

RE: SUBMISSIONS ON THE DRAFT AMENDMENTS TO THE SCHEDULES TO FICA

1. INTRODUCTION

- 1.1. We refer to the draft amendments to the Schedules 1, 2 and 3 (“**Draft Amendments**”) of the Financial Intelligence Centre Act, 2001 (“**FICA**”) published by the Standing Committee on Finance on 21 July 2022, as well as the first Financial Stability Review of 2022 (“**FSR2022**”) published by the South African Reserve Bank (“**SARB**”) in May 2022.
- 1.2. We set out herein the comments of Franklin Templeton Investments SA (Pty) Ltd (“**Franklin Templeton**”), an authorised financial services provider (“**FSP**”) under the Financial Advisory and Intermediary Services Act 37 of 2002 (“**FAIS**”), with registration number 44475, to the Draft Amendments in light of FSR2022, as well as our recommendations in respect thereof.

2. MONEY LAUNDERING AND FINANCING OF TERRORISM

Definition

- 2.1. Money laundering is the introduction of illegally-acquired assets into the financial system with the aim of concealing their true origin. The offence of money laundering involves the performance of any act which may result in concealing the nature of the proceeds of crime. Financing of terrorism is the giving of financial support to terrorists and terrorist organisations (including those who encourage or plan to engage in it). Both money laundering and terrorist financing involve the concealing of either the source or destination of money.

*Role of the Financial Action Task Force (“**FATF**”)*

- 2.2. FATF is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction.
- 2.3. FATF recommendations are recognised as the global anti-money laundering (“**AML**”) and counter-terrorist financing (“**CTF**”) standards.

- 2.4. South Africa became a member of the FATF in 2003, and is one of 39 (thirty nine) member countries.

Regulatory framework

- 2.5. The South African legislature, in recognising the importance of combatting money laundering and terrorist financing and the FATS standards, has sought to prohibit and criminalise money laundering through various legislative instruments:

2.5.1. **The Prevention of Organised Crime Act 121 of 1998 (“POCA”)**

- 2.5.1.1. This statute represents an aggressive stance against the rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally. POCA creates various offences for dealing in the “proceeds of unlawful activities”, or assisting others in so benefiting. It also creates a statutory offence of money laundering and makes provision for forfeiture of the proceeds of unlawful activities.
- 2.5.1.2. “Proceeds of unlawful activities” is defined as *“any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of [POCA], in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.”*
- 2.5.1.3. “Unlawful activity” is defined as *“conduct which constitutes a crime or which contravenes any law, whether such conduct occurred before or after the commencement of [POCA] and whether such conduct occurred in the Republic or elsewhere.”*
- 2.5.1.4. POCA sets out the substantive money laundering offences in sections 4, 5 and 6. In broad outline, these offences are the money laundering offence itself, assisting another to launder the proceeds of unlawful activity, and the acquisition, use or possession of laundered property.

2.5.2. **The Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (“POCDATARA”)**

2.5.2.1. POCDATARA provides for the criminalisation of terrorist and related offences. Provisions in POCDATARA allow authorities to freeze assets pursuant to United Nations Security Council Resolutions, provided that these resolutions have been recognised in a notice proclaimed by the President.

2.5.3. **FICA**

2.5.3.1. Apart from criminalising the activities constituting money laundering, South African law also contains a number of control measures aimed at facilitating the detection and investigation of money laundering. FICA is designed with the object of establishing an anti-money laundering regulatory regime.

2.5.3.2. FICA essentially –

2.5.3.2.1. provides for the establishment and operation of the Financial Intelligence Centre (“**FIC**”);

2.5.3.2.2. amends and supplements POCA which targets organised crime and the recovery of the proceeds of unlawful activities. Accordingly, the two Acts should be read together; and

2.5.3.2.3. makes non-compliance with FICA and “money laundering” a criminal offence carrying severe penalties. In this regard it defines “money laundering” as an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest

which anyone has in such proceeds, and includes any activity which constitutes an offence in terms of section 64 of FICA or section 4, 5 or 6 of POCA.

2.5.3.3. In addition to a variety of generally applicable obligations, FICA and the Money Laundering and Terrorist Financing Control Regulations place rigorous compliance obligations on “accountable institutions”.

2.5.3.4. “Accountable institutions” are defined in Schedule 1 to FICA and include persons who carry on the business of a bank as defined in the Banks Act 94 of 1990 and certain FSPs in terms of FAIS. (If the Draft Amendments are passed in their current form, a number of entities would also become accountable institutions.)

2.5.3.5. The obligations imposed on accountable institutions in terms of FICA include:

2.5.3.5.1. formulation and implementation a risk management and compliance programme;

2.5.3.5.2. appointment of a Compliance Officer;

2.5.3.5.3. training of employees;

2.5.3.5.4. identification and verification of clients;

2.5.3.5.5. ongoing due diligence on existing clients;

2.5.3.5.6. keeping of records of identities of clients and of transactions entered into with clients;

2.5.3.5.7. sanction screening; and

2.5.3.5.8. reporting of certain transactions to the FIC.

