC's guideline on suspicious transaction reporting (STR).

For further guidance, see the Guidance notes in respect of legislation and documents issued, available on the IRBA website.

Annexure F: POCDATARA

The Protection of Constitutional Democracy Against Terrorist and Related Activities, Act no 33 of 2004 (POCDATARA) compels the registered auditor to be alert to the risk of terrorist activities and therefore to file a report in a number of prescribed circumstances. This annexure offers the following guidance on the interpretation of relevant sections of POCDATARA; however, registered auditors are advised to seek legal opinion if they are in any doubt about the interpretation and application of the Act.

It is important to take note of the following when considering the application of the Act:

- Whether activities as described in the Act take place or not, the person charged with contravening the Act can still be prosecuted.
- Knowledge can be attributed to the registered auditor in his capacity as a professional and therefore the registered auditor who takes the required steps for overseeing compliance with the Act, will reduce his risk of being prosecuted for non-compliance.

The FATF (Financial Action Task Force) who oversees international implementation of AML laws, made a number of recommendations to enhance the effectiveness of existing AML/FT policies and procedures. Although, according to the FICA, it is not required of the registered auditor to implement the additional recommendations, it is highly recommended that consideration be given to the FATF recommendations as this could assist the registered auditor to reduce his exposure to non-compliance with POCDATARA.

The FATF recommendations include the following:

1. *Did the firm identify the beneficial owners of accounts beyond the current requirement of identifying 25% shareholders of legal persons: this would include the natural person that ultimately owns or controls the customer as well as understanding the ownership and control structure of customers that are legal persons;*
2. *Did the firm review the provisions of the current Exemptions to ensure that current practices of exempting full KYC (Know Your Client) requirements in situations where the application of simplified or reduced due diligence would be more appropriate, are addressed;*
3. *Did the firm institute explicit requirements to conduct enhanced due diligence where there is a suspicion of ML or FT, if there are doubts about previously KYC data, and with respect to high-risk customers and transactions;*
4. *Did the firm establish an explicit obligation to conduct general on-going due diligence on business relationships and reducing the existing reliance on the obligations under the FIC Act to file an STR (Suspicious Transaction Report) and the Regulations to update customer identification and verification particulars to serve this purpose;*
5. *Did the firm identify PEPs (Politically Exposed Persons) and apply enhanced due diligence with respect to these relationships and transactions conducted as a result of them;*
6. *Does the firm have policies in place or take measures as needed to prevent the misuse of technological developments by money launderers and terrorist financiers.*

The following sections from POCDATARA are quoted with commentary on its application. Registered auditors are advised to take note of the contents of these sections and incorporate them in AML training and awareness sessions.[83]

Section 3: Offences associated or connected with terrorist activities:

In order to comply with this section, it is imperative to identify and verify clients: the section specifically includes the provision that "*Any person who (a) does anything which will, or is likely to, enhance the ability of any entity to engage in a terrorist activity, including to provide or offering to provide a skill or an expertise*;" (is guilty of an offence). The section also provides for attributed knowledge to a situation where such illegal activities are or could be conducted.

3. *(1) Any person who-*

(a) does anything which will, or is likely to, enhance the ability of any entity to engage in a terrorist activity, including to provide or offering to provide a skill or an expertise;
(b) enters or remains in any country; or
(c) makes himself or herself available,

for the benefit of, at the direction of, or in association with any entity engaging in a terrorist activity, and who knows or ought reasonably to have known or suspected, that such act was done for the purpose of enhancing the ability of such entity to engage in a terrorist activity, is guilty of the offence associated with a terrorist activity.

(2) Any person who-

(a) provides or offers to provide any weapon to any other person for use by or for the benefit of an entity;
(b) solicits support for or gives support to an entity;
(c) provides, receives or participates in training or instruction, or recruits an entity the benefit of an entity; to receive training or instruction;
(d) recruits any entity;
(e) collects or makes a document: or
(f) possesses a thing.

connected with the engagement in a terrorist activity, and who knows or ought reasonably to have known or suspected that such weapons, soliciting, training, recruitment, document or thing is so connected, is guilty of an offence connected with terrorist activities.

