

TO : REBOSA

FROM : CLEM DANIEL

SUBJECT : REBOSA – FICA AND THE ESTATE AGENCY BUSINESS

DATE : 19 OCTOBER 2017

1 EXECUTIVE SUMMARY

1.1 Key findings regarding the administrative burden posed by FICA

1.1.1 The Financial Intelligence Centre Act, No 38 of 2001 (as amended) ("**FICA**") does not, in our view, leave estate agents any worse off than they were before the amendments. If anything, it should be easier to comply with FICA, for the following reasons –

1.1.1.1 The risk management and compliance programme (the "**RMCP**"), which describes an accountable institution's internal FICA procedures, is now underpinned by the risk-based approach (the "**RBA**"), which allows accountable institutions to tailor their RMCPs to their unique circumstances. Many of REBOSA's potential concerns about FICA may be resolved with reference to this flexibility. The RBA is in stark contrast to its predecessor, the rules-based approach, which was overly rigid. It often caused a mismatch between an accountable institution's size and customer profile on one hand, and the level of effort required to obtain the required information on the other hand; and

1.1.1.2 While the substantive requirements in relation to the customer due diligence (the "**CDD**") have now been expanded considerably, accountable institutions have a much greater degree of control over how and when they will go about satisfying those requirements.

1.1.2 The greatest difficulty will lie in the exercise of designing an RMCP, and the associated costs. However, this difficulty may be substantially mitigated if REBOSA has a template RMCP designed for its estate agents.¹

1.2 Key findings regarding exemptions from FICA

1.2.1 As is more fully explained under paragraph 6 hereof, it is theoretically possible for REBOSA to apply for an exemption from FICA in favour of estate agents. This course of action is not recommended, for the following reasons –

1.2.1.1 An exemption is not likely, as it would effectively render estate agents' inclusion in FICA wholly redundant;

1.2.1.2 An exemption would be inconsistent with South Africa's international obligations, in light of its membership of the Financial Action Task Force, and in light of the international community's progressively robust stance against money laundering and the financing of terrorism (see paragraph 6.5.1 and footnote 41); and

1.2.1.3 FICA does not provide a clear route to be followed by a person looking to apply for an exemption. As such, any application made would be speculative.

¹ The template RMCP has been designed, and the most recent version was sent to REBOSA on 19 October 2017.

1.3 Key recommendations to REBOSA

- 1.3.1 REBOSA is advised –
- 1.3.1.1 to make a template RMCP available to its estate agents, with the *caveat* that they should not place blind reliance thereon, but rather modify it to suit their specific needs;
- 1.3.1.2 to include provisions in the template RMCP to the effect that –
- 1.3.1.2.1 where, in respect of the same transaction, a client is common to both the estate agent and the conveyancer, a letter from the conveyancer certifying its compliance with FICA in respect of that client will simultaneously satisfy the RMCP requirements of the estate agent, who will then not have to repeat the conveyancer's FICA procedures. This arrangement was previously permissible under the Regulations on Exemptions in Terms of the Financial Intelligence Centre Act, No 38 of 2001. These have now been withdrawn. The same arrangement is still permissible, but now under the authority of an estate agent's own RMCP, which must adequately motivate such an arrangement. Partnering with conveyancers provides REBOSA with the simplest and most streamlined solution. Whether it works will, of course, largely depend on the rapport between the estate agent and conveyancer in a given transaction, and on the estate agent's influence over the contract in a sale of property;
- 1.3.1.2.2 an estate agent must carry out a CDD any time **before** receiving value (ie money or any other economic benefit worth R5000.00 (five thousand rand) or more) for the first time, whether in the context of a single, "once-off" transaction or in the context of a sustained business relationship, and whether the value is given to the estate agent by the client itself, by someone acting on the client's instructions, or by another party involved in the client's single transaction or business relationship. The receipt of value is a convenient reference point in determining the point at which a transaction is concluded, or a business relationship is established; and
- 1.3.1.2.3 a prospective client is only regarded as a client for purposes of the RMCP when there is, or there is likely to be, a transfer of value to the estate agent;² and
- 1.3.1.3 to participate in the various consultations and roadshows pertaining to the implementation of the FICA amendments. The Financial Intelligence Centre and the Estate Agency Affairs Board, being the two principal authorities under FICA, will conduct said consultations and roadshows on dates and at locations to be advertised on their respective websites from time to time. While this avenue will not necessarily assist REBOSA in obtaining an exemption for its members, it will provide it with some say over the implementation timetable.

² These provisions have been built into the template RMCP.

2 INTRODUCTION

- 2.1 The purpose of this note is to provide an exposition of the Financial Intelligence Centre Act, No 38 of 2001 ("**FICA**"), in the context of REBOSA's concerns surrounding the most recent amendments thereto.³ This will be done with a view to –
- 2.1.1 highlighting the most important changes brought about by the amendments;
 - 2.1.2 evaluating whether FICA poses an undue administrative and financial burden on estate agents, and the extent to which this burden may be lessened; and
 - 2.1.3 evaluating whether and how estate agents may be exempted from FICA.
- 2.2 The following authorities were consulted –
- 2.2.1 FICA;
 - 2.2.2 The document entitled "*Guidance Note 4A on Reporting of Suspicious and Unusual Transactions and Activities to the Financial Intelligence Centre in terms of Section 29 of the Financial Intelligence Centre Act, 2001*" ("**Guidance Note 4A**");
 - 2.2.3 The document entitled "*Guidance Note 05B on Cash Threshold Reporting to the Financial Intelligence Centre in terms of Section 28 of the Financial Intelligence Centre Act, 2001*" ("**Guidance Note 5B**");
 - 2.2.4 The document entitled "*Guidance Note 6 on Terrorist Financing and Terrorist Property Reporting Obligations in terms of Section 28A of the Financial Intelligence Centre Act, 2001*" ("**Guidance Note 6**");⁴
 - 2.2.5 The document entitled "*Guidance Note 7 on the Implementation of the New Measures to be Introduced by the Financial Intelligence Centre Amendment Act, 2017*" ("**Guidance Note 7**");
 - 2.2.6 The document entitled "*Roadmap for the Short Term Implementation of the Financial Intelligence Centre Amendment Act, 2017 (Act No. 1 of 2017) for Supervisors and Accountable Institutions*" (the "**Roadmap**") published on the Financial Intelligence Centre's (the "**FIC**") website;
 - 2.2.7 The document entitled "*A New Approach to Combat Money Laundering and Terrorist Financing*" (the "**New Approach**") published on the FIC's website;
 - 2.2.8 The document entitled "*International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation – the FATF Recommendations*"; and
 - 2.2.9 Two joint statements by the National Treasury published on its website ("**Statements 1 and 2**").

