

RECOMMENDED PROCEDURE FOR SECTION 78(2A) INVESTMENTS

1. INTRODUCTION

- 1.1 Section 78 of the Attorneys' Act 53 of 1979 was amended by the Attorneys' Amendment Act 87 of 1989 with effect from 1 March 1990. The amendment consists *inter alia* of an additional section 78(2A)(a) and (b).
- 1.2 Since the amendment attorneys have been experiencing problems with the interpretation and application of the amendment. To assist attorneys in this matter meetings have been arranged between the attorneys profession and the Institute of Chartered Accountants and they have agreed to issue guidelines to attorneys on how to apply the section in their practices. Attorneys should note that they are themselves responsible for ensuring that their accounting records conform with the requirements of the Attorneys Act and that they satisfy their auditors.

2. GUIDELINES

- 2.1 Since March 1991 the holding of trust moneys can consist of three components, viz:
- 2.1.1 **section 78(1)** current banking account;
- 2.1.2 **section 78(2)(a)** investment account which consists of trust moneys of various clients which are not immediately needed; and
- 2.1.3 **section 78(2A)** investments made on behalf of clients.

The interest on the accounts in paragraphs 2.1.1 and 2.1.2 will accrue to the Fidelity Fund while that in paragraph 2.1.3 will accrue to the client.

- 2.2 The investment of trust funds in terms of section 78(2)(a) and section 78(2A) does not in any way reduce the total obligation to trust creditors, but merely splits the holding of the liquid trust funds into the three components as in paragraph 2.1.
- 2.3 All accounting records and entries made in relation to a section 78(2A) investment must form part of the attorneys' bookkeeping records and must therefore be part of the audit carried out by the auditor on whose report a Fidelity Fund certificate is issued.

- 2.4 Once the trust investment in paragraph 2.1.2 above has been made, the corresponding debit entry should be recorded in a separate account contained in the clients' trust ledger called "*section 78(2)(a) trust investment*" or other similar description.
- 2.5 The effect of section 78(2A) is that clients' trust funds invested in terms of the clients' specific instructions retain their trust identity. In other words, the trust liabilities will not diminish once such an investment is made, nor will the available trust funds diminish. The interest will accrue to the client and will continue to be treated as trust money.
- 2.6 Once the trust investment in terms of section 78(2A) has been made, instead of debiting the clients' trust account, a new account should be opened in the clients' trust ledger, called "*Client B - section 78(2A) trust investment*" or some other similar description and debited accordingly. It follows that upon redemption, the capital portion of the investment will be credited to the investment account, while the interest portion will be credited to the clients' trust account to be treated in the same manner as any other trust moneys.
- 2.6.1 **"If the bookkeeping entries as set out in the above paragraph are followed there is a danger that the attorney or a staff member could refer to the client's trust ledger account and, without checking to see whether or not an investment had been made on behalf of that client, make payments on behalf of that client in excess of the funds held for that client in the trust banking account."**
- 2.6.2 **If this danger is to be avoided, it is suggested that the booking entries as set out in Annexure "A" are followed."**

Alternative bookkeeping entries for trust funds invested on behalf of a client in terms of Section 78(2A).

	Transaction	Debit	Credit
1.	Trust money received		
	Cash book	Trust Cash Book	Trust Client
2.	Trust money invested		

- The client's ordinary trust ledger account will reflect the money held in the trust banking account for that client.
 - The balance in the ledger account is the name of the Institution will equal the total of the funds invested at that Institution (including accrued interest) and should agree to the statement from the Institution. Note that this will be a debit balance in the trust ledger, but would not be a contravention of Rule 13.13.4 as the account is not a "trust creditor's ledger account, but actually an asset account (i.e. represents the funds held by the Institution).
 - The balances of the client's investment accounts in the trust ledger (i.e. those designated "Investment in terms of S78(2A) - Name of Institution") will reflect as trust creditors on the monthly list of trust creditors as required.
- 2.7 The introduction of an investment register is desirable as being an additional subsidiary record which will certainly facilitate reference procedures where volumes of investments justify such a register. The keeping of an investment register will most certainly be of great assistance to the auditor and thus contribute to the limitation of increase in audit fees resulting from the extra entries to be examined.
- 2.8 Trust moneys, as referred to in 2.1 above, may only be invested or kept at a banking institution.
- 2.9 Any account opened by a client over which the attorney subsequently gains control through a power of attorney or opened by the attorney in the name of the client under a power of attorney is not a section 78(2A) investment in terms of the Act.
- 2.10 Where an attorney issues an undertaking or guarantee in his firm's name in a conveyancing matter against trust moneys held by him and he retains exclusive control over those moneys, a note should be made in the books to the effect that a guarantee or undertaking has been issued. The correct method of dealing with undertakings/guarantees would be, when a suspensive condition is met, for the attorney to transfer money from the trust investment account to his trust banking account and pay the amount in terms of the guarantee/undertaking to the beneficiary, as the money cannot be paid directly from the trust investment account to the beneficiary of the guarantee/undertaking.

- 2.11 It is not permissible to open one section 78(2A) account at a banking institution for more than one client's trust investments. A separate account must be opened for each client.
- 2.12 Accounts opened and administered by attorneys in their capacities as agents for executors, as executors or as trustees in the names of the estate or trust are not subject to the provisions of section 78.
- 2.13 Practitioners may charge a reasonable fee for the administering of a section 78(2A) investment.
- 2.14 Where the frequency and number of transactions could constitute a material factor, consideration could be given to the introduction of a separate trust investment control account and a corresponding separate trust investment ledger. This could mean the introduction of separate analytical columns in the trust cash book. Sound and practical ledger account management and administration will require that each client's ledger account be marked in some way to indicate that a trust investment has been made.
- 2.15 A further possible adaptation could be the introduction of an investment column on the debit side of the client's ledger account - not to be offset against the credit balance.
- 2.16 It is important to recognise that the client's trust credit balance, notwithstanding its investment in terms of section 78(2A), must continue to be listed as forming part of the general body of trust creditors. Interest on trust investments should be brought to account on a regular basis, preferably every quarter.
- 2.17 It should also be noted that the subsection requires the account in the bank and the books to contain a reference to the subsection, in the same way as section 78(2)(b) requires a reference to section 78(2)(a).
- 2.18 When an attorney issues an undertaking or guarantee in his own name then the investment remains a section 78(2A) investment.
- 2.19 Should a financial institution be required to issue a guarantee on the strength of a section 78(2A) investment, the investment must be transferred to the attorney's trust account and then to the financial institution as a disbursement.