Standard Bank

The Secretary of Parliament
Committee Section
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Group Compliance

Attention: Mr Bradley Viljoen

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2008-04-29

Dear Mr Viljoen

Comments: Draft Financial Intelligence Centre Amendment Bill, 2008 ("the Bill")

We refer to the abovementioned Bill, and wish to thank you for the invitation to comment on the proposed amendments to the Financial Intelligence Centre Act ("FICA").

1. Introduction

The Standard Bank of South Africa Limited ("Standard Bank") agrees with the rationale and considerations in proposing amendments to FICA, as set out in the long title of the Bill. Subject to the qualifications and specific views contained in our response which may indicate a preference for an alternative approach to certain provisions of the Bill, we therefore support the legislative initiative and consultation with stakeholders in respect of the Bill.

We respectfully wish to point out, however, that our comments on the Bill should be viewed and understood within the specific context and definition of our role and function as an accountable institution, i.e. as a bank registered in terms of, and regulated under, the Banks Act, 1990 ("the Banks Act").

We also acknowledge that we cannot be aware of other sector-specific considerations and impediments that may be encountered in administering and enforcing FICA. We therefore trust, that in the absence of such awareness and knowledge, our comments will be received in the spirit of constructive engagement and discussion.

We would like to note that we endorse the comments submitted to yourselves by the Banking Association of South Africa. We have tried, in our commentary, not to duplicate matters that have already been raised by the Banking Association.

2. Specific issues

2.1 Application of the Act & issuing of directives

Whilst we understand the need for supervisory bodies to carry out supervisory functions in relation to compliance by accountable institutions with FICA, we are concerned that the insertion of **section 1A** in the Act and its consequential prevalence over any other law, other than the Constitution or another Parliamentary Act amending FICA, may lead to potential conflict with, and the eroding of, existing laws regulating specific sectors of accountable institutions, such as the Banks Act.

The fact that the definition of "this Act" now specifically includes directives and exemptions amongst others is concerning. Accordingly, any "order or determination made, or directive or exemption..." will now be elevated to legislative status. Concern is noted as to how the Financial Intelligence Centre ("the Centre") will ensure consistency across all accountable institutions if supervisory bodies are also given the authority to issue directives. Furthermore, we would like to understand who will have oversight responsibility to provide assurance that directives are not in conflict with any other legislation.

2.2. Registration process

Although it is understandable that the Centre would benefit from a registration process, of concern is the cost and administration involved in such process, especially for accountable institutions that already have legal obligations to register with various other regulators. The impact of such process will depend on the detail required for registration and the frequency of such registration (for example annual updates). It is suggested that the registration requirement specifically exclude institutions already registered under one of the supervisory bodies.

2.3. Power to conduct inspections

With reference to the proposed **section 45B(4)**, in respect of the recovery of costs associated with inspections, we respectfully submit that cognizance should be taken of the practices and rates imposed by existing supervisory bodies such as Bank Supervision Department of the South Africa Reserve Bank and the Financial Services Board, and any legislation dealing with similar matters. It is further understood that such costs should be limited to reasonable costs incurred within a pre-determined realm of investigation, and that the accountable institution concerned should be given due notice of such impending costs for their account.

With reference to **section 45B(2)(a)** - "direct a person to appear before it (the Centre or the supervisory body) for questioning", is it envisaged that any employees who have reported suspicious transactions may also be questioned, which in turn is in conflict with the protection afforded by section 38 of FICA? Questioning in this respect should not include any information pertaining to suspicious activity. The same principle should be applicable as regards the Appeal Boards right to call witnesses.

With reference to **sections 45B(2)(b) and 45B(2)(d)** referring to "any documents in the possession or custody or under the control of the accountable institution", as well as the use of computer systems to access data, these provisions seem too widely-drafted, and accountable institutions may be faced with confidentiality issues. It is recommended that the Inspector be restricted to accessing documents in the possession, custody or under the control of the accountable institution or data on computer systems, which are relevant to the inspection at hand. It is further suggested that the right to remove documents as contained in **section 45B(2)(e)** should not be permitted under any circumstances. Documentation must be copied on the premises of the accountable institution.

2.4. Administrative Enforcement

Standard Bank agrees with the principle of establishing an administrative enforcement framework in respect of failures to comply with FICA as it aligns with international best practice. Generally, Standard Bank also agrees with the proposed key features of such an enforcement model. However, it is suggested that more detail as to the process to be followed should be inserted.

