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MEMORANDUM ON THE OBJECTS OF FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL, 2015

1. BACKGROUND TO THE BILL

1.1 South Africa has a long-standing commitment to combating money-laundering and the financing of terrorism, having ratified the United Nations Convention Against Corruption ("UNCAC") in 2004, and joining the multi-lateral Financial Action Task Force ("FATF") in 2003. As a result, South Africa enacted the Financial Intelligence Centre Act, No 38 of 2001 ("FIC Act"), and other related Acts to assist in combating financial crimes. The FATF is an inter-governmental body which sets standards and develops and promotes policies to combat money laundering, the financing of terrorism, and the proliferation of weapons of mass destruction. These standards are used as benchmarks in formal peer review and evaluation processes to test the robustness of a country's measures against these illicit activities, and the integrity of its financial systems.

1.2 In 2009, the FATF evaluated the South African anti-money laundering ("AML") and combating of financing of terrorism ("CFT") regime. The assessment included a review of the relevant AML and CFT laws and regulations, and the supervisory and regulatory systems in place to deter money laundering and terrorism financing. In identifying issues requiring review, consideration is given to the FATF's assessment report on ways to improve South Africa's legal and institutional framework, and to strengthen the implementation of measures to combat money laundering and terrorism financing.

1.3 Since the adoption of the results of the assessment by the FATF, the country has been reporting to the FATF on a regular basis on the steps taken to improve the South African system to combat money laundering and terrorism financing. The next such report will be made in June, 2015. The majority of the actions still remaining for South Africa to take in this process involve amendments to the FIC Act, which relate to the obligations placed on financial and other institutions. In order to demonstrate clearly in June, 2015 that South Africa remains politically committed to the process of continuous improvement, the country should be able to report that a process to make and implement the necessary legislative changes is well under way.

1.4 The improvements to the legislation seek to enable financial and other institutions to make it simpler for customers to satisfy customer due diligence processes. It is intended that the improvements will assist institutions to strengthen their internal compliance regimes and concentrate their resources more effectively on addressing risks that their products and services may be abused for illicit purposes.

1.5 In addition, the improvements seek to create opportunities for financial institutions to explore more innovative ways of offering financial services to a broader range of customers, and bring previously excluded sectors of society into the formal economy. This will improve the efficacy of measures to combat terrorism financing and money laundering, while also promoting financial inclusion.

1.6 In order to address the deficiencies in the FIC Act, it is necessary to amend the customer due diligence provisions of the Act, by requiring financial and other institutions to have appropriate risk-management systems in place that focus their efforts on those cases where there is a higher probability that their products and services will be abused by criminals. This will enable them to take proactive steps to determine the risks of abuse associated with various customer relationships. On the basis of an understanding of the risks, an institution can apply measures to mitigate those risks, by gathering information on the customer's source of wealth, and monitoring the customer's transaction behaviour to spot transactions that seem anomalous given the recognised customer profile. In situations where transactions differ significantly from the profile, these will need to be reported to the authorities such as the Financial Intelligence Centre ("the FIC").

1.7 Customer due diligence brings greater transparency to the financial system, which is one of the tools in the fight against corruption. Customer due diligence is designed to better safeguard the integrity of the financial system and protect financial and other institutions from abuse by criminals. When used effectively in conjunction with other measures to address corruption, customer due diligence will help in the detection, investigation and prosecution of corrupt activities, and lead to the recovery of stolen assets.

2. OBJECTS OF THE BILL

2.1 The primary objective of the Bill is to establish a stronger AML and CFT regulatory framework, by enhancing the customer due diligence requirements, providing for the adoption of a risk based approach in the identification and assessment of AML and CFT risks, providing for the implementation of the United Nations Security Council Resolutions relating to the freezing of assets, dissolving the Counter-Money Laundering Advisory Council ("the CMLAC"), extending the functions of the FIC in relation to suspicious transactions, enhancing the supervisory powers of accountable institutions, and enhancing certain administrative and enforcement mechanisms.

2.2 The Bill addresses the following matters—

2.2.1 *Enhancing the Customer Due Diligence requirements of Accountable Institutions*

Customer due diligence refers to the knowledge that an accountable institution has about its customer and the accountable institution's understanding of the business that the customer is conducting with it. The Bill broadens and enhances the elements of customer due diligence requirements as identified in the FATF Recommendations, namely: the determination of the customer's identity; the duty to keep records; identifying the beneficial owner; and understanding the purpose and the intended nature of the business relationship. The Bill introduces two new concepts under customer due diligence requirements: the on-going due diligence of the customers transaction records; and the enhanced measures for persons entrusted with prominent public or private sector functions, whenever accountable institutions establish business relationships with customers.

