

**FICA AND THE ESTATE AGENCY
BUSINESS
AN INTRODUCTORY GUIDE**

30 JULY 2003

Presented by Meumann White Attorneys

Financial Intelligence Centre Act Estate Agents and the Act

What is it?

The Financial Intelligence Centre Act (FICA) is part of a worldwide legislative network that seeks to combat money laundering. "Money Laundering" is the process of manipulating the proceeds of crime (usually cash) in order to conceal the nature of its true source. Money that started out "dirty" will end up "clean". More often than not the funds will be moved through a series of financial transactions that leave a paper trail so long it becomes impossible to trace its source. The crime cartels take advantage of loopholes in the commercial world, such as juristic personality, to achieve this. In essence money laundering is a series of legal transactions that when viewed together form part of and achieve an illegal objective. Money Laundering as such only became a crime in this country about 10 years ago. South Africa gained a rather unpleasant reputation as a haven for illegal money as our banking controls were not as strict as those in Europe or the Americas.

FICA closes many of the loopholes by laying down procedures and obligations on those citizens who work in professions and organisations that have been identified as susceptible to abuse.

Why Estate Agencies?

One of the methods used to "clean" dirty money is to change its nature e.g. by purchasing immovable property and then selling it.

What needs to be done?

The requirements of FICA can be roughly divided into four general areas:

- (1) Establishment and verification of clients' identities (pgs 2 – 6);**
- (2) Recording all transactions made with clients(pg 6);**
- (3) Record Keeping (pgs 6 – 7);**
- (4) Reporting of transactions (pgs 7 – 11).**

The above four requirements will be analysed in the context of the business of conducting an estate agency.

1. Verification of clients' identities (S21).

The regulations appended to FICA set out exactly what information is required to ensure compliance. We have comprehensive information sheets that can be handed to agents, office administrators and clients which set out exactly what information is required from the client.

Please note that a great deal of information has to be gathered which will naturally take time. It is thus essential that the estate agency implement

effective and **efficient** procedures to ensure that there are no undue delays in the process.

When does all of this have to be done?

S21 (1) FICA, which provides:

S21 **Identification of clients and other persons.** — (1) *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—*

- (a) *to establish and verify the identity of the client;*
- (b) *if the client is acting on behalf of another person, to establish and verify—*
 - (i) *the identity of that other person; and*
 - (ii) *the client's authority to establish the business relationship or to conclude the single transaction on behalf of that other person; and*
- (c) *if another person is acting on behalf of the client, to establish and verify—*
 - (i) *the identity of that other person; and*
 - (ii) *that other person's authority to act on behalf of the client.*

It is important to define the key terms "business relationship", "single transaction" and "client" within the context of FICA.

In the definitions section of FICA they are defined as:

Business relationship - an arrangement between a client and an accountable institution for the purpose of concluding transactions on a regular basis.

Single Transaction - a transaction other than a transaction concluded in the course of a business relationship.

Who is the Client?

Reference is made throughout FICA to "clients". It stands to reason that a person who could be described as a "client" would differ in each accountable institution.

The Estate Agents Code of Conduct¹ defines a "client" as:

"a person who has given an estate agent a mandate"

The ordinary use of the word "mandate" is in the context of a mandate to sell. For the purposes of this note a client, in the Estate Agency context, will be defined as:

The party liable to pay commission to the Estate Agent for services rendered.

This is a rough definition, which takes into account only the ordinary course of business.

¹ CODE OF CONDUCT – GN R3415/1992

At this juncture a distinction should be drawn between the two different types of work carried out by Estate Agencies namely sales and letting.

A. Sales

The acceptance of and work related to the fulfilment of a mandate is a single transaction within the meaning of FICA.

According to the Best Practice Guidelines for Estate Agents², the mandate is fulfilled on conclusion of the sale agreement. This is when the commission accrues to the agent not when it is actually paid over. At the present time the verification has to be completed on or before the signing of an agreement of sale³.

