S.M. Munro - Flint
B. Proc. (UNISA), LLB. (UNISA), LLM. (UNISA)
Dip. Human Rights (UJ)
Tokiso Dispute Settlement Panellist
Member: AWI USA
Telephone: 010 442 6998
Cell No.: 082 452 4297
E-mail: shirley@MunroFlintAttorneys.co.za
Web Site: www.MunroFlintAttorneys.co.za

Date: 30 October 2024

Our Ref: Ms S Munro-Flint

Dear Sirs

NEWS LETTER: THE FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001, ("FICA"), HIGH VALUE GOODS DEALERS AND CREDIT PROVIDERS

Navigating the circuitous landscape of FICA requires a comprehensive understanding of it as well as a plethora of other legislation. I provide a high-level overview of the National Credit Act 34 of 2005, ("the NCA") as these two pivotal pieces of legislation although distinct in their scopes and objectives are closely intertwined in their application to High Value Goods Dealers, ("HVGD") and credit providers as defined in FICA. The complexity does not lie in the clarity of the laws but rather in the nuanced interplay between the laws and their practical implications for businesses in so far as it relates to complying with FICA.

This newsletter aims to alert businesses to their roles and responsibilities as HVGD and credit providers under FICA and the critical intersections with the NCA which may well mean a reexamination of the organisation's compliance strategies and requirements.

To provide a broader perspective, I looked at similar legislation from other countries. Whilst I shall not delve into all the details in this newsletter, I have provided what I thought could enrich our understanding and permit us to stay informed of global trends and benchmark our standards against international practices.

FICA

FICA is the primary framework for combating money laundering, terrorist financing, and other unlawful financial activities in South Africa. It is part of the global effort to uphold financial integrity. FICA mandates that accountable institutions, ("AI") *inter alia*; implement rigorous client

S.M. Munro - Flint
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identification, verification, and record-keeping procedures, detect, prevent, and report suspicious financial transactions. By enforcing these obligations, FICA aligns South Africa with international standards set by the Financial Action Task Force (FATF), ensuring transparency and bolstering the financial system's resilience against abuse by criminals.

THE UNITED KINGDOM

South Africa's FICA laws are most closely aligned with the United Kingdom's anti-money laundering (AML) and counter-terrorism financing (CTF) framework because some of South Africa's regulatory structures and legal traditions were influenced by British law. Our legal system, particularly in the commercial and financial sectors, has its roots in British common law. Both countries require *inter alia*; customer due diligence (CDD), suspicious activity reporting, and record-keeping. The United Kingdom is more focused on financial institutions. The thresholds for reporting also differ between the two countries. (See: *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017*, commonly known as the *Money Laundering Regulations 2017*. *Proceeds of Crime Act 2002 (POCA)* and *Sanctions and Anti-Money Laundering Act 2018).*

IRELAND

In Ireland, the laws for AML and CTF, equivalent to South Africa's FICA, are governed by the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended in 2013, 2018, and 2021)*. This Act incorporates the European Union's Anti-Money Laundering Directives (AMLD) into Irish law.

Ireland is also required to perform CDD, report suspicious transactions, have internal controls to prevent money laundering and terrorist financing and keep records.

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Ireland employs robust measures for customer identification and enhanced due diligence. Instead of South Africa's AI, they use a category called "Designated Persons." These entities are required to establish beneficial ownership, identify politically exposed persons (PEPs), and follow stringent compliance guidelines. The Central Bank of Ireland manages a central register and oversees financial institutions to ensure they meet AML/CFT obligations.

In Ireland, the Department of Justice and Equality handles policy matters related to AML/CFT, and the Financial Intelligence Unit (FIU)**,** which is part of the Irish police force (An Garda Síochána), is responsible for analyzing and investigating suspicious transaction reports.

These laws and regulations are in line with the European Union's AML Directives, which set out a consistent framework for AML/CFT across EU member states, including Ireland.