2.2.2 *Providing for the adoption of a Risk-Based Approach to Customer Due Diligence*

Provision is made in the Bill for the application of a risk-based approach to customer due diligence, which entails that an accountable institution should identify, assess, and understand its AML and CFT risks. The effective implementation and application of the risk-based approach is largely dependent on an accountable institution's AML and CFT Risk Management and Compliance Programme. The Bill places a responsibility on accountable institutions to develop, document, maintain and implement AML and CFT Risk Management and Compliance Programmes. The responsibility for complying with the FIC Act and the Risk Management and Compliance Programme is placed on the board of directors and the senior management of accountable institutions.

2.2.3 *Providing for the Implementation of the United Nations Security Council Resolutions relating to the Freezing of Assets*

(a) The Bill empowers the FIC to administer the measures adopted by the United Nations Security Council ("UNSC") in its Resolutions, which require accountable institutions to freeze property and transactions pursuant to financial sanctions imposed in the UNSC Resolutions. Mechanisms for the implementation of the UNSC Resolutions shall include the publication in the Government Gazette by the Minister of Finance a Notice of the adoption of the UNSC Resolution, and the publication of a Notice by the executive head of the FIC of persons who are subject to the sanction measures ("the sanctions list"). These Notices may be revoked if it is considered that they are no longer necessary to give effect to the applicable UNSC Resolutions.

(b) The acquisition, collection or use of the property of persons or an entity whose names appear in the sanctions list shall be prohibited, including the provision of financial services and products to those persons or entities. Access to financial services and products by persons identified in the sanctions list shall only be for ordinary and necessary expenses, such as food, rent or mortgage and medical treatment. For compliance purposes, an obligation is placed on accountable institutions to report to the FIC, the property in the accountable institution's possession or under its control which is owned or controlled by or on behalf of a person or an entity identified in the sanctions list.

2.2.4 *Dissolving the CMLAC*

(a) The Bill repeals Chapter 2 of the FIC Act, which establishes the CMLAC. It is envisaged that collaboration will be facilitated at the policy level between the public sector participants in the country's AML and CFT framework with the structures that will be implemented to direct the application of risk assessments and the management of identified AML and CFT risks.

(b) The decision to dissolve the CMLAC has been informed by the fact that a number of platforms exist within the country to discuss matters of concern and of mutual interest, which obviates the need for consultations by a platform such as the CMLAC. Consequential amendments have also been effected to remove reference to the CMLAC in other provisions of the FIC Act.

2.2.5 *Extending the Functions of the FIC in relation to suspicious transactions*

The functions of the FIC are extended to allow the FIC, where appropriate, to initiate the analysis of suspicious transactions based on information in its possession or information received from a source other than from information disclosed to it by accountable institutions. The Bill also mandates the FIC to provide information and

guidance to accountable institutions, which will assist the FIC to meet the requirements to freeze property and transactions pursuant to the sanctions list.

2.2.6 *Enhancing the supervisory powers*

(a) The Bill further strengthens the AML and CFT regulatory framework, by effecting amendments to place an obligation on accountable institutions to ensure that their employees are trained to comply with the FIC Act, as well as their respective Risk Management and Compliance Programmes. The FIC is empowered to issue directives, after consultation with the relevant supervisory body, in instances of general application of the Act, or in specific instances set out in the Bill.

(b) The Bill ensures that proper safeguards are in place in respect of the information in the possession of the FIC, in compliance with the Protection of Personal Information Act, 2013 (Act No. 4 of 2013). The Bill also gives effect to the Constitutional Court's decision in the matter of Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others (CCT 94/13) [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC) (27 February 2014). Section 45B of the FIC Act was declared by the Constitutional Court to be unconstitutional, as it allows for the inspector to conduct inspections, for the purpose of determining compliance with the FIC Act, without a warrant in certain instances. The Bill amends section 45B of the FIC Act, to provide for a warrant requirement, and to state in which circumstances a warrant would not be required.

2.2.7 *Enhancing Administrative and Enforcement Mechanisms*

(a) The enforcement mechanisms in the FIC Act are enhanced, in order to encourage compliance with the Act, and to assist in combating money laundering and terrorism financing. The Bill provides for financial penalties paid in respect of financial sanctions to be paid into the National Revenue Fund, instead of into the Criminal Assets Recovery Account, which is currently the case.