In essence the procedure is as follows:

- (1) Granting of Mandate** – Establish Identity of client.
- (2) Conclusion of Sale Agreement** - ie when Agreement signed and suspensive conditions fulfilled – the particulars in (1) have to be verified ie. checked against available documentation to ensure that they are correct.

What if the Property is sold before the Particulars have been verified?

On a strict construction of FICA the agreement cannot be concluded. This would make the whole system unworkable and it is our opinion that it was not the intention of the legislature to sink deals that would have otherwise proceeded without delay.

Practical Hints

- ❖ **Get as much information as possible at the mandate stage and inform the client as to what documentation is required. It should be made clear to the client that failure to provide the requested information could lead to delays.**

The agent concerned should be able to establish the identity of the client without too much trouble. It is the verification documents that may take some time.

- ❖ **If the client cannot provide you with the required documentation make a note on the FICA form that it was requested but not supplied.**

The information could then be verified at a later stage by the Conveyancers who will then relay the information back to the agents for their records.

Example:

Sale of Trust Property. Much of the information required is contained in the Trust Deed. The Agent must **establish** the basic details of the Trust, name, address,

² Prepared by the Estate Agency Affairs Board, 30th June 2003

³ The EAAB is at present negotiating with FICA to have it extended to seven days after conclusion of the agreement.

trustees, beneficiaries. The **verification** could be attended to by the Conveyancers should the client not be able to supply the Trust Documents at the time of the conclusion of the sale. Copies of the relevant documents would be then sent to the agents for their files.

Unfortunately the establishment and verification of client identity cannot be delegated wholly to the Conveyancers. However, they will have access to information resources that can assist the agent in complying with his obligations under FICA.

Whose information must be recorded?

S21 requires verification of the identity of "the Client", using the earlier definition it is the agent concerned or his compliance officer that have to ascertain who would be responsible for paying the commission should the mandate be fulfilled. It is that party's details that will have to be recorded. Please note that the details of a person acting on behalf of a client also have to be recorded. A common example of this would be a property owning CC duly represented by a member. If a client is acting on behalf of another party then that other party's details have to be recorded and verified. An example of this could be, using our earlier definition of "client", where a person agrees to pay the commission on a sale of a property owned by another person. The details of that owner would have to be recorded and verified.

B. Letting

Letting can either be a "business relationship" or a "single transaction" as defined by FICA. It best illustrated by example.

Example 1:

A landlord instructs an agent to find a tenant for his property. All that is required of the agent is that they find the tenant and conclude a lease agreement. The landlord himself will then administer the property, collect rentals etc.

This is a **single transaction** for the purposes of FICA and the same requirements apply as for sales.

Example 2:

The landlord instructs an agent to not only find a tenant for his property but also to administer the lease on his behalf. This is a "business relationship" for the purposes of FICA and requires that existing clients ie clients who were with the agency before 30 June 2003 have to have their identity established and verified. The requirements of s21 will have to be complied with *prior* to signing the mandate which will establishes a "business relationship" between the parties. Please see above for what information is required.

Existing Clients

S21 (2) lays down the same requirements for compliance in respect of existing clients. In the sales context what was said in respect of S21 (1) still applies. NB it will only apply to deals concluded after 30 June 2003. In the letting context there are further conditions. S21 (2)(d) requires that the accountable institution

take the "prescribed steps" to "trace all accounts at the accountable institution that are involved in transactions concluded in the course of that business relationship". "Transaction" means, in terms of the FICA definitions, "a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution".

S21 COMPLIANCE IS MANDATORY FROM 30 JUNE 2003.

2. Records of all business relationships and transactions made with clients – S22 FICA

S22 provides that records must be kept of all business relationships and transactions concluded with clients. Aside from the verification of identity requirements of s21 the Estate Agency must also keep a record of:

- (1) The manner in which the identity was established;
- (2) The name of the person who gathered the information;
- (3) The nature of the business relationship or transaction;
- (4) The parties to the transaction;
- (5) Details of accounts involved in the conclusion of the single transaction or used in the course of the business relationship;
- (6) Copies of all documents used to verify the identity of a client in compliance with S21.

