

Cash threshold reporting to the Financial Intelligence Centre

The Financial Intelligence Centre (the FIC) was established in terms of the Financial Intelligence Centre Act 38 of 2001 (FICA). The FIC is South Africa's financial intelligence unit, which is a government agency created to collect, analyse and interpret information disclosed to and obtained by it.

South Africa criminalises activities that constitute money laundering. Money laundering refers to the concealment of the nature of proceeds of criminal activities. Proceeds of criminal activities are referred to as 'dirty money'. This dirty money is, therefore, taken through a process of cleaning (laundering) by being pushed through the financial system for its origin to be concealed. Apart from criminalising these activities, FICA contains control measures, which are based on three principles:

- Intermediaries in the financial system must know with whom they are doing business.
- The paper trail of transactions through the financial system must be preserved.
- Possible money laundering transactions must be brought to the attention of the FIC and investigating authorities.

In dealing with the third principle, one of the control measures introduced by FICA is the cash threshold reporting to the FIC. Section 28 of FICA requires, of an accountable institution and a reporting institution to, within the prescribed period, report to the FIC the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of the prescribed amount –

'(a) is paid by the accountable institution or reporting institution to the client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or

(b) is received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting.'

Readers should take note that payment or receipt of cash includes cash received or paid in person, as well as via third parties (see 'Anti-Money Laundering and Counter-Terrorism Financing Legislation' www.fic.gov.za, accessed 3-3-2020).

This article will address the cash threshold reporting to the FIC as a requirement on accountable and reporting institutions. For the purpose of this article, when I refer to a 'payment', it also applies to a 'receipt' and vice versa.

Schedule 1 of FICA lists attorneys as defined in the Attorneys Act 53 of 1979 as accountable institutions. On 25 March 2020, the FIC issued Public Compliance Communication 47 on Practising Attorneys as Accountable Institutions setting out guidance on the interpretation of item 1 of sch 1 to FICA in line with changes brought by the Legal Practice Act 28 of 2014. This communication effectively clarifies the position that the attorneys, notaries and conveyancers continue to be classified as accountable institutions under FICA. In terms of a notice issued by the Legal Practice Council on 8 January, FICA does not yet deal with trust account advocates, but there is no doubt that it will be amended to cover them as well. Advocates with trust accounts are, therefore, urged to acquaint themselves with the relevant provisions of FICA.

The threshold for cash transactions reporting is currently set at R 24 999,99 with an amount of R 25 000 and above reportable to the FIC. Cash transactions reporting should be done as soon as possible, but within two days of becoming aware of the cash transaction that bridged the threshold. Becoming aware of the transaction is not limited to the legal practitioner, but extends to the legal practitioner's

employees, requiring that the legal practitioner defines internal processes to detect, aggregate and report to the FIC and that employees are trained as such.

Reporting is also not limited to cash received at the legal practitioner's offices, or physically by the legal practitioner in the process of rendering legal services, but extends to cash paid in by the legal practitioner's client into the legal practitioner's bank account. In the latter instance, both the legal practitioner and the financial institution where the bank account, into which the funds were paid is held, are required to file a cash transaction report with the FIC.

The legal practitioner and their employees may in some instance become aware of a cash transaction on receipt of a bank statement from the bank, and are, therefore, expected to file a cash threshold report, where necessary, within two days of receiving the bank statement.

I invite readers to read this article, together with the article 'How FICA affects you and your legal practice' 2019 (Oct) DR 6 for more enlightenment.

How to determine when the cash transaction reporting is required

Cash transaction reporting is not limited to lump sums, but includes aggregated amounts, which are small amounts adding up to R 25 000 and above. Lump sums are easy to identify and to report, but it could be tricky to aggregate smaller amounts for purposes of reporting. It, therefore, becomes important that legal practitioners assign references to their clients' matters when receiving mandates from their clients. These matter references must be quoted in each payment made to the legal practitioner. The references will aid the legal practitioner to determine whose cash has been received and for which matter, thus enabling the legal practitioner to aggregate the received cash. Paragraph 4.13 of the Guidance Note 5 on s 28 of FICA issued by the FIC requests legal practitioners to assign an alpha numeric reference to each client and advise the clients to use such references when making deposits into the legal practitioners' accounts.

As per the guide issued by the FIC, cash received for a specific matter within a 24-hour period, irrespective of who paid in the cash, must be aggregated. Should the aggregated cash amounts exceed the threshold amount, that full amount then becomes reportable to the FIC as a composite transaction. Of note is that at times a cash transactions reporting may give rise to a suspicious and unusual transaction reporting.

