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The Select Committee on Finance, National Council of Provinces
P O Box 15
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Attention: The Committee Secretary
Mr Nkululeko Mangweni

BY EMAIL: nmangweni@parliament.gov.za

Dear Sir

DRAFT AMENDMENTS TO SCHEDULES 1, 2 AND 3 TO THE FINANCIAL INTELLIGENCE CENTRE ACT, 2001

1. INTRODUCTION

1.1 We act for the National Clothing Retail Federation of South Africa (**NCRF**, or **our client**).

1.2 The NCRF is an industry association with a number of large, reputable clothing retailers as its members, namely Truworths Limited, TFG (The Foshini Group Limited), MRP (Mr Price Group Limited), Woolworths Holdings Limited, Pick n Pay Clothing, The L.A. Group, Queenspark, Cape Union Mart and Cotton On South Africa.

1.3 We make this submission on behalf of the NCRF, in response to the notice issued on 12 September 2022 by the Select Committee on Finance of the National Council of Provinces (**NCoP**), regarding the proposed amendments to Schedules 1, 2 and 3 of the Financial Intelligence Centre Act, 2001 (**FICA**).

1.4 It is noted at the outset that, on 12 August 2022, the NCRF made written submissions regarding the proposed amendments to Schedule 1 of FICA to the Standing Committee on Finance of the National Assembly (**NA**), this being the **12 August 2022 Submission**. We have attached a copy of the 12 August 2022 Submission to this letter, marked "**Annexure A**".

1.5 In this submission letter, we reiterate, explain, and further substantiate the NCRF's most strenuous objection to the proposed inclusion as an "*accountable institution*" for the purposes of FICA of

a credit provider, as defined in the National Credit Act, 2005 (**NCA**), in terms of current draft item 11(a) of Schedule 1 to FICA (**Draft Item 11(a)**). For ease of reference, we refer in this submission to a credit provider that stands to be impacted by Draft Item 11(a) as a **Draft Item 11(a) Registered Credit Provider**.

1.6 The notice issued by the NCoP inviting interested persons and institutions to submit representations on the proposed amendments to Schedules 1, 2 and 3 of FICA only allowed a period of 5 business days (i.e. from 12 to 19 September 2022) for parties to make representations. In view of the far-reaching consequences of Draft Item 11(a), some of which are dealt with in this letter, we respectfully believe that this time period is unreasonable and insufficient in the circumstances. Our client is thus compelled to reserve its position:

1.6.1 to supplement this submission in such appropriate manner as it may be advised in the future; and

1.6.2 in the event that the current Draft Item 11(a) is nevertheless enacted, to rely upon the unreasonableness of the time period allowed for representations in any later proceedings.

2. BACKGROUND

2.1 As was confirmed in the 12 August 2022 Submission, the NCRF supports wholeheartedly the review of the current legislative framework to combat money laundering and terrorist financing (**MLTF**) risk in South Africa. The NCRF is also aware of, and duly concerned about, the potential for South Africa to be 'grey-listed' by the Financial Action Task Force (**FATF**), owing to perceived deficiencies in our existing financial intelligence legislation. Our client accordingly appreciates the critical policy imperatives that are, of necessity, informing the broader FICA review process at this stage.

2.2 We understand that objections relating to the inclusion of Draft Item 11(a) have been considered and responded to by Parliament, on 21 July 2022, and that the issue was also addressed in a joint briefing by National Treasury and the Financial Intelligence Centre (**FIC**) to the Joint Meeting of the Standing and Select Committees on Finance, on 24 August 2022. We, and the NCRF, accordingly appreciate that the current position, which relates to the FATF Standards, is as follows:[1]

> *"[t]he FATF Standards require that 'lending' business be included in the scope of a country's measures against money laundering and terrorist financing. The [FATF] Standards include consumer credit and financing of commercial transactions. The [FATF] Standards envisage no exclusions for credit in particular economic sectors."*

2.3 This notwithstanding, the NCRF still formally objects in the strongest of terms to the proposed wholesale inclusion of NCA-regulated credit providers as "*accountable institutions*", as per the currently worded Draft Item 11(a), in light of the drastic and materially adverse unintended consequences that such a wholesale inclusion will inevitably have on both credit retailers and retail credit consumers alike. We submit that these unintended consequences have not been taken into account adequately to date.

