

MEMORANDUM

Estate Agents' Duties Under The Financial Intelligence Centre Act

FICA imposes four categories (sets) of duties on estate agents, namely

- (a) the duty to establish and verify the identity of clients (commonly referred to as the "know your client" requirements);
- (b) the duty to report suspicious transactions to the FIC;
- (c) the duty to report to the FIC (i) cash payments over a prescribed limit, and (II) electronic transfers of money over a prescribed limit to and from South Africa;
- (d) internal administrative duties, namely
 - (i) the duty to keep record of clients and transactions;
 - (ii) the duty to formulate and implement internal rules to ensure compliance with the Act;
 - (iii) the duty to train staff; and
 - (iv) the duty to appoint a compliance officer to monitor compliance with the Act.

Each of these categories of duties is discussed in more detail below.

A. THE DUTY TO ESTABLISH AND VERIFY THE IDENTITY OF CLIENTS AND OTHERS

1. The scope of the duty

In terms of section 21 of FICA an estate agents firm may not establish a *business relationship* or conclude a *single transaction* with a *client* unless it has taken the steps prescribed by the regulations to (i) *establish* and (ii) *verify* the identity of

- (i) the client;
- (ii) the person representing client; and
- (iii) the person for whom the client may be acting.

The Act defines a "transaction" as a "transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution". A "business relationship" is defined as "an arrangement between a client

and an accountable institution for the purpose of concluding transactions on a regular basis".

What does this mean for estate agents?

Estate agents given a mandate to sell or let immovable property do not conclude transactions between themselves and prospective buyers or lessees. The only "transaction" concluded between an estate agent and a client is the mandate agreement whereby the estate agent agrees to perform some or other estate agency service for the client. The client is therefore the person granting the mandate; in the normal course of events the seller or lessor of the property. An estate agent may of course accept a mandate from a prospective buyer or lessee to find a suitable property, in which case the buyer or lessee will be the client. This is generally referred to a "buyer agency". In everyday practice, however, estate agents mostly accept mandates from sellers and lessors, meaning that the seller or lessor is the estate agent's client.

For the purposes of FICA estate agents must therefore do the following:

- Firstly, the prescribed information must be obtained about a client's identity (and that of the other person's mentioned above). Normally the client would be the seller or lessor granting the estate agent the mandate to sell or let. *In such cases the identity of the buyer or lessee need not be established or verified.* In the exceptional instances where a mandate is accepted from a prospective buyer or lessee, the buyer or lessee would be the client and their identities must be established and verified. *In those instances it would not be necessary to establish or verify the identity of the seller or lessor.*
- Secondly, once the information has been obtained the correctness thereof must be verified taking the steps prescribed by the regulations.

2. The person responsible for obtaining and verifying the information

An estate agency mandate is given to an estate agency firm and not to the individual agents working for the firm. Accordingly, the responsibility to establish and verify the firm's clients lies with the principal of the firm. In discharging this responsibility principals will in most instances require the assistance of the salespersons or letting agents who obtain the mandates for the firm. Principals should therefore take great care in training their staff to obtain the prescribed information and documentation from clients.

3. At what point in time must a client's identity be established and verified?

In terms of the Act and regulations the position is currently as follows:

- An estate agent may not accept a mandate from a client unless the client's identity has first been established. In other words, the prescribed information about a client must be obtained *before* a mandate may be accepted.

- Once the prescribed information about a client has been obtained the mandate may be accepted and the estate agent may commence marketing the property.
- The information about a client's identity must be *verified* before the mandate is performed. In the case of a normal mandate to sell or let this means that the identity of the seller or lessor must be verified before an enforceable sale or lease agreement in respect of the property is concluded. Accordingly, if there are no suspensive conditions to be fulfilled, the identity must be verified before the sale or lease is signed by both parties. If the agreement is subject to suspensive conditions the identity must be verified before the conditions are fulfilled.

In order to comply with the duty to verify a client's identity, firms are advised to start obtaining the prescribed documentation about a client immediately after accepting the client's mandate.