³ References to "FICA" mean FICA as most recently amended by the Financial Intelligence Centre Amendment Act, No 1 of 2017. References to the legal position prior to the amendments will be clearly indicated.

⁴ Guidance notes are joint publications by the National Treasury, the South African Reserve Bank, the Financial Services Board and the Financial Intelligence Centre, and are issued under the authority of sections 4(c) to (cA) read with section 42B of FICA. The final versions of Guidance Notes 4A, 5B, 6 and 7 were published on 2 October 2017.

3 A BRIEF INTRODUCTION TO FICA

3.1 Purpose of FICA

The purpose of FICA is to root out money laundering and the financing of terrorism ("MLFT"), which are deleterious to the integrity of our financial system. FICA seeks to achieve this purpose by imposing obligations on entities known as accountable institutions, which are recognised as potential vehicles for financial malfeasance. These obligations regulate the manner in which accountable institutions deal with their clients. Estate agents are one of sixteen categories of accountable institutions listed under schedule 1 to FICA.⁵

3.2 Rationale behind the most recent amendments

- 3.2.1 The amendments to FICA were informed and prompted by a shift in the global thinking, which called for the substitution of the rigid, formalistic approach⁶ to MLFT risk management, with what is known as the risk-based approach (the "RBA"). The RBA recognises that MLFT risk differs from one sector, accountable institution and client to another. A single accountable institution may even encounter MLFT risks that vary with each type of product, service or transaction. As such, every accountable institution must be afforded the discretion to follow bespoke MLFT risk management procedures that are appropriate for its unique circumstances.
- 3.2.2 The RBA is intended to be simple, cost-effective and client-friendly. Regarding the latter point, the government seeks to strike the elusive balance between identifying suspect financial activity on one hand, but not doing so to the point of excluding *bona fide* clients from the economy on the other hand.⁷

3.3 Administration of FICA

- 3.3.1 The ultimate steward of FICA (other than, of course, the Minister) is the Financial Intelligence Centre (the "FIC"), a body created under chapter 1. Its chief objectives include the identification of monies associated with unlawful activities, and the systematic eradication of MLFT.⁸ The FIC is not a law enforcement agency in the traditional sense. Rather, it plays the adjunct role of gathering and analysing financial intelligence, and ultimately sharing it with, *inter alia*, the National Prosecuting Authority, the intelligence services, and any authority with investigative powers.⁹
- 3.3.2 Each category of accountable institution is overseen by a supervisory body, which is charged with monitoring day-to-day, sector-specific FICA compliance.¹⁰ The relevant supervisory body for present purposes is the Estate Agency Affairs Board (the "EAAB").¹¹ In recognition of the fact that most supervisory bodies are creatures of statute, each supervisory body's powers and duties under FICA are expressly incorporated into its respective legislative mandate.¹² While there is a significant concurrence of jurisdiction

⁵ Throughout this note, references will be made to "estate agents". Legal principles that are stated in respect of "estate agents" are equally applicable to other accountable institutions such as attorneys and foreign exchange dealers, and the term "estate agent" is only used for its convenience and relevance to this exercise.

⁶ Commonly known as the rules-based approach.

⁷ Sections 1, 3 and 4 of the New Approach.

⁸ Section 3(1) of FICA.

⁹ Section 3(2) of FICA.

¹⁰ Section 45(1) of FICA.

¹¹ Item 4 of schedule 2 to FICA. Similarly to what is said in footnote 5, references to "the EAAB" are made for convenience, and they also denote the other supervisory bodies.

¹² Section 45(1A) of FICA.

between the FIC and the EAAB,¹³ the FIC reserves the right to intervene whenever the EAAB fails to discharge certain of its obligations.¹⁴

3.4 **Fundamental FICA principles**

- 3.4.1 Three mutually supportive principles underpin FICA, and they are, broadly speaking –
- 3.4.1.1 **Know Your Client (KYC)** – an estate agent must know with whom it is dealing, and take appropriate steps to verify its clients' particulars;
- 3.4.1.2 **Keep records** – an estate agent must maintain proper records of its client's transactions, and keep them on hand should they subsequently be required by the authorities; and
- 3.4.1.3 **Report suspect activities** – an estate agent must, *inter alia*, report to the FIC (a) all suspicious transactions regardless of their value, and (b) certain transactions whose value is above a certain threshold, regardless of whether they are suspicious.¹⁵
- 3.4.2 If an estate agent adheres to the above principles, the understanding is that it will more easily detect suspicious activity, and forward information in connection therewith to the relevant authorities. It is in this way that FICA is said to be complementary to the Prevention of Corruption Act, No 121 of 1998, and the Protection of Constitutional Democracy Against Terrorism and Related Activities Act, No 33 of 2004.

