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INTRODUCTION

The Financial Intelligence Centre Act 38 of 2001 completes the broad legislative framework for money laundering control in South Africa. Core provisions of the Act came into effect on 1st February, 2002 thereby establishing the South African Financial Intelligence Centre (FIC), the Money Laundering Advisory Council (MLAC) and enabling the drafting of the regulations under the Act. It is envisaged that the other provisions of the Act, notably those that create customer identification, record-keeping and other compliance obligations, will enter into effect as soon as the relevant regulations are finalised and the FIC is operational. This paper provides a brief overview of the existing money laundering law in South Africa and discusses the core provisions of the Financial Intelligence Centre Act.

SOUTHAFRICAN MONEY LAUNDERING OFFENCES

Although persons who intentionally involve themselves in laundering can be prosecuted in terms of the South African common law as accessories after the fact in respect of the underlying offences, South Africa followed the international approach in the 1990s and created a statutory framework to increase the reach of its criminal law relating to laundering.

The first statutory laundering offences were introduced by the Drugs and Drug Trafficking Act 140 of 1992. These offences were restricted to proceeds of drug-related crimes. Largely as a result of the restricted ambit of these provisions they did not prove effective in practice. In 1996 the Proceeds of Crime Act was promulgated. This Act broadened laundering offences to proceeds of all types of crimes and also provided for confiscation of proceeds of crime upon conviction of the criminal.

In 1998 the South African government decided to introduce extraordinary measures against organised crime. A Prevention of Organised Crime Bill was drafted, which provided for particular offences relating to organised crime and street gang activity and for the introduction of American-style civil forfeiture. The Bill also contained amendments to the Proceeds of Crime Act that broadened the scope of its money laundering provisions and addressed constitutional concerns regarding some of its more draconian criminal confiscation provisions. During the parliamentary passage of the Bill it was decided to repeal the Proceeds of Crime Act and to re-enact its provisions, as amended in accordance with the proposals contained in the Bill, as part of the new Act. This process resulted in the Prevention of Organised Crime Act 121 of 1998 (POCA) which came into effect on 21st January, 1999. Apart from repealing the Proceeds of Crime Act, the Act also repealed the relevant provisions of the Drugs and Drug Trafficking Act. The provisions creating money laundering offences were therefore consolidated in one Act. POCA also criminalises certain acts relating to street gangs and organised crime syndicates and regulates criminal confiscation of proceeds of crime and civil forfeiture of proceeds and instrumentalities of crime. Despite the name of the Act the provisions relating to money laundering, criminal confiscation and civil forfeiture apply to the proceeds of all types of offences, whether committed by organised crime syndicates or individuals acting on their own.

The laundering provisions of POCA are some of the broadest in force internationally. In keeping with international standards, it creates the normal laundering offences by criminalising any
act in respect of proceeds of crime which is likely to have the effect of concealing or disguising the nature, location or movement of the proceeds of crime or which is likely to assist a criminal to avoid prosecution or to remove or diminish such proceeds. It also criminalises the rendering of assistance to another person to enable him or her to benefit from crime and criminalises the acquisition, possession or use of proceeds of crime of another. It furthermore creates a whistle-blowing offence and puts an obligation on every person carrying on business and every employee of a business to report any transaction, whether it was completed or not, which is suspected of having involved proceeds of crime or of facilitating the transfer of such proceeds.

Although the general tenor of these provisions is standard when measured against the laws of leading international jurisdictions, their ambit is not. First, these offences can be committed either intentionally or negligently. A person will commit an offence intentionally when he proceeds to act while he actually realises that the transaction involves proceeds of crime or when he wilfully chooses to be blind to the facts. The offences will be committed negligently if the person negligently fails to appreciate the true nature of the property involved in the transaction. In terms of POCA a person acts negligently if he fails to form conclusions which would have been formed by a reasonably diligent and vigilant person having both the general knowledge, skill, training and experience that may reasonably be expected of a person in his position and the general knowledge, skill, training and experience that he or she in fact has.

Second, the laundering offences are not confined to proceeds of drug-related or serious offences, but can be committed in respect of the proceeds of any type of offence, whether committed in South Africa or elsewhere, whether committed before or after the commencement of POCA and irrespective of the amount involved.

