

# DRAFT PUBLIC COMPLIANCE COMMUNICATION

## DRAFT PUBLIC COMPLIANCE COMMUNICATION

### No 102 (PCC102)

ON THE DISCLOSURE OF FACTS OR  
INFORMATION REGARDING THE  
CONTENTS OF SECTION 29 REPORTS, OR  
PROVIDING A COPY OF SUCH REPORT TO  
A SUPERVISORY BODY IN TERMS OF  
SECTION 29(3) AND SECTION 45(B)(2B) OF  
THE FINANCIAL INTELLIGENCE CENTRE  
ACT, 2001 (ACT NO. 38 OF 2001) BY  
REPORTERS

## FOR CONSULTATION PURPOSES ONLY

### **PCC SUMMARY**

Only inspectors appointed by the Centre, the Financial Sector Conduct Authority (formerly referred to as the Financial Services Board) or the South African Reserve Bank (SARB), which inspectors are conducting an inspection for the purposes of determining compliance with the FIC Act, may order an accountable institution, reporting institution and, or other reporter under inspection, to produce a copy of a report, or to furnish a fact or information related to a section 29 report that was submitted by the institution to the FIC. Such inspectors perform a supervisory function in terms of the FIC Act and should therefore be given access to the required section 29 information by the inspected institutions.

Inspectors appointed by any other supervisory body are not allowed access to section 29 information held by accountable institution, reporting institutions and, or other reporters without the explicit prior consent given by the FIC. Consent will only be provided by the FIC following an application, if the criteria as set out in the MLTFC Regulations are met. If the supervisory body fails to obtain such consent, they may only gain access to information in relation to section 29 reports directly from the FIC, in terms of section 40(1C) of the FIC Act. This information will only be provided by the FIC to the supervisory body concerned should it be relevant to the exercise of its powers as a supervisory body or its functions under any law.

If an inspector of any supervisory body obtained a STR or a fact or information about the STR during an inspection, the supervisory body must request information from the Centre according to section 40 relating to the same STR, which may be relevant to the inspection.

Draft PCC 102 is undergoing consultation and will be formally issued after comments have been considered.

### **DISCLAIMER**

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

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### **OBJECTIVE**

The objective of this PCC is to provide guidance to accountable institutions, reporting institutions and or other reporters, that the production of a copy of a report and or the furnishing of information or facts of a report made in terms of section 29 of the FIC Act, can only be provided to specific supervisory bodies, under certain specified conditions.

This PCC also provide guidance to all other supervisory bodies.

### **GLOSSARY**

**“The Centre”** means the Financial Intelligence Centre established in terms of section 2 of the FIC Act.

**“FIC Act”** refers to the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).

**“MLTFC Regulations”** refer to the Money Laundering and Terrorist Financing Control Regulations made in terms of section 77 of the FIC Act and promulgated by Government promulgated by Government Notice 1595 in Government Gazette 24176 of 20 December 2002, as amended by Government Notice R456 in Government Gazette 27580 of 20 May 2005, Government Notice R867 in Government Gazette 33596 of 01 October 2010 and Government Notice 1107 in Government Gazette 33781 of 26 November 2010.

**“Reporter”** refers to the person or entity submitting a Suspicious Transaction Report (STR) in terms of Section 29 of the FIC Act to the Centre.

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### 1. ACCESS TO SECTION 29 INFORMATION

1.1 Section 29(3) of the Financial Intelligence Centre Act, Act No. 38 of 2001 (FIC Act) prohibits the disclosing of a suspicious or unusual report submitted in terms of section 29 of the FIC Act (STR), or information regarding the content of an STR to any person.

1.2 There is however an exception to this, read in section 45B(2A) of the FIC Act, in that either the;

1.2.1 Centre;

1.2.2 South African Reserve Bank (SARB) and the Financial Sector Conduct Authority (FSCA) as listed as supervisory bodies in item 1 and 2 of Schedule 2; or

1.2.3 A supervisory body that has met the prescribed criteria as set out in Regulation 27D in the Money Laundering Regulations (the Regulations) to the FIC Act.

may request such information for the purposes of conducting an inspection in relation to the compliance with the FIC Act.