(b) The quorum of the adjudication panel has been reduced for practical reasons, and the Appeal Board will be empowered to condone delays, on good cause shown, in the lodging of appeals. Certain criminal sanctions in the offence provisions will be replaced, by making non-compliance with certain sections of the Act subject to administrative sanctions. These changes in sanctions are only in respect of an accountable institution's obligations regarding customer due diligence and record keeping measures. Certain penalty fines are increased in the Bill.

3. SUMMARY OF THE BILL

3.1 *Definitions (Clause 1)*

3.1.1 A definition of "beneficial owner" is inserted in the FIC Act, to define a beneficial owner, in respect of a juristic person, to mean the natural person who, independently or together with a connected person, owns or controls the juristic person directly or indirectly, including through bearer share holdings.

3.1.2 The definition of "business relationship" is amended to include in the meaning of business relationship three or more single transactions that appear to be linked to

the same person using the same product or service at regular intervals. This definition has been amended, so that accountable institutions will not be required to repeatedly identify and verify customers who regularly conclude single transactions with the same accountable institution.

3.1.3 The definition of "non-compliance" is amended, to make a distinction between what constitutes non-compliance that attracts a administrative sanction from non-compliance that is subject to a criminal sanction.

3.1.4 The following definitions are inserted into the Bill, to define "domestic prominent influential person", "executive officer" and "foreign prominent public official":

"domestic prominent influential person" *means an individual who holds, including in an acting position for a period exceeding six months, or has held at any time in the preceding 12 months, in the Republic—*

(a) a prominent public function including that of—

- *(i) the President or a Deputy President;*
- *(ii) a Minister or Deputy Minister;*
- *(iii) the Premier of a province;*
- *(iv) a member of the Executive Council of a province;*
- *(v) an executive mayor of a municipality as elected in terms of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);*
- *(vi) a leader of a political party registered in terms of the Electoral Commission Act, 1996 (Act No. 51 of 1996);*
- *(vii) a member of a royal family or senior traditional leader defined in the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003);*
- *(viii) a head or chief financial officer of a national or provincial department or government component, defined in section 1 of the Public Service Act, 1994 (Proclamation No. 103 of 1994);*
- *(ix) a municipal manager appointed in terms of section 82(1) of the Local Government: Municipal Structures Act, 1998 (Act No. 111 of 1998);*
- *(x) the chairperson of the controlling body, chief executive officer, chief financial officer or chief investment officer of—*
  - *(aa) a public entity listed in Schedule 2, or Part B or D of Schedule 3, to the Public Finance Management Act, 1999 (Act No. 1 of 1999); or*
  - *(bb) a municipal entity defined in section 1 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);*
- *(xi) a constitutional court judge or any other judge defined in section 1 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001);*
- *(xii) an ambassador or high commissioner or other senior representative of a foreign Government based in the Republic;*
- *(xiii) an officer of the South African National Defence Force above the rank of major-general;*

(b) the position of—

- *(i) chairperson of the board of directors;*
- *(ii) chairperson of the audit committee;*
- *(iii) executive officer; or*
- *(iv) chief financial officer,*

of a company as defined in the Companies Act, 2008 (Act No. 71 of 2008), if the company provides goods or services to an organ of state and the annual transactional value of the goods or services or both exceeds an amount determined by the Minister by notice in the Gazette; or

(c) the position of head or other executive directly accountable to that head, of an international organisation based in the Republic;

"executive officer" *means a person who—*
(a) exercises general executive control over and management of the whole, or a significant portion, of the business and activities of a company; or
(b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of a company,

irrespective of any particular title given by the company to an office held by the person in the company or a function performed by the person for the company;

"foreign prominent public official" *_means an individual who holds, or has held at any time in the preceding 12 months in any foreign country a prominent public function including that of a—*
(a) Head of State or head of a country or government;
(b) member of a foreign royal family;
(c) government minister or equivalent senior politician or leader of a political party;
(d) senior judicial official;
(e) senior executive of a state owned corporation; or
(f) high-ranking member of the military;";

3.1.5 A definition of "Risk Management and Compliance Programme" is inserted in the FIC Act, which is further detailed in Clause 25 (which amends section 42 of the FIC Act).

3.1.6 A definition of "trust" is inserted in the FIC Act, meaning a trust as defined in the Trust Property Control Act, 1988 (Act No. 57 of 1988), but excludes trusts established—
(a) by virtue of a testamentary writing;
(b) by virtue of a court order;
(c) for persons under curatorship;
(d) by the trustees of a retirement fund in respect of benefits payable to the beneficiaries of that retirement fund.

