

Compliance for fiduciary practitioners – an overview

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The laws governing the conduct of fiduciary practitioners are constantly evolving and have become increasingly complex. To ensure the provision of quality fiduciary services which is also in compliance with those laws, fiduciary practitioners should develop and nurture a compliance culture in all their business activities.

The first step towards a positive outcome is to make a firm personal commitment to comply with all laws, rules and directives. To achieve ongoing service delivery goals fiduciary practitioners should also be committed to conducting all of their business activities in compliance with ethical standards.

The good part about compliance which is often overlooked is that it also protects the practitioner against risks and potential financial losses that may be incurred during the course of administration processes. For example, section 35 of the Administration of Estates Act provides comprehensive personal protection for executors who distributed estate assets after having complied fully with the provisions of that section. That protection is valuable once the distribution of the estate assets has occurred.

Members of FISA are familiar with the prominent laws that apply to the preparation of wills (Wills Act), administration of estates (Administration of Estates Act) and administration of trusts (Trust Property Control Act). There is, however, also ancillary legislation that affects the provision of fiduciary services directly. A brief summary of such legislation and its compliance aspects follows below.

Financial Intelligence Centre Act (“FICA”)

The purpose of FICA is to curtail money laundering and to impose certain anti-laundering controls. With the promulgation of FICA and the commencement thereof on 30 June 2003, it has become compulsory for fiduciary practitioners to comply with the provisions thereof.

The basic obligations imposed upon fiduciary practitioners are as follows:

1. To know your client (to verify the identity of your client);
2. Keeping records pertaining to financial transactions;
3. Reporting of suspicious transactions to the Financial Intelligence Centre.

Certain transactions are exempted from compliance with the Act, which include the drafting of a testamentary writing (wills), the administration of deceased estates (for the verification of the identities of heirs and legatees). Transactions and services that will be subject to the standard KYC procedure in terms of FICA include administration of trusts and managing a client’s affairs under a power of attorney.

Protection of Personal Information Act (“POPI”)

The President signed POPI into law on 27 November 2013. The actual commencement date of the Act must still be published in the Government Gazette.

POPI's objective is to protect the personal information of clients processed by both private and public bodies (including government).

Some exceptions exist, but every entity which collects, stores and otherwise modifies or uses information (i.e. processes information), must comply with the conditions required for the lawful processing of personal information.

POPI places a number of responsibilities on the entity or 'responsible party' collecting and using the information, including:

- obtaining consent to process a person's personal information;
- identifying the legitimate purpose for which information is processed and ensuring that the processing of information is relevant, adequate and not excessive in respect of that purpose;
- installing security measures to protect the integrity of the information;
- where a security compromise occurs, notifying the regulator and the data subject of that breach and possible consequences of the security compromise;
- ensuring, by a written agreement, that any third-party operator which processes personal information for the responsible party also establishes and maintains the security measure referred to in POPI;
- the destruction or deletion of a record of personal information as soon as the purpose for which the information was collected is completed.

This list is by no means exhaustive, but gives some idea how far POPI extends to protect personal information.

POPI also enables one to request access from the responsible party holding your personal information and, unless there are other legal requirements for the responsible party to retain that information, you may request that the information be destroyed or deleted.

What can we further expect from POPI?

A Regulator will be established to undertake a number of duties in relation to POPI, to deal with consumer complaints, and to monitor and enforce compliance with POPI.

Certain industries will, no doubt, have POPI very much in their focus, especially where personal information is managed in large volumes, for instance, the health care, insurance, financial, banking, retail, and telecommunications industries.

It may well be that a person can never get through life without the exchange of personal information, but now one can expect that personal information be protected, and a forum will exist to ensure that private and public entities don't abuse your personal information.

Consumer Protection Act ("CPA")

The main purpose of CPA, which commenced on 31 March 2011, is to achieve fairness and equality for all consumers. It provides consumers with a greater level of protection against providers of goods and services.

