

# **DRAFT PUBLIC COMPLIANCE COMMUNICATION**

**DRAFT PUBLIC COMPLIANCE  
COMMUNICATION No. 12A (PCC 12A)**

**GUIDANCE ON OUTSOURCING OF  
COMPLIANCE ACTIVITIES TO THIRD  
PARTIES**

**21 July 2020**

## **PCC SUMMARY**

Accountable institutions remain responsible for their compliance obligations in terms of the Financial Intelligence Centre Act 2001 (Act 38 of 2001) (FIC Act) as amended by the Financial Intelligence Centre Amendment Act, 2017 (Act 1 of 2017) (FIC Amendment Act), regardless of their internal arrangements relating to the manner in which those obligations are met.

An accountable institution may utilise the services of a third party to perform compliance activities relating to the establishing and verifying of clients' identities. This includes the collection of required documents and/or information to establish and verify the identity of their clients, and for record-keeping purposes as required in terms of the FIC Act and the Regulations to the FIC Act. An accountable institution may utilise the services of a third party to scrutinise client information in terms of, and for the purposes of, the FIC Act.

Outsourcing refers to when an accountable institution seeks the advice or assistance of a third-party service provider in relation to the performance of their compliance obligations. The third party cannot discharge any FIC Act obligations on an accountable institution's behalf and as such an accountable institution remains liable for compliance failures associated with and/or caused by such an outsourcing arrangement. However, an accountable institution may not utilise the services of a third party to risk rate clients from a money laundering and terrorist financing perspective, and to fulfil and discharge reporting and registration obligations in terms of the FIC Act.

Outsourcing of compliance obligations to a third-party service provider is not the same as placing reliance on a third-party accountable institution.

## **DISCLAIMER**

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**OBJECTIVE**

The objective of this PCC is to provide guidance and clarity on what compliance activities can be outsourced by an accountable institution to third parties.

## **1. INTRODUCTION**

1.1. Control measures on the money laundering, financing of terrorism and related activities and financial sanctions control measures as prescribed by the FIC Act impose certain obligations on accountable institutions. These obligations are listed in Chapter 3 of the FIC Act and are inter alia:

- Part 1 – Customer due diligence (CDD);
- Part 2 – The duty to keep record;
- Part 2A – Financial sanctions;
- Part 3 – Reporting duties and access to information;
- Part 4 – Measures to promote compliance by accountable institutions.

## **2. OUTSOURCING OF FIC ACT COMPLIANCE OBLIGATIONS**

### *Outsourcing arrangements*

2.1 Draft PCC12A is applicable to all accountable institutions that outsource assistance on their performance of certain FIC Act compliance obligations to third parties.

2.2 For purposes of this PCC, outsourcing refers to when an accountable institution contracts with a third-party service provider to seek advice and assistance in relation to the performance of their compliance obligations. The third-party service provider cannot and does not discharge any FIC Act obligations on behalf of the accountable institution with which it has entered into a contractual relationship.

2.3 The FIC does not promote, dissuade or endorse any such outsourcing arrangements. Should an accountable or reporting institution opt to make use of such third-party service providers, they do so at their own discretion.

2.4 The FIC reminds all accountable institutions that they remain fully accountable and responsible for any compliance failures that may result from the outsourcing arrangement. The accountable institution remains liable for compliance failures associated with and caused by outsourcing. The responsibility for compliance failures will remain the responsibility of the accountable institution and will not be passed on to the third-party service provider. The accountable institution's liability and/or

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culpability for non-compliance with the FIC Act obligations cannot be transferred to a third party.