Third, although the majority of offences can only be committed by third parties who facilitate the laundering of proceeds of another, the main laundering offences can be committed by the criminal who committed the underlying offence. Every act that the criminal commits in an attempt to hide, change or spend the proceeds can therefore constitute a laundering offence.

Fourth, the Act requires the reporting of transactions that are suspicious because they may involve proceeds of crime or may facilitate the transfer of such proceeds, irrespective of the nature of the predicate offence or the amount involved.

Fifth, the penalties for these offences are harsh. If the laundering offence was committed in respect of proceeds of crime in general, the maximum sentence is R100m or 30 years. If it was committed in respect of the proceeds of racketeering, the maximum sentence is R1bn or life imprisonment. At the current exchange rate these amounts are respectively US$10m and US$100m.

The broad ambit of these provisions ensures that law enforcement authorities can apply them with ease. Unfortunately their effectiveness has been undermined by the fact that the general money laundering control legislation took a number of years to be finalised. As a consequence, the offences had to be investigated and prosecuted although South Africa did not have a financial intelligence unit and while it lacked general legislation that required financial institutions to identify their clients and to maintain anti-laundering compliance and training programmes. The long-awaited Financial Intelligence Centre Act closes these important gaps and will ensure that the criminal provisions can be applied more effectively.

Despite these gaps in the money laundering control framework, a number of important successes were achieved. More than 2,500 suspicious transaction reports have been filed with the South African Police Service since 1997. Investigations into statutory laundering offences committed in terms of the Proceeds of Crime Act resulted in the first two convictions for statutory
laundering in 2001.25 A further eight persons were committed as accessories after the fact on the strength of their involvement in a laundering operation.26 The first conviction for statutory laundering under POCA was handed down on 12th April, 200227 and a number of further prosecutions are in their final stages. The prosecution rate is set to rise because a Proceeds of Crime Investigation Desk was established at the Commercial Branch Head Office of the South African Police Service on 1st January, 2002. This Desk will receive, evaluate, analyse and distribute the suspicious trans- action reports and other relevant information which is sent to the Commercial Branch. The Desk will improve the ability of the South African Police Service to process and investigate laundering reports as well as relevant information and intelligence.

CURRENT MONEY LAUNDERING COMPLIANCE SYSTEMS

Although South Africa lacked a general money laundering control framework, important building blocks of a compliance system have been in place for some time.

South Africa, for instance, has a strict exchange control regime.28 The South African financial community is therefore accustomed to paying particular attention to international transactions with a view to determining their compliance with exchange control regulations. This system has certainly made South Africa a less attractive destination for foreign criminals.

The gambling industry provides an example of an industry that is subject to a number of money laundering control obligations. Provincial gaming laws, for instance, prohibit certain cash transactions by casinos,29 require casinos to report gaming transactions that involve amounts in excess of threshold amounts to the provincial gaming boards30 and compel casinos to identify certain clients.31 The rules of the JSE Securities Exchange also create relevant obligations for exchange participants. For instance, stockbrokers are required to identify their clients, to verify prescribed particulars and to maintain compliance functions.32 The Exchange also maintains a surveillance department that monitors compliance with its rules.

However, the sector with the most building blocks of a compliance system in place is the banking sector. Banks are required in terms of common law to identify and verify prospective clients who want to open bank accounts.33 The regulations under the Banks Act 94 of 1990 furthermore compels a bank to appoint a compliance officer with senior executive status in the bank and to maintain an independent and adequately resourced compliance function. Regulation 48 requires banks to implement and maintain policies and procedures to guard against the bank being used for purposes of market abuse and financial fraud, including insider trading, market manipulation and money laundering. As a minimum these policies and procedures must be adequate, inter alia, to ensure compliance with relevant legislation, to facilitate cooperation with law enforcement agencies, to identify customers and, in particular, to recognise suspicious customers and transactions, to provide adequate training and guidance to relevant staff and to report suspicious transactions. Any money laundering activity in which a bank was involved and which was not identified and reported timeously, must be reported to the Registrar of Banks in terms of Regulation 46.

