

TAX & EXCHANGE CONTROL

ALERT

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A welcoming investment environment? Exchange control circulars released pursuant to the 2022 Budget

In our [2022 Special Edition Budget Speech Alert](#), we discussed some of the exchange control changes announced in the 2022 Budget (Budget). The changes were far-reaching, to say the least, and following the publication of the Budget, the Financial Surveillance Department of the South African Reserve Bank (FinSurv) released numerous circulars giving effect to these announcements. In terms of these circulars, sections of the Currency and Exchanges Manual for Authorised Dealers (AD Manual) were amended.

More of the carrot, less of the stick? Important changes to the exchange control rules for individuals

On 23 February 2022, following the publication of the 2022 Budget, the Financial Surveillance Department of the South African Reserve Bank (FinSurv) released circulars amending some of the exchange control rules applicable to individuals. We discuss some of these amendments here.



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A number of the changes announced relate to the making of investments into and out of South Africa. We discuss some of the most important changes in a bit more detail here.

INSTITUTIONAL INVESTORS: INCREASE IN THE PRUDENTIAL LIMIT FOR OFFSHORE INVESTMENTS

In Exchange Control Circular 10/2022 numerous changes to section B.2(H) of the AD Manual, which deals with the exchange control rules pertaining to institutional investors, were announced. The most notable and important change relates to the amount of retail assets (assets from individuals, trusts, etc. received for investment purposes) a South African institutional investor may invest offshore.

Prior to the publication of the circular, there was a prudential limit of 30% for offshore investments and an additional allowance of 10% for investments into Africa. This has now been replaced with a single limit of 45%, but with a requirement to report the number of African investments on a quarterly basis (as part of the general

reporting requirement contained in the AD Manual) remaining. It is unclear why this requirement has remained, but it may be that FinSurv wants to monitor the impact of South Africa being part of the African Continental Free Trade Area and the effect on investments into Africa. The prudential limit applies to pension funds, linked and non-linked business life insurers, CIS managers and discretionary financial services providers registered as institutional investors with FinSurv.

In addition, it was announced that institutional investors may open foreign currency accounts locally, but that the amount of foreign currency held in these accounts will count towards the prudential limit. This is a relaxation from the previous rule where foreign currency could only be held locally where a foreign investment was sold and pending the reinvestment of those sale proceeds offshore.

For retail investors, including individuals, the announcement regarding the prudential limit ultimately means that they can potentially indirectly invest more

of their assets offshore. Individuals can still invest offshore in their own names, using the single discretionary allowance and foreign capital allowance.

SOUTH AFRICAN RESIDENT COMPANIES: FOREIGN DIRECT INVESTMENT DISPENSATION

In terms of Exchange Control Circular 11/2022, section B.2(C) of the AD Manual, dealing with South African resident companies seeking to invest offshore, was amended. In terms of the amendment, a South African resident company can now invest up to R5 billion offshore annually, without prior FinSurv approval. In other words, such investments are subject only to authorised dealer approval. In addition, the requirement to repatriate sale proceeds from an investment approved under this dispensation was also removed, so that the sale proceeds may now be retained abroad. However, these sales would still have to be reported in the annual report submitted to FinSurv. The increased limits also apply to investments made under the foreign portfolio investment dispensation,

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which deals with investments where a South African resident company acquires less than 10% of the equity shares/voting rights in a foreign target.

DOMESTIC TREASURY MANAGEMENT COMPANIES

The limits currently applicable to domestic treasury management companies (DMTCs), which can hold funds in foreign currency for offshore investment purposes, have been increased pursuant to the following in Exchange Control Circular 12/2022:

- In relation to listed companies, the calendar year limit for offshore investment has been increased from R3 billion to R5 billion.
- In the case of unlisted companies, the calendar year limit has been increased from R2 billion to R3 billion.
- For financial services sector companies, such as banks and insurers, the DMTC may now invest up to R5 billion in a calendar year, which is up from the previous amount of R3 billion.

INWARD LISTINGS

Pursuant to the announcements in Circular 9/2022, section H of the AD Manual dealing with the rules pertaining to inward listings, has been replaced with a brand new section.

Some of the most notable changes are:

- The uncertainty regarding the classification of inward listed instruments referencing foreign assets has been settled. Inward listed exchange traded funds and approved debt and derivative instruments referencing foreign assets remain classified as foreign assets. Banks and institutional investors need to keep this in mind as such investments would count towards their macro-prudential limit and prudential limit respectively. However, investments into inward listed shares would not count towards these limits.
- Any instrument referencing foreign assets will now require prior FinSurv approval before listing, and these applications must include specific information referred to in section H.

- The classification of inward listed shares has been broadened to include shares on all South African exchanges and not only the JSE.
- The use of inward listed shares as acquisition currency is still permitted, but can still only be done with prior FinSurv approval. The criteria that will be considered, including the benefit to South Africa, are expressly stated.
- It is also noted that FinSurv can refer inward listing applications to National Treasury for its consideration.

