



# **financial intelligence centre**

## **REPUBLIC OF SOUTH AFRICA**

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### **PUBLIC COMPLIANCE COMMUNICATION No. 28 (PCC 28) – TERRORIST PROPERTY REPORTING OBLIGATIONS FOR ACCOUNTABLE INSTITUTIONS**

The Financial Intelligence Centre (the Centre) provides the guidance contained in this Public Compliance Communication (PCC) in terms of its statutory function under section 4(c) of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) (the FIC Act) read together with regulation 28 of the Money Laundering and Terrorist Financing Control Regulations (the Regulations) issued in terms of the FIC Act.

Section 4(c) of the FIC Act empowers the Centre to provide guidance in relation to a number of matters concerning compliance with the obligations of the FIC Act.

Guidance provided by the Centre is the only form of guidance formally recognised in terms of the FIC Act and the Regulations issued under the FIC Act.

#### **PCC Summary**

Accountable institutions have terrorist financing reporting obligations which are contained in section 28A and section 29 of the FIC Act. There are fundamental differences between the two sections which are detailed in this PCC.

Sections 28A and section 29 of the FIC Act together with the relevant Regulations are attached as part of the Appendix for ease of reference.

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## **Objective**

**The objective of this PCC is to provide clarity to accountable institutions on their terrorist financing reporting obligations as contained in section 28A and section 29 of the FIC Act.**

### **Part A – Section 28A and Section 29 reporting obligations**

#### **1. Introduction**

- 1.1 Accountable institutions have terrorist financing reporting obligations which are contained in section 28A and section 29 of the FIC Act. In deciding whether to file a terrorist financing report in terms of section 28A or a suspicious transaction report in terms of section 29 of the FIC Act, it is necessary to understand the fundamental differences between the reporting obligations contained in both these sections.

#### **2. The reporting obligation created by section 28A of the FIC Act**

- 2.1 Section 28A requires an accountable institution, listed in Schedule 1 to the FIC Act, to file a report with the Centre if the accountable institution knows that it possesses or controls property linked to terrorism or to entities that are sanctioned pursuant to the provisions of the Protection of Constitutional Democracy against Terrorism and

Related Activities Act, 2004 (Act 33 of 2004) (the POCDATARA Act). The knowledge about the origin and ownership of the property in question is based on fact and should be acquired with reference to an objective set of circumstances or facts (as opposed to a suspicion that is formed subjectively).

2.2 Section 28A(1)(a) of the FIC Act states the following:

- (1) *An accountable institution which has in its possession or under its control property owned or controlled by or on behalf of, or at the direction of –*
- (a) *any entity which has committed, or attempted to commit, or facilitated the commission of a specified offence as defined in the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004; or*
  - (b) *...*
- must within the prescribed period report that fact and the prescribed particulars to the Centre.*

2.3 An accountable institution that files a report in terms of section 28A(1)(a) of the FIC Act knows that it is in possession of, or controls property linked to a specified offence as defined in the POCDATARA Act.

2.4 Section 28A(1)(b) of the FIC Act states the following:

- (1) *An accountable institution which has in its possession or under its control property owned or controlled by or on behalf of, or at the direction of –*
- (a) *...*
  - (b) *a specific entity identified in a notice issued by the President, under section 25 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004,*
- must within the prescribed period report that fact and the prescribed particulars to the Centre.*