4 **KEY CHANGES IN LIGHT OF THE AMENDMENTS TO FICA**

The crux of the changes introduced by the FICA amendments is the risk management and compliance programme (the "**RMCP**"), and the considerably expanded duty to conduct a customer due diligence (the "**CDD**"). The salient provisions pertaining to each one will be highlighted.

4.1 **The RMCP**

- 4.1.1 The RMCP is a creature of section 42. It is an exhaustive, internally-developed¹⁶ policy document, codifying the procedures that an estate agent will follow in fulfilment of its CDD, record-keeping and reporting duties.
- 4.1.2 Section 42(2) enumerates several (at least eighteen) characteristics that a FICA-compliant RMCP must have, and they are tabulated in paragraph 8 below. The primary characteristic is that it must leave the estate agent in a good position to identify, assess and minimise the risk (generally and in relation to a particular client) of unwittingly facilitating MLFT through its product or service offering. It must delineate the procedures to be followed to this end.¹⁷
- 4.1.3 The assessment of risk is a core component of FICA compliance because, as will be demonstrated further along, a significant portion of the CDD procedures vary according to each client's MLFT risk. Section 42(a)(ii) requires the RMCP to explain how risk will be evaluated. This commonly entails a risk matrix or scorecard approach, in terms of which each risk indicator is assigned a certain number of points. The client is then characterised as a low-, medium- or high-risk client, depending on the band of total points within which

¹³ See, for example, section 45C, in terms of which either the FIC or the EAAB may levy administrative sanctions against a non-compliant accountable institution.

¹⁴ Section 4(g)(ii) read together with section 45(3) of FICA.

¹⁵ These three principles are articulated in parts 1 to 3 of chapter 1 of FICA.

¹⁶ That is to say, developed internally by the individual estate agent itself.

¹⁷ Section 42(2)(a) of FICA.

that client falls. However, FICA does not constrain the estate agent to a numerical risk model, or even to a model that identifies three different categories of risk. An estate agent may, for example, opt for a qualitative risk model that only distinguishes between two levels of risk, as long as this model is appropriately substantiated in the RMCP itself.¹⁸

- 4.1.4 In terms of section 42(2A), an estate agent may exclude from its RMCP any characteristic not applicable to it.¹⁹ This provision is not as helpful as it seems for the following reason: almost all of the CDD requirements are peremptory. For the most part, each RMCP characteristic is simply a CDD requirement restated into a procedure. For example, where the CDD provisions require the nature of a client's business to be determined, the RMCP details how this requirement will be met. If almost all of the CDD requirements are peremptory, it follows, then, that an RMCP will inevitably include almost all of the prescribed characteristics.
- 4.1.5 When excluding an irrelevant characteristic, an estate agent cannot simply ignore it altogether, but must rather rationalise its exclusion in the RMCP itself. An important point to note is that section 42(2A) only provides relief from the obligation to include a particular characteristic. What it does **not** do is to diminish an estate agent's obligation to design an RMCP, to comply with the CDD requirements themselves, or to comply with FICA generally.
- 4.1.6 Proportionality is one of the most important features of an RMCP, whose granularity must correspond with the size of the estate agent, as well as with the sophistication and diversity of the estate agent's products and services.²⁰
- 4.1.7 The answer to what constitutes FICA compliance *vis-à-vis* the RMCP has two dimensions to it –
- 4.1.7.1 Firstly, the RMCP must comply with the substantive FICA provisions summarised in paragraph 8; and
- 4.1.7.2 Secondly, once an estate agent has designed and implemented its RMCP, it must at all times act within the parameters set out therein.
- 4.1.8 While there is no requirement for an RMCP to be lodged anywhere or approved prior to its implementation, an estate agent must keep a copy of it on hand and make it available to the EAAB or the FIC at their request. In addition, both the FIC and the EAAB may appoint inspectors, on whom wide powers are conferred to enter premises, request documents (including RMCPs), and penalise accountable institutions for contraventions of FICA.²¹
- 4.1.9 Lastly, there is nothing in FICA that serves to prohibit REBOSA from procuring, as it has, the design of a guidance tool in the form of a template RMCP. However, caution must be exercised in this regard, given that (i) the appropriateness of an RMCP is specific to each estate agent, and (ii) the ultimate responsibility for violations of FICA is individual, not collective. In the event of an adverse finding by the FIC, the EAAB or an inspector in connection with a particular RMCP, the fact that the estate agent concerned derived its

¹⁸ Paragraph 45 of Guidance Note 7 makes it clear that a two-tier risk model is permissible. REBOSA's template RMCP adopts this very risk model, one of the justifications for which is that estate agents typically offer a limited set of products and services, which are not as complex as, for example, those offered by banks and insurance companies.

¹⁹ By way of an example, a provision that is inapplicable to some estate agents is section 42(2)(q), which requires an RMCP to detail how the procedures set out therein will be inculcated across all an estate agent's branches and subsidiaries. Estate agent agents who are not franchisors and who do not have subsidiaries or branches could thus dispense with section 42(2)(q) in their RMCP, subject to paragraph 4.1.5.

²⁰ Paragraph 3 of the New Approach.

²¹ Section 42(4) read with sections 45A to C of FICA.

RMCP from a template would not be a valid defence. REBOSA ought, by way of a disclaimer, to make it clear that the template should not be regarded as a turn-key product. Estate agents must only use the template as a point of departure, adjusting it as necessary.

