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## 1. INTRODUCTION TO MONEY LAUNDERING

### IMPORTANT NOTE:

This is a confidential document not for dissemination or use outside APA Africa, conveyancers, and notaries (“**the Firm**”) without prior approval of Andre Pienaar.

### INTRODUCTION TO MONEY LAUNDERING

- 1.1. The Financial Intelligence Centre Act, 2001 (“**FICA**”), the Prevention of Organised Crime Act, 1998 (“**POCA**”) and the Protection of Constitutional Democracy against Terrorism and Related Activities Act, 2004 (“**POCDATARA**”) were enacted in the past few years to prevent money laundering (amongst other things).
- 1.2. In broad terms, money laundering is the manipulation of illegally acquired wealth in order to obscure its true nature or source. “Money laundering” is defined in FICA as “an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in terms of section 64 of FICA or section 4, 5 or 6 of [POCA]”.
- 1.3. Money laundering has both macro and micro levels. Typically, at the macro level, money is laundered through a three-step process. These can be seen as a continuum or alone, where proceeds or instrumentalities of crime are laundered only through one of the phases.
- 1.4. The three step process is as follows:-

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- 1.4.1. Placement - the initial stage in the laundering process where money first enters the retail economy or the financial system.
  - 1.4.2. Layering – illicit proceeds are separated from their source. Complex layers of financial transactions are created to disguise the audit trail.
  - 1.4.3. Integration – the final macro stage where laundered proceeds are placed back into the economy in such a way as to make them appear as legitimate earnings.
- 1.5. FICA essentially:
- 1.5.1. provides for the establishment and operation of the Financial Intelligence Centre ("**the Centre**") and the Money Laundering Advisory Council;
  - 1.5.2. creates money laundering control obligations primarily for “accountable institutions” which are listed in Schedule 1 of FICA. Accountable institutions include a broad spectrum of persons and entities including attorneys, estate agents, banks, long-term insurers and foreign exchange dealers;
  - 1.5.3. obliges accountable institutions to establish and verify the identity of their clients, keep records of clients and transactions and to report certain transactions to the Centre. Certain of the duties to report apply not only to accountable institutions but to all persons who carry on a business or are in charge of or manage a business or who are employed by a business;
  - 1.5.4. amends POCA which targets organised crime and the recovery of the proceeds of unlawful activities;
  - 1.5.5. regulates the reporting of terrorist and related activities; and

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- 1.5.6. makes non-compliance with FICA a criminal offence carrying severe penalties.
- 1.6. In terms of sections 42 and 43 of FICA, practitioners are required to formulate and implement internal rules ("the Rules") and to make them available to employees involved in transactions to which FICA applies. These Rules have been formulated to comply with these provisions.
- 1.7. While complying fully with FICA, practitioners must, in so far as is lawful, act in the best interests of their clients and protect their common law rights to legal professional privilege.

## **2. THE REGULATORY FRAMEWORK**

- 2.1. Money laundering and terrorist financing is currently regulated by:-
- 2.1.1. POCA;
- 2.1.2. FICA;
- 2.1.3. The Regulations promulgated in terms of FICA; and
- 2.1.4. POCDATARA.
- 2.2. This legislation is in keeping with worldwide trends aimed at curbing the proceeds of crime, money laundering and the funding of terrorism. POCA is an omnibus act dealing, among other things, with money laundering, racketeering and criminal and civil forfeiture. POCA and FICA apply to "proceeds of unlawful activities" which is a much wider concept than proceeds of crime.
- 2.3. "Proceeds of unlawful activities" is defined for purposes of POCA and FICA as "any property or any service, advantage, benefit or reward which was derived, received or

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retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of [POCA], in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.”

- 2.4. “Unlawful activity” is defined as “conduct which constitutes a crime or which contravenes any law, whether such conduct occurred before or after the commencement of [POCA] and whether such conduct occurred in the Republic or elsewhere”.
- 2.5. POCA sets out the substantive money laundering offences in sections 4, 5 and 6. In broad outline, these offences are the money laundering offence itself, assisting another to launder the proceeds of unlawful activity; and the acquisition, use or possession of laundered property. In view of the import of these provisions, and for ease of reference, these provisions are set out in Annexure A.
- 2.6. FICA complements POCA and provides an administrative framework to combat money laundering. The Regulations (containing also the Exemptions) to FICA were finalised and published on 20 December 2002.
- 2.7. In terms of FICA rigorous compliance obligations are imposed on accountable institutions. The term “accountable institution” is defined in section 1 of FICA and Schedule 1 to FICA contains a list of accountable institutions. Schedule 1 includes “a practitioner who practices as defined in section 1 of the Attorneys Act, 1979”. The Attorneys Act defines a “practitioner” as “any attorney, notary or conveyancer” and “practice” as “practice as an attorney or a notary or conveyancer”.
- 2.8. Accountable institutions are obliged to:-
- 2.8.1. register with the Centre as an accountable institution;
- 2.8.2. establish and verify the identity of new and existing clients;

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- 2.8.3. keep records of identities of clients and transactions entered into with clients;
  - 2.8.4. report certain transactions to the Centre;
  - 2.8.5. formulate and implement internal rules;
  - 2.8.6. train employees; and
  - 2.8.7. appoint a responsible person to monitor compliance.
- 2.9. In terms of Schedule 2 of FICA the provincial law societies are currently the designated supervisory bodies for practitioners (attorneys) and responsible for supervising and enforcing compliance by practitioners with the provisions of FICA and any order, determination or directive made in terms of FICA.
- 2.10. The person responsible for monitoring compliance by the Firm with the provisions of FICA is Andre Pienaar.