4. The information to be obtained and the manner in which this must be verified

The information to be obtained, and the manner in which this must be verified, are laid down in the regulations. The information and verification process differs, depending on whether the client is a –

- Natural person;
- Company;
- Close corporation;
- Partnership;
- Trust; or
- Legal entity other than a company or close corporation.

Different requirements apply furthermore depending on whether the client is

- A South African citizen or a foreigner;
- In South Africa or abroad;
- A company listed on a recognized stock exchange; or
- Not in contact with the accountable institution when information is obtained about its identity.

To facilitate matters the Board has prepared a number of standard forms that can be used by estate agents in order to establish and verify a client's identity. These forms

relate to most of the clients whom estate agents deal with in everyday practice. It is not compulsory to use these forms, and firms are free to design their own or to adopt a different approach in order to comply with the "know your client requirements".

REMEMBER THE FOLLOWING:

- If the owners jointly are your clients, or if the one represents the others when giving you a mandate, the prescribed information must be obtained and the verification process implemented for each owner.
- If your client is the husband only, then you need not establish or verify his wife's identity. However, if both husband and wife are your clients (for example if both of them signed the mandate document jointly) the identities of both must be established and verified.
- If two firms have a joint sole mandate, it is not necessary for both firms to comply with the "know your client requirements", provided they come to an agreement on which firm will establish and verify the client's identity. It can be agreed for example that the listing agent will obtain the information about the client and that the selling agent will verify the details.
- In a multi-listing situation there is normally only one mandate, namely the mandate between the seller and the listing agent. Accordingly, the duty to comply with FICA's "know your client" requirements lies with the listing agent. However, nothing prohibits the participants in the multi-listing scheme to come to an agreement that the listing agent will obtain the information about the client and that the selling agent will verify the details. If such an arrangement is made it must be remembered that the responsibility nevertheless remains with the listing agent to ensure that the selling agent performs the verification process accurately.
- You must only obtain the details of your client. However, if your client represents the owner, you must also obtain the latter's details. Take the case where A sells to B. Before transfer B sells to C. If B is your client you need not obtain A's details.
- If a client refuses to give you the prescribed information or documents when asked to do so you may go ahead with the deal but to safeguard yourself it is advisable that you record in writing that the details were requested by you but not furnished by the client. If the transaction is a sale agreement, it is furthermore advisable to inform the conveyancer about this as well.
- You need not report the matter to the FIC, unless you are suspicious about the client's true motives.
- When verifying a client's identity you must obtain certain documents concerning the client and check the correctness of the information given to you about the client's identity. The documents that you must get are prescribed by the regulations.

- To establish and verify a client's identity if he or she is a foreigner living in another country or a South African on holiday abroad, all the prescribed details about the client's identity must be obtained, for example by fax or post. You need not verify the details provided –
 - The client is situated in a country which, to the satisfaction of the Estate Agency Affairs Board, has anti-money laundering laws similar to those in the RSA; and
 - A person or institution in that country confirms to you in writing that the details obtained by you have been verified by it; and
 - That person or institution undertakes to forward to you all documents obtained during the verification process.

FICA does not prescribe who the person or institution doing the verification work in the foreign country must be. It may, for example, be a client's bank, employer or business associate.

The Board will in due course publish on its website a list of countries which have anti-money laundering laws similar to those in the RSA.

B. THE DUTY TO REPORT SUSPICIOUS TRANSACTIONS TO THE FIC

1. The scope of the duty

In terms of section 29 (1) of the Act every person who

- Carries on an estate agency business; or
- Is in charge of or manages an estate agency business; or
- Is employed by an estate agency business

Must submit a report to the FIC if such person who *knows* or *suspects* that –

- (a) the business has received or it about to receive the proceeds of unlawful activities;
- (b) a transaction or series of transactions to which the business is a party –
 - (i) facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities;
 - (ii) has no apparent business or lawful purpose;

- (iii) is conducted for the purpose of avoiding giving rise to a reporting duty under the Act; or
- (iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by SARS; or
- (c) the business has been used or is about to be used in any way for money laundering purposes.