2.4 We explain in greater detail, in paragraphs 4 to 5 below, our client's legitimate and well-founded concerns regarding the adoption of such a 'one-size-fits-all' approach, which we respectfully submit is neither fit for purpose nor necessary under the circumstances to protect against the objective mischief sought to be guarded against. Prior to setting out these concerns, we

[1] Available here: https://pmg.org.za/committee-meeting/35359/.

propose, at the outset, in paragraph 3 below, possible alternative wording to that of Draft Item 11(a), which wording we submit will achieve a more proportionate outcome.

3. PROPOSED ALTERNATIVE WORDING FOR ITEM 11(a) OF SCHEDULE 1 TO FICA

3.1 As the NCRF is mindful of the MLTF-related policy objective behind the inclusion of a Draft Item 11(a) Registered Credit Provider as an "*accountable institution*", our client wishes to suggest alternative wording for consideration, which we consider will result in a more proportionate outcome when viewed against the objective that the proposed amendment is actually seeking to achieve.

3.2 In an update to the alternative wording that the NCRF suggested in this respect in the 12 August 2022 Submission, and to elaborate on one of the suggestions our client made in the 12 August 2022 Submission, the NCRF now proposes, among other things, that a suitable monetary threshold be set, to exclude low value (and, by implication, objectively lower MLTF risk) retail store card "*credit facilities*" (as this term is defined in the NCA) from Item 11(a)'s 'net'. The underlined wording below shows the NCRF's newly proposed alternative wording for Draft Item 11(a):

> "*A person who carries on the business of a credit provider as defined in the National Credit Act, 2005 (Act 34 of 2005), excluding credit providers offering credit as provided for in section 8(1)(a) read with section 8(3), in circumstances where the credit facility in question constitutes a closed-loop, revolving credit store card where a credit limit is available to the consumer and an instalment is payable monthly*."

4. KEY ADVERSE PRACTICAL IMPLICATIONS SHOULD THE CURRENT DRAFT ITEM 11(A) BE IMPLEMENTED

4.1 Inevitable exclusion of a large segment of South African consumers from access to 'safe' and well-regulated credit

4.1.1 Most of the compliance obligations in FICA are imposed on accountable institutions. The most pertinent of these accountable institution-focused FICA obligations, for the purposes of this submission, is that FICA requires an accountable institution to conduct appropriate, and ongoing, client due diligence (**CDD**) or 'know-your customer' (**KYC**) processes, which processes are required to be established by each accountable institution in accordance with an adopted 'risk-based' approach. Accountable institutions are further required to keep records in this regard.

4.1.2 As set out in the 12 August 2022 Submission, the NCRF's members are retailers who sell clothing and footwear merchandise, in the main, offering (in-house) credit lines to selected consumers, predominantly for the use of purchasing the relevant retailer's merchandise. The "*credit agreement*" offering in this regard takes the form of a (closed loop) retail store card, as a form of "*credit facility*", which is strictly regulated under the NCA. Each NCRF member that is a registered credit provider is supervised by the National Credit Regulator (**NCR**). By virtue of the NCA, it is beyond dispute that South Africa is regarded as having a highly regulated and well-managed credit industry, which came through the heights of the Covid-19 pandemic in a robust fashion.

4.1.3 To provide context, according to statistics compiled by the NCRF based on data published by the NCR[2] as it relates to the retail credit market for the 2021 calendar year, some 11.33 million South African consumers applied for credit at retail stores and some 5.4 million retail

[2] Available here: https://www.ncr.org.za/index.php/publications/credit-bureau-monitor-cbm and https://www.ncr.org.za/index.php/publications/consumer-credit-market-report-ccmr.

store credit facilities were granted, with an aggregate value of approximately R18 billion. This pegs the average store credit facility value at R 3,348.