4.2 CDD

4.2.1 The CDD is inextricably linked to the RMCP as developed by an estate agent. It is predicated on, *inter alia*, the rule that an estate agent must not transact with an anonymous or fictitiously named client.²²

4.2.2 When dealing with any client (irrespective of its legal form), an estate agent must, in the course of commencing a business relationship or concluding a single transaction –

4.2.2.1 establish and verify the identity of the client. If the client is not acting in its own name as a principal, the estate agent must verify the principal on behalf of whom the client is acting, and the client's authority to do so;²³ and

4.2.2.2 where there will be an ongoing business relationship, collect information about the nature of the business relationship, its intended purpose, and how the transactions thereunder will be funded.²⁴ This is a powerful MLFT risk management tool, because it facilitates the detection of dubious transactions. For example, if a client has stated that it will purchase industrial and commercial properties and receive financing from South African banks, the estate agent's suspicions would be understandably raised by that client's purchase of luxury apartments, paid for with funds from a financial institution based in Bermuda.

4.3 Additional CDD generally applicable to all clients who are not natural persons (ie companies, close corporations, partnerships and trusts)

If a client is anything other than a natural person, the estate agent must, in addition to establishing that client's identity, also establish (i) the client's ownership and control structure and (ii) the nature of the client's business.²⁵ The concept of "the nature of a client's business" is not to be conflated with that of "the nature of the business relationship". There is a clear distinction between the two, and different legal obligations attach to each one.

4.4 Additional CDD of companies and close corporations

4.4.1 For a client that is a company or close corporation, the estate agent must determine and verify the identity of the client's beneficial owner. To alleviate the difficulties often attendant to determining beneficial ownership, section 21B(2)(a) allows for it to be determined with reference to (i) the ownership of the controlling²⁶ interests in a client, (ii) the control over the client exercised other than by means of a controlling interest,²⁷ or (iii) the client's directors or managers.

²² Section 20A of FICA.

²³ Section 21(1) of FICA. The nuances involved in distinguishing between a client on one hand, and a principal or agent of a client on the other hand, along with the treatment of each, are explained in the template RMCP.

²⁴ Section 21A of FICA.

²⁵ Section 21B(1) of FICA.

²⁶ "Control" is defined under paragraph 103 of Guidance Note 7 as ownership of 25% or more of the shares or voting rights in respect of a client.

²⁷ By means of a shareholders or voting agreement, for example.

4.5 Additional CDD of partnerships

- 4.5.1 In the case of a partnership, the estate agent must determine and verify the name of the partnership, the partners, the person(s) in executive control of the partnership, and the person purportedly authorised to conduct business with the estate agent in the name of the partnership.²⁸

4.6 Additional CDD of a trust

When dealing with a trust, the estate agent must determine the name of the trust, the relevant Master of the High Court, the name of the founder, the names of the trustees, the name of the person purportedly authorised to transact with the estate agent on behalf of the trust, and the names of the beneficiaries (if named) or the method by which they are determinable.²⁹

4.7 Other CDD principles

- 4.7.1 Other provisions pertaining to the CDD are, briefly –
- 4.7.1.1 Section 21C, which dictates that an estate agent must conduct a CDD on a continual basis;
 - 4.7.1.2 Section 21D, in terms of which an estate agent must repeat its CDD procedures if some doubts arise in respect of the accuracy of any information obtained in a previous CDD;
 - 4.7.1.3 Section 21E, which prohibits an estate agent from commencing a business relationship or concluding a transaction for a client in respect of whom the estate agent is unable to conduct a CDD or ongoing CDD; and
 - 4.7.1.4 Sections 21F to H, which require certain enhanced CDD procedures to be applied to foreign prominent public officials as well as high-risk domestic prominent influential persons.

4.8 How a CDD must be conducted

An important question is what steps an estate agent must take when conducting the CDD, in light of the legal principles set out above. The simple answer is that it must act in accordance with its own RMCP, which will have detailed the steps to be followed for each type of client. Of assistance is the generally accepted position that documents issued by the government or a governmental authority are regarded as more reliable than those generated by the client itself, or by some other third party. The latter two types of document are more susceptible to fabrication than the former type.³⁰

4.9 On whom a CDD must be conducted

- 4.9.1 The subject of a CDD is the estate agent's client, who is the person mandating the estate agent. However, as will be discussed more fully in paragraph 4.10, the mere act of receiving a mandate does not automatically trigger CDD obligations on the estate agent's part. Said CDD obligations are confined to the client only, and they do ***not*** apply to any other party from whom estate agents typically receive money, such as –
- 4.9.1.1 a purchaser who pays the estate agent the deposit in terms of a sale agreement in respect of which the client is the seller, and *vice versa*;

²⁸ Section 21B(3) of FICA.

²⁹ Section 21B(4) of FICA.

³⁰ Paragraph 88 of Guidance Note 7.

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- 4.9.1.2 a lessee who pays the estate agent a deposit in terms of a lease agreement in respect of which the client is the lessor, and *vice versa*;
- 4.9.1.3 a conveyancer who pays the estate agent its commission, where the conveyancer, and not the estate agent, is the party who receives the deposit; and
- 4.9.1.4 any other counter-party to an agreement involving the client.
- 4.9.2 While the estate agent has no CDD duties in respect of the people mentioned in paragraphs 4.9.1.1 to 4.9.1.4, it would still bear certain record-keeping duties, which are imposed by section 22A of FICA. Record-keeping obligations are distinct from, and not to be confused with CDD obligations.³¹