1. Record keeping

Records may be kept in electronic format. FICA imposes a positive duty on the Estate Agency to ensure that internal measures are implemented to facilitate the gathering and storage of the required information. The Financial Intelligence Centre will only be allowed access to the records by means of a court order. There does not appear to be anything in the Act, which precludes an Estate Agency from storing the information required by FICA separately from its ordinary client files. These records could be stored in a different cabinet or in a different folder on a computer database. What is of paramount importance is that they can be easily retrieved.

How long do the records have to be retained?

Business relationship – **5 years** from the date on which the business relationship terminates.

Transaction – **5 years** from the date on which the transaction is concluded.

S24 provides for third parties to keep the records on behalf of the Estate Agency. However, should the third party not comply with the requirements of s22 liability (and by this is meant criminal liability) will attach to the Estate Agency who handed over the records for storage. In the event that files are sent "for storage" at an information storage facility great care must be taken to ensure that they are not destroyed prematurely. If a third party is put in charge of the documents

then the Estate Agency must furnish the Centre with the prescribed particulars of that party.

2. Reporting of transactions.

There are two types of reporting duties:

- (1) Automatic Reporting Duties;
- (2) Reporting of suspicious or unusual transactions.

Automatic Reporting

Transactions that require automatic reporting are:

- S28 Cash Transactions over the prescribed limit (this report is made to the Centre)
- S30 Conveyance of Cash to or from Republic in excess of the prescribed amount. The person intending to convey the cash must report the prescribed particulars concerning the conveyance to the person authorised by the Minister of Finance for this purpose. They will in turn send a copy to the Centre.
- S31 Electronic transfers of money to or from Republic in excess of the prescribed amount. This must be reported within the prescribed period to the Centre.

The Minister of Finance has not yet published Regulations to give effect to ss28, 30 and 31. Though they are inoperative at this stage Estate Agencies should be aware of them.

Suspicious and unusual transactions.

The relevant section of FICA is S29 deals with the reporting of suspicious and unusual transactions.

*29. **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 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.*

Meaning of "Suspicious and Unusual"

The mere fact that a transaction is unusual does not automatically make it "suspicious" and thus impose a duty on the person concerned to make a report to the Centre. When trying to establish if a transaction is "suspicious" within the meaning of FICA the individual facts of the situation must be objectively assessed. There must be sufficient reasonable grounds/facts for the suspicion.

Who is under a duty to report?

In a nutshell, everyone who is employed by, manages or owns a business is under a duty to make a report if he or she feels that a report to the Centre is warranted.

What types of transactions are they talking about?

FICA does not make a distinction between clients and non-clients in terms of the s29 duty to report. If there are grounds for suspecting the purchaser's motives then the agency will be bound to make a report on them.

S29 (1)(a) – (c) set out the types of transactions and situations that would cause a reasonable person to become suspicious and could give rise to the duty to make a report on that transaction. Obviously, if it is clear to the person concerned that the transaction is overtly unlawful i.e. for the purpose of evading tax the duty to report will arise. One must always bear in mind this crucial distinction in regards to tax:

tax **evasion** – not paying tax when you are legally obliged to do so. This is a crime and a transaction of this nature would have to be reported.

tax **avoidance** – efficient legal planning to minimise the amount of tax to be paid on a transaction. That is not a crime.

If a person is not sure whether a transaction is illegal, for whatever reason, then legal advice must be sought.

