ACCOUNTABLE INSTITUTIONS

SCREENING AND SCRUTINISING EMPLOYEE INFORMATION PRACTICAL GUIDELINE 2023

WEBBER WENTZEL

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FIC DIRECTIVE 8

A PRACTICAL GUIDELINE FOR ACCOUNTABLE INSTITUTIONS

South Africa's greylisting by the Financial Action Task Force (FATF) in February 2023 prompted more diligent control measures for accountable institutions to prevent or detect money laundering (ML), terrorist financing (TF) and proliferation financing (PF).

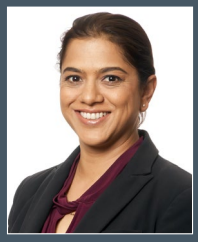
To enhance control measures against ML/TF/PF, accountable institutions are now required to diligently screen prospective and current employees for competence and integrity in terms of Directive 8, issued by the Financial Intelligence Centre (FIC) under the FIC Act on 31 March 2023 (FIC Directive 8).

As the regulatory landscape evolves, accountable institutions must navigate the complex interplay between financial regulatory law, privacy considerations, and employment law, to ensure compliance and mitigate potential risks.

For more information on periodically screening prospective and current employees for competence and integrity, following a risk-based approach, and scrutinising employee information against the targeted financial sanctions lists, please contact our contributors below:

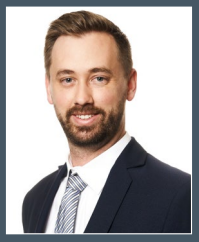
PETER GREALY
Partner
+27 11 530 5218
peter.grealy
@webberwentzel.com

VIEW PROFILE HERE



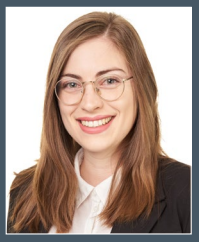
DHEVARSHA RAMJETTAN
Partner
+27 11 530 5707
dhevarsha.ramjettan
@webberwentzel.com

VIEW PROFILE HERE



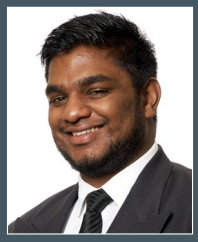
KENT DAVIS
Partner
+27 11 530 5843
kent.davis
@webberwentzel.com

VIEW PROFILE HERE



KEAH CHALLENOR
Associate
+27 11 530 5286
keah.challenor
@webberwentzel.com

VIEW PROFILE HERE



PRINEIL PADAYACHY
Senior Associate
+27 11 530 5953
prineil.padayachy
@webberwentzel.com

VIEW PROFILE HERE

MATEEN MEMON
Associate
+27 11 530 5009
mateen.memon
@webberwentzel.com

VIEW PROFILE HERE

Our leading cross-disciplinary team of experts advise clients in the Financial Services sector on the wide-ranging challenges and priorities facing accountable institutions. We guide clients on the relevant industry standards and risks with a solid understanding of Financial Services sector businesses and strategic imperatives, as well as the broader ecosystem. Find out more about our expertise and services **here**.

WHAT IS FIC DIRECTIVE 8?

This directive complements the risk management and compliance programmes (RMCPs), which detail the processes and procedures that accountable institutions must adopt to meet their FICA obligations.

The FIC has recognised the need for accountable institutions to look inward at employees to help identify, assess, monitor, mitigate, and manage the risks associated with illegal activities related to ML/TF/PF. FIC Directive 8 emphasises the importance of thorough employee screening and scrutiny against targeted financial sanctions lists (TFS Lists).

These obligations include:

- implementing customer identification and verification processes
- conducting customer due diligence
- appointing a compliance officer
- training employees on FICA compliance
- undertaking business risk assessments

WHAT IS REQUIRED?

1. Screen employees for competence and integrity, periodically and in a risk-based manner
2. Scrutinise employee information against TFS Lists
3. Records of how the screening is carried out must be retained

WHO DOES FIC DIRECTIVE 8 APPLY TO?

FIC Directive 8 applies to all accountable institutions. Amendments to Schedule 1 of the Financial Intelligence Centre Act, 2001 (Schedule 1) broadened the list of entities that are deemed accountable institutions.

