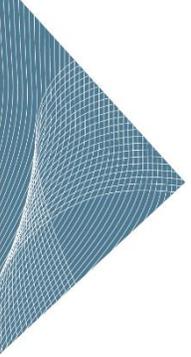


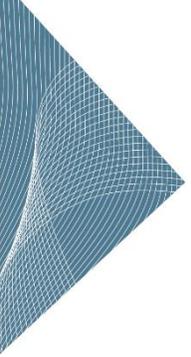
WHY AML?

- Money laundering entails exploitation of financial institutions by criminals for nefarious purposes
- It empowers criminal syndicates financially thus perpetuating criminality and facilitating perpetration of atrocities
- It undermines the integrity and stability of the institutions that sit at the core of commerce and trade



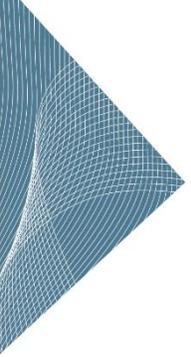
WHAT ARE THE CRITICAL SUCCESS FACTORS TO COMBAT MONEY LAUNDERING?

- A system to combat money laundering works effectively if adequate information is captured in the records of financial and other institutions which enables the sharing of information that may support investigation of criminal activity
- For this to happen the financial system has to be transparent, based on robust customer due diligence measures
- Supervision and enforcement of compliance with customer due diligence measures is a key component of an effective system to combat money laundering and terrorist financing



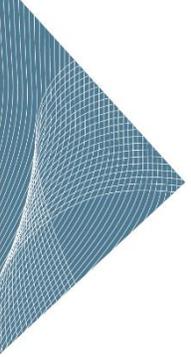
WHAT IS THE RELEVANCE OF INTERNATIONAL STANDARDS AND THE FATF?

- FATF standards require that financial institutions be subject to regulation and supervision and that countries ensure financial institutions implement the standards effectively (FATF R.26)
- Powers of supervisors must include the authority to conduct inspections, compel the production of information relevant to monitoring of compliance and sanction failures to comply with requirements (FATF R27)
- The methodology by which compliance with the standards is assessed states that “The supervisor’s power to compel production of or to obtain access for supervisory purposes should not be predicated on the need to require a court order” (Criterion 27.3).



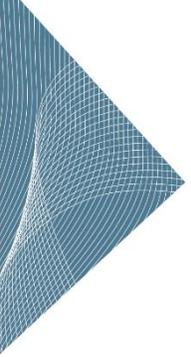
WHAT IS THE RELEVANCE OF INTERNATIONAL STANDARDS AND THE FATF?

- FATF member countries which have been evaluated and found to have met this requirement (i.e. supervisors having the ability to inspect or compel information without the need to obtain a court order) include:
 - Canada
 - Singapore
 - Malaysia
 - Norway
- Australia was criticised and rated partially compliant with this standard because its inspection powers of a premises are conditional upon the consent of an occupant or the issuing of a warrant



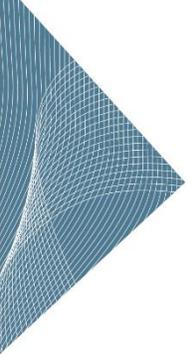
WHAT BROUGHT ABOUT THE NEED TO AMEND S.45B?

- Section 45B of the FIC Act provides for the manner in which inspections must be conducted and previously provided that inspections may be carried out without a warrant (s. 45B(7))
- Constitutional Court found this to be unconstitutional on the basis that the section started from the premise that no warrant was required for any inspection
- In its judgment the Constitutional Court confirmed that s.45B should draw a distinction between categories of inspections for which warrants are required and categories of inspections for which they are not required
- The distinction should be based on the nature of the inspection or the nature of the premises to be inspected



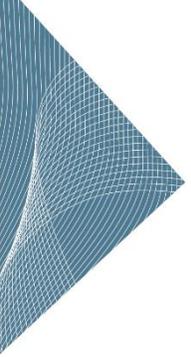
HOW WILL THE AMENDMENT WORK IN PRACTICE?

