

# **PUBLIC COMPLIANCE COMMUNICATION**

## **DRAFT PUBLIC COMPLIANCE COMMUNICATION**

### **No. 23A**

GUIDANCE ON THE INTERPRETATION OF  
CREDIT PROVIDERS, ITEM 11 OF  
SCHEDULE 1 TO THE FINANCIAL  
INTELLIGENCE CENTRE ACT, 2001 (ACT 38  
OF 2001) AND POTENTIAL RISK  
INDICATORS

## **PCC SUMMARY**

A “credit provider” is listed in item 11 of Schedule 1 to the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) (FIC Act) as – “(a) *A person who carries on the business of a credit provider as defined in the National Credit Act, 2005 (Act 34 of 2005).*

*(b) A person who carries on the business of providing credit in terms of any credit agreement that is excluded from the application of the National Credit Act, 2005 (Act 34 of 2005) by virtue of section 4(1)(a) or (b) of that Act.”*

This draft PCC provides guidance on the practical interpretation and application of the definition of credit providers and an overview of certain anti-money laundering, counter terrorist financing and counter proliferation financing vulnerabilities.

## **THE AUTHORITATIVE NATURE OF GUIDANCE**

The Financial Intelligence Centre (the Centre) provides the guidance contained in this draft PCC in terms of its statutory function in terms of section 4 (c) of the FIC Act read together with Regulation 28 of the Money Laundering and Terrorist Financing Control Regulations (the Regulations) issued in terms of the FIC Act.

Section 4(c) of the FIC Act empowers the Centre to provide guidance in relation to a number of matters concerning compliance with the obligations in terms of the FIC Act. Guidance provided by the Centre is the only form of guidance formally recognised in terms of the FIC Act and the Regulations issued in terms of the FIC Act. Accordingly, guidance provided by the Centre is authoritative in nature and must be taken into account when interpreting the provisions of the FIC Act or assessing compliance of an accountable or reporting institution with its obligations imposed on it by the FIC Act.

It is important to note that enforcement action may emanate as a result of non-compliance with the FIC Act in areas where there have been non-compliance with the guidance provided by the Centre. Where it is found that an accountable or reporting institution has not followed guidance which the Centre has issued, the institution must be able to demonstrate that it has complied with the relevant obligation under the FIC Act in an equivalent manner nonetheless.

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### **DISCLAIMER**

The publication of a PCC concerning any particular issue, as with other forms of guidance which the Centre provides, does not relieve the user of the guidance from the responsibility to exercise their own skill and care in relation to the users' legal position. The Centre accepts no liability for any loss suffered as a result of reliance on this publication.

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### **OBJECTIVE**

This draft PCC provides clarity on the interpretation of a credit provider as designated in amended item 11 of Schedule 1 to the FIC Act.

Further, the PCC highlights vulnerabilities faced by credit providers and provides risk indicators that can be considered by a credit provider when determining money laundering, terrorist financing and proliferation financing (ML, TF and PF) risks presented in their client engagements.

## 1. INTRODUCTION

- 1.1. Schedule 1 to the FIC Act has been amended and has taken effect from Monday, 19 December 2022.
- 1.2. Item 11 of Schedule 1 to the FIC Act has been amended, and as such public compliance communication 23 (PCC 23) is no longer applicable. This Draft PCC 23A replaces PCC 23 to take into consideration the amended Item 11 of Schedule 1.
- 1.3. The purpose of this PCC is to clarify the Centre's interpretation of item 11 in relation to credit providers.
- 1.4. The Centre will supervise and enforce compliance with the FIC Act obligations (anti-money laundering, combating of financing of terrorism and combating of proliferation financing (AML/CFT/CPF)) for credit providers in terms of the FIC Act.

## 2. INTERPRETATION OF A CREDIT PROVIDER

- 2.1. A credit provider is defined in item 11 of Schedule 1 of the FIC Act as:  
*“(a) A person who carries on the business of a credit provider as defined in the National Credit Act, 2005 (Act 34 of 2005).  
(b) A person who carries on the business of providing credit in terms of any credit agreement that is excluded from the application of the National Credit Act, 2005 (Act 34 of 2005) by virtue of section 4(1)(a) or (b) of that Act.”*
- 2.2. The terminology mentioned in this definition explained below.