Accountable institutions include, but are not limited to:

- boards of executors or trust companies who manage and control trust property
- estate agents
- managers registered under the Collective Investment Schemes Control Act (with certain exclusions)
- banks
- life and non-life insurers
- gambling operators
- foreign exchange dealers, and those lending money against securities
- financial service providers (with certain exclusions)
- individuals or entities involved in issuing or redeeming travellers' cheques, money orders, or similar instruments
- co-operative banks
- credit providers
- individuals or entities engaged in the business of being a money or value transfer provider
- individuals or entities engaged in the business of dealing in high-value goods when payment of over ZAR100 000 is received
- the South African Mint Company (RF) (Pty) Ltd, to the extent that it distributes non-circulation coins to the retail trade and receives payment of ZAR100 000 or more
- individuals or entities engaged in various activities or operations on behalf of clients in the crypto asset industry
- clearing system participants that facilitate or enable electronic funds transfers and act as intermediaries

The amendments to Schedule 1 took effect on 19 December 2022.

DETERMINING WHERE THE RISK LIES

A risk-based approach requires an accountable institution to determine the level of risk in an employee's role and ensure that the screening is proportionate to that risk. The screening of employees in roles with higher risks should be more stringent.

Any risk assessment should consider the risk associated with different workstreams of the organisation and the jurisdictions in which the organisation operates or to which services are rendered or goods are delivered.

For example, a global company should consider which employees service clients in sanctioned jurisdictions or jurisdictions linked to terrorist organisations. A small company operating exclusively within South Africa may limit its risk assessment in this regard.

SCRUTINISING EMPLOYEE INFORMATION

Scrutinising employee information against targeted financial sanctions lists

Accountable institutions must compare internal records of prospective and current employees against TFS Lists to determine if there are any similarities, which would indicate that records include sanctioned parties or those closely associated with sanctioned parties.

Where to find TFS Lists

TFS Lists are issued by the Director under section 26A(3) of the FIC Act. They may be accessed on the **FIC website**.

SCREENING EMPLOYEES

How to assess competence

Accountable institutions must determine whether an employee has the necessary skills, knowledge and expertise to perform their functions effectively by considering, among other factors, an employee's:

- previous employment history
- employment references
- qualifications
- relevant accreditations

How to assess integrity

In terms of Public Compliance Communication 55 (PCC), integrity relates to honesty and moral principles. Integrity screening measures may be adapted proportionately to the level of ML/TF/PF risk associated with different roles in the organisation.

Conducting criminal record checks to determine if an employee has been found guilty of a crime, particularly crimes of dishonesty, money laundering, or other financial crimes, is sufficient to assess the integrity risks associated with prospective and current employees.

The PCC also suggests issues to consider when conducting enhanced screening for integrity. These include taking into account prior conduct, in accordance with generally accepted conduct requirements, or whether the employee previously held a senior decision-making role in relation to ML/TF/PF at an accountable institution.

Accountable institutions should determine the employee's exposure to high-risk politically exposed persons or terrorist organisations.

Screening intervals

Accountable institutions are required to conduct an initial screening for competence and integrity, and periodically afterwards. Aligned with the risk-based approach, employees whose roles are categorised as higher-risk will need to be screened more frequently than employees who fill medium- or lower-risk roles.

OUTCOMES AND TFS LIST MATCHES

What to do with screening outcomes

Records of screening and scrutiny outcomes must be kept on file for the duration of an employee's employment. When requested, they should be made available to the FIC or a supervisory body which performs regulatory or supervisory functions for that accountable institution.

The requirement to retain these records distinguishes this obligation from routine background checks typically carried out during the recruitment processes. In considering candidates for employment, employers or third-party service providers do not retain any of the personal information that is required to verify and check a prospective employee's information, qualifications, and criminal record.

Handling employees who do not meet competency or integrity standards

If screening results indicating that a current employee does not meet the competency and integrity requirements associated with their role, accountable institutions may act on this information outside the ambit of FIC Directive 8.

For example, employees found to have misrepresented their qualifications should be addressed differently from those who may have been promoted into positions for which they are not yet fully qualified. Accountable institutions should consider the circumstances to determine whether disciplinary or incapacity measures may be necessary.

Handling matches with TFS Lists

The FIC Act prohibits any person from directly or indirectly providing, among other things, economic support, financial assistance, or other services to any person on a targeted financial sanctions list. Here, the relevant targeted financial sanctions list is the resolutions adopted by the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations (UN Sanctions List). While other territories and regions maintain their own sanctions lists, the prohibition in the FIC Act does not extend to those (it may, however, be prudent to screen high-risk employees against other lists, depending on the circumstances).

As the prohibition in the FIC Act applies both directly and indirectly, when a particular employee is classified as extremely high risk, it would be prudent to assess whether they may be seen as a close-known associate of a person on the UN Sanctions List.