- 2.5 Section 25 of the POCDATARA Act states that the President must issue a proclamation in respect of any entity that has been designated by the United Nations Security Council (the UNSC) in a resolution issued in order to combat or prevent terrorist and related activities.
- 2.6 The abovementioned conditions are met in respect of the sanction lists issued pursuant to the United Nations Security Council Resolution (UNSCR) 1267 (1999) and its successor resolutions, in particular, 1988(2011) and 1989(2011) in that these are the only resolutions that have been issued by the UNSC for the express purpose of combating or preventing terrorist and related activities.
- 2.7 The individuals and entities whose names appear on these listings are limited to those that are members of, or associated with the Taliban and Al Qaida. These two UNSC Resolutions are the only sanctions lists related to terrorist activities which are legally recognised within the Republic of South Africa and can be accessed on the United Nations website.
- 2.8 Section 4 of the POCDATARA Act expressly prohibits any person from dealing with property that is associated with acts of terrorism, with persons or organisations that carry out acts of terrorism or with entities that are sanctioned pursuant to the POCDATARA Act. Consequently any dealings with property that is identified in a report under section 28A of the FIC Act will constitute a contravention of section 4 of the POCDATARA Act. In effect, once an institution files a report in terms of section 28A of the FIC Act, this will lead to a requirement to freeze the property and cease to conduct business with the entity in question.
- 2.9 The processes for dealing with such instances, the filing of the report with the Centre and the subsequent freezing of the relevant property should be contained in the accountable institution's internal rules.
- 2.10 Information to be reported concerning property associated with terrorist and related activities is found in Regulation 22A of the Regulations.

### 3. Distinction between reporting obligations in terms of section 28A and section 29 of the FIC Act

3.1 The obligation to report suspicious and unusual transactions in terms of section 29 of the FIC Act applies to a very wide category of persons and businesses. The FIC Act imposes this obligation on any person who:

- carries on a business,
- is in charge of a business,
- manages a business, or
- is employed by a business.

3.2 Section 29(1)(b)(v) of the FIC Act states that:

(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 ought reasonably to have known or suspected that –*

(a) ...

(b) *a transaction or series of transactions to which the business is a party -*

(i) ...

(ii) ...

(iii) ...

(iv) ...

(v) *relates to an offence relating to the financing of terrorist and related activities; or*

(c) *the business has been used or is about to be used in any way for money laundering purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities,*

*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.*

3.3 It is important to note that section 29 of the FIC Act is not only applicable to accountable institutions as it refers to “any person”. A report made in terms of section 29, if made in the prescribed manner, is a valid defence to charges brought in terms of section 4 of the POCDATARA Act, which deals with offences associated

or connected with the financing of specified offences. This defence is contained in section 17(6)(b) of the POCDATARA Act.

3.4 No such defence is offered to an accountable institution that files a terrorist property report in terms of section 28A of the FIC Act, due to the fact that a report made in terms of section 28A is based on fact and the institution knows that the property in question is connected to terrorism. However, when an entity files a suspicious or unusual transaction report in terms of section 29 of the FIC Act (based on subjective considerations) the institution may continue with the transaction in question (by virtue of section 33 of the FIC Act) unless directed otherwise by the Centre.

#### **4. Summarising differences between section 28A and section 29 of the FIC Act**

4.1 The state of mind that is necessary to create a reporting obligation in terms of section 29 of the FIC Act is subjective and merely one of suspicion. A report filed in terms of section 28A of the FIC Act is based on the knowledge of an accountable institution and that it has property related to the financing of terrorism in its possession or under its control.

4.2 Section 29 of the FIC Act applies to “any person” whereas section 28A of the FIC Act is only applicable to accountable institutions listed in Schedule 1 to the FIC Act.

4.3 Section 28A applies to a purely factual situation. The fact that an accountable institution has certain property in its possession or under its control is sufficient to prompt a report and no activity relating to that property is required to trigger the reporting obligation. Conversely, section 29 applies where a particular activity or behaviour appears suspicious or unusual.

4.4 When filing a report with the Centre in terms of section 28A of the FIC Act it is an offence (by virtue of section 4 of the POCDATARA Act) to continue dealing with that property in any way, whereas if a person files a report with the Centre in terms of section 29 of the FIC Act they may elect to continue with the transaction as provided for in section 33 of the FIC Act. The defence contained in section 17(6)(b) of the POCDATARA Act can be applied.

## **5. Reporting in terms of section 28A and section 29 in respect of the same entity**

- 5.1 In many instances accountable institutions have been known to complete reports under section 28A and section 29 of the FIC Act. A report made in terms of section 29 of the FIC Act would refer to a particular transaction which is found to be suspicious or unusual in nature, while a report in terms of section 28A of the FIC Act relates to property which is under an accountable institution's control, and is known to be connected to the financing of terrorist activities.