### **3. SCOPE AND PURPOSE OF INTERNAL RULES**

- 3.1. The purpose of these rules is to provide clearly for the procedures which must be followed by the Firm in the discharge of practitioners' obligations in terms of FICA.
- 3.2. In terms of FICA, these rules must provide for the following: -
- 3.2.1. the establishment and verification of the identity of all clients (new and existing) entering or having entered into a single transaction or a business relationship with the Firm;

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- 3.2.2. the information which must be recorded in terms of FICA and how and where those records must be kept;
- 3.2.3. the steps to be taken to determine when a transaction is reportable to ensure that we comply with our reporting duties under FICA; and
- 3.2.4. other matters as may be prescribed by the Regulations to FICA.
- 3.3. The Regulations in summary format are attached in the Establishment and Verification of Identity Forms A to H as Annexure B.
- 3.4. A copy of these rules will be made available to every employee involved in transactions to which FICA applies and on request to the Centre and the relevant provincial law society.
- 3.5. Training will be provided on an ongoing basis to all employees concerned to enable them to comply with FICA and these rules.

#### **4. INFORMING CLIENTS OF FICA**

- 4.1. Clients of the Firm must be made aware of the Firm's obligations in terms of FICA. Practitioners must ensure that clients know and understand when any information disclosed by them will be protected by legal professional privilege. Clients should not be allowed to act under the misapprehension that all communications with practitioners will be kept confidential when, by virtue of the provisions of FICA, they may be obliged to disclose certain confidential information. Practitioners must accordingly advise existing and new clients, as a matter of course, of the nature and extent of the reporting duties which might arise in terms of FICA and of the distinction between privileged and confidential information. See the section on Confidentiality and Privilege in paragraphs 9.12 – 9.17 below.

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## 5. **ESTABLISHMENT AND VERIFICATION OF IDENTITIES**

- 5.1. In terms of FICA the Firm may not establish a business relationship or conclude a single transaction with a new client or prospective client unless a practitioner has taken certain prescribed steps to establish and verify the identity of the client or prospective client, as the case may be. Identification of the “principal” and “agent” and proof of authority are required where the client is acting on behalf of someone, or someone is acting on behalf of the client.
- 5.2. FICA also requires the Firm to establish and verify the identities of its existing clients before we conclude any further transactions with them.
- 5.3. In terms of a general exemption granted under FICA, the Firm may obtain a mandate from a prospective client to conclude a single transaction or establish a business relationship without first verifying the identity of the client. However, the client’s identity must be established and verified before the “instruction” or business mandate has been concluded.
- 5.4. A “business relationship” in FICA is defined as “an arrangement between a client and an accountable institution for the purpose of concluding transactions on a regular basis”. “Transaction” is widely defined in FICA as “a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution” and is not limited to transactions involving the flow of money.

## 6. **IDENTIFICATION AND VERIFICATION PROCEDURES**

- 6.1. The Duty to Establish and Verify Identity and Exemptions.
- 6.2. As early as possible and preferably at or before the first meeting with a client, a practitioner must ascertain what information and documentation is required to be obtained from the client in order to establish and verify the client’s identity.

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- 6.3. The process of verification of identity entails that the practitioner should compare the identifying particulars provided by the client with other available information in order to establish whether the particulars provided by the client accurately and correctly reflect the client's identity.
- 6.4. There are different identification and verification requirements depending on whether the client or prospective client is a company (foreign or local), close corporation, partnership, trust or individual (resident or foreigner). As to what information and documentation is required, practitioners are referred to the Establishment and Verification of Identity Forms annexed as Annexure **B**.
- 6.5. Where a natural person seeks to instruct the Firm as agent acting on behalf of another natural person, legal person or trust, the practitioner is required to establish and verify the identity of the agent and to obtain information which provides proof of the agent's authority to act on behalf of the other natural person, legal person or trust.
- 6.6. If a practitioner has obtained information or documentation about a client without contact in person with the client or a representative of the client, he or she must take reasonable steps to establish the existence of or establish and verify the identity of the client taking into account any Guidance Notes issued by the Centre, applicable to attorneys.
- 6.7. In terms of a specific exemption granted to practitioners in the Regulations, practitioners are only required to establish and verify the client's identity if a client is assisted in the planning or execution of:-
- 6.7.1.1. the buying or selling of immovable property;
- 6.7.1.2. the buying or selling of any business undertaking;