- 2.5 The third-party service provider in an outsourcing arrangement may also be an accountable institution in its own right. If so, the same principles as discussed above will apply. The fact that a third-party service provider is an accountable institution does absolve the accountable institution, requesting such assistance, of their FIC Act obligations pertaining to its client.
- 2.6 When considering whether to outsource compliance activities, it is important that an accountable institution take cognisance of the following:
- 26.1 The accountable institution that establishes a business relationship or concludes a single transaction with a client remains fully responsible for compliance with the FIC Act;
  - 26.2 The accountable institution must exercise strict control over the functions that are being outsourced to minimise the risks associated with such outsourcing;
  - 26.3 The outsourcing arrangement should be contained in a formal agreement between the accountable institution and the person or entity to whom functions are being outsourced in terms of the FIC Act;
  - 26.4 Accountable institutions should take care that the outsourced entity is capable and competent to assist the accountable institution with its duties;
  - 26.5 Accountable institutions cannot be indemnified from any possible administrative penalties or criminal prosecutions resulting from a contravention of the FIC Act on the grounds that compliance with a function pursuant to the FIC Act is outsourced to a third-party service provider;
  - 26.6 Accountable institutions are to adhere to relevant legislation regarding the sharing of clients' personal information with third parties and should consider obtaining the required client consent where so required;
  - 26.7 Where no such consent can be obtained from a client, the accountable institution must ensure that the obligations are met outside of such an outsourcing agreement as the accountable institution remains liable for full compliance with the FIC Act.

***Reliance agreements***

- 26.8 A distinction is drawn between an outsourcing arrangement and a reliance agreement. Outsourcing does not amount to a reliance agreement. Reliance agreements refer to circumstances where an accountable institution places reliance on, and concludes a written arrangement with, another third-party accountable institution in respect of shared clients. Refer to PCC 43 for a discussion on reliance agreements in relation to shared clients.

***Group structures***

- 26.9 For purposes of this PCC, a group structure is considered to be separate legal entities or accountable institutions who have a common shareholder.
- 26.10 It is not the Centre's expectation that when conducting compliance activities within a group structure that outsourcing agreements be applied, as discussed in this PCC, between accountable institutions and/or institutions within the group structure.
- 26.11 The Centre is aware that within group structures compliance functions are often centralised. The Centre encourages accountable institutions within a group structure to apply a group-wide anti-money laundering/counter financing of terrorism (AML/CFT) programme.

**3. OUTSOURCING OF RISK MANAGEMENT**

- 3.1. Guidance Note 7 discusses in detail the process required for accountable institutions to determine the money laundering and terrorist financing (ML/TF) risks posed by their clients within the ambit of a risk-based approach and accountable institutions risk management and compliance programme (RMCP).
- 3.2. The FIC Act does not expressly prohibit outsourcing and section 42(1) of the FIC Act provides that:

*“An accountable institution must develop, document, maintain and implement a programme for anti-money laundering and counter terrorist financing risk management and compliance”;*

and, section 42(2)(a) of the FIC Act provides that

*“A RMCP must enable the accountable institution to identify, assess, monitor, mitigate and manage the risk that the provision by the accountable institution of products or services may involve or facilitate money laundering activities or the financing of terrorist and related activities”.*

- 3.3. Accountable institutions may seek the assistance of third-party service providers when conducting their risk assessments. However, the ultimate determination and approval of the risk assessment remains the obligation and responsibility of the accountable institutions, which may not be outsourced. An accountable institution must ensure that the parameters and indicators used in the determination of ML/TF risk are in line with its risk appetite. In other words, the level of risk the accountable institution is willing to accept. These parameters and indicators may only be applied if accepted and approved by the accountable institution's board of directors, senior management or persons exercising the highest level of authority within the accountable institution.
- 3.4. An accountable institution may seek assistance from a third-party service provider for the development and implementation of a RMCP, which includes the identification of risks and mitigating controls. However, the accountable institution has the best understanding of the ML/TF risk that it faces and should be actively involved in the development of its RMCP and ensure that its RMCP is suitable to address the accountable institutions risk appetite.
- 3.5. It would not be sufficient for an accountable institution to make use of or apply a RMCP template obtained from a third party service provider, without having reviewed and applied their understanding of their risks (refer to Guidance Note 7 on risk indicators such as product, client, geographies etc). A RMCP must be approved by the accountable institution's board of directors, senior management or persons exercising the highest level of authority within the accountable institution prior to implementation.