An estate agency business negotiating a sale or lease agreement does not become a party to the contract or transaction concluded between the contracting parties. Nevertheless, the estate agency firm is a "party" to the transaction in the sense of being involved in the formation or implementation thereof. For the purposes of section 29 of FICA an estate agent is therefore a party to every sale or lease transaction negotiated by it.

A report must be submitted to the FIC not only in respect of transactions that have actually been concluded and/or implemented, but also in respect of aborted or failed transactions if there is suspicion that the transaction, had it been successfully concluded or implemented, would have caused any of the consequences referred to above.

Every estate agency firm must appoint a person with the responsibility of ensuring that employees and the firm itself complies with FICA (see below). Normally the report to FICA about a suspicious transaction will be handled by the firm's compliance officer. Employees, directors and partners in any estate agency business need not submit a report to the FIC about suspicious transactions provided they reported the matter to the firm's compliance officer.

2. Submitting a report

A report about a suspicious transaction must be submitted to the FIC only. No report must be submitted to the Estate Agency Affairs Board, the Institute of Estate Agents, newspapers, or any other body or person.

A report to the FIC can be submitted electronically on the FIC website at www.fic.gov.za. Persons who do not have access to the internet must use the report form prescribed by the regulations. This form must be

- Faxed to the FIC at (021) 315 5828; or
- Delivered to the FIC at its office in Pretoria (14th Floor, 240 Vermeulen Street, Pretoria).

All reports to the FIC are confidential. An estate agency firm is not obliged to keep copies of reports sent to the FIC, but if a copy is retained this must be kept in a safe place bearing in mind the confidential nature of the report.

3. Period of reporting

A report must be submitted to the FICA as soon as possible, but not later than 15 working days after the suspicion arose. The FIC may grant an extension of time in deserving cases.

4. Examples of suspicious transactions in an estate agency business

Each estate agency firm is in the best position to evaluate its transactions and money dealings with members of the public, taking into account normal practices, systems and methods of doing business in the property industry. No hard and fast rules can be laid down as to when a transaction or money dealing will give rise to suspicion. The following are nevertheless certain general guidelines to consider:

- Suspicion must be based on facts, not gossip, rumour or loose talk. Merely wondering about the authenticity of a transaction does not in itself give rise to suspicion.
- As a general rule events and behavior are suspicious, not people. Accordingly, no suspicion arises merely by reason of a person's race, creed, nationality, sexual orientation, gender or beliefs.
- A transaction can be suspicious regardless of the amount involved.
- A suspicious transaction may involve a number of factors that may seem innocent viewed in isolation, but raise suspicion taken together. All relevant factors must therefore be considered.
- An estate agent is not expected to launch a full scale investigation to determine whether its suspicion about a transaction or money dealing is well founded. All that is required is a reasonable evaluation of all relevant facts and circumstances.
- The majority of property transactions, by far, are ordinary commercial transactions entered into between law abiding persons. An estate agent is not expected to view every client and customer suspiciously, expecting him or her to be engaged in money laundering or other unlawful activity. Moreover, there is no duty on members of the public to establish good faith on their part when dealing with an estate agent. A transaction can be assumed to be "above board" unless there are circumstances warranting an estate agent to reasonably believe otherwise.
- Receipt of cash (banknotes) may or may not be suspicious, depending on
 - (a) the amount
 - (b) type of transaction involved (sale or lease)
 - (c) surrounding circumstances

Entrusting a large amount of cash in banknotes to an estate agent will generally require some explanation. What constitutes a large amount

depends on the market in which the estate agent operates and the amount normally received by that firm in the ordinary course of business. Suspicion will readily arise if a large amount of banknotes is entrusted to an estate agent by means of a series of irregular payments over time, especially if the estate agent was initially led to believe that only a small amount of the purchase price would be paid in cash.