4.1.4 The practical reality, which we submit cannot reasonably be ignored, is that, by the NCRF's estimation, 30% to 40% of consumers seeking retail credit will simply not be able to produce or provide proof of residence as would be required by FICA-imposed CDD / KYC and record keeping requirements, *even* when an ostensibly 'suitable' 'risk-based' approach is applied. These are consumers who do not have formal places of residence, and for whom it will be difficult or in many cases impossible to produce a document that suitably verifies the consumer's residence. In practical terms, these consumers will be excluded from the South African retail credit market, and so will be cut off, in practice, from access to 'safe' and well-regulated credit. In a country like South Africa, with its relatively unique socio-economic circumstances that are not comparable to those that characterise many other FATF member states, we submit that such a drastic consequence cannot knowingly be disregarded.

4.1.5 Our submission in this regard is further supported by the stated aims and purposes of the NCA:

4.1.5.1 Section 3 of the NCA provides that the Act's purposes are to **promote and advance the social and economic welfare of South Africans**, to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and **accessible** credit market and industry, and to **protect consumers**, by:

> "*(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions*" (our emphasis).

4.1.5.2 The "*[d]evelopment of an accessible credit market*" is dealt with in section 13 of the NCA, with section 13 confirming that the NCR is responsible for, among other things, enabling the objectives expressed in paragraph 4.1.5.1.

4.1.6 Obtaining credit is a crucial first step in the journeys of countless consumers towards self-betterment. An established and developed credit profile can, over time, be relied on by a consumer to obtain credit for items beyond the scope offered by the NCRF members, affording the consumer a path towards securing credit to start a small business, or to purchase a car and, in time, a home.

4.1.7 By requiring Draft Item 11(a) Registered Credit Providers to adhere to the FICA obligations on a wholesale basis, without exception, proof of residence will become a **barrier for entry to the credit market** for many vulnerable South Africans. It is submitted that such a barrier to entry is unrealistic and unfairly discriminatory.

4.1.8 It bears mentioning that, in *Truworths Ltd and Others v Minister of Trade and Industry and Another*[3] (the **Truworths case**), the court set aside Regulation 23A(4) of the NCA Regulations, based on the fact that Regulation 23A(4) effectively excluded informally-employed and self-employed consumers who did not have bank accounts from accessing credit. Engers, AJ stated, in the Truworths case, that Regulation 23A(4) of the NCA Regulations frustrated an aim of the NCA, namely the promotion of the development of a credit market that is accessible to all South Africans and, in particular, that is accessible to those who have historically been unable to access credit under sustainable market conditions.[4] While we appreciate that Regulation 23A(4), as dealt with in the Truworths case, related to the erstwhile requirement imposed on an NCA-registered credit provider to validate gross

[3] 2018 (3) SA 558 (WCC).

[4] at p568H.

income through the collection of bank statements or payslips from credit consumers, we submit that the FICA CDD / KYC requirements are analogous, in their impact, to Regulation 23A(4), as the FICA requirements will act as a barrier to entry for marginalised consumers who do not have a formal place of residence.

4.1.9 Failure by an accountable institution to adhere to the requirements imposed under FICA would naturally result in the imposition of sanctions or penalties as set out in FICA, along with inevitable, concomitant reputational risk to the accountable institution concerned. It follows that, should Draft Item 11(a) be implemented in its current form, a Draft Item 11(a) Registered Credit Provider will be aware that it would not be able to adhere to its FICA obligations as regards a substantially sized swathe of vulnerable yet credit-worthy consumers, and so would simply not extend credit to such consumers. This would be despite the fact that these 'excluded' consumers could objectively afford the credit applied for, and despite their material socio-economic need to secure access to 'safe' credit.

4.1.10 Ultimately, the implementation of Draft Item 11(a), as currently worded, would in the 2021 calendar year have resulted in the immediate exclusion from access to credit of between 3.399 million and 4.532 million South African consumers, not because those consumers were not able to meet the strict requirements relating to affordability and the provision of credit as set out in the NCA and the National Credit Regulations, 2006 (**NCA Regulations**), but rather by virtue of what we propose would be the irrational, wholesale imposition of a disproportionately onerous FICA requirement on Draft Item 11(a) Registered Credit Providers. Excluding such marginalised consumers from accessing credit purely because they are not able to produce proof of residence, for example, is not only inappropriate as it is impossible to comply with, but it also contradicts the purpose of the NCA as set out in section 3(a) and puts the NCR at odds with its responsibility in section 13 to develop an accessible credit market.

