

OVERVIEW OF THE GENERAL LAWS (ANTI-MONEY LAUNDERING AND COMBATING TERRORISM FINANCING) AMENDMENT BILL

The General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill [B18-2022] (the Bill) was tabled in Parliament, in August 2022.

The Bill is an omnibus Bill, incorporating the amendment of the Trust Property Control Act, the Nonprofit Organisation Act, the Financial Intelligence Centre Act, the Companies Act, and the Financial Sector Regulation Act, addressing at least 14 of the 20 recommendations, and the technical compliance deficiencies identified in the Financial Action Task Force's (FATF) Mutual Evaluation Report (MER) of South Africa, published in October 2021.

The Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill, 2022, which deals with 2 further core MER recommendations, is currently before Parliament and is expected to be enacted by November 2022.

The outstanding 4 deficient MER recommendations will be dealt with via policy processes and mechanisms to be developed by October/November 2022.

National Treasury noted that, aside from successfully addressing all or most of the 20 technical deficiencies by the end of the year, South Africa will have the harder task of demonstrating in the next 6 months, the effectiveness of its AML/CFT laws and frameworks, and that it has made significant progress in addressing the deficiencies in the FATF recommendations and all 11 Immediate Outcomes, to ensure that South Africa avoids being greylisted by the FATF, at its February 2023 Plenary meetings.

A few of the amendments are discussed below but the detailed amendments can be accessed at the source links provided at the end of this article.

1. Trust Property Control Act 57 of 1988 (the TPCA)

1.1. Beneficial ownership

The Bill proposes the insertion of a definition of beneficial ownership of a trust, and section 11A: Beneficial Ownership, into the TPCA. The section imposes the duty on trustees to establish and record beneficial ownership of the trust, keep a record of the prescribed information relating to the beneficial owners of the trust, lodge a register of the prescribed information of the beneficial owners of the trust with the Master's Office, and to ensure that all the information is kept up to date.

The section further requires the Master of the High Court to keep a register containing prescribed information about the beneficial ownership of trusts, and the Master must make the information in the register available to any prescribed person.

The Bill does not currently contain any information about the form, information, time periods for updating, and the persons to whom the information must be made available, but only states that it will be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre.

1.2. Trustee disqualification

The Bill proposes the inclusion of grounds for the disqualification of persons from being authorised as trustees, in section 6 of the TCPA. Some of the proposed grounds for disqualification include:

- being an unrehabilitated insolvent
- being prohibited by any law or the court to be a director of a company
- having been removed from an office of trust on the grounds of misconduct involving dishonesty,
- having been convicted, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence involving fraud, misrepresentation or dishonesty, money laundering, terrorist financing or proliferation financing activities, as defined in the FIC Act.

1.3. Offences

The TCPA currently does not contain any offences. In terms of the current section 19, if a trustee fails to comply with a request by the Master to account to the Master, or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty.

The Bill introduces offences in section 19 of the TCPA, inter alia, a trustee who fails to establish and record beneficial ownership of the trust, keep a record of the prescribed information relating to the beneficial owners of the trust, lodge a register of the prescribed information on the beneficial owners of the trust with the Master's Office, and ensure that all the information is kept up to date, commits an offence and on conviction is liable to a fine not exceeding R10 million, or imprisonment for a period not exceeding five years, or to both such fine and imprisonment.

It is a well-known fact that trusts are popular vehicles in money laundering, terrorist financing, tax evasion and fraud schemes.

The limitation on the availability of information, especially for verification purposes, in respect of trusts in South Africa, has been a challenge when performing customer due diligences. News reports in recent years have highlighted many issues within the Master's Office. Whether the Master's Office will be able to handle the additional administrative duties that will be brought about by the proposed changes, remains to be seen.

2. Financial Intelligence Centre Act 38 of 2001 (the FIC Act)

The Bill proposes various amendments to the FIC Act. Accountable institutions (AIs) will have to review and amend their Risk Management and Compliance Programmes and underlying processes accordingly, to incorporate these amendments.

2.1. Beneficial owner

Amendments to the definition of beneficial owner are proposed. It seeks to include every natural person who is a beneficial owner of a client that is a legal person, partnership or trust.

2.2. Politically exposed and prominent influential persons

The proposed amendments to the FIC Act include the amendment of the terminology, domestic prominent influential person and foreign prominent public official, to respectively, domestic politically exposed person and foreign politically exposed person, in section 1 of the FIC Act, as well as Schedules 3A and 3B.