- Release of monthly rental to a lessor in cash (banknotes) is not itself suspicious. Release of a deposit to a seller in cash (banknotes) may be suspicious, depending on the amount and the reasons why a cash payment is required.
- No suspicion arises merely on the grounds that the buyer or lessee transferred the purchase price or rental into an estate agent's trust account electronically. An electronic transfer, especially of a large amount, can however be suspicious when taken with other factors, for example if the funds are transferred over a period of time and originate from a different source on each occasion.
- A large number of purchase and sale transactions by the same person over a relatively short period of time may give rise to suspicion, particularly if there is no discernible investment pattern and relatively large amounts of cash are involved.
- The fact that a buyer's stated occupation does not match the type of property purchased (for example when a civil servant buys a mansion on a golf resort) may give rise to suspicion. However, people have unexpected windfalls, such as winning the lottery. Suspicion will obviously arise if the same civil servant buys more than one upmarket property in a short space of time, especially if no bond finance is involved.
- Suspicion readily arises if –
 - (a) an estate agent receives a large amount in trust from a third party on the pretence that the money is to be used for property investment purposes and the prospective buyer shortly thereafter asks for the money to be released on the grounds that he or she has had a change of heart about investing in the property;
 - (b) a lessee or buyer deposits with an estate agent a series of large cheques in the name of a third party but endorsed over to the buyer or lessee;
 - (c) a large deposit on a sale transaction is paid by an unidentified third party on the account of the buyer and the parties are not related or connected in some way,

- (d) a buyer buys a property without inspecting it, particularly commercial premises in need of major repair;
- (e) the true purchase price of a sale transaction is not disclosed in the sale agreement because money changes hands "under the table";
- (f) a party to a transaction does not wish to record his or her own name in the agreement but uses the name of a business colleague or distant relative;
- (g) the buyer pays a deposit on a sale transaction with a series of cheques, each drawn by a different person;
- (h) the name of the buyer is changed just before the transaction is closed;
- (i) the buyer insists that the property be registered in the name of a third party other than a spouse, even if this entails payment of double transfer duty;
- (j) an estate agent is offered a fee or commission to accept an electronic transfer of money from abroad in trust for safekeeping on the pretence that the money will be used to invest in property in the future;
- (k) an estate agent is asked to deposit money (cash or cheques) in his trust account and to issue a trust cheque in return for a commission or fee;
- (l) in the case of a lease of commercial premises the tenant's turnover or trading stock is patently insufficient to back the rental that is being paid;
- (m) an estate agent is asked by a seller to overstate the value of a property as at 1 October 2001 in order to evade payment of capital gains tax;
- (n) the purchase price of a property is unrealistically split between the property and movables included in the sale in order to evade payment of transfer duty on the true value of the sale;
- (o) the seller of a business informs the estate agent that the business' true financial position is not accurately reflected in its financial statements; or
- (p) an estate agent is asked to structure a transaction with a foreign buyer on the basis that the purchase price is to be paid directly into an overseas bank account.

Reporting someone to the FIC is a serious matter. It should never be done light heartedly or with ulterior motives. The disappointment of a failed sale or lease, or a desire to "get even" with someone, should never be allowed to fuel a decision to report. Estate agents are expected to comply with FICA, but they must do so responsibly and sensibly.

Remember:

- The Act draws no distinction between client and non-client when it comes to the reporting of suspicious transactions. An estate agent must therefore report the buyer if grounds for suspicion exist.
- FICA states clearly that no person who
 - made a report, or
 - knows that a report has been made
 may disclose this except for purposes of the Act, other legislation or legal proceedings, or in terms of a Court order. Moreover, the identity of the person making a report may not be disclosed to anybody by the FIC except if such person voluntarily chooses to testify at criminal proceedings against the offender.
- It must also be kept in mind that the FIC will rarely take action against a suspected money launderer based on a single report. The report received from an estate agent will form part of a series of reports received from a number of accountable institutions over a period of time. These reports, taken together, establish the profile of the person reported.
- FICA states clearly that no person can be held liable for anything done in good faith in terms of the Act.
- You cannot make a report without stating your name.
- You cannot report someone by telephoning the FIC.
- If the seller is your client you have no duty under FICA to ask the buyer anything about the source of his or her finances. If the buyer is your client, you must inquire about the source of the funds only if you are suspicious that money laundering may be an issue or that the money may constitute the proceeds of unlawful activities.
- When you are suspicious about a deal you may proceed with the transaction, unless the FIC directs otherwise.