### *General considerations*

- 2.3. **“A person”** which includes both natural persons and legal persons.
- 2.4. **“Carries on the business”** – this term is not defined in the FIC Act. The ordinary meaning of the term, within the context of the FIC Act is applied.

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- 2.5 “**Business**” is that of a commercial activity or institution, as opposed to a charitable undertaking or government institution. Where an institution only extends credit in terms of a credit agreement on an ad hoc basis and that provision of credit does not form part of the core business of the institution, the institution *is nonetheless deemed* to be a credit provider specifically for purposes of the credit agreement.

### Example

Business X sells an item for R50 000, and receives payment in cash from Mr Y.

Where the purchase amount is paid in cash in full, there would be no customer due diligence (CDD) obligations, as Business X is not a credit provider or a high-value goods dealer (HVGD) (see Draft PCC 119 on HVGDs).

Where Business X, however, provides a credit facility to Mr Y for the purchase amount of the item, then Business X is deemed to be a credit provider and must conduct CDD in terms of the FIC Act for this business relationship, as all credit providers are accountable institutions.

### *First category of credit provider considerations*

- 2.6 The **first category of credit providers** includes all persons who carry on business as a credit provider as covered by the National Credit Act, 2005 (Act 34 of 2005) (NCA).
- 2.7 In terms of section 1 of the NCA, the definition of credit provider is wide and includes numerous different persons which include:
- 2.7.1 The party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement
  - 2.7.2 The party who advances money or credit under a pawn transaction
  - 2.7.3 The party who extends credit under a credit facility
  - 2.7.4 The mortgagee under a mortgage agreement
  - 2.7.5 The lender under a secured loan
  - 2.7.6 The lessor under a lease
  - 2.7.7 The party to whom an assurance or promise is made under a credit guarantee
  - 2.7.8 The party who advances money or credit to another under any other credit agreement; or

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- 2.7.9 Any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into.

### **Consultation note**

The Centre invites commentators to provide examples of scenarios to consider for this PCC.

### *Second category of credit provider considerations*

- 2.8 The **second category of credit providers** that are included in item 11 of Schedule 1 to the FIC Act, are all persons who carry on the business of providing credit in terms of any credit agreement that is **excluded** from the application of the NCA, by virtue of section 4(1)(a) or (b) of the NCA.
- 2.9 This too is a wide category, and the onus is on the entity to evidence that they do not fall within this category, where such assertions are made. The specific terminology used in the second category of credit providers is discussed below.
- 2.10 **“Credit”** includes a deferral of payment of money owed to a person, or a promise to defer such a payment; or a promise to advance or pay money to or at the direction of another person.
- 2.11 **“Credit agreement”** includes credit facility, credit transaction, credit guarantee, any combination of a credit facility, credit transaction and credit guarantee.
- 2.12 Read with section 4(1)(a)(i) and 9(4) of the NCA, the definition of credit agreement **includes** instances where:
- 2.12.1 The credit provider’s consumers are juristic persons (irrespective of the monetary asset value or annual turnover)
  - 2.12.2 The credit agreements are large agreements (e.g. mortgage agreements or credit agreements in respect of which the principal debt under the agreement is R250 000 or above); and
  - 2.12.3 The credit provider is registered in South Africa.

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2.13 Read with sections 8(2) and 4(1)(a)(ii) and (iii) of the NCA, the definition of credit agreement **excludes** instances where:

2.13.1 Products including a policy of insurance, or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance;

2.13.2 A lease of immovable property;

2.13.3 The South African Reserve Bank, government and organs of state, and

2.13.4 a transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel.

**Consultation note**

The Centre calls for recommendations from commentators on which further elements should be noted regarding the second category of credit providers.