Section 4: Offences associated or connected with financing of specified offences:

This section covers the way property, whether movable or immovable, is utilized for committing an offence which may relate to terrorist activities. Again, the relationship the registered auditor has with the client and the attributed knowledge the registered auditor is expected to have in terms of that relationship, could form the foundation for compliance or non-compliance with this section. This includes any financial services that may relate to the property. The utilization of the property includes the control of an entity and it follows that a registered auditor must report suspected misuse of such property.

4. *(1) Any person who, directly or indirectly, in whole or in part, and by any means or method-*

(a) acquires property;
(b) collects property;
(c) uses property;
(d) possesses property;
(e) owns property;
(f) provides or makes available, or invites a person to provide or make available property; (g) provides or makes available, or invites a person to provide or make available any financial or other service;

[83] Sections are quoted from the Act with introductory commentary.

(h) provides or makes available, or invites a person to provide or make available economic support; or

(o) facilitates the acquisition, collection, use or provision of property, or the provision of any financial or other service, or the provision of economic 25 support, intending that the property, financial or other service or economic support, as the case may be, be used, or while such person knows or ought reasonably to have known or suspected that the property, service or support concerned will be used, directly or indirectly, in whole or in part-

(i) to commit or facilitate the commission of a specified offence;

(ii) for the benefit of, or on behalf of, or at the direction of, or under the control of an entity which commits or attempts to commit or facilitates the commission of a specified offence; or

(iii) for the benefit of a specific entity identified in a notice issued by the President under section 25, is guilty of an offence.

(2) Any person who, directly or indirectly, in whole or in part, and by any means or method-

(a) deals with, enters into or facilitates any transaction or performs any other act in connection with property which such person knows or ought reasonably to have known or suspected to have been acquired, collected, used, possessed, owned or provided-

(i) to commit or facilitate the commission of a specified offence;

(ii) for the benefit of, or on behalf of, or at the direction of, or under the control of an entity which commits or attempts to commit or facilitates the commission of a specified offence; or

(iii) for the benefit of a specific entity identified in a notice issued by the President under section 25; or

(b) provides financial or other services in respect of property referred to in paragraph (a), is guilty of an offence.

(3) Any person who knows or ought reasonably to have known or suspected that property is property referred to in subsection (2)(a) and enters into, or becomes concerned in, an arrangement which in any way has or is likely to have the effect of-

(a) facilitating the retention or control of such property by or on behalf of-

(i) an entity which commits or attempts to commit or facilitates the commission of a specified offence; or

(ii) a specific entity identified in a notice issued by the President under section 25;

(b) converting such property;

(c) concealing or disguising the nature, source, location, disposition or movement of such property, the ownership thereof or any interest anyone may have therein;

(d) removing such property from a jurisdiction; or

(e) transferring such property to a nominee.

is guilty of an offence.

Section 14: threat, attempt, conspiracy and inducing another person to commit offence:

The registered auditor who performs any of these mentioned actions to get another person to commit an offence is guilty of an offence.

***14.** Any person who-*

(a) threatens;

(b) attempts;

(c) conspires with any other person; or

(d) aids, abets, induces, incites, instigates, instructs or commands, counsels or procures another person, to commit an offence in terms of this Chapter, is guilty of an offence.

Section 17:Evidential matters and exclusions:

A registered auditor can be prosecuted whether the person implicated, for example, in dealing with property, commits an offence or not. Furthermore, a defense can be raised where the registered auditor performed an act solely for the purpose of preserving the value of the property or acted in good faith and reported any suspicion in accordance with section 12 of POCDATARA, section 29 of FICA, or section 45 of the APA, if applicable.

17. (1) If in any proceedings in a court of law any question arises as to whether or not any person is an internationally protected person, or is pursuant to international law entitled to special protection from any attack on his or her person, freedom or dignity, a certificate under the hand or issued under the authority of the Director General of the Department of Foreign Affairs, stating any fact relating to that question, is prima facie evidence of that fact.
(2) A person commits an offence under section 2, 3, 4, 11, 12(2) or 14 (in so far as it relates to the aforementioned sections), notwithstanding whether the terrorist activity occurs or not.
(3) A person commits an offence under section 3, 4, 11 or 14 (in so far as it relates to the aforementioned sections), whether or not-

(a) the actions of the accused actually enhance the ability of any person to commit a specified offence; or

(b) the accused knows or ought reasonably to have known or suspected the specific offence that may be committed.