C. THE DUTY TO REPORT TO THE FIC (i) CASH PAYMENTS OVER A PRESCRIBED LIMIT, AND (ii) ELECTRONIC TRANSFERS OF MONEY OVER A PRESCRIBED LIMITED TO AND FROM SOUTH AFRICA

1. Cash transactions above prescribed limit

Section 28 of FICA reads as follows:

"28. *An accountable institution and a reporting institution must, within the prescribed period, report to the Centre the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of the prescribed amount*

–

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

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

This section is not yet in operation and estate agents are therefore not required to report any cash transactions to the FIC at this stage, unless a particular cash transaction is suspicious in itself. The duty to report suspicious transactions is discussed in b above.

2. Electronic transfers of money to or from the RSA

Section 31 of FICA reads as follows:

"31. *If an accountable institution through electronic transfer sends money in excess of a prescribed amount out of the Republic or receives money in excess of a prescribed amount from outside the Republic on behalf, or on the instruction, of another person, it must, within the prescribed period after the money was transferred, report the transfer, together with the prescribed particulars concerning the transfer, to the Centre."*

This section is not yet in operation and estate agents are therefore not required to report any electronic transfers or receipts to the FIC at this stage, unless a particular electronic transfer or receipt is suspicious in itself. The duty to report suspicious transactions is discussed in B above.

D. INTERNAL ADMINISTRATIVE DUTIES

1. The scope of administrative duties

FICA imposes a number of internal administrative duties on each estate agency business, namely

- The duty to keep record of clients and transactions;
- The duty to formulate and implement internal rules to ensure compliance with the Act;

- The duty to train staff; and
- The duty to appoint a compliance officer to monitor compliance with the Act.

Each of these duties is discussed next.

2. The duty to keep record of clients and transactions

In terms of section 22 of FICA every estate agency business must for a period of five years keep record of –

- The persons whose identities have been established;
- The manner in which the identities were established;
- The nature of the transaction or business relationship with the client;
- The sale or lease transaction (if any) negotiated by the estate agency firm;
- The name of the person who obtained the information about the client's identity; and
- The documents obtained to verify the client's identity.

Estate agents using the forms prepared by the Estate Agency Affairs Board in compliance of the "know your client" requirements of FICA will comply with this record keeping duty if they keep the following documents for a period of 5 years:

- (a) the form(s), properly filled in, relating to the identities of the persons that have to be established in terms of FICA;
- (b) a copy of the relevant mandate document, if the mandate was in writing;
- (c) a copy of the relevant sale or lease agreement (if any) concluded in performance of the mandate;
- (d) the documents obtained to verify the client's identity.

These records may be kept in electronic form, ie stored on a computer hard drive or on a computer disk. If this route is followed it is advisable to make backup copies of the data for safekeeping.

If the records are not kept electronically, the Board suggests that the documents in respect of each transaction be kept together in a proper folder and stored in a safe place.

Records kept by third parties

Estate agency firms may appoint a third party (a firm or person specializing in the keeping of records) to keep the records referred to above. If such third party is appointed, the estate agency firm making the appointment must without delay supply the following information to the FIC:

- (a) the third party's –
 - (i) full name, if the third party is a natural person; or
 - (ii) registered name, if the third party is a close corporation or company;
- (b) the name under which the third party conducts business;
- (c) the full name and contact particulars of the individual who exercises control over access to those records;
- (d) the address where the records are kept;
- (e) the address from where the third party exercises control over the records; and
- (f) the full name and contract particulars of the individual who liaises with the third party on behalf of the accountable institution concerning the retention of the records.

The estate agency firm must have free and easy access to the records.

If a third party fails to keep the records properly, the estate agency firm that made the appointment is liable for that failure. In other words, an estate agency firm remains responsible for proper record keeping, even if a third party has been appointed to do the work.