Scenario 1 below illustrates a situation where the reporting duty arose, and aggregated amounts were involved:

Scenario 1

Mr Smarties approaches SKM Attorneys for legal representation. SKM Attorneys goes through the verification process of the client, gets to know the client and opens a file for the client, assigns reference SMA001 and requires a deposit of R 85 000 to be paid into the trust bank account of the legal practice. Mr Smarties proceeds to pay into the trust bank account of the legal practice.

He pays a cash amount of R 40 000 at 10:00 with reference SMA001. Two hours later another cash deposit is made into the trust bank account for an amount of R 10 000 also referencing SMA001. Another amount of R 25 000 is paid into the trust bank account via an electronic funds transfer (EFT) at 14:00 on the same day, also referencing SMA001. The final amount of R 10 000 is paid into the trust bank account in cash the next morning at 09:15 with reference SMA001.

The R 85 000 required as deposit by the legal practitioner is, therefore, paid in full, and the legal practitioner, can now carry out the client's mandate. What is important to note is that the various cash transactions happened within a period of 24-hours from the first transaction.

In terms of s 28 of FICA, the duty to report a cash transaction is triggered. The amount that the legal practitioner must report to the FIC is R 60 000 (R 40 000 + R 10 000 + R 10 000), this being the cash portion of the amount paid into the trust bank account of the legal practice. In this case the legal practitioner need not report the R 40 000 separately but the aggregated amount as it relates to the same matter. However, if the R 40 000 was the only cash transaction, then the amount would be reported as is since it exceeds the threshold of R 24 999,99.

The legal practitioner must consider filing a further report to the FIC in terms of s 29 of FICA, this being the reporting of a suspicious and unusual transaction for the full amount of R 85 000.

In this scenario, the bank where the trust bank account is held also has a duty to file reports with the FIC.

Where a legal practitioner deals with a matter where the client pays in foreign currency, the legal practitioner must convert the foreign currency into Rands to determine the Rand equivalent using the foreign currency exchange rate applicable at the time of the transaction. Should the threshold be triggered in Rand terms, a reporting obligation arises.

How to file a cash transactions report

In terms of reg 22(1) of the Regulations to FICA, reporting a cash transaction must be filed with the FIC electronically by making use of the Internet-based reporting portal specifically provided for this purpose at www.fic.gov.za. Other means of filing are acceptable only in exceptional cases, by facsimile or hand delivery. No cash transactions reporting may be posted to the FIC.

In order for the accountable and reporting institutions to file their cash transactions reporting electronically as required, they should acquire their login credentials through the FIC's website at www.fic.gov.za.

There are two report types available on the reporting portal for accountable and reporting institutions, namely –

- cash threshold report; and
- cash threshold report aggregation.

The cash threshold report is used to report a single cash transaction that is above the threshold, while the cash threshold report aggregation report is used to report aggregated amounts.

When reporting aggregated amounts, the total figure being reported will be detected by the FIC's reporting system, but the individual amounts making up the aggregated amount, thus forming a composite transaction, must be reflected individually. Using scenario 1 above, the amounts of R 40 000, R 10 000 and R 10 000 that make up the R 60 000 must be individually reported as follows:

- Transaction 1: Cash deposit R 40 000.
- Transaction 2: Cash deposit R 10 000.
- Transaction 3: Cash deposit R 10 000.

The FIC's reporting system will then detect that the amount reported is R 60 000.

It is important that the accountable or reporting institution saves the web reports as they move between various sessions of the report form before the report is submitted. This ensures that should a time-out error occur while busy filing, the report can be retrieved from the drafted menu on the FIC's registration and reporting platform.

What to do once a cash transactions report is submitted

On submitting a cash transactions report or a cash transactions report aggregation, the legal practitioner must monitor the filing to ensure that it is successfully processed, and where rejected remedy the situation. It is also important to keep records of all reports filed with the FIC. This can assist the accountable institution when it later transpires that the accountable institution's client was involved in money laundering, and perhaps being investigated, as the filed reports can be used as a defence to the effect that a filing was done as required.

Offences and penalties

In terms of s 51 of ch 4 of FICA, an accountable institution that fails to submit a cash threshold report or cash threshold report aggregation when required to do so is guilty of an offence. Failure to submit the required reports results in non-compliance and is subject to an administrative sanction.

Section 68 of FICA deals with penalties and states that any person convicted of an offence mentioned in ch 4 of FICA, other than an offence mentioned in ss 55, 62A, 62B, 62C or 62D, is liable to imprisonment for a period not exceeding 15 years or to a fine not exceeding R 100 million.

Conclusion

In conclusion, I urge legal practitioners to be on the lookout for clients who could potentially use the bank accounts of the legal practices to launder money. I also urge legal practitioners to carefully consider cash received and paid, and to be cognisant of the possibility of aggregating money, and to report as such.

Legal practitioners are encouraged to read Guidance Note 5, and 5B issued by the FIC and the notice to attorneys issued in September 2011, also issued by the FIC, for more information.