



BLACK BUSINESS COUNCIL

FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL (THE "BILL") ("FICAB")

Submission to the Standing Committee on Finance by the
Black Business Council.

25th January 2017



1. INTRODUCTION

- The Black Business Council (the “BBC”) is the over-arching confederation that represents black professional, business associations and chambers. The primary purpose of the BBC is to lobby government on policy related matters and to play an advocacy role where policies are in place in order to accelerate the participation of black business in the mainstream economy.
- The BBC wishes to state, for the record, to the Standing Committee on Finance and to the South African citizens at large that it understands that South Africa is Constitutional Democracy and the role of Parliament as the Legislative branch of the State;
- The BBC also fully understands the supremacy of the Constitution that; "the Constitution is the supreme law of the Republic and any law or conduct that is not consistent with it will be invalid. The obligations imposed by it must be fulfilled". This supremacy clause forms part of the 36 constitutional principles contained in the 1993 Interim Constitution, which constitute the bedrock of the current Constitution of the Republic and is not amendable;
- For the purpose of the Public Hearings on the Financial Intelligence Centre Amendment Bill (the “Bill”), the BBC wishes to further state, for the record, that it supports and welcomes any legislative amendments, that are fully compliant with the Constitution of the Republic, to enhance and strengthen Combating of Money Laundering & Financing of Terrorist Activities;
- The BBC is legally advised that the National Legislature is obliged to ensure that all Bills that pass through the two Chambers of Parliament are not only textually consistent with the Constitution, but contextually, formatively and substantively advance the basic tenets of equality, human dignity, freedom and social justice;



2. BACKGROUND

- On the 21st of September 2016, the BBC sent a letter to His Excellency President Zuma, formally objecting to the FICAB and requesting that he not sign the Bill into Law as per the powers conferred upon him by the Constitution of the Republic of South Africa;
 - ✓ Subsequently, President Jacob Zuma has in terms of section 79 (1) of the Constitution referred the Financial Intelligence Centre Amendment Bill back to the National Assembly for reconsideration.
 - ✓ The Presidency issued a media statement which contained the following: “I have given consideration to the Bill in its entirety and certain submissions regarding the constitutionality of the Bill. After consideration of the Bill and having applied my mind to it, I am of the view that certain provisions of the Bill do not pass constitutional muster.
 - ✓ The President further said he was of the view that even though the purpose to be served by the Bill was very important and pressing, however all the provisions of the Bill must be in line with the Constitution.
- The BBC is not oblivious or rather dismissive of attempts by the Government of the Republic of South Africa to implement international standards as set out by the Financial Action Task Force (FATF) to fight against terrorism financing and money laundering, however the BBC argues that the Bill
 - ❖ is a dangerous piece of legislation in terms of its potential impacts on the rule of law and on constitutionally protected rights, and on the health of South Africa’s democracy and sovereignty. Money laundering and terrorism financing must be countered in ways that are fully consistent with the Republic's core constitutional values (that include liberty, non-discrimination, and the rule of law), that are evidence-based, and that are likely to be effective, and
 - ❖ Is ineffective in countering money laundering and financing of terrorism activities by virtue of what is omitted from the Bill, and will actually be counter-productive in that it could easily get in the way of effective policing, intelligence-gathering and prosecutorial activity.



3. BBC'S VIEWS ON THE IMPLICATIONS OF FICAB

- The provision in FICAB of Prominent Persons as defined, infringes on the rights of citizens as contained in Chapter 2 (Bill of Rights) of the Constitution, particularly Sections: 7, 8, 9, 10, 12, 14, 18, 19, 21, 22, 25, 32, 33 & 34;
- The provision in FICAB of Risk Management and Compliance Program as defined, violates the Constitutional Right to Due Process and effectively pre-authorises violation of the established sacrosanct legal principle of 'Audi Alteram Partem';
- The provision FICAB of Risk Management and Compliance furthermore pre-authorises violation of the Constitution and the Rule of Law by transferring Criminal Investigative, Prosecutorial and Judicial Authority from Law Enforcement Agencies and the Independent Judiciary into the hands of Banking & Financial Institutions;
- Effectively, the Banking & Financial Institutions would be vested with the unfettered powers to convict and sentence citizens without prosecution in a open court;
- Furthermore, the definition of Domestic Prominent Influential Persons ("DPIP") makes provision for creation of a predetermined list of criminal suspects which includes Leaders and Senior Officials in all of the Branches of State (Legislature, Judiciary & Executive) as well as Directors of Private companies that do any business howsoever with any State department or organ.