Many other non-banking financial institutions in South Africa, for instance the main insurance companies and foreign exchange dealers, also have money laundering compliance programmes. These programmes were mainly developed by internal audit, legal or compliance divisions who often relied on the support of organisations such as the Money Laundering Forum34 and the Compliance Institute of South Africa.35
THE FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001 (FICA)

The origins of FICA can be traced back to August 1996 when the South African Law Commission published a Money Laundering Control Bill as part of a report entitled Money laundering and related matters. The Bill provided for regulatory structures and mechanisms to combat money laundering. However, the government did not take immediate action on the legislation. In 1998 the Department of Finance appointed a task team to advise it on the appropriateness of the Bill. The Department of Finance produced a new Financial Intelligence Centre Bill based on the recommendations of the Task Team. Further consultation with, especially, other government departments took place before the Bill was finally approved by Cabinet and submitted to Parliament in 2001. After much deliberation, public comment and extensive amendment the legislation was passed and it was signed by the President on 28th November, 2001. However, its provisions will enter into effect on dates fixed by the President by proclamation. The first such proclamation was published in January 2002. As a consequence the provisions regarding the establishment of the Financial Intelligence Centre and the Money Laundering Advisory Council as well as provisions that enable the writing of the regulations under the Act came into effect on 1st February, 2002.

Apart from providing for the establishment and operation of the Financial Intelligence Centre and the Money Laundering Advisory Council, FICA creates money laundering control obligations and regulates access to information. These obligations are primarily applicable to accountable institutions although some obligations extend to reporting institutions, to all persons involved in businesses and to international travellers. Accountable institutions include, inter alia, attorneys, estate agents, banks, long-term insurers, foreign exchange dealers, investments advisers and money remitters. Only two reporting institutions are listed in FICA, namely persons dealing in motor vehicles, as well as persons dealing in Krugerrands.

Although the reach of FICA appears clear at first glance, it may prove quite difficult to ascertain whether a particular person or business qualifies as an accountable institution and, if so, the extent to which an individual should comply with the Act. For instance, the list of accountable institutions in Schedule 1 to FICA lists as such an `attorney as defined in the Attorneys Act, 1979 & Act No. 53 of 1979'). Section 1 of the Attorneys Act defines an attorney as `any person duly admitted to practise as an attorney in any part of the Republic'. As a result, attorneys who are not currently practising but who are academics or legal advisers are also brought within the ambit of FICA. They are therefore saddled with the onerous compliance obligations that are created by FICA, such as the appointment of a compliance officer and the drafting of internal compliance rules. The definition also fails to make adequate provision for attorneys who practise in firms or in companies. The compliance obligations should attach to the firm or company rather than to every attorney individually in that firm or company.

The definition of accountable institution also includes any person `that invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act, 1988 & Act No. 57 of 1988').' This Act regulates specific aspects of the conduct of trustees. The consequence of this definition is that every trustee of a trust mortis causa will also be saddled with the onerous compliance duties.

It is improbable that such unfortunate consequences as those outlined above were intended by the legislature. They will hopefully be addressed by means of amendments or softened by means of exemptions and/or the regulations under FICA.
THE FINANCIAL INTELLIGENCE CENTRE (FIC)

The principal objective of the FIC is to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities. Other objectives of the FIC include:46

a) making information collected by it available to investigating authorities, the intelligence services and the South African Revenue Service (SARS) to facilitate the administration and enforcement of the laws of South Africa; and

b) exchanging information with similar financial intelligence units in other countries regarding money laundering activities.

The FIC will collect, retain, compile and analyse all information disclosed to it and obtained by it in terms of the Act. It will not investigate criminal activity, but will provide information to, advise and cooperate with intelligence services, investigating authorities and SARS who should carry out such investigations.47

Although the FIC must monitor and give guidance to accountable institutions, supervisory bodies and other persons regarding the performance of their duties and their compliance with FICA,48 the Act does not empower the FIC to supervise the accountable institutions. The supervisory functions will be performed by the relevant supervisory bodies listed in Schedule 2 to FICA.49 The list includes the Financial Services Board, the Reserve Bank, the Registrar of Companies,50 the Estate Agents Board, the Public Accountants and Auditors Board, the National Gambling Board, the JSE Securities Exchange and the Law Society of South Africa.