Ireland's laws make the most sense to me as there is an alignment with EU Directives that provide a standardized and comprehensive approach to AML across multiple jurisdictions. This EU alignment ensures clarity, consistency, and a well-established framework that I find logical and well-defined. Their laws have seen regular updates, keeping pace with new challenges, especially around emerging trends like virtual currencies. This adaptive nature makes the laws contemporary and relevant, focusing and aligning with modern financial risks and technologies.

The requirement to file Suspicious Transaction Reports is well-structured and guidelines clearly outline what needs to be reported, and when, making it easier for Designated Persons to comply. The Central Bank of Ireland is the primary body responsible for monitoring compliance with AML/CFT obligations, issuing guidelines, and enforcing regulations. This centralized oversight helps ensure that institutions maintain clear and consistent standards.

DEALERS IN HIGH-VALUE GOODS

S.M. Munro - Flint
B. Proc. (UNISA), LLB. (UNISA), LLM. (UNISA)
Dip. Human Rights (UJ)
Tokiso Dispute Settlement Panellist
Member: AWI USA
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Web Site: www.MunroFlintAttorneys.co.za

In Ireland, designated persons include entities such as "dealers in high-value goods", which generally refers to businesses dealing in items of significant value that could be used for money laundering. The regulations typically focus on transactions involving cash payments above a certain threshold (often €10,000 or more), triggering AML obligations like customer due diligence and reporting suspicious transactions.

HIGH-VALUE GOODS DEALERS

In South Africa, we refer to “AI”. In Schedule 1 to FICA, we have a definition of a HVGD. The definition has caused some debate as to whether the threshold is reached in one single item purchased or whether it is multiple items. I am of the view that a stronger argument can be made that it is a single item valued at R100,000 or more. There is however, more to consider.

The last part of the definition is as follows — *“any item that is valued in that business at R100,000 or more”*—does introduce a level of ambiguity, and here's why.

Ambiguity in the Phrase:

The phrase *“valued in that business”* can be interpreted in different ways:

Subjective Valuation: It could imply that the value of the item is determined by the business itself, which could vary depending on the business's pricing model, market position, or subjective criteria. This means one business might value an item at R100,000 or more, while another might not.

Objective Market Value: Alternatively, it could mean the item has an objective market value of R100,000 or more, irrespective of how the business values it.

Why It Could Be Ambiguous:

S.M. Munro - Flint
B. Proc. (UNISA), LLB. (UNISA), LLM. (UNISA)
Dip. Human Rights (UJ)
Tokiso Dispute Settlement Panellist
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Subjectivity: The wording suggests that the business has some discretion in determining what constitutes a "high-value good." This might create inconsistency, where similar items could be classified differently depending on how they are valued by different businesses.

Unclear Standards: It raises the question of whether there are clear standards or guidelines for how businesses should determine the value of the item. If not, this leaves room for interpretation, potentially complicating compliance with FICA.

A possible solution:

FICA's Objective: From a practical compliance perspective, the intention behind FICA is likely to capture any transaction where the total payment reaches R100,000 or more, regardless of how the item is valued. The law focuses on the transaction amount (R100,000), not the inherent value of the item in the broader market.

Linked Transactions: The provision about linked transactions shows that the key is monitoring large sums of money rather than quibbling over subjective valuations. This interpretation would make the phrase more straightforward—if the transaction total is R100,000 or more, the business must comply.

Conclusion:

The phrase introduces some ambiguity, especially regarding how the value of the item is determined. The ambiguity could lead to different interpretations by different businesses, which could impact how they report under FICA. However, from a practical standpoint, the focus appears to be on transactions where the total payment is R100,000 or more, and not so much on the internal valuation of the item.

This would likely prompt businesses to err on the side of caution and comply whenever the

S.M. Munro - Flint
B. Proc. (UNISA), LLB. (UNISA), LLM. (UNISA)
Dip. Human Rights (UJ)
Tokiso Dispute Settlement Panellist
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Cell No.: 082 452 4297
E-mail: shirley@MunroFlintAttorneys.co.za
Web Site: www.MunroFlintAttorneys.co.za

amount paid by a client is R100,000 or more, regardless of how they value the item themselves.