4. ENGAGEMENT WITH RELEVANT STAKEHOLDERS

- On Wednesday, 9 November 2016, the BBC met with the Association for Savings and Investment South Africa (ASISA) where it was agreed that ASISA and BBC will :
 - ❖ co-ordinate enterprise development spend on the part of ASISA members.
 - ❖ continue the dialogue between BLSA and BBC on establishing one voice of business for South Africa. ASISA to present to BBC on the proposals around this, similar to as presented to BLSA.
 - ❖ establish an ASISA/BBC joint initiative around improving savings in South Africa.
 - ❖ convene a workshop on the FICAB to discuss legitimate BBC concerns and to discuss how these concerns can be resolved. The workshop would include the South African Reserve Bank, Treasury, The Banking Association of South Africa and the Financial Intelligence Centre.
- The BBC delegation included Danisa Baloi – President, Sello Rasethaba - Chairman, George Sebulela – Secretary General and Sindi Mzamo – Treasurer General. From ASISA we had Nomkhita Nqweni of Barclays Africa and Ian Kirk of Sanlam.



5. ENGAGEMENT WITH RELEVANT STAKEHOLDERS

- On Tuesday, 15th November 2016, the BBC held a workshop that included:
 - ❖ the Deputy Governor of the South African Reserve Bank and Banking Regulator, FICAB sponsor Treasury's Deputy Director General, Ismail Momoniat and other Treasury officials, representatives of ASISA and the Banking Association of South Africa and head of the Financial Intelligence Centre
 - ❖ The BBC was led by Danisa Baloyi and included George Sebulela and Sello Rasethaba.
- The outcome of the meeting, according to Raymond Masoga of treasury:

"I want to take this opportunity to thank you and your team for the fruitful and mutually beneficial engagement on the FIC Amend Bill. It is our hope that the discussions have helped in clarifying most, if not all, of your concerns around the Bill and hopefully will help to positively enrich your own internal deliberations. Your partnership and support of the Bill will go a long way in the fight against financial crime and the protection of the integrity of our financial system."
- As the BBC, we feel that the meeting was inconclusive and we agreed to meet again to iron out how the parties agree on the fact that the BBC has raised objection to FICAB and has requested President not to sign the Bill but refer it back to Parliament for public hearings and amendments. The BBC requested them to go back to their principals to get a mandate on the forward and on how parties can work together to effect the necessary amendments.



6. FATF

- The Financial Action Task Force (FATF) can be seen as the international standard-setter in the fight against terrorist financing and money laundering. It was established in 1989, by a Group of Seven (G-7) Summit held in Paris. The summit recognised the growing threat posed by money laundering to the banking system and financial institutions and set up the FATF to develop and promote national and international policies, globally, to help eliminate this threat. In 2001, the FATF took over responsibility for the development of standards in the fight against terrorist financing.



7. G7/8 SUMMITS • PARIS SUMMIT - PARIS, JULY 16, 1989 ECONOMIC DECLARATION, DRUG ISSUES

- Give greater emphasis on [sic] bilateral and United Nations programs for the conversion of illicit cultivation in the producer countries. The United Nations Fund for Drug Abuse Control (UNFDAC), and other United Nations and multilateral organizations should be supported, strengthened and made more effective. These efforts could include particular support for the implementation of effective programs to stop drug cultivation and trading as well as developmental and technical assistance.
- Support the efforts of producing countries who ask for assistance to counter illegal production or trafficking.
- Strengthen the role of the United Nations in the war against drugs through an increase in its resources and through reinforced effectiveness of its operation.
- Intensify the exchange of information on the prevention of addiction, and rehabilitation of drug addicts.
- Support the international conference planned for 1990 on cocaine and drug demand reduction.
- Strengthen the efficiency of the cooperative and mutual assistance on these issues, the first steps being a prompt adhesion to, ratification and implementation of the Vienna Convention on illicit traffic in narcotic drugs and psychotropic substances.
- Conclude further bilateral or multilateral agreements and support initiatives and cooperation, where appropriate, which include measures to facilitate the identification, tracing, freezing, seizure and forfeiture of drug crime proceeds.
- **Convene a financial action task force from Summit participants and other countries interested in these problems. Its mandate is to assess the results of cooperation already undertaken in order to prevent the utilization of the banking system and financial institutions for the purpose of money laundering, and to consider additional preventive efforts in this field, including the adaptation of the legal and regulatory systems so as to enhance multilateral judicial assistance. The first meeting of this task force will be called by France and its report will be completed by April 1990.**