Accordingly, the Bill proposes various amendments to incorporate these changes in terminology.

Schedule 3A currently provides that a domestic prominent influential person is a person that currently holds, including in an acting position for a period exceeding six months, or has held at any time in the preceding 12 months, a position listed in the Schedule.

The Bill amends the Schedule to provide that a person listed in the Schedule, will be considered a domestic politically exposed person, if that person currently holds or has held the position at any time. Therefore, it removes the time limitations currently specified in the Schedule.

A similar amendment is proposed to Schedule 3B, relating to foreign politically exposed persons. The removal of the time limitations may have a material impact on AIs which have applied it. Such AIs, may, if the amendment is promulgated, unknowingly have exposure to politically exposed persons in terms of the amended requirements, and will most likely have to, through their ongoing customer due diligence, identify such persons and apply additional due diligence measures.

The term 'prominent influential person' has been included separately as a distinct category of person from 'politically exposed person', to better align with the FATF terminology and relevant requirements. Accordingly, it also includes a new Schedule 3C, which is in essence, the existing paragraph (b) of Schedule 3A, which has been moved from Schedule 3A to Schedule 3C.

2.3. Proliferation financing and proliferation financing activity

The Bill proposes the inclusion of a definition of proliferation financing and proliferation financing activity, in section 1 of the FIC Act. Accordingly, it proposes the inclusion of proliferation financing and proliferation financing activities, in addition to money laundering and terrorist financing, in various sections of the FIC Act.

2.4. Customer due diligence (CDD)

Section 21B, relating to additional due diligence measures relating to legal persons, trusts and partnership, will be amended to provide for instances where the partners in a partnership or, in the case of trusts, founders, trustees or beneficiaries, are legal persons.

The proposed amendments to section 21C will also allow AIs that suspect that a transaction or activity is suspicious in terms of section 29 (STR), and reasonably believes that performing the customer due diligence measures will disclose to the client that an STR will be made to the Centre, to discontinue the CDD process and consider filing an STR.

Section 21D deals with the process to be followed by AIs when there are doubts about previously obtained CDD information from a client. The proposed amendments extend this obligation to instances where an STR is made to the Centre.

2.5. Risk Management and Compliance Programme (RCMP)

Various amendments are proposed to section 42, which deals with AIs' Risk Management and Compliance Programmes. This includes requiring AIs to consider new and existing products or services that may involve or facilitate money laundering or terrorist financing activities, and for them to include in their RMCPs:

- the manner and process by which an AI determines whether not only a prospective client is a foreign or a domestic politically exposed person or a prominent influential person, but to also include how it applies in respect of existing clients;
- the process and manner, when reporting suspicious and unusual transactions, in accordance with the proposed amended section 21D;
- the manner and processes by which an AI conducts enhanced due diligence for higher-risk business relationships, including single transactions;
- the way the AI will apply appropriate additional measures to manage the risks if the host country does not permit the implementation of measures required in terms of the Act; and
- the manner and processes by which group-wide programmes of an AI for all its branches and majority owned subsidiaries are implemented, to enable the institution to comply with the FIC Act. This also extends to the exchange of information within branches, subsidiaries or other operations relating to the analysis of suspicious or unusual transactions or activities. However, AIs will be required to have adequate safeguards to protect the confidentiality of information exchanged in terms of the new requirements.

2.6. Supervisory bodies

Schedule 2 will be amended by the deletion Estate Agency Affairs Board and the provincial licensing authorities defined in section 1 of the National Gambling Act, 2004 (Provincial



Gambling Boards). Going forward, the Financial Intelligence Centre will be responsible for supervising and enforcing compliance of the FIC Act for both estate agents, and persons carrying on the business of making available a gambling activity in terms of the National Gambling Act.

3. Companies Act 71 of 2008

Like the changes proposed to the TCPA, the proposed amendments to the Companies Act include the inclusion of a detailed definition of beneficial owner of a company.

Companies will also be required to, with their annual returns to the CIPC, submit its securities register and a register disclosing beneficial interests. The CIPC will be required to make the annual return available to any of the prescribed persons. Companies will be required to record in its securities register, information regarding the natural persons who are the beneficial owners of the company and must ensure that this information is updated within a certain period after any changes in beneficial ownership have occurred. The Bill does not currently contain any information about the form, information, time periods for updating, and the persons to whom the information must be made available, but only states that it will be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre.

With regards to beneficial ownership, even though the registers as proposed in the TCPA and the Companies Act, and depending on the level of compliance, accuracy, completeness, and accessibility of the information, might assist with the availability, transparency, and verification of information, it will by no means be a silver bullet when it comes to information relating to beneficial ownership.