BUNDLED GOODS

This is a group or package of individual products or services that are sold together as a single unit, often at a combined price. This practice is commonly used in retail, service industries, and even digital products to encourage purchases by offering several items together at a discounted or perceived value price.

Key characteristics of bundled goods:

Combination of Items: Multiple items that are grouped and sold as one product. For example, a technology store might sell a laptop, a mouse, and a laptop bag together as a bundle.

Single Price: Instead of pricing each item separately, the bundled goods are offered at a single price. This price might be lower than what a customer would pay if they purchased each item individually.

Incentive for Customers: Bundles are often used to provide value to customers by offering discounts or added convenience. It can also be a way for businesses to promote slower-moving products by pairing them with more popular items.

Promotions and Discounts: Bundles are often promoted as special deals, where buying multiple items together results in a discount. For example, Vodacom may sell a cell phone, protective case and headphones at a reduced total price compared to buying each item separately.

Under FICA, bundled goods might refer to several items being sold together where the combined value exceeds R100,000. Upon closer analysis and considering the various Public Compliance Communications, particularly PCC 58, I believe that a stronger argument can be made that it is a

S.M. Munro - Flint
B. Proc. (UNISA), LLB. (UNISA), LLM. (UNISA)
Dip. Human Rights (UJ)
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single item valued at R100,000 or more, rather than bundled or combined goods that are sold at R100,000 or more.

What if you only sell 1 item a year valued at R100 000

The key consideration is not the frequency of transactions but rather whether the business deals in any item valued at R100,000 or more in the course of its activities. The definition applies regardless of how many such transactions occur in a given period. Whether the business sells one or multiple items annually, as long as one of those items is valued at R100,000 or more, the business must comply with FICA's registration and reporting requirements.

In summary, if the business meets the threshold of selling even a single high-value item in a year, it is obligated to register with the FIC under the HVGD classification.

CREDIT PROVIDERS

In Ireland, there isn't an exact equivalent of "Credit Provider" as defined in South Africa's Schedule 1 of FICA. However, entities with similar functions fall under the broader category of "Financial Institutions" and are subject to AML and CTF regulations under the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010*. Examples are the following:

Key entities considered similar to "credit providers" in Irish legislation include:

Banks and Building Societies: Entities providing loans, credit facilities, and other financial services.

Credit Unions: Member-owned financial cooperatives that provide credit and other financial services.

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Moneylenders: Institutions or persons lending money and charging interest outside of traditional banking frameworks.

Leasing and Hire Purchase Firms: Companies involved in leasing goods or providing hire purchase agreements.

Payment Service Providers: Entities offering services related to payment processing, including electronic money.

In South Africa, an organization could just be a credit provider or a credit provider and a HVGD, in which event there would be dual registration with the Financial Intelligence Centre. The National Credit Act 34 of 2005 (NCA) of South Africa applies broadly to the regulation of the credit industry and governs credit agreements which include transactions where payment is deferred and involves interest or fees for the credit. It applies if the company defers payment and charges interest or fees.

THE NCA

The NCA is meant to promote a fair and non-discriminatory credit market, improve transparency, and protect consumers from unfair lending practices. It also encourages responsible lending and borrowing.

Generally, the NCA applies to credit agreements between parties dealing at arm's length within South Africa.

It specifically does not apply to credit agreements between certain categories of consumers, such as:

- A juristic person (a company or close corporation for instance) with an asset value or

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B. Proc. (UNISA), LLB. (UNISA), LLM. (UNISA)
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annual turnover of all related juristic persons at the time the agreement is made, equals or exceeds the threshold value determined by the minister which is currently one million rand.

- Certain agreements with the state or an organ of state.
- Large agreements in terms of which the consumer is a juristic person whose asset value or annual turnover is at the time the agreement is made, below one million rand.