Source: <http://www.g8.utoronto.ca/summit/1989paris/communique/index.html>



8. RESPONSIBILITIES OF FATF

- The FATF's main responsibility is to ensure global action to combat money laundering and terrorist financing is undertaken.
- Since its creation, the FATF has been at the forefront of measures designed to counter criminal attempts to use the financial system to further criminal and terrorist purposes.
- Most notably, in 1990 the FATF established a series of money laundering recommendations.
- In 2001, they established a series of special recommendations on the prominent threat of terrorist financing, collectively known as the 40+9 Recommendations whose aim was to unite anti-money laundering and terrorist financing efforts into one universal instrument.

Source: <http://www.anti-moneylaundering.org/FATF.aspx>

The IBA Anti-Money Laundering Forum, the lawyers' guide to legislation and compliance, is an internet-based network assisting lawyers in dealing with their current responsibilities in connection with new anti-money laundering legislation.



9. FATF ASSESSMENT AND EVALUATION

- The FATF examines techniques and counter-measures and reviews whether existing national and international policies are sufficient to combat the developing threat.
- The FATF monitors compliance with the 40+9 recommendations through a two-pronged strategy.
 - ❖ Firstly, member countries complete annual self-assessment style questionnaire and
 - ❖ secondly, the FATF regularly conducts on-site Mutual Evaluation Report examinations on individual jurisdictions, assessing the effectiveness of their national policies in dealing with money laundering and terrorist financing.

Source: <http://www.anti-moneylaundering.org/FATF.aspx>



10. FATF MONEY LAUNDERING RECOMMENDATIONS

- Global efforts to combat money laundering and the financing of terrorism have been tailored to attack criminal and terrorist organisations through their financial operations . The strategy has been aimed at depriving them of the means to act and gain knowledge of how their financial networks and methods work in order to prevent any future operations.
- The 40 recommendations are intended to provide counter-measures against money laundering and **encompass the criminal justice system, law enforcement, the financial system and its regulators, together with international co-operation**. They also set out principles and minimum standards for action.
- Countries are free **to implement the details of the recommendations in the manner they choose, in order to fit them into their own constitutional frameworks**. Despite not being binding, many countries have chosen to make a commitment to implement them in order to combat money laundering.



11. FATF MONEY LAUNDERING RECOMMENDATIONS

- The recommendations were first published in 1990, and have been subsequently revised in 1996 and 2003. They are constantly reviewed and updated to take into account any changes or anticipated changes in money laundering trends. In 1996, the FATF issued a series of interpretative notes designed to clarify their application.
- In 2003, the FATF amended the scope of the recommendations to include designated non-financial businesses and professionals. Designated non-financial businesses and professionals are defined by the FATF to include casinos, real estate agents, dealers in precious stones and metals, and lawyers, notaries, other independent legal professionals and accountants.



12. FATF MONEY LAUNDERING RECOMMENDATIONS

- The 2003 amendments applied, for the first time, customer/ client due diligence and record keeping practices to designated non-financial businesses and professionals. They are required to report transactions suspected of being linked to money laundering to the designated authorities.
- In the case of lawyers, the FATF recommends that lawyers be excused from this responsibility if their knowledge or suspicions arises as a result of legal professionally privileged circumstances. The 2003 amendments revised the recommendations to include the FATF's enhanced counter terrorist financing mandate.



13. FATF AND SOUTH AFRICA

- Member of FATF since 2003.
- Member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG).