The supervisory model, which was fashioned by FICA, is awkward. It requires the FIC to provide some guidance to accountable institutions and to monitor them, while entrusting the supervisory powers to the supervisory bodies.51 The model creates potential for territorial disputes between the FIC and the supervisory bodies and also among some of the bodies themselves. Whether the model will prove effective in practice will depend on the quality of the working relationships that can be formed between the different parties. Consideration will also have to be given to the current powers and capacities of the supervisory bodies to ensure that they have the ability to perform the functions envisaged in FICA. It will also be important to address the regulation or supervision of those accountable and reporting institutions do not fall within the current ambit of any of the listed supervisory bodies. Appropriate supervisory bodies for these institutions will have to be identified or created and designated as such, or the FIC will have to be given the necessary powers to supervise anti-laundering compliance by those institutions.

FICA furthermore creates a special relationship between the FIC and SARS. The FIC data will assist SARS to combat tax evasion and to collect taxes more effectively. In fact, s. 29 (suspicious and unusual transactions) explicitly requires all businesses to report any transactions that may be relevant to the investigation of any evasion or attempted evasion of a duty to pay a tax, levy or duty under any legislation that is administered by SARS.52 SARS, in turn, is required by FICA to divulge certain information relating to the possible abuse of an accountable institution for laundering, or its possible involvement therein, to the FIC.53 However, SARS is allowed by s. 36(2) of FICA to make reasonable procedural arrangements and to impose reasonable safeguards to maintain the confidentiality of the information which is disclosed in terms of FICA.
THE MONEY LAUNDERING ADVISORY COUNCIL (MLAC)

The MLAC will advise the Minister of Finance on policies and best practices regarding the combating of money laundering activities as well as the exercise by the minister of his powers under FICA. It will also advise the FIC concerning the performance of its functions and act as a forum in which the FIC, associations representing categories of accountable institutions, organs of state and supervisory bodies can consult one another. The MLAC is one of the parties that must be consulted before the minister may make, repeal or amend regulations under FICA, amend the lists of accountable institutions, supervisory bodies or reporting institutions or exempt anyone from compliance with provisions of FICA.

The MLAC will primarily consist of various government representatives and representatives of categories of accountable institutions and supervisory bodies.

MONEY LAUNDERING CONTROL OBLIGATIONS

FICA imposes various money laundering control obligations on a variety of persons and accountable institutions. These obligations include a duty to identify clients; a duty to keep records of business relationships and single transactions; a duty to report certain transactions; a duty to appoint a compliance officer and a duty to train employees on their money laundering control obligations.

These obligations are primarily imposed on accountable institutions, although some reporting obligations also extend to reporting institutions, persons involved in businesses and international travellers in general.

Duty to identify clients

Section 21(1) of FICA requires an accountable institution to establish and verify the identity of a prospective client before establishing a business relationship or concluding a single transaction with that client.

Accountable institutions are also required to establish similar facts in relation to clients that are parties to business relationships that were established before FICA took effect. In addition, the institution must trace all accounts at the institution that are involved in transactions concluded in the course of that relationship. In terms of s. 82&2)&1) this duty in respect of existing clients will only take effect one year after the general identification duty in s. 21(1) takes effect. Accountable institutions are therefore allowed a year to identify their existing clients who still have active business relationships with the institution. It seems as if the large banks and insurance companies will find it very difficult to comply with this obligation in such a relatively short period of time. Calls have therefore been made for an amendment to the legislation that will provide the larger accountable institutions with a more realistic timeframe within which this obligation could be met or, alternatively, for their complete or partial exemption from this obligation in the regulations.

FICA compels accountable institutions to establish the identity of their clients. Accountable institutions are not explicitly required to probe further and to establish the sources of the funds of a client, the occupation or business of that client, the client's net worth etc. Whether such information should be regarded as essential for customer identification in the banking industry, is currently being considered by the Basel Committee on Banking Supervision. However, if an institution has only the bare details of a client, it will lack information that could be used to profile that specific client and to correctly identify a suspicious and unusual transaction that may be concluded by that client.
Duty to keep records

Accountable institutions are required to keep records of specific details regarding clients, agents and principals as well as their transactions63 for a period of at least five years.64 The FIC may have access to the records kept by or on behalf of the accountable institution. If the records are not by nature public records, access may be obtained by virtue of a warrant issued in chambers.65

Reporting duties

FICA creates a number of reporting duties relating to transactions involving cash amounts in excess of a prescribed amount, suspicious and unusual transactions, the conveyance of cash across the borders of South Africa and electronic transfers of money by accountable institutions. These threshold amounts are to be prescribed by regulation.