4.10 **When a CDD must be conducted**

- 4.10.1 Just as the RMCP sets out how the CDD must be conducted, it also sets out when. In this regard, "single transactions" and "business relationships" are two key concepts to be borne in mind, both of which are defined in section 1. A "single transaction" is a transaction other than one effected under a "business relationship", the value of which must be above a certain threshold.³² A "business relationship" is, in turn, defined as an arrangement contemplating a series of transactions occurring on a continual basis. All this is to say that a "single transaction" is "once-off", and a "business relationship" is ongoing.
- 4.10.2 It is suggested that estate agents conduct their CDDs any time *before* the first receipt of value, whether such value (a) is in the form of money or any other thing embodying economic benefits, (b) is received in terms of a single transaction or a business relationship, and (c) is received from the client or from another person who is relevant to the single transaction or business relationship. The approach of making the transfer of value the focal point when conducting a CDD is sound for the following inter-related reasons –
- 4.10.2.1 Financial Action Task Force

Firstly, South Africa is a member of the Financial Action Task Force (the "**FATF**"), an international standard-setting body on whose principles FICA is rooted.³³ The FATF's prescripts around various MLFT matters are known as "recommendations", and an excerpt of recommendation 10 (CDDs) reads as follows (with our emphasis):

"Financial institutions should be required to verify the identity of the customer and beneficial owner before or during the course of establishing a business relationship or conducting transactions for occasional customers. Countries may permit financial institutions to complete the verification as soon as reasonably practicable following the establishment of the relationship, where the money laundering and terrorist financing risks are effectively managed and where this is essential not to interrupt the normal conduct of business."

Recommendation 10 is indicative of the fact that MLFT measures should be taken as pragmatically as possible, with an approach that is not divorced from the realities of the business environment. MLFT risk, we submit, is most effectively managed where money is involved. It is trite, but worth repeating, that money laundering is any practice in terms

³¹ The record-keeping obligations are, arguably, less onerous than CDD obligations. Under section 22A of FICA, the estate agent need only record such details as will facilitate the reconstruction of the transaction, such as the name of the person from whom the money was received, the underlying reason for the receipt of that money, and the currency involved. Unlike the information established in terms of a CDD, details recorded under section 22A do not require verification.

³² The threshold is determined by regulation, and it is currently R5 000.00 (five thousand rand).

³³ Incidentally, much of the nomenclature used in FICA is borrowed directly from the FATF recommendations.

of which someone deals with money in such a way as to obscure its illegitimate origins. Absent the transfer of value, there is little scope for the estate agent to facilitate MLFT unwittingly.³⁴ Given that one of FICA's stated objectives is to combat MLFT, it follows that if estate agents conduct CDDs any time before the transfer of value, FICA's objectives are fulfilled; and

4.10.2.2 The RMCP's flexibility regarding timing

Secondly, FICA is silent on the precise moment at which the obligation to conduct a CDD is triggered. One possible reason for this is that there are sixteen distinct categories of accountable institution. Each one operates within a different paradigm, and it would be difficult (and undesirable) for the legislature to seek to prescribe a universally applicable framework in respect of the timing of FICA compliance. However, the more likely reason is that the timing of a CDD is yet another matter that is left to the discretion of the estate agent, but that must be expressly provided for in the RMCP. This much is borne out in paragraphs 76 to 78 of Guidance Note 7, wherein it is stated that estate agents ***even have the discretion of determining in their RMCPs the point in time at which a prospective client becomes a client.***³⁵ It is be more economically and administratively expedient to tie the client / prospective client distinction to the question of value. This will avoid a situation in which CDD procedures are conducted on a prospective client, only to find that the engagement with the prospective client did not crystallise into a single transaction or business relationship, and the estate agent did not receive any value. This point is highly relevant to estate agents in particular, who sometimes receive mandates from clients who have given mandates to several other estate agents in respect of the sale of one and the same property. If the approach to CDD proposed above is not followed, then not only will estate agents carry out CDDs even in circumstances where it is unlikely that they will ultimately receive value, but prospective clients will also be subjected to FICA processes by each and every estate agent who they have mandated.

4.10.3 As long as an estate agent conducts CDDs in accordance with methods, and at points in time stipulated in its own ***compliant*** RMCP, then that estate agent will have complied with FICA.

5 OTHER FACETS OF FICA COMPLIANCE – RECORDS AND REPORTS

5.1 The record-keeping and reporting obligations under FICA,³⁶ though just as important as the CDD and RMCP obligations, will not be discussed in any great detail herein. There are three reasons for this –

5.1.1 Firstly, the FICA amendments do not radically change the legal position in respect of estate agents' recordkeeping obligations;

5.1.2 Secondly, the FIC's electronic reporting portal, on which all estate agents must have already been registered even prior to the FICA amendments,³⁷ already contains the information that must be filled in for each type of report; and

³⁴ Indeed, the idea of "value" suffuses the FICA provisions. See, for example: the definition of "single transaction", which only applies to transactions above a prescribed *value*; section 21A(c), which requires estate agents to gather information on the source of the *funds* to be used in terms of the business relationship; and section 22A, which stipulates that an accountable institution must maintain records of the *amounts and currencies* involved in every transaction concluded.

³⁵ In light of this discretion, the question of *when* a transaction comes into existence is of no consequences. Of concern is the question of when there is a transfer of value to the estate agent, which is decisive of when the CDD obligations are triggered.

³⁶ Sections 22 to 26, and 27 to 41A respectively.

³⁷ Section 43B of FICA.

- 5.1.3 Lastly, the RMCP explains at length the procedures and timelines to be observed when making reports to the FIC, and the circumstances under which this is to be done. Reproducing this information would add unnecessary volume hereto.

