

ANNEXURE A

RE: MINERALS COUNCIL SOUTH AFRICA'S SUBMISSIONS ON THE DRAFT AMENDMENTS TO SCHEDULES 1, 2 AND 3 OF THE FINANCIAL INTELLIGENCE CENTRE ACT, 2001

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 Consultation Paper on the Amendments to Schedule 1, Schedule 2 and Schedule 3 of FICA issued by the Financial Intelligence Centre in 2020 ("**FIC Paper**").
- 1.2. We set out herein the comments of the Minerals Council South Africa ("**Minerals Council**") to the Draft Amendments as well as our recommendations in respect thereof.

2. SUBMISSIONS

- 2.1. We specifically make submissions in respect of the following business category being included as an accountable institution in terms of Schedule 1 to FICA in terms of the Draft Amendments:

"A person who carries on the business of dealing in high-value goods in respect of any transaction where such a business receives payment in any form to the value of R100 000,00 or more, whether the payment is made in a single operation or in more than one operation that appears to be linked, where "high-value goods" means any item that is valued in that business at R100 000,00 or more."

3. THE ROLE OF THE MINING INDUSTRY IN THE SOUTH AFRICAN ECONOMY

- 3.1. The Minerals Council is a mining industry employers' organisation that supports and promotes the South African mining industry. The Minerals Council serves its members and promotes their interests by providing strategic support and advisory input.
- 3.2. The South African economy remains in the doldrums, exacerbated by the global pandemic.
- 3.3. The performance of the mining industry after 2 (two) years of disruptions caused by the Covid-19 pandemic and loadshedding has played a critical role in stabilising South Africa's economy, which slowed under lockdown conditions, and it injected capital into the fiscus allowing the government to support millions of people with a basic income grant.

- 3.4. Considering the value the mining sector brings through direct and indirect employment and skills development, and its ability to attract international investment, there is no doubt that mining will be expected to continue playing a critical role in the economy for the foreseeable future.
- 3.5. However, if the policy and regulatory challenges are not sufficiently addressed, the long-term future of the industry may be in jeopardy.
- 3.6. At the same time the Minerals Council supports responsible initiatives that combat money laundering, organised crime and all aspects associated with illicit trade.

4. **MONEY LAUNDERING AND FINANCING OF TERRORISM**

Definition

- 4.1. 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 FATF

- 4.2. The Financial Action Task Force ("**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.
- 4.3. FATF recommendations are recognised as the global anti-money laundering ("**AML**") and counter-terrorist financing ("**CTF**") standards.
- 4.4. South Africa became a member of the FATF in 2003, and is one of 39 (thirty nine) member countries.

Regulatory framework

- 4.5. 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:

- 4.5.1. **The Prevention of Organised Crime Act 121 of 1998 ("**POCA**")**

- 4.5.1.1. 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.

- 4.5.1.2. “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.”
- 4.5.1.3. “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.”
- 4.5.1.4. 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.
- 4.5.2. **The Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (“POCDATARA”)**
 - 4.5.2.1. 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.
- 4.5.3. **FICA**
 - 4.5.3.1. 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.
 - 4.5.3.2. FICA essentially –
 - 4.5.3.2.1. provides for the establishment and operation of the Financial Intelligence Centre (“**FIC**”);
 - 4.5.3.2.2. 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
 - 4.5.3.2.3. 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.

- 4.5.3.3. 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”.
- 4.5.3.4. “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 financial services providers in terms of the Financial Advisory and Intermediary Services Act 37 of 2002. (If the Draft Amendments are passed in their current form, a number of entities would also become accountable institutions.)
- 4.5.3.5. The obligations imposed on accountable institutions in terms of FICA include:
 - 4.5.3.5.1. formulation and implementation a risk management and compliance programme;
 - 4.5.3.5.2. appointment of a Compliance Officer;
 - 4.5.3.5.3. training of employees;
 - 4.5.3.5.4. identification and verification of clients;
 - 4.5.3.5.5. ongoing due diligence on existing clients;
 - 4.5.3.5.6. keeping of records of identities of clients and of transactions entered into with clients;
 - 4.5.3.5.7. sanction screening; and
 - 4.5.3.5.8. reporting of certain transactions to the FIC.

Mutual evaluation by FATF

- 4.6. 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 ratings on legislation adequacy, half of South Africa’s ratings scored as only partially compliant or non-compliant.
- 4.7. The FATF’s AML and CTF measures - South Africa Mutual Evaluation Report released in October 2021 (“**FATF Report**”) notes under key findings that the potentially high-risk sectors of (among other things) “Dealers in Precious Metals and Stone” (“**DPMS**”) are not AML/CTF regulated, save for a general reporting obligation (of suspicious and unusual transactions in terms of section 29 of FICA).
- 4.8. Following the FATF Report, 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.

FIC Paper

- 4.9. The FIC Paper refers to the FATF standards and notes that criminals can potentially use any high-value goods to launder illicit funds. However, it acknowledges, some high-value goods dealers are more vulnerable to being misused for money laundering or the financing

of terrorism than others, such as DPMS (e.g., jewellers) and dealers in antiques and collectibles, fine art and aircraft, boats, and luxury motor vehicles.