Existing legislation on anti-discrimination, data protection, and rights to due process in the workplace must be enforced when company records show similarities to sanctions lists.

Any matches should be flagged and marked for further analysis. Even though sanctions screening may seem straightforward, it can be complex when dealing with bigger data sets that often have errors or missing data. In addition, employees may be flagged due to protected identifying characteristics such as surnames that suggest a certain ethnic or social origin.

Accountable institutions need to take adequate measures to guard against false positives that may be construed as discriminatory. Understanding and analysing screening results may be subject to further investigation and carried out manually by someone who understands the applicable employment law risks as well as the FIC Act.

RECORD KEEPING

Records of screening outcomes must be kept on file and, when requested, made available to the FIC or a supervisory body which performs regulatory or supervisory functions for that accountable institution. Accountable institutions must retain records for as long as an employee remains employed.

Accountable institutions should note their obligations under the Protection of Personal Information Act 4 of 2013 (POPIA). In terms of POPIA, records of personal information may only be retained as long as is necessary to achieve the purpose for which the information was collected in the first place. However, personal information may be retained for longer if it is authorised by law. As Directive 8 only applies to current and prospective employees, accountable institutions should ensure that:

- when an employee leaves an accountable institution, their personal information is deleted; and
- the personal information of prospective employees is deleted once they have completed the recruitment process (whether successfully or not), subject to any retention requirements set out under FIC Directive 8.

Accountable institutions are mandated by POPIA to ensure that the integrity and confidentiality of any personal information in their possession is maintained by taking appropriate, reasonable technical and organisational measures to prevent unauthorised access or damage to, or destruction of, the personal information.

While FIC Directive 8 does not expressly mention POPIA, accountable institutions should be aware that compliance with FIC Directive 8 will trigger certain POPIA concerns and obligations. Accountable institutions are encouraged to adopt a 'privacy-by-design' approach when developing a screening methodology, to ensure that POPIA compliance is always front of mind.

CONSENT AS A LAWFUL BASIS FOR PROCESSING PERSONAL INFORMATION

In terms of POPIA, personal information may only be processed if:

- a data subject consents to the processing;
- the processing is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is a party;
- the processing complies with an obligation imposed by law on the responsible party;
- processing protects a legitimate interest of the data subject;
- processing is necessary for the proper performance of a public law duty by a public body; or
- processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.

While accountable institutions may rely on any one of the abovementioned lawful grounds, practically it is recommended that they obtain consent from both current and prospective employees before processing those employees' personal information to conduct integrity and competency screenings.

Consent can be obtained in various ways, including through separate consent forms or by amending employment contracts and privacy notices/policies, to capture consent at the outset of the employment relationship or a prospective employee's engagement with an accountable institution.

WHAT ARE THE IMPLICATIONS OF FAILING TO COMPLY?

Section 45C(1) of the FIC Act empowers the FIC to impose administrative sanctions on any accountable institution or other person to whom the FIC Act applies when it is satisfied that the institution or person has failed to comply with a provision of the Act or failed to comply with a directive issued by the FIC.

Section 49A of the FIC Act makes it an offence for any person to contravene a provision of section 26B of the FIC Act (i.e. providing, among other things, economic support, financial assistance, or other services to any person on the UN Sanctions List). In terms of section 49A, a person who fails to comply with a provision of section 26B will be subject to an administrative sanction.

NECESSARY STEPS FOR COMPLIANCE

Please contact our contributors for:

- Assistance with reviewing and updating RMCPs to ensure compliance with the requirements of FIC Directive 8 are tailored to the institution's specific needs.
- Advice on implementing thorough employee screening and scrutiny processes.
- Help in determining the level of risk associated with different workstreams and jurisdictions.
- Training to educate employees on FICA compliance and the requirements of FIC Directive 8. Training can cover topics such as recognising illegal activities, understanding targeted financial sanctions lists, and implementing effective risk mitigation measures.
- Advice on record-keeping requirements in compliance with FIC Directive 8. This includes developing document retention policies, ensuring data protection and privacy compliance, and making records available to the FIC or relevant supervisory bodies when requested.
- Assistance in revising privacy policies, employee and prospective employee consent forms and employment contracts to address screening and scrutiny obligations.
- Assistance with developing appropriate disciplinary and incapacity processes for handling employees who do not meet competency or integrity standards.

Cape Town
15th Floor, Convention Tower
Heerengracht, Foreshore,
Cape Town
8001
+27 21 431 7000

Johannesburg
90 Rivonia Road,
Sandton
Johannesburg
2196
+27 11 530 5000

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