4.2 **Additional compliance costs to be borne by Draft Item 11(a) Registered Credit Providers and, ultimately, by (credit and non-credit) consumers**

4.2.1 It is estimated by the NCRF that the cost of adhering to FICA, should the current Draft Item 11(a) be implemented, would stand at least R25.00 to R30.00 per credit applicant, translating into additional 'hard costs' for clothing retailers of between R275 million and R330 million. This estimation covers only the cost of adhering to the initial FICA CDD / KYC requirements; ongoing compliance costs to adhere to the numerous other obligations imposed under FICA would create a further financial burden on NCRF members.

4.2.2 These costs would materially impact the NCRF members. The reality is that a new 'hard' cost must either be absorbed by the retailer or it will need to be passed onto the consumer. If the retailer is to absorb the cost, this will, of course, directly impact its profitability, thereby potentially jeopardising jobs at the retailer. It could also result in the retailer not being able to meet undertakings provided to government by an NCRF member to expand in the sector and create employment opportunities within the local job market. For the avoidance of doubt, since the NCA stringently regulates the fees and costs that can be passed on to a credit consumer under an NCA-regulated credit agreement, any 'passing on' of the mentioned hard costs to consumers by retailers would more likely be passed on to consumers through increased pricing of the retailer's merchandise. In the current economic climate, characterised by high inflation and a global cost of living crisis, this is clearly an undesirable outcome from a consumer and policy perspective.

4.2.3 Based on the numbers provided in paragraph 4.2.1 above, it is respectfully submitted that the compliance-cost burden placed on Draft Item 11(a) Registered Credit Providers, should Draft Item 11(a) be implemented in its current form, is disproportionate to the level of MLFT

risk relevant to the NCRF members' retail store credit businesses. We address the proportionality of risk further, in paragraphs 6.2.1 to 6.2.3 below.

5. CONSTITUTIONAL ISSUES

5.1 As explained above, a direct result of the implementation of the current Draft Item 11(a) would in the 2021 calendar year have been the immediate and automatic exclusion of some 3.399 million – 4.532 million consumers from accessing credit because they could not provide proof of a place of residence. We are instructed that the vast majority of these consumers are previously disadvantaged persons who historically have been unable to access credit.

5.2 As mentioned in paragraph 4.1.8 above, the facts of the Truworths case are analogous to the present circumstances because of the similar impact in creating a barrier for entry and thereby excluding consumers from access to credit. As was stated at paragraph 53 of the judgment in the Truworths case:

> *"In my view, in discriminating against a section of the population that represents the less privileged, and probably also many previously disadvantaged persons, in a manner that is not fair, the regulation falls foul of s 14(2) and (3) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The applicants also submit that it contravenes s 9(3) of the Constitution in that it effectively discriminates on the basis of race. It is clear to me that this could never have been the intention of the Minister, but it may well be an unintended result. If so, it would offend against s 9(3), but I make no finding on this point."*

5.3 Although obviously unintended, the indirect impact of the implementation of the current Draft Item 11(a) would similarly be discrimination on the basis of race, in contravention of section 14(2) and (3) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and section 9(3) of the Constitution. We are of the view that the current Draft Item 11(a) would also not be reasonable nor justifiable in terms of section 36 of the Constitution.

6. FURTHER REPRESENTATIONS IN SUPPORT OF THE ALTERNATIVE WORDING PROPOSED FOR ITEM 11(a) OF SCHEDULE 1 TO FICA

We respectfully submit that the adoption of the alternative wording, or substantively similar wording, for Item 11(a) of Schedule 1 to FICA, as proposed by the NCRF in paragraph 3 above, will appropriately achieve the MLTF policy objective sought to be achieved, while simultaneously and legitimately avoiding the harsh unintended consequences that the implementation of the current Draft Item 11(a) will inevitably and irrationally cause. We set out below our further arguments in support of such alternative wording.