Cash transactions

Prescribed particulars of every transaction to which an accountable institution or a reporting institution is party and which involves the payment or receipt by the institution of an amount of cash exceeding a prescribed amount, must be furnished to the FIC within a prescribed period.66 'Cash' is defined in s. 1 as coin and paper of South Africa &or of another country if it is designated as legal tender, circulates as, and is customarily used and accepted as a medium of exchange in that country) and travellers' cheques.

A transaction is defined in s. 1 as `a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution'. A transaction with a reporting institution does not constitute a transaction as defined in s. 1 because the definition limits the meaning of `transaction' to transactions with accountable institutions.67 If `transaction' in s. 28 is defined in terms of the definition in s. 1, reporting institutions will not have any reporting obligations in terms of that section. Such a result is clearly contrary to the intention of the legislature as expressed in FICA. It is therefore submitted that the definition of `transaction' should not be applied to s. 28. However, this matter should preferably be addressed by means of urgent amending legislation.

Conveyance of cash to and from South Africa

A person intending to convey an amount of cash in excess of a prescribed amount to or from South Africa must report prescribed particulars concerning that conveyance to a person designated by the minister, before the cash is conveyed. The designated person is then required to send a copy of the report to the FIC without delay.68

Electronic transfers of money to and from South Africa

If an accountable institution sends money in excess of a prescribed amount through electronic transfer across the borders of South Africa, or receives such a sum from abroad, on behalf of or on the instructions of another person, it must report prescribed particulars of that transfer to the FIC within a prescribed period after the transfer.69
Suspicous and unusual transactions

FICA will repeal s. 7 of POCA which currently regulates the reporting of suspicious transactions. It will also substitute the text of s. 7A of POCA with a different text. Section 7A provides that a person who is charged with negligently committing a laundering offence under POCA may validly raise as a defence the fact that he or she reported the transaction as suspicious in terms of s. 7. After these amendments are made, the duty to report suspicious transactions will be regulated by s. 29 of FICA.

Section 7 of POCA and s. 29 of FICA differ in a number of respects, for instance:

(a) Section 7 creates a reporting duty for a person who suspects certain facts while s. 29 applies to a person who has knowledge of certain facts or who suspects such facts.

(b) Section 7 applies to transactions that the business is entering into while s. 29 also extends to transactions that were innocently entered into and even carried out by the business but are now suspect because of knowledge subsequently acquired or a suspicion subsequently formed.

(c) Section 7 reports must be made to a designated person, while s. 29 requires reports to be made to the FIC.

(d) Section 29 has a wider ambit because it extends *inter alia* to transactions that have no apparent business or lawful purpose or that may be relevant to an investigation into the evasion of a tax, duty or levy administered by SARS.

(e) Section 7 transactions must be reported within a reasonable time while s. 29 reports will have to be submitted within a prescribed time after the knowledge was acquired or the suspicion formed.

Grounds for a suspicious or unusual transaction report

FICA creates a very broad category of suspicious or unusual transactions that must be reported and also applies this duty to a broad spectrum of persons.

Any person who carries on a business, who manages or is in charge of a business or who is employed by a business and who knows or suspects certain facts must report the grounds for the knowledge or suspicion and prescribed particulars regarding the transaction to the FIC within a prescribed period after he acquired the knowledge or formed the suspicion. The facts may relate to the following:

(a) The business has received or is about to receive the proceeds of unlawful activities;

(b) a transaction or series of transactions to which the business is a party:
   i. facilitated or is likely to facilitate the transfer of proceeds of unlawful activities;
   ii. has no apparent business or lawful purpose;
iii. is conducted to avoid giving rise to a reporting duty under FICA; or
iv. may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner of SARS; or

(c) the business has been used or is about to be used in any way for money laundering purposes.76

