



# 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