6.1 Objectively low risk of MLTF

6.1.1 We have noted that the FIC, through Mr Pieter Smit, the Legal and Policy Head of the FIC (**Mr Smit**), expressed the view, during the Finance Standing Committee (**FSC**) meeting held on 30 August 2022,[5] that even in an area where there is a low risk of MLTF, such an area should not be excluded from the ambit of FICA, and where there is "*any risk, then the legislation should be applied on a risk-sensitive basis*".

6.1.2 The NCRF appreciates the FIC's position in this regard, and submits that the FIC itself, by virtue of the quoted, italicised statement set out in paragraph 6.1.1 above, appears to be conscious (rightfully so) of applying MLTF legislation in cognisance of the specific MLTF risks,

[5] As set out in the Meeting Summary relevant to the meeting of the FSC held on 30 August 2022, available here: https://pmg.org.za/committee-meeting/35397/

or level of risk, that a particular business or area, by its nature, poses. The NCRF respectfully requests that this committee specifically considers the proportionality between, on the one hand, the inevitable unintended and undesirable consequence of effectively closing the local credit market to a large segment of vulnerable South African 'would-be' credit consumers and the burden and cost of compliance and, on the other hand, the actual mischief that FICA is aiming to prevent through the proposed amendments to Item 11(a) of Schedule 1 to FICA. This can be done by taking into consideration the indisputable, objectively low practical risk of the NCRF members' retail store card credit businesses actually facilitating, or being used to facilitate, MLTF.

6.1.3 The importance of being cognisant of the burden of compliance when implementing amendments to FICA was discussed in the FSC meeting held on 16 August 2022,[6] where the Chairperson of the FSC raised the issue before National Treasury and the FIC. According to the meeting report, Mr Vukile Davidson, Chief Director: Financial Sector Policy (**Mr Davidson**) assured the FSC that National Treasury would ensure that the amendments to FICA's Schedules would be operationalised in a risk-based way and "*affirmed that National Treasury was working hard to achieve risk-based and proportional benefits*".

6.1.4 Anecdotally, the Financial Sector Conduct Authority (**FSCA**) has also stated, in its '*Financial Inclusion Strategy Document*', in the context of the creation of a regulatory and supervisory framework that promotes financial inclusion, that under a proportional regulatory framework, regulatory requirements should be designed in such a way that they vary with the benefits and the risks associated with a financial service or provider of financial services.[7] While this statement was made in the context of allowing entrants into the financial market to promote innovation, it is submitted that such proportionality between the burden of compliance and the risk the regulation is actually seeking to guard against should not cease to be a consideration once entities are allowed access to regulated markets and are subject to stringent and well-supervised regulation.

6.1.5 Regrettably, we were unable to find any evidence that the FIC has undertaken a specific risk assessment in relation to the inherent MLTF risks posed by credit providers, other than money lenders that lend against the security of securities. Such a risk assessment is clearly and patently relevant to Draft Item 11(a) Registered Credit Providers and their industry and, we submit, should reasonably have been undertaken prior to the making of proposals for the amendment of Item 11(a) of Schedule 1 to FICA. We note that the FIC did conduct and publish MLTF risk assessments, during 2022, for various other business sectors, namely gambling, motor vehicle dealers, lenders of money against the security of securities, trust services providers, real estate, Kruger rand dealers, and legal practitioners.[8]

6.1.6 Considering the onerous obligations imposed by FICA on accountable institutions, the apparent failure of the FIC to undertake such an assessment for the broader credit/lending industry, whose role-players stand to be materially impacted by Draft Item 11(a) (and Item 11(b)), is both surprising and irrational. Had an assessment for credit providers as a sector been undertaken by the FIC, our client is confident that owing to the nature of the business being conducted by the NCRF members, in the form of retail store credit, the MLTF risk-level assessment would have pegged the MLTF risk as being extremely low.

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[6] As set out in the Meeting Summary relevant to the meeting of the FSC held on 16 August 2022, available here: https://pmg.org.za/committee-meeting/35319/.

[7] FSCA Financial Inclusion Strategy Document, page 22, available here: https://www.fsca.co.za/Documents/FSCA%20Financial%20Inclusion%20Strategy.pdf.

[8] The various sector assessments mentioned are available here: https://www.fic.gov.za/Resources/Pages/Publications.aspx.