(4) Nothing in section 4 makes it an offence to provide or collect funds intending that they be used, or knowing or while a person ought reasonably to have known or suspected that they are to be used, for the purpose of advocating democratic government or the protection of human rights.
(5) If a person reports the presence of a person referred to in section 11, as soon as possible in accordance with section 12, he or she shall not be liable for prosecution, under section 11.
(6) A person charged with committing an offence under section 4 may raise as a defence-

(a) the fact that he or she had performed any act in connection with the property in question, or allowed or facilitated the performance of any act in connection with that property solely for the purpose of preserving the value of that property; or

(b) that he or she acted in good faith and reported his or her suspicion in accordance with section 12 of this Act, or section 29 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), as the case may be.

(7) No action, whether criminal or civil, lies against a person complying in good faith with section 12(1).
(8) A person who has made, initiated or contributed to a report in terms of section 12 (1) concerning a suspicion that any other person intends to commit or has committed an offence referred to in section 4 is competent, but not compellable, to give evidence in criminal proceedings arising from the report.
(9) No evidence concerning the identity of a person who has made, initiated or contributed to a report in terms of section 12 (1) concerning a suspicion that any other person intends to commit or has committed an offence referred to in section 4, is admissible as evidence in criminal proceedings unless that person testifies at those proceedings.
(10) A person who acts reasonably in taking or omitting to take measures to comply with section 4(2) shall not be liable in any civil action arising from having taken or omitted to have taken those measures, if the person proves that he or she took all reasonable steps to satisfy himself or herself that the relevant property was not owned, controlled or possessed by, or on behalf of or for the benefit of or at the direction of, an entity referred to in the said section 4(2).
(11) A person is guilty of an offence under section 13(l)(a) or (b), whether or not he or she has any particular person in mind as the person in whom he or she intends to induce the belief in question.

Section 18: Penalties:

A registered auditor who is convicted is liable for fines and various periods of imprisonment which include imprisonment for life or a fine up to R250.000. The Court may also order that a convicted registered auditor reimburse any party who incurred expense incidental to an investigative response. Such an order could be enforced as a civil judgment, which means that the party seeking payment could institute further action in the civil court without having to prove a civil case.

(1) Any person who is convicted of an offence referred to in-

(a) section 2, 5, 6, 7, 8, 9 or 10 is liable-

(i) in the case of a sentence to be imposed by a High Court, to a fine or to imprisonment for a period up to imprisonment for life;

(ii) in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding 18 years;

(iii) in the case of a sentence to be imposed by any magistrate's court, to a fine or to imprisonment for a period not exceeding five years;

(b) section 3 or 11 is liable-

(i) in the case of a sentence to be imposed by a High Court or a regional court, to a fine or to imprisonment for a period not exceeding 15 years;

(ii) in the case of a sentence to be imposed by any magistrate's court, to any penalty which may lawfully be imposed by that court;

(c) section 4, is liable-

(i) in the case of a sentence to be imposed by a High Court or a regional court, to a fine not exceeding R100 million or to imprisonment for a period not exceeding 15 years;

(ii) in the case of a sentence to be imposed by any magistrate's court, to a fine not exceeding R250 000,00 or to imprisonment for a period not exceeding five years;

(d) section 13(l)(a) or (b), is liable-

(i) in the case of a sentence to be imposed by a High Court or a regional court, to a fine or to imprisonment for a period not exceeding 10 years;

(ii) in the case of a sentence to be imposed by any magistrate's court, to any penalty which may lawfully be imposed by that court:

(e) section 12(2). is liable-

(i) in the case of a sentence to be imposed by a High Court or a regional court, to a fine or to imprisonment for a period not exceeding five years.

(ii) in the case of a sentence to be imposed by any magistrate's court, to any penalty which may lawfully be imposed by that court;

(f) section 14, is liable to the punishment laid down in paragraph (a), (b), (c) (d) or (e) for the offence which that person threatened, attempted or conspired to commit or aided, abetted, induced, instigated, instructed. Commanded, counseled or procured another person to commit.

(2) (a) The court, in imposing a sentence on a person who has been convicted of an offence under section 13(l)(a) or (b), may order that person to reimburse any party incurring expenses incidental to any emergency or investigative response to that conduct, for those expenses.

(b) A person ordered to make reimbursement under paragraph (a), shall be jointly and severally liable for such expenses with each other person, if any, who is ordered to make reimbursement under that paragraph for the same expenses.

(c) An order of reimbursement under paragraph (a), shall, for the purposes of enforcement, be treated as a civil judgment.