3.2 Objectives (Clause 2)
3.2.1 As a Member State of the United Nations, South Africa is obliged to implement targeted financial sanctions measures to comply with the UNSC Resolutions under Chapter VII of the Charter of the United Nations. These resolutions often, in conjunction with other forms of sanctions, such as arms embargoes and travel bans, require countries to freeze, without delay, the funds or other assets of, and to ensure that no funds or other assets are made available, directly or indirectly, to or for the benefit of, any person or entity designated by the UNSC Resolutions under Chapter VII of the UN Charter.

3.2.2 The FIC Act is best placed to provide for the mechanism for the implementation of financial sanctions pursuant to the UNSC Resolutions, taking into account the current obligations placed on accountable institutions under the FIC Act. Clause 2 of the Bill extends the objectives of the FIC to include administering measures requiring accountable institutions to freeze property and transactions

pursuant to financial sanctions that may arise from UNSC Resolutions.

3.3 Functions (Clause 3)

3.3.1 The functions of the FIC are extended, to allow explicitly for the FIC to initiate an analysis based on information in its possession or information received from another source. This clarifies the fact that the FIC can conduct an analysis which is not predicated on the receipt of a suspicious transaction report.

3.3.2 In addition, clause 3 makes provision for the FIC to provide information and guidance to accountable institutions that will assist in meeting requirements to freeze property and transactions pursuant to UNSC Resolutions.

3.3.3 *Appointment of Director (Clause 4)*

The reference to the consultation with the CMLAC has been deleted. This relates to paragraph 4.3, which discusses the repeal of Chapter 2 of the FIC Act.

3.4 CMLAC (Clause 5)

3.4.1 Chapter 2 of the FIC Act, relating to the CMLAC, is repealed. Collaboration at a policy formulation level between the public sector participants in the country's framework to combat money laundering and terrorism financing can be facilitated better if it is linked with structures that will be implemented to direct the application of risk assessments and the management of identified money laundering and terrorism financing risks.

3.4.2 The implementation of risk-based processes in the AML and CFT framework will greatly reduce the need for policy advice to be provided to the Minister on matters such as the detailed content of regulations and the granting of exemptions from AML and CFT requirements. Instead of relying on rigid requirements in regulations and exemptions granted at the executive level, financial and other institutions will have greater discretion to determine the appropriate compliance steps to be taken in given instances, in accordance with their internal AML and CFT compliance and risk management programmes.

3.4.3 The maturity of the country's framework to combat money laundering and terrorism financing has increased to the point where a number of fora exist for the discussion of matters of mutual interest or concern. This has obviated the need for a rigid platform in the form of a statutory body for consultations to happen.

3.5 Identification of clients and other persons (Clause 8)

3.5.1 Customer due diligence refers to the knowledge that an accountable institution has about its customer and the accountable institution's understanding of the business that the customer is conducting with it.

3.5.2 A customer due diligence programme, if properly implemented, enables an accountable institution to better manage its relationships with customers, and to better identify possible attempts by customers to abuse the accountable institution's products and services for illicit purposes.

3.5.3 Customer due diligence is comprised of four basic elements. These are—

(a) Determining the customer's identity: This entails obtaining information

concerning the customer’s identity and verifying that information using reliable, independent information.

(b) Identifying the beneficial owner: This entails whether the customer has a beneficial owner and, if so, obtaining information concerning the beneficial owner’s identity, and taking reasonable measures to verify that information.

(c) Understanding the purpose and intended nature of the business relationship: This entails having an understanding of the particular products or services provided to the customer, and obtaining information from the customer as to the intended purpose for which the customer wants to use the products or services in question.

(d) Conducting ongoing due diligence: This entails that the accountable institution will keep information relating to the business relationship up to date, scrutinise transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the accountable institution’s knowledge of the customer and the customer’s business, and identify anomalies in transaction patterns.

(e) These elements have been provided for expressly in the customer due diligence requirements in the Bill, and they are linked with an accountable institution’s application of a risk-based approach through the institution’s AML and CFT compliance and risk management program.

(f) Clause 8 of the Bill provides for a risk-based approach to customer due diligence. The application of a risk-based approach entails that an accountable institution should identify, assess, and understand its money laundering and terrorism financing risks. The notion of "money laundering and terrorism financing risks", in this context, refers to the risk that an accountable institution’s products or services may be abused by its customers in order to carry out money laundering or terrorism financing activities. These risks emanate from a combination of factors, such as the customers, countries, products, delivery channels, etc., involved in a given scenario. An accountable institution should then apply its knowledge and understanding of its money laundering and terrorism financing risks in the development of control measures to prevent or mitigate the risks identified.

