

Financial Intelligence Centre Amendment Bill [B 33—2015]

Briefing of the Standing Committee on Finance

1 February 2017

Preliminary and Draft Response



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA



financial intelligence centre
REPUBLIC OF SOUTH AFRICA

Delegation

- **Mr Ismail Momoniat**, Deputy Director-General, NT
- **Mr Olano Makhubela**, Chief Director for Financial Investments and Savings, NT
- **Ms Empie van Schoor**, Chief Director for Legislation, NT
- **Mr Raymond Masoga**, Director for Financial Integrity, NT
- **Mr Pieter Smit**, Executive Manager for Legal and Policy, FIC
- **Mr Christopher Malan**, Executive Manager, Compliance and Prevention, FIC
- **Ms Poovindree Naidoo**, Senior Legal & Policy Advisor, FIC

Key issues for consideration by the Committee following public hearings

1. Response to Section 45B(1C) related comments
2. Proposed legal amendment clarifies administrative vs enforcement powers
3. Administrative versus Criminal inspections
4. Clarifying the scope of the FIC Act
5. Other specific concerns
6. Conclusion

1. Section 45B(1C)

- All submissions except two agree with the scope of current FICA process
 - is very narrow, focus must be strictly on the constitutionality of warrantless searches
 - No new issues can be raised, not even via a second letter from the President;
 - Once National Assembly decides, President must only consider whether his concerns addressed or not
 - Must sign bill into law if yes, or send this issue (restricted to this clause only) to Constitutional Court
 - Others can only take to the Constitutional Court AFTER Bill is enacted.
- Two submissions (BBC, PPF) want to address broader issues
 - Status of their legal opinion is queried by National Treasury as not done by a practicing attorney or advocate but a political analyst
- All legal opinions submitted agree clause is constitutional, and warrantless searches essential supervisory tool to enforce compliance with FICA
 - Two legal opinions (Semenya, Gauntett) suggest we can still tighten clause to reduce scope for constitutional challenges and provide more explicit certainty
- NT and FIC propose amendments to Section 45B(1C)/clause 32 as contained in a separate ANNEXURE, based on two legal opinions (but adjusted for technical clarity)

2. Proposed legal amendment clarifies administrative vs enforcement powers

- FIC Act power is restricted to ADMINISTRATIVE enforcement only, where inspectors under FIC power is restricted to compliance with the FIC Act only
- FIC and inspectors under FIC law do NOT have investigative or criminal law enforcement powers, which can only be done by the SAPS and NPA
- FIC also does its supervision via supervisory authorities like SARB, FSB, gambling, estate agency and law society
 - Almost all inspectors and inspections are done by the supervisory institutions and their employees
 - FIC-employed inspectors only involved when there is no supervisor to oversee AML/CFT over any sector, so limited instances
- It should be noted that NO private or regulated entity like a bank or estate agent has any power to inspect, or is allowed to inspect, for compliance to the FIC Act

3. Administrative versus Criminal inspections - Regime on entry, search and seizure

Criminal	Administrative
<ul style="list-style-type: none"> ▪ Police official ▪ Conducted under the Criminal Procedure Act ▪ Purpose <ul style="list-style-type: none"> - reasonable suspicion of commission or suspected commission of a <u>criminal offence</u> - obtain evidence of the commission or suspected commission of an offence - evidence intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence ▪ Apply to <u>all</u> within the territory of the Republic ▪ Information obtained may result in arrest, prosecution and criminal sanction ▪ Bill of Rights (Constitution) apply 	<ul style="list-style-type: none"> ▪ Inspector ▪ Authority under the founding legislation of a regulatory/supervisory body/FIC ▪ Purpose <ul style="list-style-type: none"> - determine <u>compliance</u> with provisions of FICA or any order, determination or directive made in terms of FICA - reasonable grounds for suspecting that an act of non-compliance has occurred - likely to yield information pertaining to the non-compliance ▪ Focus only on regulated/licensed entity or unregulated/unlicensed entity carrying out activity falling under FICA ▪ Information <u>cannot</u> be used as evidence to support arrest, prosecution and criminal sanction <ul style="list-style-type: none"> - may <u>only</u> result in administrative action (i.e. fine, suspension of licence) ▪ Constitutional values underlie the application and enforcement