Section 22: Investigating powers:

There are a number of circumstances in which any knowledge, or involvement in the alleged commission of an offence, entitles the Director of Public Prosecutions to obtain information in respect of such circumstances. This could include that any cash in respect of such offence may have to be transferred to another bank account as ordered by the National Director.

(1) Whenever the National Director has reason to believe that-

(a) any person may be in possession of information relevant to-

(i) the commission or intended commission of an alleged offence under Chapter 2; or

(ii) any property which-

(aa) may have been used in the commission, or for the purpose of or in connection with the commission, of an offence under this Act;

(bb) may have facilitated the commission of an offence under this Act, or enabled any entity to commit such an offence, or provided financial or economic support to an entity in the commission of such an offence; or

(cc) may afford evidence of the commission or intended commission of an offence referred to in subparagraph (i);

(b) there may be in any building, receptacle or place, or in the possession, custody or control of any entity any property referred to in paragraph (a)(ii); or

(c) any entity may be in possession, custody or control of any documentary material relevant-

(i) to an alleged offence referred to in paragraph (a)(i); or

(ii) in respect of any property referred to in paragraph (a)(ii) or (b), he or she may, prior to the institution of any civil or criminal proceeding, under written authority direct that a Director of Public Prosecutions shall have, in respect of a specific investigation, the power to institute an investigation in terms of the provisions of Chapter 5 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), relating to the commission or intended commission of an alleged offence referred to in paragraph (a) (i) or any property contemplated in paragraph (a)(ii), or to any property referred to in paragraph (0), or to the possession, custody or control of any documentary material referred to in paragraph (c).

(2) For purposes of subsection (I), a reference in the said Chapter 5 to-

(a) the "head of the Directorate of Special Operations" or an "Investigating Director" shall be construed as a reference to a Director of Public Prosecutions authorized under subsection (1): Provided that for purposes of section 28 (2) (a) of the said Act, a Director of Public Prosecutions, may only designate a Deputy Director of Public Prosecutions;

(b) a "special investigator" shall be construed as to include a "police official".

(3) If any property, contemplated in subsection (l)(a)(ii), seized under any power exercised under subsection (l), consists of cash or funds standing to the credit of a bank account, the Director of Public Prosecutions who has instituted the investigation under that subsection, shall cause the cash or funds to be paid into a banking account which shall be opened with any bank as defined in section 1 of the Banks Act, 1990 (Act No. 94 of 1990), and the Director of Public Prosecutions shall forthwith report to the Financial Intelligence Centre established in terms of section 2(1) of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), the fact of the seizure of the cash or funds and the opening of the account.

Annexure G: Template for identification and verification of clients in terms of the FIC Act

CLIENT	INFORMATION REQUIRED	VERIFYING DOCUMENTS
Natural Person: resident or citizen of SA *Note*: if natural person represented by guardian or curator, need personal details and contact details of such person	• Full name(s) • Date of birth • Identity number • Residential address	• ID document / drivers' license • Utility bill (rates & taxes account / telephone account / front page of tax return
Foreign Natural Person *Note*: if natural person represented by guardian or curator, need personal details and contact details of such person	• Full name(s) • Date of birth • Passport number • Nationality	• ID document / passport / drivers' license
SA Company	• Registered name • Registration number • Registered address	• CM1 bearing stamp by registrar of Companies and signed by company secretary • CM22 bearing stamp by registrar of Companies and signed by company secretary
	• Name under which it conducts business • Address from which it operates, or if multiple addresses: • Address of office seeking to establish business relationship or enter into single transaction • Address of Head office	• Information which can reasonably be expected to achieve verification and can be obtained by practical means
	• Income tax and VAT numbers	• Documents issued by SARS bearing such numbers
	• Particulars of manager and representative of company including full names, date of birth, ID number	• Same as for natural person