(g) By adopting a risk-based approach, both the supervisory body and accountable institutions are able to ensure that measures to prevent or mitigate money laundering and terrorism financing are commensurate with the risks identified. This will ensure that resources are directed in accordance with priorities, so that the greatest risks receive the highest attention. Where lower risks are identified, the requirements to identify and verify are lowered, creating opportunities for accountable institutions to explore more innovative ways of offering financial services to a broader range of customers, and bring previously excluded sectors of society into the formal economy. This will improve the efficacy of measures to combat terrorism financing and money laundering, while also promoting financial inclusion.

3.6 Understanding and obtaining information on business relationship (Clause 9)

Clause 9 requires accountable institutions to ascertain from a prospective client what the purpose and intended nature of the business relationship will be, as well as to obtain information on the source of funds that the prospective client expects to use in the course of the business relationship.

3.7 *Additional due diligence measures relating to corporate vehicles (Clause 9)*

3.7.1 A key component of customer due diligence measures is the identification of beneficial owners. In many instances (including in the case of corruption) where criminals wish to obscure the ownership or control of funds in the financial system, they will make use of a corporate vehicle to transact with financial and other institutions "at arm's length".

3.7.2 Requiring the identification of the beneficial ownership of customers which are not natural persons is a key step to bring greater transparency to activities in a financial system. This not only enhances the ability of accountable institutions to better assess customer related risks in the course of managing business relationships, but also greatly improves the ability of authorities to detect, investigate and prosecute abuses of financial and other institutions for money laundering and terrorism financing purposes.

3.7.3 The FATF describes a "beneficial owner" as "the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement".

3.7.4 The FATF Recommendations contain very detailed and specific requirements in respect of beneficial ownership that countries should apply to financial and other institutions. These requirements are based on the premise that the identification, on the one hand, of a customer which is not a natural person, and the identification of a customer's beneficial owner(s), on the other, together form one process in which these requirements are likely to interact and complement each other naturally. Over and above the identification of the customer and its beneficial owner(s), financial and other institutions should also understand the nature of its business, and the ownership and control structure of the customer. Clause 9 of the Bill makes provision for accountable institutions to identify the beneficial owner of the customer.

3.7.5 Linked to identifying the beneficial owner is the issue of the responsibility of a country to ensure that accurate and current information on the beneficial ownership and control of companies and other legal persons can be accessed in a timely fashion by the relevant authorities. Consultations with the relevant Departments will be necessary to ensure that the mechanisms to achieve this objective are in place.

3.8 *Persons entrusted with prominent public or private sector functions (Clause 9)*

3.8.1 The starting point for the effective implementation of measures relating to persons who are entrusted with prominent public or private sector functions , is for all financial and other institutions (referred to as "accountable institutions" in the FIC Act) to have effective measures in place to know who their customers are and to understand their customers' business.

3.8.2 Typically, this process happens when an institution takes on a new customer. The institution needs to establish who the prospective customer is, by using reliable and independent source documents. In instances where the customer is a business, the institution will need to make sure that it knows, among other matters, who the beneficial owner is, what the ownership and control structure of the business is, and

the nature of the business. Over the lifetime of the relationship with the customer, the institution is required to monitor the customer's on-going transactions, to ensure that they fit the profile of the customer.

3.8.3 The current South African legislation lacks some of these elements, such as express requirements for financial and other institutions to identify their customers' beneficial owners, to apply on-going due diligence to their relationships with their customers, and to determine if they are dealing with a prominent person in a given instance.

3.8.4 The Bill amends the customer due diligence provisions of the FIC Act, by requiring accountable institutions to have appropriate risk-management systems in place, that focus their efforts on those cases where there is a higher probability that their products and services will be abused by criminals. This will enable them to take proactive steps to determine whether a potential customer (domestic or foreign) or the beneficial owner of a business should be considered to be a prominent person. If an institution finds out that it is dealing with a foreign prominent public official, senior management approval is needed to establish the business relationship. If a customer is regarded as being a domestic prominent influential person, then the accountable institution will need to decide if the customer brings higher risk. If so, then the accountable institution will need to determine the source of wealth and funds, and thereafter monitor the account to spot transactions that seem anomalous given the recognised customer profile. The amendments also apply to immediate family members of such prominent persons, as well as known close associates.