6 EXEMPTIONS AND IMPLEMENTATION

- 6.1 The Minister, by virtue of section 74(1)(a), is empowered to exempt from FICA (wholly or partially) any persons, accountable institutions or categories of accountable institutions. The exemption can be unqualified, or in relation to particular types of transaction. He must exercise his section 74(1)(a) powers in consultation with the FIC.
- 6.2 What is not clear is how an exemption is initiated or proposed. FICA provides no mechanism through which REBOSA or an estate agent, for example, may approach the Minister or the FIC directly to apply for said exemption. However, there is nothing expressly prohibiting REBOSA (or anybody else) from following such a course of action.
- 6.3 Given that FICA offers no guidance as to whether or how applications for exemptions can be made, the various consultations (which pertain and are pivotal to the implementation of FICA)³⁸ provide a possible route along which REBOSA may proceed. Two allied things are relevant here –
- 6.3.1 The FIC will conduct roadshows during which it will engage with the various categories of accountable institutions, on dates to be published on the FIC's website. The roadshows will provide REBOSA with an opportunity to voice its concerns,³⁹ and gauge the likelihood of its members obtaining an exemption.
- 6.3.2 The EAAB will set the date by which FICA will be applicable to estate agents, but this date will ideally be determined inclusively, through extensive discussions between the EAAB and estate agents.⁴⁰ It is suggested that REBOSA lobbies for timelines that are as generous as possible. While generous timelines would not be the panacea to the potential concerns to be outlined in paragraph 7, they would provide some measure of relief, in that REBOSA and its members would have ample time in which to plan as seamless a transition as possible into becoming FICA-compliant (on the assumption, of course, that the exemption is denied altogether),
- and it is advisable for REBOSA to take advantage of both avenues, in order to maximise its chances of success. Of importance is the fact that although many of the FICA amendments have been effective since 2 October 2017, the penalties and administrative sanctions for non-compliance will be suspended pending the determination of a timetable for implementation.
- 6.4 It is suggested that if REBOSA wishes to apply for an exemption, it applies for one extending to estate agents whose turnover or number of employees is below a certain threshold (or some other objective basis), which would be of benefit to SMMEs. This is more likely to succeed than an application for a universal exemption from FICA for the entire estate agency industry.
- 6.5 Our view, despite what is said in paragraphs 6.3 and 6.4, is that the probability of obtaining any exemption is low, because –
- 6.5.1 South Africa's international obligations constitute a significant constraint (at least politically) to the Minister's powers to grant exemptions. In particular, South Africa's membership of the FATF intimated above means that any amendments made to FICA must be consonant

³⁸ Paragraph 1 of the Roadmap.

³⁹ See paragraph 7 of this memorandum.

⁴⁰ Paragraph 5 of New Approach suggests that there must be agreement in respect of the timelines and implementation dates.

with these standards. Exempting estate agents from FICA would run counter to the principles espoused by the FATF;⁴¹ and

- 6.5.2 for reasons that will become apparent in paragraph 7, an exemption is, in the final analysis, probably not necessary.

7 COMMENTS FOR REBOSA REGARDING THE CDD AND RMCP

7.1 Concerns

On the whole, FICA compliance should be less burdensome under the new regime. It is nevertheless useful to consider REBOSA's potential concerns, if only to allay them. They are as follows –

- 7.1.1 **RMCP** – notwithstanding the considerable discretion and latitude that estate agents will enjoy whilst designing their RMCPs, it will be a costly exercise. The substantive requirements listed in section 42(2) are exacting. As explained in paragraph 4.1.5, although section 42(2A) offers a means of obviating some of the requirements, requirements so obviated cannot be disregarded. They must still be addressed in the RMCP, and their non-applicability must be demonstrated.
- 7.1.2 **Nature of a juristic person's business** – the requirement to determine the nature of a corporate client's business is articulated in section 21B(1). Under the old Companies Act, No 61 of 1973, this exercise was a relatively simple matter of referring to its articles or memorandum of association. The memorandum of incorporation, which is a modern iteration of the constitutional document for companies under the new Companies Act, No 71 of 2008, is typically silent on the nature of the business in which a company will engage, and when it is not silent, the objects of the company are framed in such vague or wide language as to make it nearly impossible to glean the precise type of business contemplated. This problem is compounded by the fact that the details of a company's business activities are often contained in a shareholders agreement, which is not a public document, and which is usually protected by a confidentiality clause.
- 7.1.3 **Beneficial ownership** – section 21B(2)(a)'s wording is such that the three methods of determining the beneficial ownership of a company or close corporation (ie ownership, control and management) must be exhausted in that order. Doing this for a close corporation is comparatively easy, because in **most** cases, the members are all natural persons, and the CIPC document discloses the percentages in which the members' interests are held. The position is entirely different with companies. In many instances, they are owned or controlled by several other companies which are, in turn, likewise owned or controlled by several other companies. Off-shore entities interposed between these companies add further complexity to the ownership structure, and the net result is that tracing the ultimate ownership or control to a particular natural person is difficult. The owners and controllers of a company are not reflected in that company's CIPC documents. The CIPC documents do, however, disclose the directors. REBOSA might wish for estate agents to be allowed to select, from the three available methods, the one that is simplest and quickest for them, instead of having to exhaust the three methods one-by-one.⁴²
- 7.1.4 **Legal documents** – when transacting with partnerships and trusts especially, estate agents may be confronted with situations in which they have to read partnership

⁴¹ The FATF's powers of sanction are not akin to those of the United Nations, in the sense that the FATF is not empowered to levy penalties directly against its members. When a country acts inconsistently with its FATF obligations, the FATF makes a public statement announcing the non-compliance. This is a signal to the other member states that the offending country is not adequately addressing its MLFT risks. The intention behind the public statement is that other member states will approach the offending country with circumspection when making investments therein or, better yet, not invest therein at all.