6.1.7 As was submitted by the NCRF in the 12 August 2022 Submission, common sense dictates that it is highly unlikely that a consumer will purchase retail merchandise, such as clothing or footwear, on credit, for the purpose of laundering money or as a means to participate in the financing of terrorist activities. In addition, the NCRF's members do not accept deposits from consumers that would give rise to credit balances on their retail store cards (as the NCRF's members are, in any event, not authorised to conduct "*the business of a bank*").

6.1.8 The NCRF members also adhere, of course, to their obligations to report suspicious and unusual transactions or activity, in compliance with section 29 of FICA. The percentage of reports made by NCRF members in this regard, relative to the total number of transactions completed, is miniscule and the carrying out of a full MLTF risk assessment of the industry would confirm this. This further evidences the indisputable fact that the MLTF risk for a retailer providing store cards is extremely low by virtue of the very nature of such a retailer's business.

6.2 **Perceived unequal treatment in the practical assessment of MLTF risk across different categories of accountable institutions, in terms of the currently proposed amendments**

6.2.1 Item 20 of the proposed amendment to Schedule 1 of FICA creates another 'new' category of accountable institution for the purposes of FICA, namely a 'high-value goods dealer'. One qualifies as a 'high-value goods dealer', however, only where the transaction value is R100,000 or more.

6.2.2 By way of practical example, then, should the proposed amendments to Schedule 1 to FICA be implemented as they currently stand, a jewellery store owner that sells jewellery but keeps the value of the store's transactions below R100,000 would not be considered an accountable institution. On the other hand, a Draft Item 11(a) Registered Credit Provider that provides retail store credit where the average credit facility granted is just R3,348 (as per paragraph 4.1.3) would qualify as an accountable institution as a matter of course, and so would need to adhere to all of the obligations imposed by FICA on accountable institutions. With respect, this example illustrates that there is a clear disjunct between the manner in which objective MLTF risks are being assessed and the practical reality of the businesses proposed to be added as accountable institutions under Schedule 1 to FICA.

6.2.3 At the very least, the obligations that will be imposed on Draft Item 11(a) Registered Credit Providers seem materially disproportionate, relative to those who are not caught by virtue of a transaction value falling below the relatively high monetary threshold value of R100,000 in terms of proposed item 20 of Schedule 1 of FICA.

6.2.4 We submit that the alternative proposed wording for Item 11(a), as set out in paragraph 3 above, if implemented, will achieve a far more balanced approach in practice, as it does not seek to carve out Draft Item 11(a) Registered Credit Providers entirely from potential qualification as accountable institutions. Rather, by placing a (relatively low, in comparison to item 20) monetary threshold value on store card credit facilities, the proposed approach is mindful of the objective behind the inclusion of a Draft Item 11(a) Registered Credit Provider as an accountable institution, thereby still addressing the FATF Standards' ideal regarding the inclusion of 'lending' as a category in South Africa's MLTF legislation, though in a rational and sensible way.

6.2.5 Related to the points of proportionality and rationality, and as set out in the 12 August 2022 Submission, we draw your attention, anecdotally, to the fact that the regulators in Botswana, in October 2018 (in an apparent 'knee jerk' response to Botswana's FATF grey-listing), amended Botswana's financial intelligence legislation wholesale, effectively making any entity registered in terms of any law subject to obligations in terms of financial intelligence legislation. The practical results of the taking of this step were untenable from a business

perspective, and the prior changes made by the regulators in Botswana had to be revised. On the other hand, regulators in Namibia have taken a more measured approach, by conducting risk assessments across a number of industries / sectors, methodically determining the bespoke level of MLTF risk in a particular sector.

6.2.6 Considering the FIC's apparent failure, insofar as we are aware, to have conducted an MLTF risk assessment for credit providers, the NCRF strongly suggests that the committee insist on such an industry assessment being carried out before item 11 of Schedule 1 to FICA is implemented. It is critical, on our assessment, that the practical impact of the amendments on both retailers and consumers alike be well understood to avoid the potentially dire consequences described in this submission.