#### **Section 29(3) of the FIC Act:**

“No person who made or must make a report in terms of this section may, subject to subsection 45B(2A), disclose that fact or any information regarding the contents of any such report to any other person, including the person in respect of who 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 a order of court.”

**Section 45B(2A) of the FIC Act:**

When acting in terms of subsection (2)(b) or (d), an inspector of—

- (a) the Centre;
  - (b) a supervisory body referred to in item 1 or 2 of Schedule 2;
  - (c) any other supervisory body meeting the prescribed criteria,
- may order from an accountable institution or reporting institution under inspection, the production of a copy of a report, or the furnishing of a fact or information related to the report, contemplated in section 29.

**2. SUPERVISORY BODIES ALLOWED TO ACCESS INFORMATION RELATED TO A REPORT IN TERMS OF SECTION 29(3) FROM A REPORTER**

**2.1 Supervisory bodies referred to in item 1 or 2 of Schedule 2 are:**

2.1.1 The South African Reserve Bank (SARB) in respect of the powers and duties contemplated in section 10(1)(c) in the South African Reserve Bank Act, 1989, (Act 90 of 1989), the Registrar as defined in sections 3 and 4 of the Banks Act, 1990, (Act 94 of 1990), the Prudential Authority in terms of the Financial Sector Regulation Act 9 of 2017 (FSRA) (formally constituted as the Banking Supervision Division), and the Financial Surveillance Department in terms of Regulation 22.E of the Exchange Control Regulations, 1961.

2.1.2 The SARB supervisory bodies are known as;

2.1.2.1 The Prudential Authority (PA)

2.1.2.2 The National Payments System Department (NSPD); and

2.1.2.3 The Financial Surveillance Department (Finsurv)

and

2.1.3 The Financial Sector Conduct Authority (FSCA) in terms of the Financial Sector Regulation Act 9 of 2017 (FSRA) (formerly referred to as the Financial Services Board).

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**3. POWERS OF INSPECTORS IN TERMS OF SECTION 45B(2)(b), (d) and (e)**

- 3.1 Inspectors appointed by the Centre, the FSCA and the SARB that are conducting an inspection for the purposes of determining compliance with the FIC Act, may:
- 3.1.1 order an accountable institution or reporting institution under inspection, to produce a document it has/had under his/her/it's control relating to the affairs of the accountable institution, reporting institution or person (section 45B(2)(b)(i));
  - 3.1.2 order an accountable institution or reporting institution under inspection to furnish the inspector at the place and in the manner determined by the inspector with information in respect of that document (section 45B(2)(b)(ii));
  - 3.1.3 use any computer system or equipment on the premises or require reasonable assistance from any person on the premises to use that computer system to access any data contained in or available to that computer system and reproduce any document from that data (section 45B(2)(d));
  - 3.1.4 examine or make extracts from or copy any document in the possession of an accountable institution, reporting institution or person or, against the issue of a receipt, remove that document temporarily for that purpose (section 45B(2)(e));
- 3.2 Inspectors perform a supervisory function in terms of the FIC Act and should therefore be given access to the required section 29 information held by the inspected reporters.
- 3.3 This request, and receipt of STR information by an inspector of a supervisory body is exercised within the general inspection powers vested in an inspector in terms of section 45B of the FIC Act.

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**4. PROCEDURE AFTER A REPORT OR A FACT OR INFORMATION RELATED TO SECTION 29 HAS BEEN OBTAINED BY THE CENTRE, FSCA OR SARB.**

- 4.1 Section 45B(2B) prescribes the procedure to be followed after a copy of a report or fact or information related to section 29 of the FIC Act has been obtained by the Centre, FSCA, or the SARB from the inspected reporter directly.

**Section 45B(2B) of the FIC Act:**

If the inspector of a supervisory body, referred to in subsection (2A)(b) or (c), obtained a report, or a fact or information related to the report, under subsection (2A), that supervisory body must request information from the Centre under section 40(1C) relating to the report contemplated in section 29 which may be relevant to such inspection.