3.8.5 Customer due diligence (including the identification of beneficial owners and persons entrusted with prominent public or private sector functions) brings greater transparency to the financial system, which is one of the tools in the fight against corruption. Customer due diligence is designed to better safeguard the integrity of the public sector and protect financial and other institutions from abuse by criminals. When used effectively in conjunction with other measures to address corruption, customer due diligence and measures relating to prominent persons will help in the detection, investigation and prosecution of corrupt activities and lead to the recovery of stolen assets.

3.9 *Doubts about veracity of previously obtained information (Clause 9)*
Clause 9 of the Bill provides for measures that accountable institutions are required to take if doubts about the veracity or adequacy of previously obtained customer due diligence information arise later on in the relationship, or where a suspicion of money laundering or terrorism financing is formed at a later stage.

3.10 *Inability to verify identity (Clause 9)*
The FIC Act currently does not provide expressly that an accountable institution which is unable to comply with the identification and verification requirements, may not commence a business relationship or perform a transaction. The Act also does not specifically state that a suspicious transaction report ought to be made if the accountable institution is unable to comply with the identification and verification requirements in suspicious circumstances. Clause 9 of the Bill now makes provision for those circumstances.

3.11 *On-going due diligence (Clause 9)*
Clause 9 of the Bill provides for on-going due diligence measures. These measures include the scrutiny of transactions undertaken throughout the course of a relationship, to ensure that the transactions being conducted are consistent with that accountable institution's knowledge of the customer, and the customer's business and risk profile, including, where necessary, the source of funds. It also requires accountable institutions to ensure that the information that an accountable institution has about a client is still accurate and relevant.

3.12 *Obligation to keep customer due diligence records (Clause 10)*
Clause 10 of the Bill allows accountable institutions more flexibility in the manner in which records are kept for purposes of identification and verification. This will improve the ease of compliance with the obligations in terms of the FIC Act, and reduce compliance costs for accountable institutions.

3.13 *Obligation to keep transaction records (Clause 11)*
A new section 22A is included in clause 11 of the Bill, relating to the accountable institution's obligation to keep records in respect of a customer's transaction activity. This will ensure that adequate information will be captured in an accountable institution's records to be able to reconstruct a trail of transactions to assist investigators in the reconstruction of transaction activities and flows of funds when performing their investigative functions.

3.14 *Period for which records must be kept (Clause 12)*
Clause 12 of the Bill provides clarity regarding the period for which records must be kept in instances where an accountable institution has made a suspicious transaction report.

3.15 *Records may be kept in electronic form and by third parties (Clause 13)*
Section 24 of the FIC Act is amended to provide for accountable institutions that have outsourced the keeping of records to third parties, to make the records readily available to the FIC and the relevant supervisory bodies. In addition, records may be kept in electronic form, and in a manner that will enable the accountable institution to reproduce it in a legible format.

3.16 *Admissibility of records (Clause 14)*
This clause contains a technical amendment.

3.17 *FIC's access to records (Clause 15)*
Section 26 is repealed from the Act, and is inserted elsewhere in the Act under the provisions relating to reporting obligations.

3.18 *Financial sanctions (Clause 16)*
Clause 16 sets out the mechanisms to identify and initiate proposals for designations of persons and entities targeted by UNSC Resolution. When a UNSC Resolution is adopted, the Minister must publish a Notice of the adoption of the resolution in the *Government Gazette* and other appropriate means of publication. This does not apply to resolutions of the UNSC contemplated in section 25 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004) ("POCDATARA").

3.19 Following the Notice published by the Minister, the Director of the Financial Intelligence Centre must, from time to time and by appropriate means of publication, give notice of—

(a) persons and entities being identified by UNSC Resolutions; and
(b) decisions of the UNSC to no longer apply Resolutions to previously identified persons or entities.

3.20 Clause 16, in addition, allows the Minister to revoke a Notice, if the Minister is satisfied that the Notice is no longer necessary to give effect to financial sanctions pursuant to a UNSC Resolution.

3.19 Clause 16 provides that no person may, among other matters, acquire, collect, use property or provide or make available, or invite a person to provide or make available any financial or other service, intending that the property, financial or other service will be used for the benefit of or on behalf of a person or an entity identified pursuant to a UNSC Resolution.

3.20 In terms of clause 16, the Minister may permit a person to conduct financial services or deal with property if it is necessary to provide for basic expenses, including, among other things, foodstuffs, rent or mortgage and medicines or medical treatment. Provision is made for the Director of the FIC to publish a notice of the Minister's permission for the provision of financial services or dealing with property.