6.3 **Other 'carve-outs' of sectors are already catered for in Schedule 1 to FICA**

6.3.1 The NCRF is mindful that the FIC, through Mr Smit, has expressed that the FIC's general approach to the proposed amendments to Schedule 1 to FICA was to avoid creating 'carve-outs' from the scope of FICA's application, which ostensibly makes it difficult to determine "*… when an institution was accountable and when it was not, as all the exceptions and specific arrangements carved out had to be consulted to determine this*".[9] The NCRF understands, therefore, that the FIC may be reluctant to consider the updated proposed alternative wording for item 11(a) of Schedule 1 to FICA as set out in paragraph 3 above.

6.3.2 It must be noted, however, that there are already *existing carve-outs* from categorisation under Schedule 1, within other classes of accountable institutions, namely:

6.3.2.1 item 8 of Schedule 1 to FICA, in relation to short-term insurers (now known as 'non-life insurers' by virtue of the promulgation of the Insurance Act, 2017 (**Insurance Act**)); and

6.3.2.2 item 12 of Schedule 1 to FICA, in relation to financial services providers (**FSP**) authorised as such in terms of the Financial Advisory and Intermediary Services Act, 2002 (**FAIS**), where such FSPs provide advice in relation to, or intermediate, only short-term insurance contracts as defined in the Short-Term Insurance Act, 1998 (now known as 'non-life insurance policies' by virtue of the promulgation of the Insurance Act).

6.3.3 It is our understanding that non-life insurers and intermediaries were carved out of Schedule 1 of FICA in 2017, owing to a practical appreciation of the exponential time and monetary impact that including the two categories as accountable institutions would have had. As a result, the FIC suspended the inclusion of these categories pending the outcome of a risk analysis, which was ultimately conducted by Deloitte and funded by the Financial Intermediaries Association of Southern Africa (**FIA**) and the South African Insurance Association (**SAIA**). The final Deloitte report in this regard was presented to the FIC Non-life Insurance Working Group on 19 November 2021, with the overall finding being that the sector should be classed as 'low risk' from a MLTF perspective. The FIA announced, on 3 June 2022, that the FIC had issued a communication advising that, based on the findings of the risk report, the FIC had concluded that, at this stage, there is no need to include non-life insurers and intermediaries as accountable institutions under FICA.[10]

6.3.4 As set out in paragraph 4.2.1 above, the cost to NCRF members of being included within the full scope of FICA as Draft Item 11(a) Registered Credit Providers, and so being classified as accountable institutions under FICA, is material and immense. It has further been submitted,

[9] As set out in the Meeting Summary of the meeting of the FSC held on 16 August 2022, available here https://pmg.org.za/committee-meeting/35319/.

[10] Available here: https://fia.org.za/2022/06/07/fia-and-industry-associations-successfully-lobby-for-non-life-intermediaries-and-insurers-not-to-be-included-as-accountable-institutions-under-the-fic-act/.

and *prima facie* demonstrated, that the MLTF risk brought about by the credit businesses of the NCRF's members is objectively low. We submit that the NCRF has a reasonable and legitimate expectation in the circumstances that its industry and its members will be afforded the same consideration and treatment as that which has been afforded to other industries or sectors that are conceivably in similar positions. Should this not be done, this will be objectively unfair.

6.3.5 For completeness, we note that the proposed changes to items 8 and 12 of Schedule 1 to FICA do not alter the fact that a carve-out was created; the proposed changes merely bring the existing carve-outs in line with the terminology used in the Insurance Act.

7. CONCLUDING REMARKS

7.1 We trust that this submission made on behalf of the NCRF will persuade the committee that Draft Item 11(a) cannot be implemented in its current form in the absence, at least, of additional concrete steps and actions being taken, as discussed in this submission.

7.2 The practical implications of the implementation of Draft Item 11(a) for both Draft Item 11(a) Registered Credit Providers and retail credit consumers alike are far-reaching, undesirable, unnecessary and drastic, and it is, we submit, indisputable that these implications have not yet been adequately taken into account.

7.3 The NCRF requests the opportunity to discuss the content of this submission at the public hearing on Tuesday, 20 September 2022.

7.4 All our client's rights remain reserved.

Yours faithfully

Bowman Gilfillan
per: James McKinnell / Kirsten Kern / Keryn Layton-McCann