⁴² Arguably, the easiest of the three options would be to determine beneficial ownership with reference to who the directors or managers are.

agreements and trust deeds. This would be done to satisfy the requirement of identifying partners, trustees or beneficiaries, evaluating whether a particular person is authorised to transact with the estate agent, or determining the scope of a partnership's or trust's activities. For many estate agents, correctly interpreting these legal documents may be beyond their expertise. The costs of enlisting legal assistance in this regard are usually prohibitive. Moreover, as is the case with the shareholders agreement discussed earlier, partners may not readily divulge their agreement, which is often subject to confidentiality obligations in any event.

- 7.1.5 **Ongoing due diligence** – in the case of ongoing business relationships, section 21C requires an estate agent to monitor the client's transactions periodically. This is with a view to assessing whether such transactions were contemplated when the client initially defined the nature of the business relationship. As with the point made about legal documents above, this seems to require estate agents to act as auditors, which may not be within the scope of their expertise.
- 7.1.6 **Verification** – in most instances when FICA imposes a duty to establish information about a client, it is coupled with a duty to verify the information established.⁴³ It can be argued that government-issued documents such as identity cards, passports, driver's licences and CIPC documents fulfil the purpose of both establishing and verifying a certain particular, or at the very least lessen the need for verification. However, verification will be problematic where no government-issued document is available, and the estate agent has to rely on client- or third-party-generated documents. The problem is two-fold: firstly, there is a dearth of reliable databases, and the few reliable ones are costly; and secondly, given that an estate agent may not take on a client in respect of whom information cannot be established or verified, what will result is the economic exclusion of *bona fide* clients who pose little risk, which is subversive to the government's efforts to mitigate MLFT risk in an economically inclusive fashion.⁴⁴
- 7.1.7 **Withdrawal of exemptions** – the Regulations on Exemptions in Terms of the Financial Intelligence Centre Act, No 38 of 2001 (the "**Exemption Regulations**")⁴⁵ have been withdrawn, and there is no indication that they will be replaced. This might be of concern for the following reasons –
- 7.1.7.1 Regulation 2 permits estate agents to defer their duty to verify client information until such time that either (i) a transaction is concluded (in the case of an ongoing business relationship with the client) or (ii) anything is done to effect a single transaction. Regulation 2 is especially helpful to estate agents, because of the speculative nature of the mandates that they receive; and
- 7.1.7.2 Regulation 4 provides that where a client's transaction involves two different accountable institutions, one of them (termed the "second accountable institution") may be exempted from compliance with sections 21 and 22 of FICA (the duties to conduct a CDD and to keep records respectively), on the strength of the other one's (termed the "primary accountable institution") prior compliance therewith, and a letter from the primary accountable institution to that effect. The relevance of regulation 4 is more fully appreciated when considering that estate agents often work closely with conveyancers (who are also accountable institutions). In many cases, both the estate agent and the conveyancers earn their fees upon the registration of the transfer of the property sold, and it is the conveyancer who consummates the underlying sale agreement by effecting the transfer. In the circumstances, there is some scope, under the Exemption

⁴³ See, in particular, sections 21(1) and (2), as well as section 21B of FICA.

⁴⁴ See paragraph 3.2.2 of this memorandum.

⁴⁵ Published under GN R1596 in GG 24176 of 20 December 2002.

Regulations, for estate agents to position themselves as secondary accountable institutions,⁴⁶

and the withdrawal of regulations 2 and 4 will deny estate agents of the significant advantages enjoyed thereunder.

7.2 Allaying the concerns

- 7.2.1 The concerns around the costs of designing an RMCP are valid. However, said costs will be considerably reduced by the template RMCP.
- 7.2.2 The requirement to conduct an ongoing CDD will have little impact on those estate agents who engage in single transactions, as opposed to business relationships.
- 7.2.3 If one carefully considers the flexibility that comes with designing an RMCP, the requirement to determine the nature of a client's business and beneficial ownership structure (and to verify the same) should not raise much concern. This may be illustrated by way of an example: a client, who is a company, approaches estate agent Smith. Smith's RMCP might be as simple as providing that for a low-risk client, the nature of the business and beneficial ownership of that client are verified by a copy of a letter from its public officer or senior employee confirming the correctness of the information provided. For a high-risk client, the RMCP might require that CIPC documents be produced to verify the same thing. The RMCP itself answers the question of how to determine the risk category within which a given client will fall, and the documentary requirements for each category.
- 7.2.4 The same principles stated in the immediately preceding paragraph apply to the concern that FICA will make excessive inroads into estate agents' core business, in that they will spend an inordinate amount of time poring over legal documents such as partnership agreements and trust deeds, which time could have been better spent selling properties. No estate agent would be compelled to include the interpretation of legal documents in its RMCP, in circumstances where such a procedure cannot be reconciled with the estate agent's MLFT risk.
- 7.2.5 Finally, the withdrawal of the Exemption Regulations will not change an estate agent's ability to rely on a conveyancer's FICA compliance in respect of a client that is common to the estate agent and the conveyancer, nor will it change an estate agent's ability to defer its compliance with the CDD requirements to the conclusion of a transaction with a client. Where previously these two things were possible under the authority of regulations 2 and 4, they are now possible under the authority of the RMCP,⁴⁷ which may validly allow an estate agent to leverage off the efforts of a conveyancer or to delay compliance with FICA, if such measures are appropriate for the estate agent concerned. As can be seen, there is no longer a need for the Exemption Regulations. They were only necessary because without them, the dogmatism of the old rules-based approach would have required accountable institutions to conduct CDDs, even where this would amount to a duplication of efforts, and where the timing of the CDDs would be inconvenient. Under the RBA, there is no longer a need for a set of regulations that distinguish between primary and secondary accountable institutions, because this distinction could now fit squarely within any RMCP that makes provision for it.