- 4.10. According to the FIC Paper, a proposed category of high value goods dealers will be focussed on the retail sector as the risk of money laundering and terrorist financing lies in this area. Consultation with, amongst others, the Diamond Council and the Jewellery Council has confirmed the view that the risk lies in the retail sector as compared to the manufacturing or wholesale sector in so far as trade in precious metals and stones is concerned. This category will also include the categories of business that are currently referred to in Schedule 3 of FICA, namely, Kruger rand dealers and motor vehicle dealers.
- 4.11. The FIC Paper recognises that the inclusion of such category is in line with the approach by foreign jurisdictions. The 4th Anti-Money Laundering Directive ("**AMLD4**"), adopted by the European Union on 20 May 2015, applies to persons who trade in goods to the extent that payments are made or received in cash in an amount of EUR 10 000 (ten thousand Euro). Likewise, in the United Kingdom, high-value dealers (classed as person who accepts cash payments of EUR 15,000 fifteen thousand Euro) or more (or equivalent in any currency) in exchange for goods are subject to the Money Laundering Regulations, 2007 ("**UK Regulations**").

Issues(s)

- 4.12. While the Minerals Council supports compliance with the FATF standards and that a grey-listing should be avoided, we are of the view that the Draft Amendments are too wide for the reasons set out below.
- 4.12.1. First, whereas AMLD4 and the UK Regulations limit the trigger for AML/CTF regulation of high-value dealers to cash transactions, the Draft Amendments refer to businesses receiving "payment in any form" to the value of R100 000,00 (one hundred thousand Rand).
- 4.12.2. Secondly "high-value goods" are defined in the Draft Amendments as any "item" that is valued in that business at R100 000,00 (one hundred thousand Rand) or more. It is unclear what is meant by "item". What is clear, however, is that giving the word its ordinary meaning, it would include items not identified as posing a high risk of money laundering as set out in the FIC Paper. (See paragraph 4.9 above.)
- 4.12.3. Thirdly, the Draft Amendments do not restrict their application to high-value dealers within the retail sector where it has been identified the risk lies. The scope of "any person" is too broad and is not restricted to high-value dealers within the retail sector, which is where the risks identified by the FAFT lies.
- 4.12.4. Fourthly, it is unclear from the Draft Amendments what the meaning of "dealer" is. Would a once-off or occasional sale of an item to the value of R100 000,00 (one hundred thousand Rand) or more render the seller a "dealer"?
- 4.13. It should be noted that section 29 of FICA places an obligation of disclosure on any person to report suspicious or unusual transactions to the FIC. In terms of this provision, any person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that:

- 4.13.1. the business has received or is about to receive the proceeds of unlawful activities;
- 4.13.2. a transaction or series of transactions to which the business is party:
 - 4.13.2.1. has no apparent business or lawful purpose;
 - 4.13.2.2. is conducted for the purpose of avoiding a reporting duty under FICA; or
 - 4.13.2.3. may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service; or
- 4.13.3. the business has been used or is about to be used in any way for money laundering purposes,

must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the FIC the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions. Accordingly, in respect of such transactions all persons would be subject to FICA and there is no need to extend the definition for such purposes.
- 4.13.4. In support of the above provisions, the mining sector supports responsible initiatives that combat money laundering including the reporting obligations that would apply to the companies in the mining industry to combat organised crime and all aspects associated with illicit trade. The general obligations, imposed on any business in terms of FICA, POCA and POCDATARA are sufficient in that the objectives of these obligations are keeping with worldwide trends aimed at curbing the proceeds of crime, money laundering and the funding of terrorism. POCA is a wide-ranging Act dealing, among other things, with money laundering, racketeering and criminal and civil forfeiture. Both POCA and FICA apply to “proceeds of unlawful activities” which is much wider than proceeds of crime and sufficiently regulates and extends to the mining industry.

5. **RECOMMENDATION(S)**

- 5.1. Our recommendations to the Draft Amendments are as follows:
- 5.2. The Proposed Amendments should be limited to cash transactions to the value of R100 000,00 or more. The proposed wording could be amended as follows:

"20. A high-value goods dealer [rather than person], who carries on the business of dealing in high-value goods in respect of any transaction where such a business receives payment ~~in any form~~ to the value of R100 000,00 or more, where the payment is made in cash, whether the payment is made in a single operation or in more than one operation that appears to be linked, where “high-value goods” means any item that is valued in that business at R100 000,00 or more."
- 5.3. “Item” as used in “high-value goods” should be defined and should be restricted to goods posing a high risk of money laundering as indicated in the FIC Paper. In addition, clarification is required as to what would constitute an item or the unit of measurement for mining commodities.

- 5.4. "Dealer" should be defined as dealers within the retail sector and sellers in respect of once off or occasional transactions in high-value goods should be excluded from the definition. Alternatively, the definition of "dealer" should exclude any holder of a permit under the Mineral and Petroleum Resources Development Act 28 of 2002 as follows:

"High-value goods dealer" is any person who is involved in the retail and sale of goods of a high value and excludes the holder of a right in terms of the Mineral and Petroleum Resources Development Act, 2002".