Some examples of transactions that should be reported:

- The purchase price is to be paid into a foreign bank account (exchange control violation – tax evasion);
- The purchase price is being paid in cash and there doesn't seem to be any legitimate explanation as to where the money originated;
- Over valuation of a property as at 1 October 2001 for the purposes of evading Capital Gains Tax;
- Unrealistically splitting a purchase price between moveable and immovable property;
- Sale of a business where one set of books is presented to the Receiver and another, which reflects what the business is actually worth;
- A purchaser's job does not match the type of property purchased;

- A large amount of money is deposited in the Agency Trust account on the pretext of future investment in property and is withdrawn shortly thereafter due to a “change of heart”;
- Purchase price is paid by an unidentified third party;
- The name of the purchaser is changed just before the transaction is concluded;
- Purchaser concludes deal without inspecting premises physically or on the internet;
- Purchaser insists that property be registered in the name of a third party unrelated to him or her.

The above list is not exhaustive. In essence it requires that every deal done by the agency must be assessed, bearing in mind that not every unusual deal is a suspicious one.

When does the report have to be made?

Within 15 days of the suspicion arising. This does not include weekends or public holidays. The transaction may continue after the report has been made (s33 FICA) unless the Centre directs otherwise.

The report may be made after the transaction has been concluded S29 (2). This covers the situation where new facts arise and cast suspicion over what was originally perceived to be a legitimate deal.

Secrecy

Because FICA is directly related to criminal investigations the person making the report is not allowed to inform the person whom he or she has reported about the report or any other person (s29 (3) FICA). This extends to those persons who know that a report has been made but were not responsible for making the report (s29 (4)). To do so is an offence under FICA and the penalties are stiff. Owners and Managers of agencies must ensure that adequate training is given to their agents and admin staff members to maintain this secrecy.

Making the Report

The report is to be made in on a standard form electronically via the website (www.fic.gov.za). Should the person wishing to make the report not have the technical expertise or resources to use the online system then the report can be made in hard copy and faxed or hand delivered to the Centre.

The status of the deal

The making of a report does not affect the deal. The agency can continue with the transaction as normal. The purpose of this information gathering is to build up a profile of the suspected money laundering. It could be a substantial amount of time (years even) before any action is taken if at all. Principals must not fall into the trap of thinking that because a report is made on the Monday their client will be arrested on the Friday!

Compliance with FICA

S42 FICA requires that the business draw up Internal Rules covering all aspects of compliance with FICA.

The Internal Rules must comply with the prescribed requirements (see below) and a copy has to be made available to all employees.

S43 provides that the Estate Agency must:

- 1. Provide training to all employees on the Internal Rules and FICA;**
- 2. Appoint a Compliance Officer to ensure compliance with the internal rules and FICA by both the institution and the employees.**

Regulations 25, 26 and 27 set out FICA's requirements in respect of Internal Rules to be implemented regarding:

- 1. Establishment and verification of Identities;**
- 2. Keeping of Records;**
- 3. Reporting of Information.**

In essence what is required is:

- Clear processes and working methods to ensure compliance;
- Responsibility of management to ensure that there is compliance;
- Appointment of employees to carry out FICA's requirements;
- Provide for disciplinary steps to be taken should employees fail to comply with the internal rules, the regulations and FICA. What is envisaged here is that the Employees Code of Conduct be amended to make provision for FICA Compliance;
- Provide training to its employees in order for them to be familiar with FICA and its requirements.

Exemptions

Estate Agents are specifically exempted from compliance with s21 (identification of Clients), s22 (keeping of records) in relation to:

Collecting or receiving—

- (a) money payable by any person to or on behalf of a developer or a body corporate in terms of the Sectional Titles Act, in respect of a unit or proposed unit;

- (b) money on behalf of a share block company payable by the holder of a share in such company or his nominee;
- (c) money in consideration of a promise or an undertaking by the person receiving such money or his agent or nominee to the person paying such money his agent or nominee to make available to such person, his agent or nominee, information or details of immovable property, any interest in immovable property or any business undertaking with a view to bringing potential buyers, sellers, lessors, lessees or occupiers thereof into contact with one another.