- 4.2 Section 40(1C) of the FIC Act requires that when an inspector of any supervisory body obtaining a STR or a fact or information about the STR during an inspection, the supervisory body must inform and request information from the Centre relating to the same STR which may be relevant to the inspection.
- 4.3 The Centre requires the supervisory body to provide a written request to the Centre noting the following;
- 4.3.1 Confirmation that the supervisory body has requested, and is in receipt/possession of an STR and/or STR information;
  - 4.3.2 Confirming the specific entity and ORG ID number relating to the STR in question;
- and requesting the following information;
- 4.3.3 That the STR/STR information is a true reflection as compared to the FICs records;
  - 4.3.4 Timeous submission of the STR by the reporter;
  - 4.3.5 Quality of information captured within the STR by the reporter;
  - 4.3.6 Completeness and accuracy of information captured in the STR by the reporter.

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### CONSULTATION NOTE:

Supervisory bodies to specify if there is additional information that would be required from the Centre for purposes of testing compliance with the FIC Act during the inspection of an entity, and the subsequent review of a STR or STR information.

## 5 REQUEST FOR INFORMATION RELATING TO A REPORT – PROCEDURE

5.1 Requests for information by the supervisory body to the Centre in relation to section 40(1C) must comply with the below requirements. The request must;

- 5.1.1 Be in writing following the request for information process;
- 5.1.2 Be submitted by an authorized officer at the supervisory body;
- 5.1.3 Specify the accountable institution, reporting institution or reporter;
- 5.1.4 Specify the required information and the purpose for which the information is required;
- 5.1.5 Specify which inspector, and any other persons, who will be receiving and reviewing the content of the FICs information and the STR/STR information obtained;
- 5.1.6 Provide a reasonable time period for when this information is due by the Centre, not less than 20 working days; and
- 5.1.7 Acknowledge that this request is subject to handling conditions.

## 6 CONFIDENTIALITY OF INFORMATION RECEIVED FROM THE CENTRE

6.1 To ensure confidentiality of the information submitted by the Centre, the Director has a discretion to, as a condition, make reasonable procedural arrangements and impose reasonable safeguards regarding the furnishing of such information before the information is provided in terms of section 40(3) of the FIC Act.

6.2 The receipt of information from the FIC is subject to handling conditions as envisaged in section 40(3) to the FIC Act. A person who obtains information from the Centre may use that information **only**—

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- 6.2.1 within the scope of that person's powers and duties in facilitating the inspection in terms of the FIC Act; and
  - 6.2.2 for the purpose specified in the request.
- 6.3 Information obtained by persons in terms of section 40 of the FIC Act is sensitive and classified. No person is entitled to be in possession of such information unless such possession is justified in terms of section 40 and 41 of the FIC Act.
- 6.4 A person who obtains information from the Centre, may only use this information for the purpose which was specified in the request and subsequently approved by the Centre. A person who obtains this information may only use the information within the scope of that person's legislative powers and duties.
- 6.5 This information may not be compromised in any way through any disclosure to any person who is not required to use the information in accordance with section 40 of the FIC Act.
- 6.6 The information may not be disclosed directly or indirectly to individuals or entities that form the subject matter of the information.
- 6.7 Confidentiality of the information is maintained before and after the information is provided.
- 6.8 The recipient of this information must immediately notify and forewarn the FIC of any demand or any legal proceedings (including any notice of intended legal proceedings) to seek access to or the disclosure of this information received from the FIC.
- 6.9 Any person who uses information obtained from the Centre otherwise than in accordance with any arrangements or safeguards made or imposed by the Director in terms of section 40 or 41 is guilty of an offence in terms of section 60 of the FIC Act.

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**7. CONFIDENTIALITY OF INFORMATION RECEIVED FROM AN ACCOUNTABLE INSTIUTION**

- 7.1 An inspector may only obtain information for purposes of determining compliance with the FIC Act as envisaged by section 45B(1)(b) of the FIC Act.
- 7.2 An inspector is not permitted to disclose any information obtained during an inspection, including STR and related information to any person other than for the purposes of enforcing compliance with the FIC Act, legal proceedings and when required to do so by a court of law. This includes providing information to the subject of the STR, or providing a fact that a STR was submitted. Failure to do so is considered an offence in terms of section 60 of the FIC Act.
- 7.3 Failure to keep this information confidential by the inspector is deemed unauthorised disclosure, which is a criminal offence in terms of section 53 of the FIC Act.
- 7.4 The Centre advises that supervisory bodies should not make copies of, nor remove any physical copies of any STRs or STR information in so far as possible and should rather take note of the content required for the testing of compliance with the FIC Act whilst on site at the inspected reporting entity. This will reduce the potential of any information being abused by third parties and would further secure the confidentiality of sensitive information.