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- 6.7.2. the opening or management of a bank, investment or securities account;
  - 6.7.3. the organisation of contributions necessary for the creation, operation or management of a company or close corporation or of a similar structure outside the Republic;
  - 6.7.4. the creation, operation or management of a company or close corporation or of a similar structure outside the Republic;
  - 6.7.5. the creation, operation or management of a trust or of a similar structure outside the Republic, except for a trust established by virtue of a testamentary writing or court order;
  - 6.7.6. a client is assisted in disposing of, transferring, receiving, retaining, maintaining control of or in any way managing any property;
    - 6.7.6.1. a client is assisted in the management of any investment;
    - 6.7.6.2. a client is represented in any financial or real estate transaction; or
    - 6.7.6.3. a client deposits, over a period of twelve months, an amount of R100 000 or more into our account in respect of fees (including disbursements) which may be incurred in the course of litigation. For the purpose of these rules "litigation" includes disputes before legislative bodies such as the Competition Commission or Competition Tribunal, ICASA and other like bodies and where a dispute is referred to arbitration.
- 6.8. FICA contains certain general exemptions which have not been listed above. The requirements of most of those exemptions are incorporated in Annexure **B**. Some of these general exemptions are dealt with in more detail below.

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- 6.9. If the Firm is required to establish and verify the identity of a client involved in a transaction where another accountable institution is also involved, please revert to Andre Pienaar for guidance regarding the applicable exemption.
- 6.10. Client verification is not required where the client lives or is situated in a country where, to the satisfaction of the relevant provincial law society, anti-money laundering regulation and supervision is in place equivalent the anti-money laundering regulatory regime applicable to practitioners in South Africa, provided:-
- 6.10.1. a person or institution in such other country confirms to the Firm's satisfaction that they have verified the client's particulars which the Firm has obtained; and
- 6.10.2. undertakes to forward all documents obtained in the course of verifying the client's identity to the Firm.
- 6.11. Where the client is a public company listed on a stock exchange set out in the schedule to the Regulations (attached as Annexure **C**), the practitioner is exempt from obtaining and verifying certain of the client's particulars. The exemption applies only to the listed entity and not to unlisted subsidiaries or operational entities within the group. As to the information required to be obtained and verified, refer to Annexure **B**.
- 6.12. The exemptions referred to above do not apply in respect of a medium or high-risk client or in respect of a business relationship or single transaction with a client which poses a particularly high risk of facilitating money laundering activities. Practitioners are required to revert to Andre Pienaar for guidance in these instances.

## Procedures

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- 6.13. At the first interaction with the client, a practitioner should as a minimum obtain the client's details (name, address, identity number, company information, contact numbers, e-mail address and the like) and the exact nature of the entity involved, if any. The client should be informed, as soon as possible, of the nature of the information and documents that would be required in terms of FICA and that the required documents are to be sent to the FICA Officer in electronic format, by telefax or hard copy.
- 6.14. Before any file is opened, the practitioner in whose name the file is to be opened must complete and sign a FICA Verification form (Annexure D), irrespective of whether the client is a new client or existing client of the Firm. The FICA Verification form must be kept on file and a copy sent to the FICA Officer.
- 6.15. When the required or outstanding client information and/or documentation is received by the FICA Officer and he or she is satisfied that the client has complied with all the FICA requirements, the client will have been properly identified and verified in accordance with FICA.
- 6.16. Each practitioner is responsible to ensure that his or her client furnishes the required information and documentation.
- 6.17. A practitioner should not debit a fee or disbursement or accept money from the client in the form of a deposit before the client has been identified and verified in accordance with FICA. To do so would be a contravention of FICA.

## Maintaining Correctness of Particulars

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- 6.18. Practitioners must, in addition to the establishment and verification procedures outlined above, take reasonable steps to maintain the correctness of particulars of a client which are susceptible to change.

#### **Queries**

- 6.19. All queries pertaining to the establishment and/or verification of a client's identity must be discussed with the FICA Officer or Andre Pienaar.

## **7. KEEPING OF RECORDS**

### **Duty to Keep Records**

- 7.1. In terms of section 22 of FICA, the Firm is required, in all matters identified in paragraph 16, to keep detailed records, in electronic format, of the Firm's clients and the transactions entered into with them.
- 7.2. The duty to keep records arises whenever the Firm establishes a business relationship or concludes a single transaction with such a client.
- 7.3. FICA requires the Firm to keep records of the following:-
- 7.3.1. the identity of a client and, if applicable, the identity of the client's agent or principal;
  - 7.3.2. the manner in which the identity of the client and the client's agent or principal was established;
  - 7.3.3. the nature of the business relationship or transaction;
  - 7.3.4. in the case of a transaction, the amount involved and the parties to that transaction;

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- 7.3.5. all accounts that are involved in transactions concluded by the Firm in the course of a business relationship or a single transaction, as the case may be;
- 7.3.6. the name of the person who obtained the information referred to in 8.3.1 to 8.3.3 above; and
- 7.3.7. any document or copy of a document obtained by the Firm in order to verify a person's identity.
- 7.4. In order to comply with this requirement of FICA hard copies of identifying documents received from clients must be sent to Lisa De Bruin for storage in the Firm's safe. All such documents are to be given to Lisa De Bruin in a folder containing the reference number together with an email sent to Melanie Hanreck informing her of the documents contained in the said folder.
- 7.5. The records must be kept for a period of five years from the date on which the business relationship is terminated and in respect of a transaction at least five years from the date on which the transaction was concluded. Where a report is made to the Centre, the records must be kept for a period of at least five years from the date on which the report is made.
- 7.6. No person may delete or destroy any record pertaining to a client in respect of identity or verification of identity or in respect of any recorded transaction before the expiry of the five year period referred to in the preceding paragraph.