NB. This does not relieve the estate agent of its reporting duties under s29 and only applies to this specific function.

General Exemptions

Regulation 5

The accountable institution will be exempt from compliance with s21 in respect of verification only if:

- The client is situated in a country that has similar anti-money laundering legislation. Attached is a list of all countries that meet the requirements of the Financial Action Task Force, the international organisation that oversees *inter alia* anti-money laundering measures.
- A person or institution in that country has identified the client and verifies the particulars of the client in question in writing.
- The aforesaid person undertakes to forward all documents obtained in the course of that verification.

NB. This does not relieve the accountable institution of its obligations to establish the identity of the client. It merely lessens the burden of having to verify the particulars of a client that is overseas.

The regulations do not state who could perform this function. It is suggested that only an attorney, banking institution or a similar corporate entity would be able to meet the requirements of FICA.

Regulation 6(1)

In the case of a company which is listed either on the JSE or an approved stock exchange. The establishment and verification requirements **do not** have to be complied with.

Regulation 6(2)

There is a general exemption regarding the income tax and VAT details required under FICA. These are not required at this stage.

Conclusion

Though the requirements of FICA may be onerous it is here to stay. Effective risk management depends on the efficient and effective gathering of information in the shortest time possible.

Meumann White has committed itself to keeping up to date with the latest developments regarding FICA. These notes have been compiled on the strength of information available at the present time. Further guidelines will be issued by the Financial Intelligence Centre in the future and there may be a possibility that FICA itself may be amended. **Please check back regularly with us to make sure that you have the most current edition of these notes.**

Financial Action Task Force Members⁴

Argentina

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Russia

Singapore

South Africa

Spain

⁴ Source – FATF website - <http://www1.oecd.org/fatf/index.htm>. This list comprises all the countries that have sufficient money-laundering controls that satisfy the requirements of FATF. This relates not only to the controls but also to effective implementation of those controls. South Africa was recently admitted to FATF.

Sweden
Switzerland
Turkey
United Kingdom
United States

Bibliography

Best Practice Guide for Estate Agents

Estate Agency Affairs Board
30 June 2003

Financial Intelligence Centre Act

Law Society of South Africa - Centre for
Continuing Legal Education
Marelise van der Westhuizen – Denys Reitz

April 2003

Financial Intelligence Centre Act 38 of 2001

www.fic.org.za

Financial Intelligence Centre website

www.eaab.org.za

Estate Agency Affairs Board Website

LIST OF ACCOUNTABLE INSTITUTIONS

1. An attorney as defined in the Attorneys Act, 1979 (Act No. 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 No. 57 of 1988).
3. An estate agent as defined in the Estate Agents Act, 1976 (Act No. 112 of 1976).
4. A financial instrument trader as defined in the Financial Markets Control Act, 1989 (Act No. 55 of 1989).
5. A management company registered in terms of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981).
6. A person who carries on the "business of a bank" as defined in the Banks Act, 1990 (Act No. 94 of 1990).
7. A mutual bank as defined in the Mutual Banks Act, 1993 (Act No. 124 of 1993).
8. A person who carries on a "long-term insurance business" as defined in the Long-Term Insurance Act, 1998 (Act No. 52 of 1998), including an insurance broker and an agent of an insurer.
9. A person who carries on a business in respect of which a gambling licence is required to be issued by 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 rendering investment advice or investment broking services, including a public accountant as defined in the Public Accountants and Auditors Act, 1991 (Act No. 80 of 1991), who carries on such a business.
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 No. 124 of 1998).
15. A member of a stock exchange licensed under the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985).
16. The Ithala Development Finance Corporation Limited.
17. A person who has been approved or who falls within a category of persons approved by the Registrar of Stock Exchanges in terms of section 4 (1) (a) of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985).

18. A person who has been approved or who falls within a category of persons approved by the Registrar of Financial Markets in terms of the Financial Markets Control Act.19.
19. A person who carries on the business of a money remitter.