Disclosure
A person who makes a report or must make a report and any person who knows or suspects that a report has been made or is to be made, may only disclose information regarding that report within the scope of that person's powers and duties in terms of legislation, for the purpose of carrying out the provisions of FICA, for the purposes of legal proceedings, or in terms of a court order.77

Offence and defence
Section 69 of FICA provides a special defence to a charge based on the failure to report an unusual or suspicious transaction to the FIC. If a person who is an employee, director or trustee of, or a partner in, an accountable institution is charged with committing an offence under s. 52, that person may raise as a defence the fact that he or she had:

(a) complied with the applicable obligations in terms of the internal rules relating to the reporting of information of the accountable institution;

(b) reported the matter to the person charged with the responsibility of ensuring compliance by the accountable institution with its duties under this Act; or

(c) reported the matter to his or her superior, if any, if:
   i. the accountable institution had not appointed such a person or established such rules;
   ii. the accountable institution had not complied with its obligations in s. 42(3) in respect of that person (copy of the rules were not made available by the institution to that person); or
   iii. the internal rules did not apply to that person.

In essence, s. 69 allows persons not to report a transaction directly to the FIC but to comply with the internal rules of their business that may allow them to report the s. 29 transactions internally to a person or unit who will consider the information and will lodge a report with the FIC if it is warranted. In certain cases an employee may simply report the matter to a superior and, if that can be proved, the person will have a valid defence if he or she is charged with not reporting the transaction to the FIC directly. The defence is limited to persons who are employees, directors or trustees of, or partners in, accountable institutions. An important omission from this list appears to be members of close corporations. However, many such members may qualify as employees and may utilise the defence in that capacity.78

A person with a reporting obligation under s. 29 will often have such an obligation because he or she is involved in a possible laundering transaction. Apart from a defence to a charge under s. 29,
the reporter therefore also requires a valid defence against a charge based on a contravention of the relevant provisions of POCA. FICA will amend s. 7A of POCA to provide such a defence. When this amendment comes into operation, s. 7A will allow a person to raise as a defence the fact that he or she had reported a knowledge or suspicion in terms of s. 29 of FICA if he or she is charged with committing an offence under s. 2(1)&a or &b), 4, 5 or 6 of POCA. In addition, a defence which is similar to the s. 69 internal reporting defence will be inserted by FICA into s. 7A. However, this defence relating to internal reporting will only be available to employees of accountable institutions. As a result, employees of non-accountable institutions will not be able to defend themselves against a charge of money laundering under the specific sections of POCA, by proving that they followed internal procedures or, in the specific cases set out in the provision, that they reported the transaction to their superiors. They will only have such a defence if they reported the transaction directly to the FIC in terms of s. 29 of FICA.

The limited ambit of the new internal reporting defence in s. 7A may also expose some role-players in accountable institutions to liability. The s. 69 internal reporting defence to a charge of non-reporting (s. 52) is available to persons who are employees, directors or trustees of, or partners in, accountable institutions. However, the s. 7A internal reporting defence to a charge of money laundering under specific sections of POCA is only available to employees of accountable institutions. Directors and trustees of, or partners in, accountable institutions who are not also employees of accountable institutions are therefore afforded a defence against a charge of non-reporting if they report internally, but are not shielded from criminal liability for money laundering under POCA. This result is unfortunate and the matter will hopefully be addressed by means of an appropriate amendment to the new text envisaged for s. 7A. In the meantime, it is advisable to ensure that persons associated with accountable institutions and who are not employees of accountable institutions report directly to the FIC, in order to ensure that they enjoy sufficient protection against criminal liability in this respect.

**Reporting - general provisions**

*Request for further information*

A reporter who submitted a report in terms of s. 28 (transaction involving cash in excess of a prescribed amount), s. 29 (unusual and suspicious transactions) or s. 31 (electronic transfer of money across the border) may be requested by the FIC or other specified authorities and officials to furnish them with such additional information concerning the report and the grounds for the report as may reasonably be required to perform their functions (s. 32). The reporter must furnish the information that he has available to the FIC without delay.