- A supervisory body e.g. the Registrar of Banks, the Financial Services Board, etc. may inspect a business premises of a licensed or registered accountable institution without a warrant
- When a supervisory body does an inspection without a warrant it must do so at a reasonable time and, where appropriate, on reasonable notice



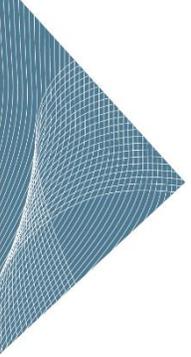
HOW WILL THE AMENDMENT WORK IN PRACTICE?

- A supervisory body may inspect a premises of a business which conducts the activities of an accountable institution, but which is not licensed or registered, only on authority of a warrant
- A supervisory body may inspect a private residence only on authority of a warrant, even if a licensed or registered accountable institution uses a part of the residence as its business premises
- Where a warrant would normally be required, an inspection may be done without a warrant only with the consent of the relevant person, or if the inspector believes that a warrant will be issued if applied for, but that the delay in obtaining the warrant is likely to defeat the purpose for the inspection



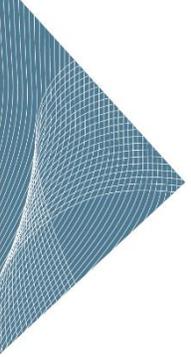
HOW WILL THE AMENDMENT WORK IN PRACTICE?

- Inspections under the amended s.45B, with or without a warrant, may only be conducted for the purposes of determining compliance with the FIC Act or any order, determination or directive made in terms of the Act
- Hence inspections for any other purpose, i.e. investigation of suspected criminal offences, are completely excluded
- Inspections, with or without a warrant, must be done with strict regard to decency and good order, including to a person's right to respect for and the protection of dignity, freedom and security and personal privacy



SPECIFIC CONCERNS RAISED IN THE REFERRAL LETTER

- The concerns raised in the referral letter relate specifically to the new s.45B(1C)
 - It is important to bear in mind that s.45B(1C) creates an exception to the general rule that a warrant is required to do inspections referred to in the section and does not allow warrantless inspections in general.
 - The exception is based on one of two grounds:
 - the consent of the affected person, or
 - the reasonable belief that the delay in obtaining a warrant will defeat the purpose of the inspection



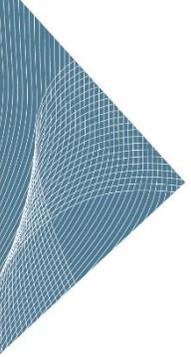
SPECIFIC CONCERNS RAISED IN THE REFERRAL LETTER

- Consent to the inspection:
 - Consent to enter premises, e.g. to conduct searches, is a well-established principle in our law and applies even in relation to searches in criminal investigations under the Criminal Procedure Act (s.22(a) of the CPA)
 - Since the introduction of s.45B in 2010, roughly 6000 inspections have been done under the FIC Act and in only one instance was consent refused
- Avoiding the purpose of a warrant being frustrated:
 - The need to avoid the purpose of a search being defeated by the process of obtaining a warrant is equally a well-recognised principle in our law e.g. s.22(b) of the CPA

SPECIFIC CONCERNS RAISED IN THE REFERRAL LETTER

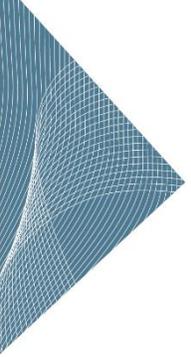
- Other examples of legislation where “consent” and “avoiding the purpose of a warrant being frustrated” are recognised the bases for exceptions to a warrant requirement:

Competition Act, 1998	International Trade Administration Act, 2002
Tax Administration Act, 2011	Securities Transfer Tax Administration Act, 2007
Counterfeit Goods Act, 1997	National Prosecuting Authority Act, 1998
Meat Safety Act, 2000	Health Professions Act, 2007
Immigration Act, 2002	Merchandise Marks Act, 1941
South African Human Rights Commission Act 2013	Promotion of National Unity and Reconciliation Act, 1995



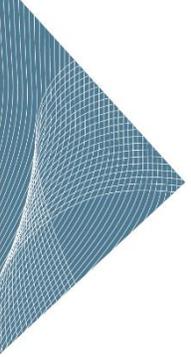
SPECIFIC CONCERNS RAISED IN THE REFERRAL LETTER