Mutual evaluation by FATF

- 2.6. A mutual evaluation of South Africa was conducted by an assessment team led by the International Monetary Fund and included officials from the Eastern and Southern Africa Anti-Money Laundering Group and the FATF member countries. The assessment commenced in April 2019 and was concluded in May 2021. Out of 40 (forty) ratings on legislation adequacy, half of South Africa's ratings scored as only partially compliant or non-compliant.
- 2.7. Following the adoption of the FATF's AML and CTF measures - South Africa Mutual Evaluation Report released in October 2021 ("**FATF Report**"), at the FATF Plenary in June 2021, the FATF is due to visit South Africa at the end of October 2022 to ascertain whether sufficient progress has been made after a one-year observation period. If not, South Africa may be grey-listed by the FATF as early as February 2023.
- 2.8. The grey-list names the countries that are under increased monitoring but are working to resolve the identified deficiencies and include Pakistan, Myanmar, South Sudan and Syria.
- 2.9. The National Treasury and the FIC briefed the Parliamentary committees on the Draft Amendments on 15 June 2022. These, Ismail Momoniat, acting Director-General of the Treasury said, would go a long way to aligning South Africa with the FATF's standards and were ready to adopt.

Consequences of a grey-listing

FSR2022

- 2.10. The SARB publishes the Financial Stability Review twice a year to communicate its views on the potential risks to financial system stability and the policy actions being taken to address these risks.
- 2.11. In FSR2022 the SARB said an unfavourable outcome of the FATF's Mutual Evaluation poses the following risks:
- 2.11.1. Higher transactional, administrative and funding costs for domestic banks;
 - 2.11.2. Restrictions on cross-border transactions, which will affect imports and exports, leading to a decline in gross domestic product;

- 2.11.3. Reputational damage to South Africa's financial system, which could have negative capital and currency implications; and
 - 2.11.4. The inability of South African banks to maintain correspondent banking relationships with offshore institutions.
- 2.12. The SARB indicated that the government-led interdepartmental committee on AML/CTF and counter financing of proliferation has drawn up a co-ordinated response to address the deficiencies identified by the FATF. However, there is a risk that the mitigating actions may not be implemented timeously.

Implications for consumers

- 2.13. According to Businesslive, in February, FIC director Xolisile Khanyile warned that no investor would risk bringing money into a country that has been grey-listed: the implication would be a drop in foreign direct investment, leading to a knock-on effect on economic growth and, consequently, the financial well-being of South Africans.
- 2.14. The implications of a grey-listing for consumers would include:
- 2.14.1. Limited investment choice to be more limited, as some financial institutions may not want to transact with entities in South Africa; and
 - 2.14.2. Increased compliance costs which could be passed onto consumers.

Issues(s)

- 2.15. As indicated above, a grey-listing could have wide-reaching consequences for the South African financial system from a broader reputational risk perspective, and for the banking and finance sector in particular in terms of funding costs and the ability to maintain correspondent banking relationships. It would also negatively impact consumers.
- 2.16. *The IMF Working Paper WP/21/153 states that the empirical results suggest that capital flows decline on average by 7.6 percent of GDP when the country is grey-listed.*
- 2.17. *"The consequences of being grey-listed are worse than downgrading,"* Standard Bank chief executive Sim Tshabalala said on *The Clement Manyathela Show* on Radio 702 in July 2022.

2.18. According to Tshabala: *“The rand will weaken, inflation will spike, interest rates will go up [...] It will be more expensive to buy food, pay for petrol, buy homes, buy cars. The country can’t afford it.”* However, the country would be able to avoid grey-listing if it approached the issue with sufficient urgency to ensure legislation was passed that tightened the laws against money laundering and terrorist financing before 1 October 2022.

2.19. *Bongiwe Kunene, the managing director of the Banking of Association of South Africa has noted in an article published on Moneyweb on 11 August 2022, that the possible grey-listing of South Africa will likely hamper investment and international financial transactions in the country, which it can ill-afford.*

2.20. *Kunene also notes:*

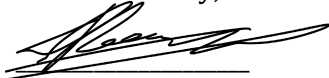
“South Africa may be placed on the European Union’s blacklist and the United Kingdom’s list of high-risk countries. A high-risk classification means access to commercial loans, Internal Monetary Fund (IMF) borrowing and financial aid would be limited, or more stringent access requirements imposed.”

Recommendation

2.21. The Draft Amendments should, taking into consideration submissions from relevant role-players, be implemented before October 2022.

2.22. We would welcome the opportunity to engage with you in more detail in this regard. Do not hesitate to contact us if you require further information.

Yours sincerely,



Danesh Ranchhod, CFA
Vice President / Executive Director