*Continuation and suspension of transactions*

A reporter who reports a transaction in terms of s. 28 (transaction involving cash in excess of a prescribed amount) or s. 29 (unusual and suspicious transactions) may continue and carry out the transaction unless the FIC directs the suspension of the transaction. The FIC may issue such a directive in writing after consultation with the institution or person concerned, if it has reasonable grounds to suspect that the transaction is unusual or suspicious as set out in s. 29. The directive may require the institution or person not to proceed with the transaction or any other transaction in respect of funds affected by the particular transaction for a period not exceeding five days, to allow the FIC to make inquiries about the transaction or to inform and advise an investigating authority. Such a directive cannot be issued in respect of transactions that are carried out on a regulated financial market.
Confidentiality and privilege

FICA overrides most of the secrecy and confidentiality obligations in South African law. No duty of secrecy or confidentiality or any other statutory or common law restriction on the disclosure of information affects any duty of an institution, person or SARS to report or to allow access to information in terms of Chapter 3 Part 3 & reporting duties and access to information) of FICA (s. 37(1)). However, this provision does not apply to the common law right to legal professional privilege as between an attorney and an attorney's client in respect of communications made in confidence between:

(a) the attorney and the attorney's client for purposes of legal advice or litigation which is pending or contemplated or which has commenced;

or

(b) a third party and an attorney for purposes of litigation which is pending or contemplated or has commenced (s. 37(2)).

The protection enjoyed under s. 37(2) is wider than the current protection in terms of s. 7&5) of POCA which restricts the legal professional privilege to information communicated to the attorney to enable him to provide advice, to defend the client or to render other assistance to the client in connection with an offence:

(a) of which the client is charged;

(b) in respect of which he has been arrested or summoned to appear in court; or

(c) in respect of which an investigation is being conducted against him or her with a view to institute criminal proceedings.

Protection of reporters, information and evidence

No criminal or civil action can be instituted against an institution, a person or SARS if it complies in good faith with the obligations in terms of Chapter 3 Part 3 (reporting duties and access to information) of FICA or against any person acting on their behalf. A person who made, initiated or contributed to a report that was submitted in terms of s. 28 (transaction involving cash in excess of a prescribed amount), s. 29 (unusual and suspicious transactions) or s. 31 & electronic transfer of money across the border) or who has furnished additional information concerning such a report or the grounds for the report in terms of FICA enjoys protection under s. 38: such a person can give evidence in criminal proceedings arising from the report, but cannot be compelled to do so. Section 39 provides that an official of the FIC may issue a certificate certifying that information specified in the certificate was reported or sent to the FIC in terms of the provisions of FICA requiring reports to be made. That certificate is, subject to the exclusions in s. 38, on its mere
production in any matter before a court admissible as evidence of any fact contained in it of which direct oral evidence would be permissible.87

ACCESS TO INFORMATION

A number of provisions of the Act regulate the access to information by the FIC as well as access to information held by the FIC. Important provisions allowing access to information by the FIC include the following:

(a) An authorised representative of the FIC may, by virtue of a warrant issued in chambers by a magistrate, judge or regional magistrate, examine and make extracts from or copies of records kept under s. 22. These records contain details regarding the identification of the clients, business relationships and single transactions. The warrant is only required if the records are not public records. It may only be issued if there are reasonable grounds to believe that the records may assist the FIC to identify the proceeds of unlawful activities or to combat money laundering activities.88

(b) The FIC may require an accountable institution to advise whether a particular person is or was a client, represented a client or was represented by a client.89

(c) Reporters of transactions may be required to furnish the FIC with additional information regarding the report and the grounds for the report.90

(d) The FIC may apply to a judge for a monitoring order requiring an accountable institution to furnish information to the FIC regarding transactions concluded with the institution by a specified person or transactions conducted in respect of a specified account or facility at the institution. No notice of the application or hearing is given to the person involved in the suspected money laundering activity.91 The order may be issued if there are reasonable grounds to believe that the person engaged or may engage in an unusual or suspicious transaction or that the account was or may be used for such purposes. The order will lapse after three months unless it is extended.92