Third parties will invariably charge a fee for their services. Nothing prohibits an estate agent from debiting a client with the fee (or a portion thereof) provided this has been arranged with the client at the time when the mandate was accepted. It will constitute improper conduct for an estate agent to charge a client a fee for record keeping, over and above the commission payable on a transaction, unless the client agreed to pay such fee.

3. The duty to formulate and implement internal rules

Each estate agency firm must formulate and implement internal rules to ensure that employees comply with the requirements of FICA. The rules must be in writing and a copy must be made available to each employee involved in the performance of clients' mandates. Copies must therefore be made available to

- All salespersons and letting agents working for the firm;
- Employees involved in keeping the firm's trust account; and

- Any other employee involved in estate agency transactions for the firm.

A copy of the internal rules must on request also be made available to the FIC and the Estate Agency Affairs Board.

Content of the internal rules

The content of the internal rules is prescribed by FICA. It must deal with the following:

- The establishment and verification of the identity of persons whom the estate agency firm must identify in terms of FICA;
- The information of which record must be kept in terms of FICA and the manner in which and place at which such records must be kept; and
- The steps to be taken to determine when a transaction is reportable to ensure that the estate agency firm complies with its duties under FICA.

Insofar as the *establishment and verification of the identity of persons* are concerned, the internal rules must specifically –

- (a) provide for the necessary processes and working methods which will cause the required particulars concerning the identities of the parties to a business relationship is established or a single transaction is concluded with the estate agency firm;
- (b) provide for steps to be taken by the relevant staff members aimed at the verification of the required particulars concerning the identities of the parties to a business relationship or single transaction; and
- (c) allocate responsibilities and accountability to ensure that staff duties concerning the establishment and verification of identities are complied with.

Concerning *record keeping* the internal rules must specifically –

- (a) provide for the necessary processes and working methods to ensure that the accuracy and that the integrity of those records are maintained for the entire period for which they must be kept; and
- (b) provide for the necessary processes and working methods to ensure that access as may be required or authorised under the Act by the relevant staff members to those records can be obtained without undue hindrance.

Insofar as the *reporting of suspicious transactions* is concerned, the internal rules must specifically –

- (a) provide for the necessary processes and working methods which will cause suspicious and unusual transaction to be reported without undue delay;
- (b) provide for the necessary processes and working methods to enable staff to recognize potentially suspicious and unusual transactions or series of transactions; and
- (c) allocate responsibilities and accountability to ensure that staff duties concerning the reporting of suspicious and unusual transactions are complied with.

The internal rules must furthermore take into account any guidance notes which may apply to estate agency firms and specifically provide for

- the responsibility of the management of the estate agency firm in respect of compliance with the Act, the regulations and the internal rules; and
- disciplinary steps against the relevant staff members for non compliance with the Act, the regulations and the internal rules.

The Estate Agency Affairs Board has prepared a form containing specimen internal rules for estate agency firms. Firms are free to copy the form and to make whatever changes to the specimen rules as they consider appropriate for the purposes of their own businesses, provided of course the requirements stated above are met.

4. The duty to train staff

Each estate agency firm must provide training to its employees to enable them to comply with the provisions of FICA and the firm's internal rules. The nature, duration and content of the training are not prescribed. It is not a requirement that employees be assessed, or that the training be repeated at certain intervals.

It does not constitute sufficient training to merely give each employee a copy of the Act and/or this document. Firms are at least expected to work through this document with staff members and to make sure that all employees understand exactly what they are expected to do to comply with FICA. Some staff members obviously require more detailed training than others, such as salespersons, letting agents and the persons dealing with an estate agency firm's trust account. For others awareness training may be sufficient.

5. The duty to appoint a compliance officer

Each estate agent firm must appoint a person who has the responsibility of ensuring that the firm and its employees comply with the provisions of FICA and the firm's internal rules. This need not be a new appointment as such; a firm's office manager could for example be entrusted with the responsibilities of a compliance officer.

It is not a requirement that the name of a firm's compliance officer be furnished to the FIC or the Estate Agency Affairs Board.