4. Clarifying the scope of the FIC Act

- The fight against financial crime predates FICA
 - FICA is one of the many policy instruments to support the broader Government policy to tackle organised crime
 - FICA is not intended to, and does not, criminalise money laundering, racketeering and terror financing as this is done in other legislation (POCA, POCDATARA, etc.)
 - FICA and AML only deal with the laundering of the PROCEEDS OF CRIME, so there is always a PREDICATE crime in terms of another law that generates the illicit proceeds
- Targeted at protecting the integrity of the South African financial system
 - by imposing certain duties on banks, insurers, asset managers, estate agents, law firms, gambling institutions as they could be used for money laundering purposes and financing of terrorist and related activities
 - require them to conduct risk management (i.e. KYC) on those already designated by Cabinet/legislator as Prominent Influential Persons
 - to file STRs with the FIC (analysis + disseminate) = law enforcement

5. Other Specific concerns raised and not related to the referral under Section 79(1)

- **Concern 1: Impact of FIC will be felt mainly by black businesses**
 - This concern is based on anecdotal evidence, and not supported by actual factual evidence that has been provided
 - FIC must act without fear or favour against anyone breaking the law, black or white. No person who does not break the law has anything to fear
 - FIC mandate and FICA are in line with constitutional values
 - Focus of bill is also on CDD which includes individuals who are entrusted with prominent public functions who hold positions which can be abused for purposes of laundering illicit funds or other offences (i.e. corruption, bribery)
 - reference to prominent persons is not based on race but value of business conducted with or on behalf of an organ of state
 - **Solution:** Bill introduces a threshold to be set by Minister by way of notice in the Gazette to ensure it focuses on high-value transactions, which will be above the micro-SMMEs

Specific concerns not related to the referral...

- **Concern 2: Banks are police, prosecutor and judge**
 - FIC Act imposes duties on many sectors, and not only banks, like insurers, estate agents, gambling institutions, legal firms
 - Banks/FIs have a duty / legal obligation to comply with FICA
 - ✓ obligation is consistent with policy objective to tackle financial crimes
 - banks required to put in place risk management (i.e. KYC) measures to prevent the abuse of their systems to facilitate money laundering, terror financing and related crimes (and face fines from other jurisdictions if they do not)
- **Concern 3: Risk Mngt and Compliance Prog (RMCP) give banks undue powers**
 - this is an essential tool under any risk-based regulatory regime
 - Bill prescribes minimum requirements to be met for a RMCP (checks & bal)
 - RMCP forces banks/FIs to be innovative and less conservative
 - ✓ support financial inclusion policy objective (i.e. NO proof of address)
 - FIC and supervisory bodies will have access to the RMCP
 - ✓ can instruct banks/FIs to amend their RMCP if do not comply

Specific concerns not related to the referral...

- **Concern 4: Once a PIP always a PIP**
 - Law does not do this, but like reputations, may be the case with any significant PIP, but not likely for less significant PIPs
 - Bill enables the Minister to change the list of prominent persons by Gazette
 - introduces an open and transparent consultative process
 - Parliament must approve changes prior to Gazette
- **Concern 5: Banks are outside the net**
 - SA banking sector is highly regulated (intensive, intrusive, effective), and will soon be subjected to comprehensive MARKET CONDUCT regulation under Fin Sector Reg Bill (Twin Peaks)
 - Treat Customers Fairly a major objective under Twin Peaks
 - Power of ombudsmen will soon be strengthened and widened under Twin Peaks, designed to achieve quick and effective dispute resolution for banks and their customers in a fair, impartial and confidential manner

6. Conclusion

- Scope for current hearing on FICA Bill is narrow and restricted to warrantless searches
- NT proposes amendments to s45 as per Annexure
- Need a separate process to deal with concerns raised - are not related to s45, including future SCOF hearings on impact of the amendments and unintended consequences
- Many of the concerns raised are not based on fact or what the proposed law actually says
 - NT happy to meet with any party that has specific concerns, both now or as problems are identified
 - FIC must be held accountable for performance and implementation
- It is critical for SA that we comply with FATF standards for our own sake, as it is in our best interests

conclusion...

- Concerns unrelated to the referral will be taken into account in the process of developing regulations to the Act and implementation
- Banks and other financial institutions apply the PIP regime as is international standard
 - ✓ they operate in other jurisdictions outside of SA where similar rules apply
- The down side of adherence to international standards without an equivalent domestic legal framework is that there are no checks and balances to manage overreach
- There is high risk of SA banks losing their correspondent banking relations if SA does not align with international best practice
- In Fin Sector Reg and COFI Bills will address concerns relating to closure of accounts comprehensively