With reference to **section 45(C)** of the Bill, we would like to comment as follows:-

- In this respect, we submit that the Bill does not provide for any detail around the due process that should be followed by the Centre / supervisory body before reaching the point of issuing an administrative sanction. Such sanction should only be applicable when it can be shown that the accountable institution or person concerned has intentionally breached or been grossly negligent in not meeting FICA requirements

- In addition and accordingly to international best practice, the application of administrative sanctions should only come into play once all other avenues to resolve the issue at hand have been exhausted. This would mean that only accountable institutions / persons who are shown to be uncooperative in resolving compliance issues that have been identified should be subject to administrative sanction
- In order to ensure consistency and bearing in mind the multi-regulatory environment within which we operate, clear guidance should be given as to how administrative sanctions are determined and who determines whether they are commensurate with the offence at hand
- It is noted that the administrative penalties do not replace the criminal penalties. It is suggested that detail be provided as to in which instances the administrative penalties will be enforced vs. the criminal penalties
- It is very important for registered banks, which are subject to Guidance Note 3 issued by the Centre in July 2005, to understand how administrative sanctions will be applied to elements contained in the Guidance Note which are in line with international best practice and which registered banks are required to comply with, but which are in conflict with FICA requirements for example Guidance Note 3 permits registered banks to adopt a risk-based approach to the identification and verification of customers which is in conflict with FICA requirements which dictate exactly what documentation is required to identify and verify a customer
- In terms of **section 45(C)(7),** we submit that due to the excessive penalties that can be imposed on individuals, it is unlikely that an individual will be able to pay such penalty within 30 days in order to appeal to decision. This effectively removes an individual's right to appeal, which is surely not the intention

2.5. General

With reference to **section 40(6A),** "...the Centre's right to make available any information obtained during an inspection to a department, organ of state, supervisory body ..." is too widely drafted and conflicts with confidentiality issues. The Centre's authority to make information available should be restricted to those circumstances contained in **section 45B(5)(b).**

With reference to **section 45(1B)(g)** and the use of the terms "hold office" and "fit and proper" should be clarified as this may lead to confusion. It is suggested that the term "hold office" be replaced or more clearly defined and the term "fit and proper" be deleted as it may be confused with the same terminology as used in the Financial Advisory and Intermediary Services Act ("FAIS"). Furthermore the term "has been involved in money laundering or terrorist related activities" may be too wide in this instance. The level of involvement referred to, ought to be clarified. It is suggested that it be replaced by "found guilty of an offence in terms of the Prevention of Organised Crime Act (POCA), FICA or the Protection of Constitutional Democracy Against Terrorist and Related Activities Act (POCDATARA)".

Concern is noted regarding the apparent creation of a super-regulator, in the form of the Centre, which will be empowered to supervise accountable institutions that are already subject to recognized supervisory authorities, for example registered banks. This provides for duplication of effort and uncertainty in the process. Where an industry is already supervised, their supervisory body should be fully empowered in terms of the Bill. The Centre should only be given jurisdiction over currently unregulated accountable institutions.

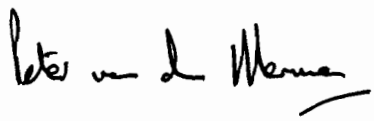
The fines provided for in the Bill (up to R100m) for any person (individual or legal) seem excessive in relation to the criminal penalties that can be imposed in terms of the Act. Surely an administrative sanction is less serious by nature than a criminal sanction and the penalties should reflect this.

3. Conclusion

The amendments proposed by the Bill have far-reaching implications for several existing laws and certain constitutional rights. It is submitted that these amendments and the said implications be further investigated and discussed with affected parties and existing supervisory bodies of accountable institutions. In particular, it is our respectful submission that absolute legal certainty as to the respective powers and ambit of responsibility of the Centre and existing supervisory bodies (in our instance the Registrar of Banks) are attained before the Bill is passed into law.

We once again wish to thank you for the opportunity to comment on the proposed amendments to the Act, and remain available to participate in any further discussions in respect of the Bill. Insofar as you may require further elucidation on comments contained in this letter, please do not hesitate to contact Nadia Hoff, Group Money Laundering Control Officer – (011) 636 4133, at your convenience.

Yours faithfully



Peter van der Merwe
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