3.21 *Accountable institutions, reporting institutions and persons subject to reporting obligations to advise the FIC of clients (Clause 17)—*
Clause 17 of the Bill makes provision for accountable institutions, reporting institutions, as well as any person required to make a report in terms of the FIC Act, to advise the FIC whether a specified account number corresponds with a client, as well as the type and status of the business relationship. The amendments are necessary to enhance the FIC's analysis capability.

3.21 *Authorised representative's access to records in respect of reports required to be submitted to the FIC (Clause 18)*
The current section 26 of the FIC Act is moved and inserted as section 27A, as it is more appropriate to deal with access to information relating to reports submitted to the FIC under Part 3 of Chapter 3 of the FIC Act. The section is also amended to provide for instances where a report ought to be made, but the accountable institution failed to make a report in terms of the Act.

3.22 *Property associated with terrorist and related activities and financial sanctions pursuant to UNSC Resolutions (Clause 19)*

(a) Provision is made for an accountable institution to report to the FIC property in its possession or under its control that is owned or controlled by or on behalf of a person or an entity identified pursuant to a UNSC Resolution.
(b) An accountable institution must, after publication of a Notice by the President under section 25 of the POCDATARA, or a notice being given by the Director of the FIC, scrutinise its information concerning clients with whom the accountable institution has business relationships, in order to determine whether a client is a person or entity mentioned in a Notice by the President

or notice by the Director.

3.23 *Reporting procedures and furnishing of additional information (Clause 21)*
Clause 21 contains amendments to section 32 of the FIC Act, to enhance the FIC's analysis capability in respect of the information that should be provided by persons making a report to the FIC, and makes further provision for the additional information to be provided in the prescribed manner and within the prescribed period.

3.24 *Intervention by Centre (Clause 22)*
(a) Clause 22 amends section 34 of the FIC Act, by increasing the number of days during which an accountable institution may be prevented from continuing with a transaction based on a report submitted to the FIC from 5 to 10 days. This amendment is to allow more time for the FIC and investigating authorities to make the necessary inquiries in respect of a transaction.
(b) Provision is also made for the intervention by the FIC to be extended to include property owned or controlled by or on behalf of, or at the direction of a person or entity identified pursuant to a UNSC Resolution contemplated in a Notice.

3.25 *Monitoring orders (Clause 23)*
Clause 23 allows for the monitoring order issued by a judge to be extended to include property owned or controlled by or on behalf of, or at the direction of a person or entity identified pursuant to a UNSC Resolution contemplated in a Notice.

3.26 *Protection of personal information (Clause 24)*
To ensure that proper safeguards are in place in respect of the information in the possession of the Centre and to comply with the Protection of Personal Information Act, 2013 (Act No. 4 of 2013), it is necessary for the FIC Act to be amended to make provision for measures to be taken to prevent the loss of or damage to information. Provision is also made to prevent the unlawful access to or processing of information, other than in accordance with the FIC Act or the Protection of Personal Information Act.

3.27 *Risk Management and Compliance Programs (Clause 25)*
The customer due diligence measures mentioned above are linked with an accountable institution's application of a risk-based approach through the institution's AML and CFT compliance and risk management programme. Clause 25 of the Bill states that accountable institutions must develop, document, maintain and implement a Risk Management and Compliance Programme. The clause also provides details in respect of the Program, including, among other matters, measures to assess the risks that the products or services that the accountable institution provides may involve money laundering or the financing of terrorism. The board of directors, senior management or other person exercising the highest level of authority in that institution must approve the Risk Management and Compliance Programme.

3.28 *Governance of AML and CFT compliance (Clause 26)*
Clause 26 of the Bill sets out the governance obligations for accountable institutions. The board of directors or the senior management of an accountable institution is responsible for ensuring compliance with the FIC Act and its Risk Management and

Compliance Programme.

3.29 *Training relating to AML and CFT compliance (Clause 27)*
Clause 27 amends section 43 of the Act, by placing the obligation on the accountable institution to ensure that its employees are trained to enable them to comply with the FIC Act as well as its Risk Management and Compliance Programme.

3.30 *Directives (Clause 28)*
Clause 28 of the Bill amends section 43A of the FIC Act, to allow the FIC to issue a directive, after consultation with the relevant supervisory body, in instances of general application of the Act, or in specific instances as set out in section 43A.