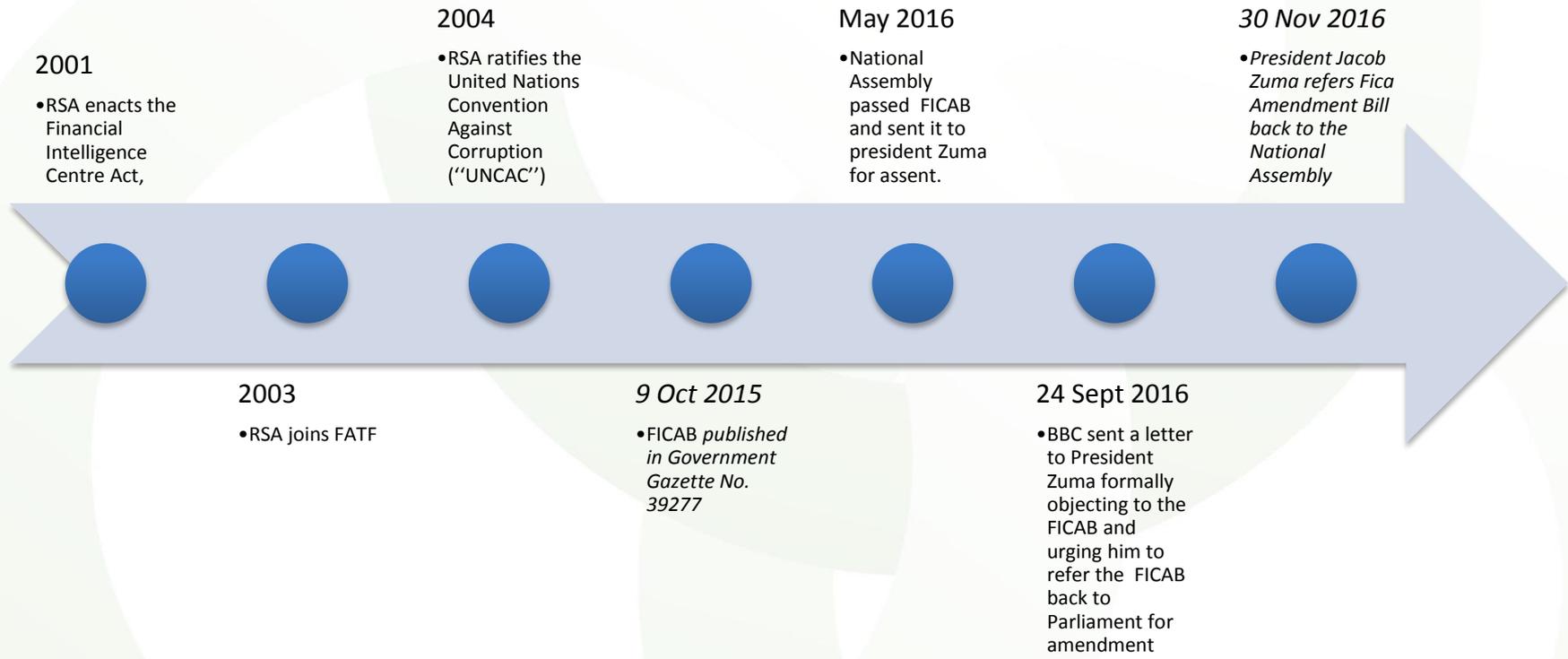
14. FATF AND SOUTH AFRICA

- South Africa has made good progress in developing its system for combating money laundering (ML) and the financing of terrorism (FT) since its last FATF mutual evaluation in 2003, according to an assessment of the implementation of anti-money laundering and counter-terrorist financing (AML/CFT) standards in South Africa. This assessment was jointly conducted by the FATF and ESAAMLG.
- 4th Round Mutual Evaluation of South Africa, joint FATF/ESAAMLG Mutual Evaluation of South Africa, tentative dates:
 - ❖ On-site visit: October / November 2019
 - ❖ Plenary discussion: June 2020