COMMENT

Following the devastating impact of the COVID-19 pandemic and concomitant lockdown these welcome changes will hopefully not only make investing into and out of South Africa more appealing, but also assist in South Africa's attempts to stimulate economic growth.

LOUIS BOTHA

More of the carrot, less of the stick? Important changes to the exchange control rules for individuals

On 23 February 2022, following the publication of the 2022 Budget, the Financial Surveillance Department of the South African Reserve Bank (FinSurv) released circulars amending some of the exchange control rules applicable to individuals. We discuss some of these amendments here.

EXPORT OF MULTI-LISTED DOMESTIC SECURITIES BY PRIVATE INDIVIDUALS

Up until a few years ago, South African residents who held shares listed on various exchanges, were not allowed to export their South African listed shares to another exchange. In Exchange Control Circular 5/2022 it was announced that the exporting of these dual/multi-listed securities would be allowed, in terms of amendments made to section B.2(B) of the Currency and Exchanges Manual for Authorised Dealers (AD Manual). Section B.2(B) now states that private individuals may, as part of their single discretionary allowance (SDA) and/or foreign capital allowance (FCA), export multi-listed domestic securities, subject to tax compliance and reporting to FinSurv via a central securities depository participant, in conjunction with an authorised dealer.

The reference to tax compliance appears to refer to section 9K of the Income Tax Act 58 of 1962 (Act), which came into effect in 2021 and states that a deemed disposal for capital gains tax purposes arises where a share is delisted from a South African exchange and listed on a foreign exchange.

From a practical perspective, an individual seeking to export shares to a foreign exchange using her annual SDA of R1 million would only need to approach her authorised dealer to assist them to obtain the necessary approval letter from FinSurv. An individual seeking to transfer listed shares worth more than R1 million would have to make use of her FCA and would have to obtain a tax compliance status letter from the South African Revenue Service (SARS) in this regard. The individual would potentially have to deal with the impact of section 9K of the Act in her application.

ONLINE FOREIGN EXCHANGE ACTIVITIES: GOOD NEWS FOR THE CRYPTO ASSET INDUSTRY

A notable announcement was made in Exchange Control 6/2022 to amend section B.2(B) of the AD Manual to expressly permit individuals to fund their online international trading accounts by using their SDA or FCA. However, individuals may not fund these international trading accounts using South African credit, debt and virtual card transfers. The use of these trading accounts to invest in crypto assets is expressly referred to in the amended section.

This announcement will be welcomed, especially by the crypto asset industry, as it provides much needed clarity. It appears that this amendment was made pursuant to the recommendation being made by the Intergovernmental Fintech Working Group (IFWG) in its position paper released in June 2021. It remains to be seen whether some of the IFWG's other recommendations will be implemented, such as the proposal to include a BOP code specifically for crypto asset transactions.

FOREIGN TRUSTS

In terms of Exchange Control Circular 8/2022, section B.2(B) of the AD Manual was further amended to state that FinSurv will now consider applications by private individuals who wish to invest in excess of their annual FCA limit of R10 million in different asset classes and that such offshore investments may also be made via a foreign domiciled and registered trust. The amendment states that this dispensation also applies to private individuals who have existing authorised foreign assets, irrespective of their value.

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South African individuals making use of this dispensation must keep in mind that where funds are transferred to an offshore trust structure, either from South Africa or from an offshore account, they would still need to comply with South African tax law provisions applicable to loans and donations, depending on the nature of the transfer made.

FOREIGN DONATIONS AND INHERITANCES

For a long time, there was a distinction to the rules applicable to the receipt of foreign donations and foreign inheritances. Whereas foreign inheritances from a bona fide non-resident state have been exempt from Exchange Control Regulations 6 and 7 for a few years, this did not apply to foreign donations. Pursuant to the amendment announced in Exchange Control Circular 7/2022, foreign donations are now also exempt from the obligations under Regulations 6 and 7, subject to the recipient complying with his tax obligations in this regard. This only

applies to foreign donations received on or after 23 February 2022 and contraventions prior to this date would still need to be regularised.

In addition, South African residents may now also donate, lend or dispose of authorised foreign assets to other South African residents, subject to local tax disclosure and compliance by both parties.

In relation to the inheritance of foreign assets, South African residents inheriting foreign assets from a South African resident estate are now also exempt from Regulations 6 and 7, subject to local tax disclosure and compliance. As stated above, this previously only applied to foreign assets inherited from *bona fide* non-resident estates. However, if the foreign assets held by the deceased were unauthorised assets, these assets must still be regularised with FinSurv.

COMMENT

Many of these changes follow the trend that seems to have started with the relaxation of loop structure rules – whereas regulatory oversight was exercised through exchange control rules it is now exercised through rules in tax legislation. This is evident from the fact that for each of the amendments discussed, exchange control relaxation occurs subject to the required tax disclosure and compliance taking place (except cases where a person only makes use of their SDA). It is thus anticipated that SARS may receive more tax compliance status letter applications under section 256 of the Tax Administration Act 28 of 2011, for individuals seeking to invest abroad using their FCA.

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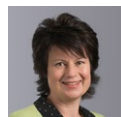
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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.

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