## Access to Records

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- 7.7. In terms of section 26 to FICA an authorised representative of the Centre has access during ordinary working hours to any records kept by the Firm in terms of section 22 of FICA (including where those records are kept by a third party) and may examine, make extracts from or copies of any such records, for the purposes of obtaining further information concerning a report filed by the Firm with the Centre.
- 7.8. If the records are not public documents access may only be obtained by virtue of a duly issued warrant.
- 7.9. Any request for access to records, including by way of warrant, must be forwarded to Andre Pienaar and may not be dealt with by any practitioner or employee without prior consultation with Andre Pienaar. Andre Pienaar will consult with the relevant practitioner and/or any other person the Firm deems necessary, in order to determine whether the records sought by the Centre:
- 7.9.1. requires the Centre to obtain a warrant;
  - 7.9.2. if a warrant is required whether the warrant has been duly issued and/or whether the request should be opposed for any justifiable reason; and
  - 7.9.3. is subject to legal professional privilege.
- 7.10. If the Centre is entitled to access to records, then Andre Pienaar, in consultation with the practitioner, will arrange for the relevant records to be made available to the representative of the Centre without delay and provide all reasonable assistance necessary to enable such representative to exercise his or her powers in terms of FICA.

## **8. ADVICE TO CENTRE OF CLIENTS**

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- 8.1. The Centre may, without a warrant, request the Firm to advise whether a specified person is or has been a client of the Firm; a specified person is acting or has acted on behalf of any client of the Firm; or a client is acting or has acted for a specified person. To the extent that some of this information may be protected by privilege and to keep the reporting process streamlined, no person other than Andre Pienaar may respond to such request. If a practitioner receives such a request from the Centre he or she must immediately inform Andre Pienaar. Andre Pienaar will consult with the relevant practitioner and/or any other person the Firm deems necessary and respond to the Centre as appropriate.

## 9. REPORTING OBLIGATIONS

### The Duty to Report Suspicious and Unusual Transactions

- 9.1. Subject to legal professional privilege, section 29 of FICA requires any person who is employed by a business to report to the Centre suspicious and unusual transactions relating to the proceeds of unlawful activities connected to the affairs of such business.
- 9.2. Accordingly, a report may need to be made to the Centre where an employee knows or suspects (or ought reasonably to have known or suspected) that the Firm:-
- 9.3. has 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;
- 9.4. is party to a transaction that:-
- 9.4.1. 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;

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- 9.4.2. has no business or lawful purpose;
- 9.4.3. is constructed to avoid any reporting duty under FICA; or
- 9.4.4. may be relevant to the investigation of any evasion or attempted evasion of a duty to pay tax or any other duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service; or
- 9.4.5. relates to an offence relating to the financing of terrorist and related activities;
- 9.5. has been or is about to be used for money laundering purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities;
- 9.6. 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 paragraphs 10.1, 10.2 or 10.3.
- 9.7. In terms of section 1(2) of of FICA, a person has knowledge of a fact if:-
- 9.7.1.1. the person has actual knowledge of that fact; or
- 9.7.2. the court is satisfied that the person believes that there is a reasonable possibility of the existence of that fact; and the person fails to obtain information to confirm or refute the existence of that fact.
- 9.8. FICA defines “unlawful activity” as “conduct which constitutes a crime or which contravenes any law, whether such conduct occurred before or after the commencement of [POCA] and whether such conduct occurred in the Republic or elsewhere”. “Proceeds

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of unlawful activities” is defined for purposes of FICA as “any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of [POCA], in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.”

- 9.9. “Money laundering” and “money laundering activity” means “an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in terms of section 64 of [FICA] or section 4, 5 or 6 of [POCA]”.
- 9.10. The term “terrorist activity” and the offence of terrorism and offences associated or connected with terrorist activities were introduced into FICA when POCDATARA was enacted. With the enactment of POCDATARA, FICA now also imposes a reporting obligation in connection with property associated with terrorist and related activities which may come into the Firm’s possession or under its control.
- 9.11. The Centre has proposed that accountable institutions include examples of suspicious transactions particular to their industry or profession in their internal rules. Whilst it is not the client, but rather the nature of a particular transaction, that ordinarily gives rise to a suspicion, a list of potentially suspicious client behaviour and transactions that might in certain circumstances give rise to a suspicion, is included as Annexure E.

## Confidentiality and Privilege

- 9.12. FICA preserves legal professional privilege and privileged communications need not be reported. In broad terms, that privilege protects from disclosure communications between practitioners and their clients which are made in confidence for the purpose of enabling

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the client to obtain general legal advice and advice in respect of litigation which is either pending or contemplated or which has commenced. This latter concept of “litigation privilege” also extends to communications between a third party and a practitioner for the purposes of litigation which is pending or contemplated or has commenced.