**Examples of credit providers and credit agreements include, but are not limited to:**

- Clothing store credit providers
- Companies that provide any loans to employees
- Companies that provide any loans to juristic persons
- Short-term and long-term loans and credit transactions
- Entities that provide incidental credit
- Incidental credit agreements
- Microfinance loans
- Small, intermediate and large credit agreements
- Low-cost housing loans
- Credit cards
- Credit overdrafts
- Unsecured and secured credit agreements and credit transactions
- Closed loop and open loop credit facilities
- Retail store card credit facilities
- Credit facility providers
- Revolving credit agreements

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- Credit guarantees in respect of a credit facility or credit transaction
- Instalment agreements
- Lease agreements

- 2.14 There may be instances where institutions no longer provide credit, however, they are still managing a run off loan book. These institutions are not included as credit providers. Only credit providers that provide new loans from date of commencement of the new Schedule 1, item 11 will be included in the scope of item 11 where that business acquires the rights of a credit provider under a credit agreement after the credit agreement was entered into.
- 2.15 There is no monetary threshold applicable when determining if an entity is a credit provider.

### **3. POTENTIAL ANTI-MONEY LAUNDERING, COUNTER TERRORIST FINANCING AND COUNTER PROLIFERATION FINANCING RISK INDICATORS**

- 3.1. Credit providers must conduct a money laundering, terrorist financing and proliferation financing (ML, TF and PF) risk assessment on a business level, and at a client level. Due to operating in the industry, credit providers would be in the best position to determine where the potential ML, TF and proliferation financing (PF) vulnerabilities are. For further information on risk determination, please refer to Guidance Note 7, available on the FIC website, [www.fic.gov.za](http://www.fic.gov.za).
- 3.2 Credit providers should refer to the Centre's sector risk assessment on item 11 which sets out certain inherent risks that are particular to the credit provider industry. Possible indicators of ML in the provision of credit facilities to businesses and individuals, include the following:
- 3.2.1 The use of the credit funds for illicit activities.
- 3.3 Reversing of transactions before repayments of a loan have started, resulting in the borrowed funds being repaid within a short space of time.



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- 3.4 Repayment amounts for loans are higher or within a shorter time frame than originally agreed upon with no reasonable explanation for this or the source of funds used.
- 3.5 Multiple cash repayments without plausible explanation for source of funds.
- 3.6 Clients hesitant to provide personal information and information on their proposed business.
- 3.7 The business being established does not make economic sense and does not fit into the profile of the borrower.
- 3.8 A change in the business or the business strategy of the borrower that does not make economic sense.
- 3.9 The client is part of a complex structure or group or is a trust established in a foreign jurisdiction.
- 3.10 The loan is serviced by a third party that was not part of the original transaction.
- 3.11 Multiple loans are taken out which do not make sense or do not fit the economic profile of the client.

## 4. CONSULTATION

- 4.1. Before issuing guidance to accountable institutions, supervisory bodies and other persons regarding their performance, duties and obligations in terms of the FIC Act or any directive made in terms of the FIC Act, the Centre must in accordance with section 42B of the FIC Act—
  - 4.1.1. Publish a draft of the guidance by appropriate means of publication and invite submissions.
  - 4.1.2. Consider submissions received.
- 4.2. Commentators are invited to comment on the draft guidance by submitting written comments via the [online comments submission link only](#). Any questions or requests relating to this draft PCC 23A may be sent to the Centre only at **consult@fic.gov.za**. Submissions will be received until **Friday, 20 January 2023**, by close of business.

## 5. COMMUNICATION WITH THE CENTRE

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- 5.1 The Centre has a dedicated compliance contact centre geared to assist accountable institutions to understand their registration obligations in terms of the FIC Act. Please call the compliance contact centre on 012 641 6000 and select option 1.
- 5.2 Compliance queries may also be submitted online by clicking on: <http://www.fic.gov.za/ContactUs/Pages/ComplianceQueries.aspx> or visiting the Centre's website and submitting an online compliance query.

**Issued By:**

**The Director**

**Financial Intelligence Centre**

**15 December 2022**