



CORPORATE & COMMERCIAL ALERT

IN THIS ISSUE

BANE OR BOON? THE AMENDMENTS TO FICA

The Financial Intelligence Centre Act, No 38 of 2001 (FICA) was recently amended by Act, No 1 of 2017 (Amendments), the bulk of the operative provisions of which came into effect on 2 October 2017. Precipitating the Amendments was a sea change in the global thinking around anti-money laundering (AML) and the financing of terrorism. A proper understanding of FICA as it currently reads must be rooted in an appreciation of its international provenance, and of the nature and extent of its radical deviation from FICA as it read prior to the Amendments.

BANE OR BOON? THE AMENDMENTS TO FICA

FICA is an articulation of South Africa's FATF obligations. In certain places, its wording borrows heavily from the FATF's nomenclature.

South Africa's Amendments were prompted by the report of 2014, which sharply criticised certain aspects of FICA and the underlying machinery used to implement it.



The Financial Intelligence Centre Act, No 38 of 2001 (FICA) was recently amended by Act, No 1 of 2017 (Amendments), the bulk of the operative provisions of which came into effect on 2 October 2017. Precipitating the Amendments was a sea change in the global thinking around anti-money laundering (AML) and the financing of terrorism. A proper understanding of FICA as it currently reads must be rooted in an appreciation of its international provenance, and of the nature and extent of its radical deviation from FICA as it read prior to the Amendments.

The Global Context

Since its initial promulgation on 1 February 2002, FICA has engendered a fair bit of antipathy from those regulated by it (Accountable Institutions). This is usually to be expected of any piece of legislation with which it is costly and administratively burdensome to comply. However, some of the antipathy is informed by the popular view that FICA represents the government's attempt to outsource a part of its law enforcement function to the private sector. While that view has some truth to it, it is somewhat over-simplified. This becomes clear when one traces FICA to its origins.

South Africa is a member of the Financial Action Task Force (FATF), an inter-governmental organisation headquartered in Paris and composed of 37 member states. The FATF was formed in 1989. At that time, the G7 countries identified the pressing need for a unified response to AML, which was recognised as a threat to the integrity of the global financial system and the various players within it. The FATF sets international standards comprising 49 recommendations (Recommendations) pertaining to various aspects of AML. Member countries are expected to adopt

the Recommendations by tailoring them to their peculiar circumstances, and ultimately giving them the force of law as domestic legislation. FICA is an articulation of South Africa's FATF obligations. In certain places, its wording borrows heavily from the FATF's nomenclature.

An important detail about the FATF is that it is not akin to the UN, in that it cannot impose embargos, sanctions and similar measures against its members. Rather, its punitive power lies in its ability to influence inter-member trade relations. Every five years, each member undergoes a peer review culminating in what is known as a mutual evaluation report, assessing its level of compliance with the Recommendations. A negative report signals that the offending member is not combatting AML as vigorously as it should be. This, in turn, hampers the ability of the member concerned to attract foreign investment from its compliant counterparts, who represent some of the largest economies in the developed and developing world. South Africa's Amendments were prompted by the report of 2014, which sharply criticised certain aspects of FICA and the underlying machinery used to implement it.

BANE OR BOON? THE AMENDMENTS TO FICA

CONTINUED

Section 42 of FICA introduces the concept of a risk management and compliance programme (RMCP), which every Accountable Institution is required to design for itself and implement.



FICA is a consequence of South Africa's membership of an international community, whose AML stance is becoming progressively robust; in some senses it is a consequence of the economic hardship that would ensue if South Africa's stance were perceived as any less robust.

The Amendments

The salient features of the Amendments are the following:

1. Risk-based approach

The Amendments heralded the FATF's migration to a risk-based approach, which is best understood when described in relation to its predecessor, the rules-based approach. At the FATF's inception and for a number of years thereafter, the best practice of the day was to impose a rigid, formulaic set of rules to deal with specific situations. This thinking was incorporated in the Recommendations and, by extension, in the first iteration of FICA. The rules-based approach was precisely why banks, for example, were inflexible in the documents they required of their clients. The FATF eventually realised that this sort of dogmatism was untenable, and substituted the rules-based approach with the risk-based approach. It adjusted its Recommendations accordingly, and this in turn occasioned the Amendments.

2. Extended customer due diligence obligations

Under the previous dispensation, an Accountable Institution's customer due diligence (CDD) obligations were centred in the identification of

clients. Discharging these obligations now entails going beyond mere identification, by taking steps to understand such things as the nature of the client's business, the services sought from the Accountable Institution, and the identity of the client's ultimate beneficial owners (being the natural persons ultimately benefitting from the client's assets and profits). The latter piece of information can be difficult to obtain, as ultimate beneficial owners are often several steps removed from the client, and often designedly so.