- 9.13. The privilege is the privilege of the client, not the practitioner. If a practitioner claims privilege, he or she does so on behalf of the client and indeed it is suggested that the practitioner has a duty to claim such privilege. The client may elect not to claim the privilege, in which event the practitioner has no independent right to do so.
- 9.14. The privilege does not operate if the client obtains the legal advice in order to further a criminal end. A legal adviser who knowingly participates in the commission of a crime is not acting professionally, but the authorities suggest that even if he or she had no knowledge of the purpose for which advice was sought, no privilege will attach to the communications with the client if the latter obtained the advice in order to further a criminal objective.
- 9.15. Confidentiality is a wider concept than privilege as information may be confidential even though it is not protected by legal professional privilege. An obligation of confidentiality may arise from contract, either as an express term or as an implied term in a fiduciary relationship, or it may arise from a delictual duty to refrain from disclosing confidential information.
- 9.16. There is an overlap between the concepts of confidentiality and legal professional privilege. Confidentiality is a necessary condition for claiming privilege but is not a sufficient condition for such a claim. The mere fact that a communication was made in confidence will not necessarily mean that that communication is privileged. That privilege only attaches if the communication is made for the purpose of obtaining legal advice, so that a statement unconnected with the giving of legal advice will not be privileged even if it was made in confidence. For a broader background to the basis of the duty of

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confidentiality and some examples of its scope, read with Chapter 22 of Lewis' book on "Legal Ethics".

- 9.17. Confidentiality, as opposed to privilege, is overridden by the duty to report.

### Advising Clients

- 9.18. When a client discusses with an attorney a proposed course of conduct that may, if proceeded with, give rise to a reporting duty in terms of FICA, and the communication is not privileged, an attorney will not be precluded from advising the client that the proposed course of conduct is unlawful and should not be persisted with.

### The Right to Withdraw

- 9.19. The provisions of FICA do not impact on an attorney's ethical right and duty not to accept an unlawful mandate from a client or to withdraw from a matter.
- 9.20. The client is entitled to expect that information which would otherwise be reportable that is disclosed to the attorney as part of the process of providing instructions to the attorney for the purpose of obtaining advice or within the litigation privilege, will not be reported to the Centre. Unrelated and incidental disclosure not germane to the privileged situation will not be protected. Dinner table or change room gossip imposes no reporting obligation.

### Internal Reporting of Suspicious and Unusual Transactions

- 9.21. To ensure that legal professional privilege is protected and to avoid the difficulties with the concepts "knows" and "suspects" and the severe penalties for failure to report a suspicion to the Centre, employees must immediately report every suspicion to Andre Pienaar.

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- 9.22. Andre Pienaar will decide whether or not a report must be made to the Centre as required by FICA and, in the event of a report being made by the Firm, whether or not the relationship with the client will be continued. In coming to that decision, Andre Pienaar will consider the profile of the particular client and hold discussions, if necessary, with the person reporting the suspicion or any other person the Firm deems necessary.
- 9.23. The Firm must make a report to the Centre as soon as possible but no later than fifteen days after a practitioner or employee acquires knowledge or forms a suspicion as contemplated in section 29.
- 9.24. No person other than Andre Pienaar may report directly to the Centre.
- 9.25. Each person who reports a suspicion within the meaning of Section 29 of FICA to Andre Pienaar will be given feedback on the report, including whether or not a report was made to the Centre.
- 9.26. No employee who has made or must make a report within the meaning of Section 29 of FICA or who knows or suspects that such a report has been or must be made may disclose that fact or any of the contents of such report to any person other than Andre Pienaar (or, with the consent of Andre Pienaar, another practitioner in the Firm), particularly not to the client concerned. To do so would constitute “tipping off” which is an offence under FICA, unless the communication is made:-
- 9.26.1. within the scope of the person’s powers and duties in terms of any legislation;
- 9.26.2. for the purpose of carrying out the provisions of FICA;

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- 9.26.3. for the purpose of legal proceedings, including any proceedings before a judge in chambers; or
- 9.26.4. in terms of an order of court.
- 9.27. An employee who has reported knowledge or a suspicion within the meaning of Section 29 to Andre Pienaar will have discharged his or her obligation to report in terms of FICA. This obligation is discharged whether or not the Firm ultimately reports to the Centre.
- 9.28. Any further communications from Centre, including a request for information pertaining to the report made, must be forwarded to and be dealt with by Andre Pienaar and not the person who reported the knowledge or suspicion internally.

### Cash Threshold Reporting Obligations

- 9.29. Subject to legal professional privilege, the Firm is also required, in terms of section 28 of FICA, to report cash transactions above a prescribed limit, whether or not such transaction is considered suspicious or unusual.
- 9.30. “Cash transactions” is defined in FICA as transactions involving domestic and foreign notes and coins and travellers’ cheques above the prescribed limit.
- 9.31. The prescribed limit is R24 999,99 (or an aggregate of smaller amounts which combine to come to this amount if it appears to a practitioner that the transactions involving those smaller amounts are linked and to be considered fractions of one transaction).
- 9.32. Employees and practitioners must report all cash transactions (as defined in FICA), above the prescribed limit to Andre Pienaar.