⁴⁶ One way of achieving this is for the sale agreement (which is often drafted by the estate agent) to include a term requiring the seller to procure that the conveyancer complies with FICA, certifies its compliance by way of a letter, and furnishes the estate agent with said letter.

⁴⁷ The template RMCP incorporates the now withdrawn exemptions.

8 SUBSTANTIVE REQUIREMENTS IN RESPECTIVE OF SECTION 42

| NO | WHAT AN RMCP MUST DO | SECTION REFERENCE |
|----|---|-------------------|
| 1 | Enable an accountable institution to identify, assess, monitor, mitigate and manage the MLFT risk to which it is exposed | 42(2)(a) |
| 2 | Determine how an accountable institution will distinguish between: <ul style="list-style-type: none"> • Prospective clients; and • Actual clients for both single transactions and business relationships | 42(2)(b) |
| 3 | Determine how an accountable institution will ensure that it does not deal with anonymous or fictitious clients | 42(2)(c) |
| 4 | Set out the procedures to be carried out to establish and verify the identity of natural persons, trusts and legal persons | 42(2)(d) |
| 5 | Determine how the accountable institution will compare future transactions against the knowledge of a client at the accountable institution's disposal | 42(2)(e) |
| 6 | Set out the additional CDD procedures to be carried out in respect of trusts and legal persons | 42(2)(f) |
| 7 | Set out the ongoing CDD procedures in the case of business relationships | 42(2)(g) |
| 8 | Explain how complex or abnormally large transactions, as well transactions with no apparent business or lawful purpose, will be scrutinised, and how findings in this regard will be documented | 42(2)(h) |
| 9 | Describe how an accountable institution will confirm existing information if doubts arise as to its accuracy | 42(2)(i) |
| 10 | Detail how an accountable institution will identify clients, collect information about an intended business relationship, conduct an additional CDD, and conduct an ongoing CDD when its suspicions are raised during a business relationship | 42(2)(j) |

| NO | WHAT AN RMCP MUST DO | SECTION REFERENCE |
|----|---|-------------------|
| 11 | Set out how an accountable institution will terminate an existing relationship when it cannot conduct a CDD, obtain information about the business relationship, or conduct an ongoing CDD | 42(2)(k) |
| 12 | Describe how an accountable institution will determine whether a client is a foreign prominent public official or domestic prominent influential person | 42(2)(l) |
| 13 | Determine how the accountable institution will distinguish between clients of low risk and high risk, and how the CDD procedures will differ for each | 42(2)(m) |
| 14 | Describe how and where FICA records will be kept | 42(2)(n) |
| 15 | Detail the criteria to be used in deciding when a transaction or activity is reportable to the FIC | 42(2)(o) |
| 16 | Set out the processes to be followed when reporting information to the FIC | 42(2)(p) |
| 17 | Provide for how: <ul style="list-style-type: none"> • the RMCP will be applied across branches, subsidiaries and foreign operations; • the accountable institution will determine whether the RMCP's implementation is possible in a foreign country hosting one of its foreign branches or subsidiaries; and • the accountable institution will inform the FIC if the RMCP is impermissible in such foreign country | 42(2)(q) |
| 18 | Detail how the RMCP will be operationalised | 42(2)(r) |
| 19 | Indicate whether any provisions of section 42 are not applicable, with justifications | 42(2A) |

9 REQUIRED CDD INFORMATION FOR VARIOUS TYPES OF CLIENT

| TYPE OF CLIENT | FICA SECTION | INFORMATION REQUIRED |
|--|--------------|---|
| NATURAL PERSONS | 21(1) | <ul style="list-style-type: none"> • Name of client, or of client's principal • Authority to act on principal's behalf (if applicable) |
| | 21A | <ul style="list-style-type: none"> • Nature of business relationship • Purpose of business relationship • Source of funding |
| COMPANIES AND CLOSE CORPORATIONS | 21(1) | <ul style="list-style-type: none"> • Name of client, or of client's principal • Authority to act on principal's behalf (if applicable) |
| | 21A | <ul style="list-style-type: none"> • Nature of business relationship • Purpose of business relationship • Source of funding |
| | 21B(1) | <ul style="list-style-type: none"> • Nature of client's business • Ownership and control structure |
| | 21B(2) | <ul style="list-style-type: none"> • Names of beneficial owners |
| PARTNERSHIPS PARTNERSHIPS (CONTINUED) | 21(1) | <ul style="list-style-type: none"> • Name of client, or of client's principal • Authority to act on principal's behalf (if applicable) |
| | 21A | <ul style="list-style-type: none"> • Nature of business relationship • Purpose of business relationship • Source of funding |
| | 21B(1) | <ul style="list-style-type: none"> • Nature of client's business • Ownership and control structure |
| | 21B(3) | <ul style="list-style-type: none"> • Name of partnership • Name of every partner • Name of executive controllers • Name of person authorised to act for partnership |
| TRUSTS | 21(1) | <ul style="list-style-type: none"> • Name of client, or of client's principal • Authority to act on principal's behalf (if applicable) |
| | 21A | <ul style="list-style-type: none"> • Nature of business relationship • Purpose of business relationship • Source of funding |
| | 21B(1) | <ul style="list-style-type: none"> • Nature of client's business • Ownership and control structure |
| | 21B(4) | <ul style="list-style-type: none"> • Name of trust • Master involved • Name of founder • Names of trustees • Name of person authorised to act on behalf of trustee |