*Example: In the event of an Al Qaida member attempting to withdraw money to purchase a motor vehicle from a dealership, the transaction may not be suspicious for purposes of section 29 of the FIC Act, but the institution would need to report that they are in control of the assets of a person on the UNSC 1267 list (in terms of section 28A of the FIC Act).*

## **Part B – Monitoring and Risk Based Approach**

### **6. Section 28A failure**

- 6.1 The FIC Act and its Regulations do not require an accountable institution to determine whether it controls relevant property. It furthermore does not compel an accountable institution to investigate or search for links with terrorist property or names of suspected terrorists in its client database.
- 6.2 It should, however, be noted that an accountable institution that does not have such measures in place could be found guilty of an offence associated or connected with the financing of specified offences in terms of section 4 of the POCDATARA Act.
- 6.3 The failure to file a report in terms of section 28A also constitutes an offence in terms of section 51A of the FIC Act.

### **7. Applying a Risk Based Approach to Client On-Boarding and Databases**

- 7.1 As stated previously, there is no legal obligation imposed upon accountable institutions to screen their clients or prospective clients for the presence of terrorists or property connected to the financing of terrorist acts. If a person is, however, found to have conducted business with a terrorist or dealt with property connected in any

way to the financing of terrorism, they may be charged with contravention of section 4 of the POCDATARA Act.

- 7.2 As the “third party” terrorist financing offences contained in section 4 of the POCDATARA Act utilise the terminology “knows or ought reasonably to have known”, a person who is charged criminally under this section will be called upon to prove that their actions were reasonable under the circumstances. From this perspective it is important that institutions apply their minds to the terrorist financing risks inherent to their business activities. The manner in which terrorist financing risks are managed should be determined with reference to an institution’s business model, products, services and the nature of its client database.
- 7.3 Taking into account its terrorist financing risk profile, an institution may decide upon a permutation of the following measures to counter the financing of terrorism (or may decide that no measures are necessary at all):
- Automated screening of client databases at client take-on in real time;
  - Periodic screening of existing client databases to detect potential changes in status;
  - Screening of cross border payments (Financial Institutions).
- 7.4 It is important for institutions to note that the effectiveness of screening processes is highly dependent upon an efficient client identification and verification program. The counter financing of terrorism measures implemented to counter the perceived risk of the business being abused to promote the activities of terrorist organisations should always be detailed in the accountable institution’s internal rules.
- 7.5 It is recommended that those sectors that have been identified by competent authorities as being widely used for the financing of terrorist activities should utilise sophisticated detection tools and enhanced monitoring techniques to safeguard their institutions against abuse. This may include the limiting of business activities to those persons and countries that are subject to appropriate levels of regulation.

## **8. Conclusion**

- 8.1 Accountable institutions have terrorist financing reporting obligations which are contained in section 28A and section 29 of the FIC Act. There are fundamental differences between the two as described above.
- 8.2 Section 28A and section 29 of the FIC Act together with the relevant Regulations are attached as part of the Appendix for ease of reference.

For any further enquiries regarding this Public Compliance Communication No. 28, please contact the Centre on 0860 222 200, or by sending an email to: [fic\\_feedback@fic.gov.za](mailto:fic_feedback@fic.gov.za).

### **Issued by:**

**The Director  
Financial Intelligence Centre  
27 March 2014**

## **Appendix**

### **Section 28A of the FIC Act - Property associated with terrorist and related activities**

- (1) An accountable institution which has in its possession or under its control property owned or controlled by or on behalf of, or at the direction of—
  - (a) any entity which has committed, or attempted to commit, or facilitated the commission of a specified offence as defined in the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004; or
  - (b) a specific entity identified in a notice issued by the President, under section 25 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004,must within the prescribed period report that fact and the prescribed particulars to the Centre.
  
- (2) The Director may direct an accountable institution which has made a report under subsection (1) to report—
  - (a) at such intervals as may be determined in the direction, that it is still in possession or control of the property in respect of which the report under subsection (1) had been made; and
  - (b) any change in the circumstances concerning the accountable institution's possession or control of that property.