**4. OUTSOURCING OF THE ACTIVITIES RELATING TO CONDUCTING CUSTOMER DUE DILIGENCE**

- 4.1. Section 21 of the FIC Act prevents accountable institutions from establishing a business relationship or concluding a single transaction unless they have established and verified the identities of their clients.
- 4.2. An accountable institution cannot outsource their customer due diligence (CDD) process in its entirety. Rather, an accountable institution may utilise the services of a third-party service provider to collect the identified and required documentation and information for CDD purposes.
- 4.3. Accountable institutions may not assume that their obligations have been adequately fulfilled where the third-party service provider has completed its task. The accountable institution must have sufficient controls in place to confirm that its CDD obligations have been met.
- 4.4. The accountable institution must determine whether the CDD documentation and/or information collected is acceptable in terms of the FIC Act requirements and the accountable institutions RMCP.

**5. SCRUTINISING OF CLIENT INFORMATION**

- 5.1. Section 28A of the FIC Act requires that an accountable institution must scrutinise its client information in order to identify whether any such client is a sanctioned person in terms of the section 26A of the FIC Act and section 25 of the Protection of Constitutional Democracy Against Terrorist and Related Activity Act, 2004 (Act 33 of 2004) (POCDATARA Act).
- 5.2. The activity of scrutinising client information may be determined by the accountable institution (see Guidance Note 6A), and the FIC Act does not prohibit this function from being outsourced to a third-party service provider.



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- 5.3. Where a client is identified against a list as published in terms of section 26A of the FIC Act and/or section 25 of the POCDATARA Act, the third-party service provider must provide this information to the accountable institution for reporting purposes.

## 6. OUTSOURCING OF RECORD-KEEPING REQUIREMENTS

- 6.1. Outsourcing of record-keeping requirements is regulated in sections 22 to 25 of the FIC Act and regulation 20 of the Money Laundering and Terrorist Financing Control (MLTFC) Regulations to the FIC Act.
- 6.2. Regulation 20 sets out the process to be followed when an accountable institution opts to appoint a third-party service provider to keep records on their behalf.

### ***MLTFC Regulation 20 - Particulars of third parties keeping records***

*If an accountable institution appoints a third party to keep on its behalf any records which that institution must retain in terms of the Act, that institution must without delay provide the Centre and the relevant supervisory body with—*

*(a) the third party's—*

*(i) full name, if the third party is a natural person; or*

*(ii) registered name, if the third party is a close corporation or company;*

*(b) the name under which the third party conducts business;*

*(c) the full name and contact particulars of the individual who exercises control over access to those records;*

*(d) the address where the records are kept;*

*(e) the address from where the third party exercises control over the records; and*

*(f) the full name and contact particulars of the individual who liaises with the third party on behalf of the accountable institution concerning the retention of the records.*

- 6.3. The storing of records relates to the information and/or documentation that has been obtained through the accountable institution's processes and stored by the third-party provider.

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- 6.4. The Centre advises reporters against the outsourcing of record-keeping relating to regulatory reports submitted to the FIC for records of information relating to the content of a report filed by a reporter to the FIC, specifically reports in terms of section 28, 28A and 29 of the FIC Act.

### **7. OUTSOURCING OF A COMPLIANCE FUNCTION**

- 7.1. Section 42A of the FIC Act requires that an accountable institution have a compliance function to assist the board of directors or the senior management in discharging their compliance obligations and that a person be assigned with sufficient competence and seniority to ensure the effectiveness of the compliance function.
- 7.2. Accountable institutions may seek assistance and advice from third-party service providers. However, the compliance function cannot be outsourced. The accountable institution must discharge their obligations in terms of section 42 of the FIC Act.

### **8. OUTSOURCING OF REGISTRATION OBLIGATIONS**

- 8.1. Registration with the FIC is set out in section 43B of the FIC Act and MLTFC regulation 27A. Regulation 27A(4) stipulates that registration with the FIC must be done in the prescribed format as specified by the FIC. Directive 2 (issued in 2014) and Directive 4 (issued in 2016) issued by the FIC provides further clarity on the registration requirement.
- 8.2. Although the FIC Act does not explicitly prohibit the registration of an accountable institution by a third-party service provider, Directive 2 prohibits the sharing of usernames and passwords on the FIC's registration profile. The registration process requires the generation of a username and password, and for this reason no third-party service provider may register the entity and related users of that entity on an accountable institutions' behalf.
- 8.3. The FIC's reporting and registration platform, goAML, only caters for the accountable institution's compliance officer and money laundering and reporting officer to be registered against the entity's profile (refer to the goAML registration user guides). Read with paragraph 9 below, no third-party service provider should have access to reporting information held by the accountable institutions on the reporting platform.