In brief, this is how the CPA does this:

- It promotes a fair, accessible and sustainable marketplace for consumer products and services.
- It lays down norms and standards to protect consumers.
- It prohibits certain unfair marketing and business practices.
- It promotes responsible consumer behaviour.
- It lays down laws relating to transactions and agreements.
- It brings into being the National Consumer Commission and National Consumer Tribunal to enforce consumer protection.

What does the Consumer Protection Act apply to?

Section 5 of the CPA provides that the Act shall apply to every transaction, agreement, advertisement, production, distribution, promotion, sale or supply of goods or services. Further, the CPA shall apply to the promotion and marketing of any goods or services. Certain transactions are exempt. For instance, where the goods or services could not reasonably be the subject of a transaction falling within the ambit of the CPA or where the goods or services have been exempted from the application of the CPA (exemption requirements and procedure are set out in s5(3) and s5(4)).

What are the duties of the Administrator, Executor or Liquidator of a supplier's property?

Certain duties arise where a supplier goes into liquidation, is placed under administration, or passes away. In any of these instances, the administrator, liquidator or executor must diligently investigate the circumstances of the supplier's business in a bid to ascertain whether the supplier holds any money or property that belongs to a consumer and where such money or property is found, the administrator, liquidator or executor must ensure that the money or property is dealt with for the consumers benefit (s65(3)(a)). The administrator, liquidator or executor would be liable for any loss unless he or she acted in good faith and was unaware of the consumer's interest in the money or property (s65(3)(b)).

Treating Customers Fairly ("TCF")

The Financial Services Board (FSB) has initiated a programme called Treating Customers Fairly (TCF), to ensure that the needs of customers of financial services are appropriately met.

The FSB has communicated six fairness outcomes that must be achieved during all interactions with clients. The intention is that, over time, these outcomes should be entrenched in a business or company's corporate culture, and become a way of doing business.

What are the Six Habits of Treating Customers Fairly?

1. Be fair to customers and clients each and every time you interact with them to demonstrate that fair treatment is central to your culture.
2. Meet customer needs by providing products and services designed to meet the needs of identified customer groups.
3. Ensure that clients and customers are provided with clear information and kept informed before, during and after the sale.

4. Make certain that the advice you provide is suitable and considers the customers circumstances.
5. Your word, your honour. Product performance and service must always meet the expectations of customers and clients.
6. Make it easy for customers to change products, switch to another financial institution, make a claim, or lay a complaint.

Foreign Account Tax Compliance Act (“FATCA”)

The main purpose of FATCA is to reduce tax evasion by USA citizens. FATCA imposes registration and reporting obligations on applicable Foreign Financial Institutions (FFIs).

Members of FISA must establish whether they would be deemed to be FFI's in terms of FATCA. If so, registration as an FFI is required on the US IRS Registered User Portal by 25 April 2014.

Conclusion

Having regard to all the laws that apply to the activities of fiduciary practitioners it is evident that compliance plays a critical role in the fiduciary industry. A successful culture of compliance is achieved when fiduciary practitioners have a practice that builds client trust and reduces its own risk exposure. It should be the fiduciary practitioner's objective to continue to foster such a culture in order to conduct business in a way that is also ethical and transparent.

FISA

The Fiduciary Institute of Southern Africa (FISA) is a non-profit organisation that represents fiduciary practitioners and sets high minimum standards for the industry to protect the public's interests. FISA is the only professional body focusing solely on fiduciary practitioners in Southern Africa.

Membership is drawn from trust companies and banks, as well as the legal, accounting and financial planning professions.

Activities of FISA members include but are not restricted to estate planning, the drafting of wills, administration of trusts and estates, beneficiary funds, tax and financial advice and the management of client assets.

FISA has close to 750 individual members, who collectively manage in excess of R280 billion. They draft several thousand wills each year and administer around 50 percent of deceased estates reported to the Master's Office.

FISA helps to make processes smoother for members and the public, particularly through its good working relationship with the Master's Office and SARS.