**8. MEMORANDUMS OF UNDERSTANDING BETWEEN THE FIC AND SUPERVISORY BODIES IN TERMS OF SECTION 45(1D)**

- 8.1 The Centre and a supervisory body must coordinate their approach to exercising their powers and performing their functions conferred on it by the FIC Act to ensure the consistent application of the Act.
- 8.2 The Centre and supervisory bodies are to ensure that the memorandum of understanding (MOU) that has been entered into between the parties includes the principles as set out in this PCC.

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**9. ACCESS TO STR INFORMATION BY SUPERVISORY BODIES OTHER THAN ITEM 1 AND 2 TO SCHEDULE 2 OF THE FIC ACT**

9.1 STR information requests from supervisory bodies, other than the Centre, FSCA and SARB, must meet certain criteria before they may access any STR information from either the reporting entity or the Centre.

**Process to be followed by a supervisory body, other than the SARB and FSCA when a STR/STR information is required**

9.2 The supervisory body is to be in the process of conducting an inspection for the purposes of determining FIC Act compliance by the reporting entity.

9.3 The supervisory body is to first seek and obtain permission from the Centre before they may proceed requesting STR/STR information from either the Centre or the reporting entity. This permission will be provided for in writing and must be given to the reporting entity covering the request for STR/STR information.

9.4 The Centre will provide such permission only if the supervisory body can demonstrate that the minimum prescribed criteria is met.

**Prescribed criteria to be met for other supervisory bodies**

9.5 Regulation 27D sets out the criteria for supervisory bodies to request information relating to a report made in terms of section 29 of the FIC Act. Such supervisory bodies must, to the satisfaction of the Centre, have-

9.5.1 appropriate measures to ensure that the information obtained from the STR is processed only for the purposes of determining compliance with the FIC Act;

9.5.2 appropriate measures to prevent unlawful access to the information contained in the STR;

9.5.3 appropriate security safeguards for the protection of information contained in the STR.

9.6 The Centre must advise the accountable institution concerned in writing of its decision whether a supervisory body meets the required criteria.

**Process if the prescribed criteria is not met by a supervisory body**

- 9.7 Should the Centre not approve a request from a supervisory body in terms of section 45B(2A)(c), the supervisory body's inspectors would not be allowed to request and access STRs or related information held by the accountable, reporting institution or other reporters.
- 9.8 Such supervisory bodies may only gain access to information relating to a section 29 report submitted to the Centre in terms of section 40(d) and 40(1C) of the FIC Act, from the Centre directly. This is provided that such information is relevant to the exercise of its powers as a supervisory body or its functions under any law.

**Section 40(1)(C) of the FIC Act:**

Information contemplated in subsection (1) may only be made available to a supervisory body referred to in subsection (1)(d)—

- a) at the initiative of the Centre or at the request of the supervisory body; and
- b) if the Centre reasonably believes such information is relevant to the exercise by the supervisory body of its powers or performance by it of its functions under any law.

**10. CONSULTATION**

- 10.1 Before issuing guidance to accountable institutions, supervisory bodies and other persons regarding the performance and compliance by them of their duties and obligations in terms of the FIC Act or any directive made in terms of the F Act, the Centre must in accordance with section 42B of the FIC Act—
- 10.1.1 publish a draft of the guidance by appropriate means of publication and invite submissions; and
  - 10.1.2 consider submissions received.
- 10.2 Commentators are invited to comment on the draft guidance notes by submitting written comments, representations or requests only at **consult@fic.gov.za**. Submissions will be received until, **Monday, 20 January**, by close of business.

## **11. ENQUIRIES**

For any further enquiries regarding this Draft PCC102, please contact the Compliance Contact Centre on **(012) 641 6000**, or a query can be logged at

<http://www.fic.gov.za/Secure/Queries.aspx>

**Issued By:**

**The Director**

**Financial Intelligence Centre**

**19 December 2019**

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