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- 9.33. Andre Pienaar will decide whether or not a report must be made to the Centre as required by FICA. In coming to that decision, Andre Pienaar will hold discussions, if necessary, with the person reporting the suspicion and/or any other person the Firm deems necessary.
- 9.34. The Centre has designed a secure online login process to enable Firms to file Cash Threshold Reports electronically with the Centre. Such report must be filed as soon as possible but no later than two days after an employee or practitioner becomes aware of a cash transaction or series of cash transactions which exceed the prescribed limit.
- 9.35. No person other than Andre Pienaar may report directly to the Centre.

### **Information to be reported when a cash transaction is above the prescribed limit**

- 9.36. When a report concerning a cash transaction that is above the prescribed limit above, the report must contain full particulars in respect of the natural or legal person making the report or other entity on whose behalf the report is made, of—
- 9.36.1. the name of the person or entity;
- 9.36.2. the identifying particulars of the person or entity such as identity number, registration number or practice number for example;
- 9.36.3. the address of the person or entity;
- 9.36.4. the type of business or economic sector of the accountable institution and reporting institution;
- 9.36.5. in the case of a natural person, the person's contact particulars; and

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- 9.36.6. in the case of a legal person or entity, the surname, initials and contact particulars of a contact person.
- 9.37. the report must contain as much of the following information as is readily available:
- 9.37.1. the date and time of the transaction, or in the case of a series of transactions, the time of the transactions in the 24 hour period;
- 9.37.2. the description of the transaction or series of transactions;
- 9.37.3. the amount of the funds per transaction or series of transactions;
- 9.37.4. the currency in which the funds were disposed of; and
- 9.37.5. the purpose of the transaction or series of transactions.
- 9.38. In respect of each natural person conducting the transaction or series of transactions or legal persons or other entity on whose behalf the transaction or series of transactions is conducted, the report must contain as much of the following information as is readily available—
- 9.39. in the case of a natural person, full particulars of—
- 9.39.1. the person's name and surname, or initials and surname if the name is not available;
- 9.39.2. the date of birth of the person or identification number; and

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- 9.39.3. the person's or entity's identifying number; and
- 9.39.4. the names of the natural person with authority to conduct the transaction on behalf of the person or entity; and (c) in the case of other entity any information which is readily available.
- 9.40. A report must:—
- 9.40.1. contain a full description of the amount of cash in excess of the prescribed limit which is paid out by the accountable institution and reporting institution; and
- 9.40.2. contain a full description of the amount of cash in excess of the prescribed limit which is received by the accountable institution and reporting institution.

### Property Associated with Terrorist and Related Activities

- 9.41. Subject to legal profession privilege, the Firm must file a report with the Centre In terms of section 28A of FICA if it has in its possession or under its control property owned or controlled by or on behalf of or at the direction of:-
- 9.41.1. an entity which has committed or attempted to commit or facilitated the commission of a specified offence as defined in POCDATARA; or
- 9.41.2. a specific entity identified in a notice issued by the President under section 25 of POCDATARA,

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- 9.42. Such report must be filed as soon as possible but not later than five days after an employee or practitioner establishes that the Firm has property associated with terrorist and related activities in its possession or under its control, unless the Centre gives permission for the report to be sent after the expiry of the five-day period. Any request for an extension must reach the Centre before the expiry of the five-day period.
- 9.43. Employees and practitioners must report all transactions concerning property related to terrorist and related activities to Andre Pienaar.
- 9.44. Andre Pienaar will decide whether or not a report must be made to the Centre as required by FICA. In coming to that decision, Andre Pienaar will hold discussions, if necessary, with the person reporting the transaction and/or any other person the Firm deems necessary.
- 9.45. No person other than Andre Pienaar may report directly to the Centre.

#### **Furnishing Additional Information**

- 9.46. In terms of section 32 of FICA the Centre or an investigating authority acting with the permission of the Centre or under the authority of an authorised officer, may request an accountable institution, a reporting institution or any other person that has made a report in terms of sections 28 (cash threshold reporting) or 29 (suspicious transaction reporting) to furnish additional information concerning the report and the grounds for the report. If any person requests information on the basis of this section any such request must be immediately forwarded to Andre Pienaar who will deal with and respond to the request after consultation, if necessary, with the practitioner and/or any other person the Firm deems necessary.

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## Continuation of Reported Transactions

- 9.47. Once a report in terms of sections 28 or 29 is required to be made, the Firm may continue with and carry out the transaction in respect of which the report is required to be made, unless a conflict of interests arises or the Centre directs the accountable institution not to proceed with the transaction in terms of section 34 of FICA.
- 9.48. The Centre may in the circumstances specified in section 34 of FICA direct an accountable institution not to proceed with a transaction for a maximum period of five days to allow the Centre to investigate the matter (but may not do so in respect of transactions to which the rules of an exchange licensed in terms of the Security Services Act, 2004 apply).