	• Full names, date of birth and ID number of each person who holds 25% or more voting rights of general meeting (nationality if not RSA citizen) • If person/entity holding such shares is Company or CC, details as set out above • If person/entity holding such shares is partnership, name of partnership • If person/entity holding such shares is a trust, name and number of trust • If a legal person, other than the entities referred to above, holds such shares, the name of the legal person, its address and its legal form	• Same as for natural person (or foreign natural person). If not a natural person, as for SA company, CC's, foreign company, corporate entity, partnership, trust, whichever is applicable
Close Corporation	• Name under which it conducts business • Address from which it operates, or, if multiple addresses: • Address of office seeking to establish business relationship or enter into single transaction • Address of Head office	• CK1 bearing registrar of Close Corporations and signed by company secretary • CK2 bearing registrar of Close Corporations and signed by company secretary
	• Income tax and VAT numbers	• Documents issued by SARS bearing such numbers
	• Particulars of manager and representative of company including full names, date of birth, ID number	• Same as for natural person
Foreign Company	• Name under which company is incorporated • Registration number • Address where situated for purposes of incorporation • Name under which conducts business in country where incorporated • Name under which it conducts business within	• Official document issued by an authority for recording incorporation of companies and address for incorporation purposes

	RSA	
	• Address from which it operates in country where incorporated or if multiple addresses, address of head office • Address from which it operates in RSA, or if it operates from multiple addresses, address of office seeking to establish business relationship or to enter into single transaction	• Information which can reasonably be expected to achieve verification and can be obtained by practical means
	• Income tax and VAT numbers	• Documents issued by SARS bearing such numbers
	• Full names, date of birth and ID number of manager of affairs and representative of foreign company (nationality if not RSA citizen)	• Same as for natural person
	• Full names, date of birth and ID number of each person who holds 25% or more voting rights of general meeting (nationality if not RSA citizen) • If person/entity holding such shares is company or close corporation, details of company or close corporation itself as set out above and below. • If person/entity holding such shares is partnership, name of partnership • If person/entity holding such shares is trust, name and number of trust • If legal person, other than entities referred to above, holds such shares, name of legal person, address and legal form	• Same as for natural person (or foreign natural person). If not natural or foreign person, information as for SA company, CC's, foreign company, corporate entity, partnership, trust
Legal Persons (other than Company, CC or Foreign Company)	• Name of legal person • Address from which it operates • Legal form	• Constitution or other founding documents
	• Income tax and VAT numbers	• Documents issued by SARS bearing such

		numbers
	• Full names, date of birth and ID number of each representative of corporate entity (nationality if not RSA citizen)	• Same as for natural person (or foreign natural person)
Partnerships	• Name • Address	• Partnership agreement in which of which was formed
	• Full names, date of birth and ID document of each partner, including every member of partnership *en commandite*, anonymous partnership or any similar partnership	• Same as for natural person (or foreign natural person). If not natural or foreign person, information as for SA companies, CC's, foreign companies, other legal entities, or trusts
	• Full names, date of birth and ID document of person who exercised executive control over partnership and representative of such partnership • Where partner or person who exercises control or who acts as representative is company or close corporation, details of company itself or close corporation itself as set out above • Where such person is partnership, name of partnership • Where such person is trust, name and number of trust • Where such person is legal person, other than entities referred to above, name of legal person, its address and its legal form	• Same as for natural person (or foreign natural person). If not natural or foreign person, information as for SA companies, CC's, foreign companies, other legal entities, or trusts
Trusts	• Identifying name • Registration number	• Trust deed or other founding documents. Where trust is created in RSA, authorisation given by Master of High Court to each trustee to act in that capacity. Where trust is created outside

		RSA, official document reflecting particulars of trust
	• Business address	• Information which can reasonably be expected to achieve verification and can be obtained by practical means
	• Address of Master of High Court where trust is registered (if applicable)	• Authorisation given by Master of High Court in terms of section 7 of Trust Property Control Act, 1988 to each trustee of trust to act in that capacity
	• Income tax and VAT numbers	• Documents issued by SARS bearing such numbers
	• Full names, date of birth and ID number in respect of each trustee, each representative of trust and each founder of trust • Where such persons are natural persons, full names, date of birth and ID number of each such natural person (nationality if not RSA citizen) • Where such persons are persons/entities other than natural persons, identification requirements as per those set out above	• Same as for natural persons (or foreign natural persons). If not natural person or foreign natural person, information as for SA companies, CC's, foreign companies, other legal entities, or trusts
	• Full names, date of birth and ID number of beneficiaries of trust or other founding instrument creating trust, where such beneficiaries are natural persons (nationality if not RSA citizen). • Where such beneficiaries are not natural persons, identification requirements as per those set out above	• Same as for natural persons (or foreign natural persons). If not natural person or foreign natural person, information as for SA companies, CC's, foreign companies, other legal entities, or trusts