3.30 *Inspections (Clause 29)*
The Constitutional Court, in the matter of *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* (CCT 94/13) [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC) (27 February 2014), made a ruling declaring parts of section 45B of the FIC Act to be unconstitutional, to the extent that the section allows for inspections without a warrant in certain instances. The declaration of invalidity was suspended for 24 months, to allow Parliament to amend the section. Clause 29 gives effect to the Constitutional Court's judgment, by amending section 45B to provide for a warrant requirement, and to state in which circumstances a warrant would not be required.

3.31 *Administrative sanctions (Clause 30)*
Clause 30 amends section 45C of the FIC Act, to provide for the financial penalties paid in respect of a financial sanction to be paid into the National Revenue Fund. The Act currently provides for the monies to be paid into the Criminal Assets Recovery Account.

3.32 *Appeal (Clause 31)*

(a) Section 45D of the FIC Act provides that an appeal must be lodged within 30 days. However, the Act does not make provision for condonation for the late filing of an appeal. Clause 31 of the Bill provides for the appeal board to condone delay in lodging an appeal, on good cause shown.

(b) The FIC Act makes provision for the Chairperson of the appeal board to determine any procedural matter relating to the appeal process. Clause 31 provides that the Chairperson may also make rules in respect of procedures relating to an appeal.

(c) To ensure that the appeal board is not burdened with irrelevant and frivolous information that may not be relevant to the appeal, it is necessary to amend the FIC Act to provide that an appeal is decided on the written evidence, factual information and documentation which was submitted to the FIC or supervisory body before the decision was taken.

(d) Clause 31, in addition, provides that the appellant, the FIC, or the supervisory body may, on application to the appeal board and on good cause shown, introduce evidence which was not given to either party prior to a decision being taken.

(e) The existing provisions of the FIC Act that provide that the decision of the majority the appeal board is the decision of the appeal board has proven to be

impractical, as there are currently nine members appointed to the appeal board. This effectively means that at every appeal hearing, all nine members will have to hear the appeal. Clause 31 provides for the establishment of an adjudication panel which will consist of not less than three members of the appeal board, and the decision of the majority of the panel will be the deciding vote, and the chairperson will have the deciding vote in the case of an equality of votes.

3.33 *Offences provisions (Clauses 32 to 45)*
Following the inclusion of the administrative sanctions provisions in the previous amendments to the FIC Act, it is now proposed that certain acts of non-compliance in respect of the obligations in the FIC Act should carry a purely administrative sanction. Clauses 32 to 45 replace the criminal sanctions in the offence provisions, by making the non-compliance of certain sections of the FIC Act subject to administrative sanctions. The clauses that will provide for purely administrative sanctions relate to the accountable institution's obligations regarding customer due diligence and record keeping measures.

3.34 *Technical Amendments (Clauses 46 to 51)*
These clauses contain technical amendments. Clause 51 also increases the fine for a failure to comply with the regulations from a maximum amount of R100 000 to R1 000 000, or such administrative penalties as may apply.

4. ORGANISATIONS AND INSTITUTIONS CONSULTED

The National Treasury worked with the FIC in the preparation of the Bill. A policy document which included the proposed areas of reform was circulated to relevant industry bodies, and comments were received on the policy document. Written comment on the consultation document was received from the following persons:

- South African Reserve Bank;
- Financial Intermediaries Association of Southern Africa;
- The Law Society of the Northern Provinces;
- Danie du Plessis, Independent Forensic Accountant;
- Financial Services Board;
- The Law Society of the Free State;
- Limpopo Gambling Board;
- Independent Regulatory Board for Auditors;
- Casino Association of South Africa;
- Western Cape Gambling and Racing Board;
- Professor Louis de Koker;
- Association for Savings and Investments South Africa;
- Credit Suisse Securities;
- The Banking Association of South Africa;
- Nedbank;
- Standard Bank;
- Firstrand;
- ABSA Bank;
- JSE's Retail Advisory Committee;
- Sanlam Securities;
- Macquarie;

- Investec;
- Law Society of South Africa.

5. FINANCIAL IMPLICATIONS FOR THE STATE

There are no financial implications envisaged for the FIC.

6. CONSTITUTIONAL IMPLICATIONS

The Bill will amend section 45B of the FIC Act, in light of the Constitutional Court judgment in the matter of *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* (CCT 94/13) [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC) (27 February 2014), to ensure that the section is constitutionally compliant.

7. PARLIAMENTARY PROCEDURE

7.1 The State Law Advisers and the National Treasury are of the opinion that this Bill must be dealt with in accordance with the procedure prescribed by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

7.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.