## 10. DIRECTIVES, COMPLIANCE AND ENFORCEMENT

- 10.1. In terms of section 43A of FICA the Centre and/or the relevant provincial law society are entitled to issue directives to the firm to:-
- 10.1.1. make available information and/or documents;
- 10.1.2. cease or refrain from engaging in any act, omission or conduct in contravention of FICA;
- 10.1.3. perform acts necessary to remedy an alleged non-compliance with FICA;
- 10.1.4. perform acts necessary to meet any obligation imposed by FICA.
- 10.2. In terms of section 45B of FICA an inspector appointed by the Centre or the relevant provincial law society may enter and inspect the premises of the Firm to conduct an inspection in terms of section 45B of FICA, for the purposes of determining compliance

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with FICA or with any order, determination or directive made in terms of FICA. No warrant is required for such inspection.

- 10.3. The Centre or the relevant provincial law society may in terms of section 45C impose an administrative sanction on the Firm when satisfied on available facts and information that the Firm or any practitioner has, for example, failed to comply with any provision of FICA, or any order, determination or directive made in terms of FICA.
- 10.4. Any communication from the Centre or the relevant provincial law society relating to the exercise of their powers to issue a directive, conduct an inspection or impose administrative penalties must be forwarded or communicated to Andre Pienaar and may not be dealt with by any practitioner or employee without prior consultation with Andre Pienaar. Andre Pienaar will assess, in consultation with the relevant practitioner and/or any other person the Firm deems necessary, how the Firm should respond to the relevant communication.
- 10.5. FICA preserves legal professional privilege also in respect of the Centre and the relevant provincial law society's powers to issue a directive, conduct an inspection or impose administrative penalties.

## **11. PROTECTION OF PERSONS MAKING REPORTS**

- 11.1. No action, whether criminal or civil, lies against the Firm when it complies in good faith with the reporting obligations under FICA or the obligations imposed in Part 4 of Chapter 3 or Chapter 4 of FICA, including a director, employee or any other person acting on behalf of the Firm.
- 11.2. A person who has made, initiated or contributed to a report in terms of sections 28 or 29 of FICA or who has furnished additional information concerning such a report is

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competent, but not compellable, to give evidence in criminal proceedings arising from the report.

- 11.3. No evidence concerning the identity of a person who has made, initiated or contributed to such a report or who has furnished additional information concerning such a report, is admissible as evidence in criminal proceedings unless that person testifies at those proceedings.

## 12. **ADMINISTRATIVE SANCTIONS, OFFENCES AND PENALTIES IN TERMS OF FICA, DISCIPLINARY ACTION**

- 12.1. In addition to the administrative sanctions that may be imposed on the Firm, a breach of the provisions of FICA constitutes an offence attracting severe penalties. It is important to note that in certain circumstances the offences extend to negligence.

- 12.2. Some examples of the offences are set out below:-

12.2.1. should an accountable institution fail to identify persons (section 46), fail to keep records (section 47) or destroy or tamper with records (section 48) they will be guilty of an offence.

12.2.2. in terms of section 53:

12.2.2.1. “Any person who fails, within the prescribed period, to report to the Centre the prescribed information in respect of a suspicious or unusual transaction or series of transactions or enquiry in accordance with section 29(1) or (2), is guilty of an offence.

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- 12.2.2.2. Any person referred to in section 29(1) or (2) who reasonably ought to have known or suspected that any of the facts referred to in section 29(1)(a), (b) or (c) or section 29(2) exists, and who negligently fails to report the prescribed information in respect of a suspicious or unusual transaction or series of transactions or enquiry, is guilty of an offence.”
- 12.2.3. Any person convicted of a Chapter 4 offence such as failure to identify persons, failure to keep records, destroying or tampering with records, failure to give assistance, failure to advise Centre of client, failure to report cash transactions, failure to report suspicious or unusual transactions, unauthorised disclosure, failure to report conveyance of cash into or out of Republic, failure to report electronic transfers, failure to comply with request, failure to comply with direction by Centre, failure to comply with monitoring order, misuse of information, obstructing of official in performance of functions, conducting transactions to avoid reporting duties, unauthorised access to computer system or application or data and unauthorised modification of contents of computer system but excluding the offences of failure to send report to centre, failure to formulate and implement internal rules and failure to provide training or Fica compliance officer is liable to imprisonment for a period not exceeding 15 years or to a fine not exceeding R10 000 000 (ten million rand).
- 12.2.4. Any person convicted of the offences of failure to send report to centre, or failure to formulate and implement internal rules or failure to provide training or appoint a Fica compliance officer is liable to imprisonment for a period not exceeding 5 years or to a fine not exceeding R1 000 000 (one million rand).

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- 12.3. Any person who fails to comply with any provision of these rules will in addition to the sanctions imposed by FICA be subject to disciplinary action.

### 13. APPOINTMENT OF COMPLIANCE OFFICER

The person responsible for monitoring compliance at APA Africa.

I, the undersigned accepts herewith my appointment as Compliance Officer and certifies that I am familiar with the contents of this manual. Furthermore, shall ensure compliance as set out herein.

