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# Corporate Investigations ALERT

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## FICA Forecast: Storm warning, grey on the horizon

*(Five key takeaways from the FICA  
Amendment Act)*

On 31 December 2022, before the clock struck twelve, several amendments to the Financial Intelligence Centre Act 38 of 2001 (FICA), as embodied in the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022 (Amendment Act), commenced. This, as per National Treasury's media statement, was the legislature's fast and furious attempt to reduce the prospect of South Africa's grey listing by the Financial Action Task Force (FATF) by addressing certain deficiencies identified in its Mutual Evaluation Report of South Africa in 2021. Back then, South Africa's legislative framework came up short on a number of aspects, notably:

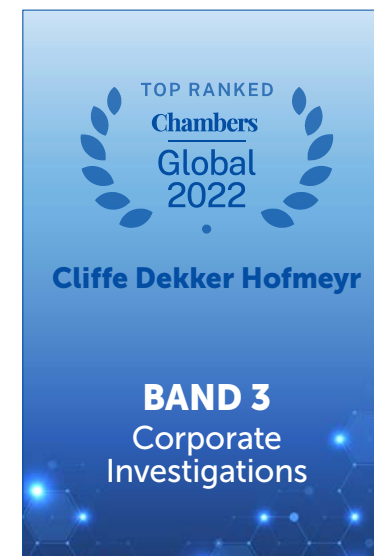
- identifying ultimate beneficial ownership of legal persons and legal arrangements;
- an absence of mechanisms to enable inter-agency co-operation at both policy and operational levels;

- the requirement for financial groups to implement group-wide programmes in respect of foreign branches and subsidiaries; and
- with regard to politically exposed persons, among other things, that the definition thereof was limited in time.

Thus, it was only a matter of time before FICA had a facelift, and it now enters the new year in style, prescribing obligations on accountable institutions (AIs) to identify ultimate beneficial owners and beefing up the risk management and compliance programme (RMCP) requirements with renewed vigour, in addition to several other atomic resolutions.

### **Beneficial ownership**

The FATF noted that beneficial ownership information is not always available timeously to competent authorities and there is still limited access to such information.



## FICA Forecast: Storm warning, grey on the horizon

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Central to the Amendment Act is the obligation placed on AIs to determine ultimate beneficial ownership. This obligation extends to ascertaining the natural person who ultimately owns or exercises effective control of an AI's client or of a legal person that, in turn, owns or exercises effective control of an AI's client. Legal persons contemplated in the Amendment Act include partnerships and trusts.

The additional measures which AIs are required to implement relating to partnerships and trusts include taking reasonable steps to establish the identity of the beneficial owner of legal persons, in circumstances where a partner in a partnership or a founder, trustee or beneficiary of a trust is a legal person.

### Time to tinker with your RMCP

Section 42 has taken its collagen and now aims to give the RCMP a new glow. Amendments include ensuring, in circumstances where operations of AIs are seated in foreign jurisdictions, the implementation of additional measures to manage risk in circumstances where foreign laws

do not permit the implementation of FICA's prescripts abroad, especially in higher risk jurisdictions.

It also requires the implementation of group-wide programmes addressing, amongst other things, information sharing at an organisational level in circumstances where AIs comprise of several South African branches. AIs are required to exchange information regarding identified suspicious or unusual transactions and activities.

This would ensure that the one hand is talking to the other and that AIs effectively communicate identified suspicious activity to all branches (operating in different locations) to help stay ahead of the curve when it comes to trends in financial crime.

### The FIC: New year, new me

The Financial Intelligence Centre (FIC) has also had its teeth done and, with renewed confidence, will be producing forensic evidence (presumably in enforcement proceedings) pertaining to the flow of financial transactions and corresponding links between persons and property.

Ever the socialite, the FIC can also enter into public private partnerships and, critically, request information from organs of state.

This, read with its empowering provisions to enforce compliance in circumstances where a relevant supervisory body fails to enforce compliance despite its recommendation, solidifies its status as the belle of the New Year's Eve ball.

### Risky business

The Amendment Act took a red pen to provisions relating to "*prominent influential persons*" and replaced them with the more common and internationally aligned parlance of politically exposed persons.

Schedule 3A, previously listing "*domestic prominent public officials*" now lists "*domestic politically exposed persons*" instead. The amendment is more form over substance, as all the usual suspects still appear, however, the limitation placed on prominent positions held in international organisations based in the "*Republic only*" has been disposed of.

## FICA Forecast: Storm warning, grey on the horizon

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Schedule 3B, previously listing “foreign prominent public officials” now lists “foreign politically exposed persons”. Again, all the VIPs were invited to the party.

To address the FATF’s critique, both schedules have done away with the outer time limit applicable to holding a prominent position, previously “the preceding 12 months”, as a factor to determine politically exposed status. This may result in AIs having to now apply enhanced due diligence measures for a multitude of their existing clients due to prominent roles held decades ago.

Prominent influential persons have not been altogether banished, though. These were transplanted from Schedule 3A and can be found lurking in Schedule 3C, which targets private sector actors. The outer time limit applicable to holding a prominent influential position remains unchanged as “the preceding 12 months”.

### The more the merrier

The investigative division of the Auditor General has been included in the definition of “authorised officers” contemplated in FICA.

The above inclusion ties in with, amongst others, the FIC’s information sharing function to make information it collects and produces available to investigative bodies to facilitate law enforcement.

To not reveal its entire hand, certain safeguards are in place to restrict access to information by authorised officers to circumstances where the FIC reasonably believes such information is required to investigate suspected unlawful activity.

### It’s not over until ...

The Amendment Act is evidently one of many measures adopted to address the deficiencies identified in the FATF’s Mutual Evaluation Report, with the aim of aligning South Africa’s anti-money laundering framework with international best practice.

If the FATF’s International Co-operation Review Group remains unconvinced ahead of its plenary set

to take place on 22–24 February 2023, South Africa will be subjected to increased monitoring or “grey listing”. When the FATF places a jurisdiction under increased monitoring, it means the country has committed to resolve the strategic deficiencies identified in relation to countering money laundering, terrorist financing and financing of proliferation.

This places it one step away from the “black list”, in which countries are called upon to apply counter-measures (likely in the form of sanctions) to protect the international financial system from the ongoing financial crime risk posed by the country.

And so, for those of us who have lived with FICA-like sands through the hourglass, whether the amendments are sufficient to fend off South Africa’s grey listing for the remaining days of our lives is the ultimate cliff hanger.

Find out more about the implications of grey listing in our next Compliance Bulletin.

**Krevaria Pillay and Tiffany Alves**

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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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