### **Section 29 of the FIC Act - Suspicious and unusual transactions**

- (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 ought reasonably to have known or suspected that—
  - (a) the business has received or is about to receive the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related 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 or property which is connected to an offence relating to the financing of terrorist and related 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
    - (v) relates to an offence relating to the financing of terrorist and related activities; or
  - (c) the business has been used or is about to be used in any way for money laundering purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities, 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.

#### **Regulation 22 - manner of reporting**

- (1) Subject to subregulation (2), a report made under Part 3 of Chapter 3 of the Act must be made in accordance with the format specified by the Centre, and sent to the Centre electronically by means of—
- (a) the internet-based reporting portal provided by the Centre for this purpose at the following internet address: <http://www.fic.gov.za>; or
  - (b) a method developed by the Centre for this purpose and made available to a person wishing to make such reports.
- (2) If a person wishing to make a report under Part 3 of Chapter 3 of the Act—
- (a) does not have the technical capability to make a report in accordance with subregulation (1); or
  - (b) is for another reason indefinitely unable to make a report in accordance with subregulation (1),
- that person shall make the report on a form specified by the Centre from time to time for this purpose and provide it to the Centre at the contact particulars specified by the Centre from time to time for this purpose.

## **Regulation 22A - Information to be reported concerning property associated with terrorist and related activities**

- (1) When an accountable institution makes a report concerning property associated with terrorist and related activities under section 28A of the Act, the report must contain full particulars in respect of the accountable institution making the report, of—
  - (a) the name of the accountable institution;
  - (b) the identifying particulars of the accountable institution for example an identity number, registration number or practise number;
  - (c) the address of the accountable institution;
  - (d) the type of business or economic sector of the accountable institution;
  - (e) the surname and initials of a contact person; and
  - (f) the contact particulars of a contact person.
  
- (2) In respect of the property concerning which a report under section 28A is made, the report must contain as much information as is readily available of—
  - (a) a description of the type of property;
  - (b) any identifying particulars concerning the property for example registration particulars, unique numbers or other particulars;
  - (d) the estimated value of the property; and
  - (e) the physical address where the property is located.
  
- (3) In respect of a person or entity exercising control over the property on behalf of the accountable institution making the report, the report must contain full particulars of—
  - (a) the name of the person or entity;
  - (b) the identifying particulars of the person or entity for example an identity number or registration number;
  - (c) the physical address of the person or entity;
  - (d) in the case of a natural person, the person's contact particulars; and
  - (e) in the case of a legal person or an entity, the surname, initials and contact particulars of a contact person.

- (4) In respect of every person who, according to the knowledge of the accountable institution making the report, may have an interest in the property, the report must contain as much information as is readily available of—
- (a) in the case of a natural person, full particulars of—
    - (i) the person's names and surname, or initials and surname, if the person's full names are not available;
    - (ii) the person's identifying number;
    - (iii) the type of identifying document from which the particulars referred to in subparagraphs (i) and (ii) were obtained;
    - (iv) the person's address in the Republic;
    - (v) the person's country of residence;
    - (vi) if the person's country of residence is other than the Republic, the person's address in the country of residence;
    - (vii) the person's contact telephone number;
    - (viii) the person's occupation; and
    - (ix) the source of the funds with which the person acquired the interest in the property; and
  - (b) in the case of a legal person or other entity, full particulars of—
    - (i) the person's or entity's name;
    - (ii) the person's or entity's identifying number, if it has such a number;
    - (iii) the person's or entity's address in the Republic;
    - (iv) the type of business conducted by the person or entity;
    - (v) the person's or entity's country of origin;
    - (vi) if the country of origin is other than the Republic, the person or entity's address in the country of origin; and
    - (vii) the source of the funds with which the person acquired the interest in the property.
- (5) A report under section 28A of the Act must contain a description of the grounds on which the accountable institution making the report has reached the conclusion that the entity which owns or controls the property in question, or on whose behalf, or at whose direction, the property in question is owned

or controlled, is an entity referred to in subsection (1)(a) or (b) of section 28A of the Act.

[Regulation 22A inserted by GN R456 of 20 May 2005.]