Source: <http://www.fatf-gafi.org/countries/#South%20Africa>



15. THE PROCESS LEADING TO FICAB





16. REASONS - PRESIDENT ZUMA REFERRED FICAB TO NA

- President Jacob Zuma has in terms of section 79 (1) of the Constitution referred the Financial Intelligence Centre Amendment Bill back to the National Assembly for reconsideration.
- “I have given consideration to the Bill in its entirety and certain submissions regarding the constitutionality of the Bill. After consideration of the Bill and having applied my mind to it, I am of the view that certain provisions of the Bill do not pass constitutional muster.
- In terms of section 79 (1) of the Constitution I have therefore referred the Bill to the National Assembly for reconsideration for the reasons set out to the Speaker of the National Assembly,” the President said.
- The President specifically raised concern with the provisions of the Bill relating to warrantless searches, which according to him fall short of the constitutional standard required for the provision not to unjustifiably limit the right to privacy.
- The President further said he was of the view that even though the purpose to be served by the Bill was very important and pressing, however all the provisions of the Bill must be in line with the Constitution.

Source: <http://www.gov.za/zu/node/758880>



17. “PARLIAMENT TO CHALLENGE PRESIDENCY ON ANTI-MONEY-LAUNDERING BILL”

- Parliament is to challenge the opinion of the Presidency that the Financial Intelligence Centre Amendment (Fica) Bill could be unconstitutional.
- Chairperson of the Standing Committee on Finance, Yunus Carrim, says committee has done all it can to ensure that the bill is constitutionally sound.
- President Jacob Zuma last week declined to sign the bill into law, saying it might not pass constitutional muster.
- Carrim was responding in parliament to remarks by the EFF that the President's failure to sign the bill would frustrate the efforts to fight financial crimes.
- Carrim says they will reconsider the bill carefully, but they are convinced it is constitutionally sound.
- “Without the Fica bill, part of what we are doing here does not carry weight. We have to act against financial crime and we have to expedite the process. These are the views of the lawyers in the Presidency. Other lawyers may come to a different opinion. It doesn't mean because it comes from the Presidency's lawyers therefore parliament must tremble and buckle. No, we are not going to do that. **We are going to get independent legal advice and if the Presidency's lawyers are wrong they are just wrong.**”

Source: <http://www.sabc.co.za/news/a/725d36804f3ac6c285febfac00d1b90c/-?src=ilaw>



18. PETITIONS TO PARLIAMENT

- Section 56 (d) and 69 (d) of the Constitution provides for the National Assembly and the National Council of Provinces to receive petitions, representations or submissions from any interested persons or institutions.
- Public participation in law-making, oversight and other processes of Parliament is an important constitutional provision of our democracy. Parliament has developed a number of ways to promote public involvement in the work of the institution. One way the public can exercise their right to participate in Parliament is through submitting a petition.
- Procedures for dealing with petitions are set out in the **rules of the National Assembly and the National Council of Provinces**.
- ❖ **WHAT IS A PETITION?**
 - A petition is a formal request to Parliament for intervention in a matter. It can take the form of either a request for assistance with a specific issue or for the redress of a grievance.
- ❖ **TYPES OF PETITIONS**
 - special petition
 - A special petition is when an individual makes a specific request or asks for personal relief from the State, which is not authorised by law, such as access to a pension.
 - public or general petition
 - A public petition is when a group of citizens with similar interests request general relief or redress of a grievance.



19. SUBMISSIONS

➤ WHAT IS A SUBMISSION?

- ❖ The South African Constitution makes provision for public involvement in lawmaking, oversight and other processes of Parliament. South Africa's democratic system not only provides for citizens to elect their representatives, but also allows citizens to have a say in matters that affect them.
- ❖ One of the ways that the public can make their voices heard is by making submissions to the National Assembly Committees, the National Council of Provinces Committees or Joint Committees.
- ❖ For submissions from the public to be effective, content and format need to be considered carefully.
- ❖ It is important that a submission is easily read and understood by the Members of committees.

➤ WHAT IS A SUBMISSION?

- ❖ A submission is the presentation of views or opinions on a matter or piece of legislation under consideration by a committee of Parliament.
- ❖ Submissions may be presented in your language of choice.
- ❖ Submissions are usually in written form. They can be reinforced through oral representation to the committee, if the person or group who has made the submission is invited to make an oral presentation.
- ❖ Making submissions creates an opportunity for any member of the public to propose changes or suggest possible actions to ensure that the laws passed by Parliament or any other matter being considered by Parliament, serve their purpose.

Source: http://parliament.gov.za/live/content.php?Item_ID=63