Many of the questions relating to such registers have been raised in a FATF White Paper, published for consultation in 2021, relating to amendments of Recommendation 24 on the transparency and beneficial ownership (BO) of legal persons. Some of the questions raised include:

- How should the accuracy of BO information disclosed to the BO Registry be confirmed?
- Who should play a role in the verification of BO information?
- How can compliance burden on low risk companies be reduced, without creating loopholes that could be exploited by criminals?
- How frequently should disclosed BO information be updated or re-confirmed?
- Who should have access to a BO register and what measures should be taken to address concerns relating to privacy, security and potential misuse of BO information, arising from access to BO information?

4. Financial Sector Regulation Act 9 of 2017 (FSR Act)

The Bill proposes the insertion of Chapter IIA in the FSR Act, which deals with beneficial owners of financial institutions. It will also give a financial sector regulator the power to make standards applicable to:

- beneficial owners with respect to fit and proper requirements, in particular honesty and integrity, and reporting of relevant information regarding the beneficial owner to the financial sector regulator; and



- financial institutions with respect to the identification and verification of beneficial owners; and
- reporting relevant information in respect of beneficial owners to the financial sector regulator.

It will also allow a financial sector regulator to issue to a beneficial owner a written directive requiring the beneficial owner to, if the beneficial owner has contravened or is likely to contravene a financial sector law, take the action specified in the directive, stop the contravention, and may include requiring the beneficial owner to take steps to cease being a beneficial owner. The latter may be far reaching as the beneficial owner may be required to dispose of its ownership, and it is not clear what will happen in instances where the beneficial owner is unable to dispose of its ownership.

The above aligns to the increased focus on significant ownership of financial institutions in recent years, and FATF Recommendation 26, which requires that financial supervisors take the necessary legal or regulatory measures to prevent criminals or their associates from holding, or being the beneficial owner of, a significant or controlling interest or holding a management function in, a financial institution. Although the FSCA acknowledges that a significant owner and a beneficial owner is not the same, the definition of a significant owner in the FSR Act already captures a relatively broad scope of beneficial owners.

In 2020, the FSCA and the Prudential Authority published Joint Standard 1 of 2020: Fitness, propriety and other matters relating to significant owners, in terms of the FSR Act. However, certain entities were exempted from the Standard in terms of FSCA General Notice 3 of 2020.

Note that in September 2022, the FSCA published FSCA General Notice 1 of 2022:

Amendment of the exemption by the Financial Sector Conduct Authority of certain persons from Joint Standard 1 of 2020 as published in FSCA General Notice 3 of 2020, amending the exemption. Entities that were previously exempt, may now be subject to the requirements of the Joint Standard.

In addition, FSCA Information Request 6 of 2022 (General): Request for Information Relating to Ownership of certain Financial Institutions, was distributed requesting beneficial owner information of authorised financial services providers and managers as defined in the Collective Investment Schemes Control Act, 2002.

5. Next steps

Compliance officers and functions of AIs have a critical role to play in the efforts to increase the effectiveness of South Africa's AML/CFT framework. It is vital that the compliance functions of AIs scrutinise the proposed amendments and assess the impact on their organisations.

Join the discussion, debate changes, and exchange ideas about AML matters with fellow compliance officers at the next CISA AML Focus Group meeting taking place on 18 November 2022. Register for this free event on the CISA events page. For further information about the AML Focus Group, please contact enquiries@compliancesa.com





Sources

National Treasury's Media Statement -

http://www.treasury.gov.za/comm_media/press/2022/2022082901%20Media%20statement%20-%20General%20Laws%20Amendment%20Bill.pdf

Bill - [http://www.treasury.gov.za/legislation/bills/2022/\[B18-2022\]%20General%20Laws%20\(Anti-Money%20Laundering\).pdf](http://www.treasury.gov.za/legislation/bills/2022/[B18-2022]%20General%20Laws%20(Anti-Money%20Laundering).pdf)

FATF white paper: <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/white-paper-r24.html>

Joint Standard 1 of 2020: <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Standards.aspx>

FSCA Information Request 6 of 2022 (General): Request for Information Relating to Ownership of certain Financial Institutions:

<https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx>

FSCA General Notice 1 of 2022: Amendment of the exemption by the Financial Sector Conduct Authority of certain persons from Joint Standard 1 of 2020 as published in FSCA General Notice 3 of 2020: <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx>

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