(There are other exclusions, see *sections 4,5,6 and 7 of the NCA*).

Credit providers who qualify as AI's must adhere to both the NCA for the fair and transparent provision of credit, register with the National Credit Regulator, ("NCR") and comply with FICA.

The connection between the two is that if an organization is dealing with credit as an AI, the NCA governs the consumer protection side, while FICA ensures regulatory compliance in terms of monitoring financial flows and preventing financial crime.

IN A NUTSHELL

The NCA applies to a business that offers, provides, or is involved in credit agreements. These can be a credit provider like a bank or where there is a credit agreement between the parties where payment for goods, services or money is deferred or delayed or where a charge, interest or fee is applied for the deferral of payment. A credit provider whose total principal debt exceeds the prescribed threshold, (currently zero) must register with the National Credit Regulator (NCR). However, incidental credit providers who meet specific criteria are not required to register under the NCA.

The NCR issues guidelines and circulars to clarify aspects of the NCA and ensure compliance. The

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B. Proc. (UNISA), LLB. (UNISA), LLM. (UNISA)
Dip. Human Rights (UJ)
Tokiso Dispute Settlement Panellist
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Regulations provide detailed requirements on matters such as the calculation of interest and fees, consumer credit information, and the registration requirements for credit providers. FICA Guidance Note 7 and PCC 05 are also applicable if the credit provider is an AI.

ITEM 11 IN SCHEDULE 1 TO FICA

I quote;

"*(a) A person who carries on the business of a credit provider as defined in the National Credit Act, 2005 (Act 34 of 2005).*

(b) A person who carries on the business of providing credit in terms of any credit agreement that is excluded from the application of the National Credit Act, 2005 by virtue of Section 4 (1)(a) or (b) of that Act."

FICA APPLIES IN TWO SCENARIOS

Item 11 in Schedule 1 to FICA identifies two types of entities that qualify as AIs. Here is a breakdown of each part:

A person who carries on the business of a credit provider as defined in the NCA. A credit provider in the NCA is defined as a credit agreement and to;

"(a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement;

(b) the party who advances money or credit under a pawn transaction;

(c) the party who extends credit under a credit facility;

(d) the mortgagee under a mortgage agreement;

(e) the lender under a secured loan;

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(f) *the lessor under a lease;*

(g) *the party to whom an assurance or promise is made under a credit guarantee;*

(h) *the party who advances money or credit to another under any other credit agreement; or*

(i) *any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into;*

(b) *A person who carries on the business of providing credit in terms of any credit agreement that is excluded from the application of the NCA by virtue of section 4 (1) (a) or (b) of that Act".*

In essence:

- **Part (a)** refers to credit providers regulated by the NCA.
- **Part (b)** applies to credit providers who operate outside the scope of the NCA. I refer you to page 8.

These institutions must comply with FICA because credit transactions could be exploited for money laundering or terrorist financing.

Let's say you sell a manufactured piece of equipment for R15,000, and you enter into a credit agreement with the buyer whereby the buyer is permitted to pay it off over three months. Normally, this type of credit agreement would be regulated under the NCA. If so, in terms of section 40 of the NCA you will need to register with the NCR. You will also need to comply with FICA.

Item 11(b) refers to situations where the NCA does not apply.

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- If the buyer is a large company (like a retailer with a very high turnover or assets, (one million rand)), then the NCA may not apply to you, even though you are still providing credit.
- Or, if the agreement involved a very large amount of money (much larger than R15,000), where the buyer has a lower turnover or assets, (less than one million rand) there could also be an exclusion from the NCA for the seller.

In both cases, **even though the NCA does not apply to the seller, FICA still applies**, meaning you must register with the Financial Intelligence Centre and comply.

So, item 11(b) is about organisations providing credit to large companies or for very large amounts, where the NCA does not cover them, but they still have FICA obligations.

We trust that the above is of assistance to you.

Yours faithfully

Shirley Munro-Flint