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- 8.4. The FIC will not permit third parties to be registered on the FIC's registration system as the accountable institution's employees should fulfil this role. The third-party service provider may, however, advise and assist an accountable institution on the steps required to register. However, the third-party service provider may not have access to the accountable institutions goAML system, nor maintain such system information.
- 8.5. The FIC will not provide any information, nor take any instruction in relation to registration profiles or reporting information from any person that is either not registered against the accountable institution's profile, or not an employee of the accountable institution. It should be noted that a third-party service provider is not considered to be an employee of an accountable institution.

## **9. OUTSOURCING OF REPORTING OBLIGATIONS**

- 9.1. Regulation 22(1) of the MLTFC Regulations requires a reporter to report in accordance with the format and method as developed by the FIC, that is made available to a person who is required to make such a report. In this regard Directives 1, 2 and 4 sets out the prescribed reporting format and methodology.
- 9.2. Further, in terms of Directive 2, the login credentials may only be used by the person who has registered with the Centre on goAML (see further the discussion in paragraph 8).
- 9.3. Therefore, reporting done in terms of the FIC Act cannot be outsourced to a third-party service provider.

### ***Reporting of suspicious and unusual transactions in terms of section 29 of the FIC Act***

- 9.4. Section 29 of the FIC Act does not make provision for the reporting of suspicious and unusual transactions to be performed by a party other than the "person who carries on a business or is in charge of or manages a business or who is employed by a business".

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- 9.5. A person who is required to submit a report in terms of section 29 of the FIC Act is not permitted to disclose any information regarding that report, this would include to a third-party service provider.
- 9.6. As such, section 29 of the FIC Act implicitly prohibits the outsourcing of the activity to report such transactions to the FIC.
- 9.7. A third-party service provider may assist an accountable institution in developing the parameters and indicators for purposes of identifying suspicious and unusual activity and transactions. However, they cannot form a suspicion on behalf of an accountable institution. (See Directive 5 on the Automated Transaction Monitoring System).

### ***Reporting in terms of sections 28 and 28A of the FIC Act***

- 9.8. A third-party service provider may assist an accountable institution in identifying reportable transactions. However, the accountable institution must determine if these transactions are reportable and must report to the FIC accordingly.
- 9.9. All reporting obligations that are imposed by the FIC Act must be performed by the reporter (the accountable institution) and the activity to report such transactions to the FIC may not be outsourced.

## **10. QUALITY ASSURANCE**

It would be considered good practice for accountable institutions to conduct quality assessments of third-party services at various intervals. Such quality assessments could be done through the use of an internal audit function or external auditors to ensure adequate levels of services offered by a third-party service provider.

## **11. SUPERVISION**

- 11.1 Accountable institutions may not transfer their responsibilities including, compliance recommendations and enforcement actions imposed on them by supervisory bodies in terms of section 45, 45B and 45C of the FIC Act.

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- 11.2 Accountable institutions must respond to all information requests by supervisory bodies that are exercising their duty in terms of section 45B without transferring such responsibility to a third-party service provider.
- 11.3 An accountable institution may request assistance from a third-party service provider, as detailed in this PCC, to assist in such remediation efforts stemming from supervisory actions.

## 12. CONSULTATION

- 12.1 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—

12.1.1 publish a draft of the guidance by appropriate means of publication and invite submissions; and

12.1.2 consider submissions received.

- 12.2 Commentators are invited to comment on the draft PCC12A by submitting written comments via the [online submission platform here](#). Any questions or requests relating to this draft PCC12A may be sent to the FIC only at **consult@fic.gov.za**. Submissions will be received until close of business on, **Tuesday, 11 August 2020**.

## 13. COMMUNICATION WITH THE CENTRE

- 13.1 The Centre has a dedicated compliance contact centre geared to help accountable institutions to understand their registration obligations in terms of the FIC Act. Should you have any queries please contact the compliance contact centre on 012 641 6000 and select option 1.
- 13.2 In addition, online compliance queries may be submitted by clicking on: <http://www.fic.gov.za/ContactUs/Pages/ComplianceQueries.aspx> or visit the FIC's website and submitting an online compliance query.

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