- Both “consent” and “avoiding the purpose of a warrant being frustrated” have been recognised in principle by the Constitutional Court as valid bases for exceptions to a warrant requirement:
 - In the Gaertner case the Court stated that SARS officials must apply for a warrant in terms similar to those required by s. 22 of the CPA when they search private residences under the Customs and Excise Act
 - In a more recent case (Minister of Police v Kunjana) the Court referred to s.22 of the CPA as an example of a constitutionally sound safeguard to justify an exception to a warrant requirement
 - S45B(1C)(b) follows the reading-in clause of the Constitutional Court in the Auction Alliance case almost word for word



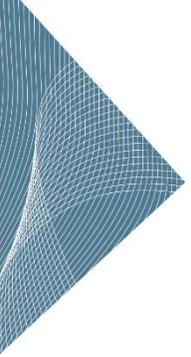
SPECIFIC CONCERNS RAISED IN THE REFERRAL LETTER

- Information gathered by an inspector may result in criminal prosecution:
 - An inspection cannot be used to obtain evidence for a criminal prosecution. Supervisory bodies are not legally entitled to carry out criminal investigations (nor is the FIC) and cannot use their powers of inspection (with or without a warrant) for an ulterior purpose. If a supervisory body (or the FIC) is of the view, based on the results of an inspection (with or without a warrant), that an instance of non-compliance should be dealt with as a criminal offence it has to refer the case to the SAPS for criminal investigation (under the Criminal Procedure Act) and possible prosecution.



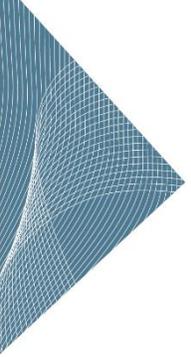
SPECIFIC CONCERNS RAISED IN THE REFERRAL LETTER

- Any premises, including private homes:
 - A private residence may only be inspected if:
 - the residence is used for a business to which the provisions of the FIC Act apply (see s.45B(1A)) and
 - there are reasonable grounds for suspecting that an act of non-compliance has occurred,
 - entry to the residence or premises is likely to yield information pertaining to the non-compliance and
 - entry to the residence or premises is reasonably necessary for the purposes of the FIC Act (see s.45B(B))



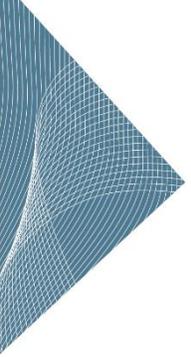
SPECIFIC CONCERNS RAISED IN THE REFERRAL LETTER

- Any premises, including private homes:
 - These grounds apply also where a private residence is inspected without a warrant as
 - the residence has to be used for a business to which the Act applies for it to be inspected at all, and
 - an inspector has to have a reasonable belief that a warrant would be issued if applied for under s.45B(1B)



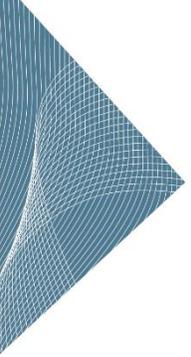
SPECIFIC CONCERNS RAISED IN THE REFERRAL LETTER

- The element of surprise may be met by allowing warrants to be issued *ex parte*:
 - The exceptions provided for in s.45B(1C), in particular subs. (b) are not aimed at dealing with the element of surprise, but with the element of defeating the purpose of the inspection due to delay. The requirement to obtain a warrant (including *ex parte*) is therefore not a less restrictive means to achieving the same objective (i.e. the element of surprise) in such circumstances.



SPECIFIC CONCERNS RAISED IN THE REFERRAL LETTER

- The breadth of sections 21F, 21G and 21H requires that the authority under section 45B(1C) be carefully circumscribed:
 - The inspection powers under s.45B, including s.45B(1C) do not relate to the information which accountable institutions obtain in respect of prominent persons, their family members and close associates, or any other customer for that matter. The inspection powers may only be used to inspect the accountable institution and its compliance with the requirements of the FIC Act, not to gather information about the customers of an accountable institution.



Thank you