All enquiries pertaining to the establishment and/or verification of a client's identity, as well as reports on suspicious and/or unusual transactions will be received by me.

Signed at \_\_\_\_\_ on \_\_\_\_\_

\_\_\_\_\_  
ANDRE PIENAAR

1. \_\_\_\_\_  
WITNESS

2. \_\_\_\_\_  
WITNESS

## ANNEXURE A

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## **14. OFFENCES RELATING TO PROCEEDS OF UNLAWFUL ACTIVITIES – THE PREVENTION OF ORGANISED CRIME ACT, 1998**

### **Section 4 - Money laundering**

Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and-

- (a) enters into any agreement or engages in any agreement or transactions with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or
- (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person.

which has or is likely to have the effect-

- (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
- (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere-
  - (aa) to avoid prosecution; or
  - (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,

shall be guilty of an offence.

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## **Section 5 - Assisting another to benefit from proceeds of unlawful activities**

Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any agreement or transaction whereby:-

- (a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or
- (b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way.

shall be guilty of an offence.

## **Section 6 - Acquisition, possession or use of proceeds of unlawful activities**

Any person who:-

- (a) acquires;
- (b) uses; or
- (c) has possession of,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence.

## **ANNEXURE B**

### **15. EXCHANGES RECOGNISED FOR PURPOSES OF EXEMPTION 6**

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American Stock Exchange  
Amsterdam Exchanges N.V.  
Athens Stock Exchange  
Australian Stock Exchange Ltd  
Barcelona Stock Exchange  
Bolsa de Comercio de Buenos Aires  
Bolsa de Madrid  
Bolsa de comercio de Santiago  
Bolsa de Valores de Bilbao  
Bolsa de Valores de Lima  
Bolsa de Valores de Lisboa  
Bolsa de Valores do Rio de Janeiro  
Bolsa de Valores do Sao Paulo  
Bolsa Mexicana de Valores  
Bourse de Montreal  
Brussels Exchanges Ltd  
Canadian Venture Exchange  
Chicago Board Options Exchange, Inc.  
Colombo Stock Exchange  
Copenhagen Stock Exchange  
Deutsche Börse AG  
Helsinki Exchanges Group Ltd  
Oy Irish Stock Exchange  
Istanbul Stock Exchange  
Italian Exchange  
Jakarta Stock Exchange

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Johannesburg Stock Exchange  
 Korea Stock Exchange  
 Kuala Lumpur Stock Exchange  
 Ljubljana Stock Exchange, Inc.  
 London Stock Exchange  
 Malta Stock Exchange  
 National Association of Securities Dealers, Inc.  
 New York Stock Exchange, Inc  
 New Zealand Stock Exchange  
 OM Stock Exchange  
 Osaka Securities Exchange  
 Oslo Bors  
 Paris Bourse SBF SA  
 Philippine Stock Exchange Inc.  
 Singapore Exchange  
 Société de la Bourse de Luxembourg SA  
 Swiss Exchange  
 Taiwan Stock Exchange  
 Tehran Stock Exchange  
 The Bermuda Stock Exchange Ltd  
 The Chicago Stock Exchange, Inc.  
 The Stock Exchange of Hong Kong Ltd  
 The Stock Exchange of Thailand  
 The Tel Aviv Stock Exchange Ltd  
 The Toronto Stock Exchange  
 Tokyo Stock Exchange  
 Warsaw Stock Exchange

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Wiener Börse AG

## ANNEXURE C

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## 16. POTENTIALLY SUSPICIOUS CLIENTS

- A client who provides vague or contradictory information or references.
- A client who has no record of past or present employment or involvement in a business but who frequently seeks advice.
- A client whose business or sources of funds are ill-defined, or who is reluctant to provide details about his or her business or source of funds.
- A client who uses a financial institution which is located far from his or her home or work, without adequate explanation.
- A client who is reluctant to disclose other bank or business relationships, without adequate explanation.
- A client who operates different accounts at different branches of the same financial institution without sound reasons for doing so.
- A client who enters into transactions that do not appear to have a legitimate business purpose or that are out of the ordinary given the client's profile.
- A client who makes deposits or withdrawals into the trust account mainly in cash.
- A client who is a known criminal or gangster.

## POTENTIALLY SUSPICIOUS TRANSACTIONS

- Any transaction involving an unusually large cash amount given the profile of the client.

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**Paralegals:**

Aletta Argyle, Justin Blume



- Substantial deposits of funds into a trust account in respect of fictitious transactions where those funds are withdrawn in a reasonably short period.
- Business payments by practitioners against the promise of reimbursement by a client can be used to acquire assets which are then disposed of. The funds paid to settle the practitioner's disbursement have effectively been laundered.
- A deposit in respect of fees for a transaction or series of transactions which, by preconceived plan, will never eventuate. The requested refund of the deposit produces a trust cheque.
- Practitioners can also be used indirectly to launder money. He or she may be requested to establish companies, close corporations and trusts, all of which may be used as a vehicle for laundering funds.
- The practitioner's services can be used in the preparation and implementation of contracts involving international trade where over and under invoicing represents a common method of laundering funds.

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