3. Personalised compliance

Section 42 of FICA introduces the concept of a risk management and compliance programme (RMCP), which every Accountable Institution is required to design for itself and implement (it succeeds the "internal rules" of the previous dispensation). The RMCP exhaustively sets out an Accountable Institution's FICA compliance strategy in respect of three broad duties, namely "know-your-customer" (KYC), recordkeeping and reporting. FICA is not prescriptive as to the precise wording of the RMCP. It does, however, list the minimum matters that must be addressed in it, as well as certain things that it must enable its user to do. In broad terms, for every "what" appearing in FICA in relation to the three duties, a corresponding "how" must appear in the RMCP. Under the Amendments, Accountable Institutions are afforded considerable discretion to tailor their RMCP to fit their unique AML exposure and business requirements. This discretion is accompanied by an equal

BANE OR BOON? THE AMENDMENTS TO FICA

CONTINUED

The transition to the new FICA regime is anything but painless for Accountable Institutions which will have to expend substantial resources in giving effect to the new regime.



measure of responsibility. Under the old dispensation, FICA compliance was a matter of passive compliance with the hard and fast rules then imposed; in the wake of the Amendments, FICA no longer lends itself to passivity, and compliance now has two dimensions to it: (a) an Accountable Institution must adhere to its RMCP; and (b) the RMCP, in turn, must be in harmony with FICA. Both dimensions require of an Accountable Institution active engagement with its AML environment, and a thorough grasp of the risk-based approach. The most difficult part of designing an RMCP is deciding on the appropriate risk model to be applied when ascribing risk to a given client. A number of factors might bear upon on risk, and the permutations regarding the interplay between these factors as well as their relative weighting are potentially endless. Once the risk model is in place, the Accountable Institution can then detail the

documentary requirements under its bespoke CDD procedures. A core tenet of the risk-based approach is that the stringency of the CDD procedures must be graduated according to each client's risk profile. The Accountable Institution's estimation of a client's risk is determinative of how that client is on-boarded. This is in stark contrast to the rules-based approach, as it was indifferent to risk and treated all clients equally.

Conclusion

The Amendments were, on the whole, well intended and necessary. The proving ground for their efficacy will be the mutual evaluation report of 2019, which South Africa will hopefully withstand. That said, the transition to the new FICA regime is anything but painless for Accountable Institutions, which will have to expend substantial resources in giving effect to the new regime.

BK Taoana



CDH's latest edition of
Doing Business in South Africa
CLICK HERE to download our 2018 thought leadership

OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:



Willem Jacobs
National Practice Head
Director
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com



David Thompson
Regional Practice Head
Director
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com

Mmatiki Aphiri
Director
T +27 (0)11 562 1087
M +27 (0)83 497 3718
E mmatiki.aphiri@cdhlegal.com

Chris Baird
Director
T +27 (0)11 562 1556
M +27 (0)82 544 4988
E chris.baird@cdhlegal.com

Roelof Bonnet
Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

Tessa Brewis
Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Etta Chang
Director
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Clem Daniel
Director
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Jenni Darling
Director
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@cdhlegal.com

André de Lange
Director
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Werner de Waal
Director
T +27 (0)21 481 6435
M +27 (0)82 466 4443
E werner.dewaal@cdhlegal.com

Rafael Eliasov
Director
T +27 (0)11 562 1866
M +27 (0)61 268 8797
E rafael.eliasov@cdhlegal.com

Lilia Franca
Director
T +27 (0)11 562 1148
M +27 (0)82 564 1407
E lilia.franca@cdhlegal.com

John Gillmer
Director
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Sandra Gore
Director
T +27 (0)11 562 1433
M +27 (0)71 678 9990
E sandra.gore@cdhlegal.com

Johan Green
Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@cdhlegal.com

Allan Hannie
Director
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@cdhlegal.com

Peter Hesselting
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesselting@cdhlegal.com

Quintin Honey
Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Roelf Horn
Director
T +27 (0)21 405 6036
M +27 (0)82 458 3293
E roelf.horn@cdhlegal.com

Yaniv Kleitman
Director
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige
Director
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Johan Latsky
Executive Consultant
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Giada Masina
Director
T +27 (0)11 562 1221
M +27 (0)72 573 1909
E giada.masina@cdhlegal.com

Nkcubeko Mbambisa
Director
Corporate & Commercial
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

Nonhla Mchunu
Director
T +27 (0)11 562 1228
M +27 (0)82 314 4297
E nonhla.mchunu@cdhlegal.com

Ayanda Mhlongo
Director
Corporate & Commercial
T +27 (0)21 481 6436
M +27 (0)82 787 9543
E ayanda.mhlongo@cdhlegal.com

William Midgley
Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Tessmerica Moodley
Director
Corporate & Commercial
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@cdhlegal.com

Anita Moolman
Director
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Jo Neser
Director
T +27 (0)21 481 6329
M +27 (0)82 577 3199
E jo.neser@cdhlegal.com

Francis Newham
Director
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

Gasant Orrie
Cape Managing Partner
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@cdhlegal.com

Verushca Pillay
Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@cdhlegal.com

David Pinnock
Director
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid
Director
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Ludwig Smith
Director
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Ben Strauss
Director
T +27 (0)21 405 6063
M +27 (0)72 190 9071
E ben.strauss@cdhlegal.com

Tamarin Tosen
Director
Corporate & Commercial
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum
Director
Corporate & Commercial
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Deepa Vallabh
Head: Cross-border M&A,
Africa and Asia
Director
Corporate & Commercial
T +27 (0)11 562 1188
M +27 (0)82 571 0707
E deepa.vallabh@cdhlegal.com

Roux van der Merwe
Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Charl Williams
Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

©2018 2536/JULY