(e) If a supervisory body or SARS knows or suspects that an accountable institution is wittingly or unwittingly involved in an unusual or suspicious transaction, it must inform the FIC and furnish the FIC with any records regarding that knowledge or suspicion which the Centre may reasonably require to achieve its objectives.93 If the FIC believes that a supervisory body or SARS have such information, it may request the body or SARS to confirm or rebut that belief. If the belief is confirmed, certain information must be provided to the FIC.94 These bodies may make reasonable procedural arrangements and impose reasonable safeguards to maintain the confidentiality of any information.95

Section 40 is the main provision that regulates access to the information held by the FIC. In essence, investigating authorities, SARS and intelligence services may be provided with information on request or at the initiative of the FIC. Information may be provided to foreign entities performing functions similar to those of the FIC, pursuant to a formal, written agreement between the FIC and that entity or its authority.96 The FIC may decide to provide information to an accountable or reporting institution or person regarding steps taken by the FIC in connection with transactions that it reported to the FIC, unless it would be inappropriate to disclose such information. Information may also be supplied to a supervisory body to enable it to exercise its powers and perform its functions in
relation to an accountable institution. In addition, information may be supplied in terms of a court order or in terms of other national legislation. The most important general national legislation regulating an application for access to information is the Promotion of Access to Information Act 2 of 2000. This Act gives effect to the constitutional right of access to information held by public bodies as well as access to information held by private bodies that is required for the exercise or protection of any right. However, the right of access to information is not absolute and the Act lists specific grounds for refusal of access to records.

MEASURES TO PROMOTE COMPLIANCE BY ACCOUNTABLE INSTITUTIONS

FICA creates the normal compliance obligations that are associated with money laundering control systems. It requires every accountable institution to formulate and implement internal rules concerning:

(a) the establishment and verification of the identity of persons which it must identify in terms of FICA;

(b) the information of which record must be kept in terms of FICA;

(c) how and where those records must be kept;

(d) the steps to be taken to determine when a transaction is reportable to ensure that the institution complies with its reporting duties under FICA; and

(e) other matters as may be prescribed by regulation.

An accountable institution must provide training to its employees to enable them to comply with FICA and the relevant internal rules. It must furthermore appoint a person with the responsibility to ensure compliance by the employees of the accountable institution with FICA and the internal rules as well as compliance by the accountable institution with its obligations under FICA.

FICA creates an onerous duty for the person who is appointed to shoulder this responsibility in a company. In general, the responsibility to ensure compliance in a business resides with the management of the business as well as with every employee that has to comply. Compliance officers assist management and the employees to discharge this duty by designing and operating appropriate systems. However, the person appointed under FICA will have the responsibility to ensure compliance by the business. Compliance officers have already indicated an unwillingness to accept this appointment. They are reluctant to shoulder this burden unless they have all the powers and resources that will be required to enable them to ensure compliance. It is probable therefore that the managing directors of many companies will be appointed in terms of FICA as the responsible officers and they will then be assisted by the compliance officer of the business to ensure compliance with FICA.
OFFENCES

FICA gives rise to a large number of offences. The majority of these offences carry a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10m. These offences were generally discussed in context in the general discussions of the provisions above. In addition to those offences, Chapter 4 of FICA also creates the following offences:

(a) Any person who obstructs, hinders or threatens an official or representative of the FIC in the performance of their duties or the exercise of their powers in terms of FICA commits an offence.

(b) Any person who conducts, or causes to be conducted, two or more transactions with the purpose, in whole or in part, of avoiding giving rise to a reporting duty under FICA is guilty of an offence.

(c) Any person who, without authority to do so,
   i. wilfully accesses or causes any other person to access any computer system that belongs to, or is under the control of, the FIC, or any application or data held in such a computer system;
   ii. wilfully causes any computer system that belongs to, or is under the control of, the FIC, to perform or fail to perform a function; or
   iii. wilfully causes a computer system that belongs to, or is under the control of, the FIC, or any application or data held in such a computer system, to be modified, destroyed, erased or the operation or reliability of such a computer system, application or data to be otherwise impaired;
also commits an offence.

SEARCH, SEIZURE AND FORFEITURE

Although POCA regulates general criminal confiscation of proceeds of crime as well as civil forfeiture of such proceeds and instrumentalities, cash that is transported across South Africa's borders may be forfeited under FICA if the required report is not filed.

FICA provides for the seizure of any cash which is transported or is about to be transported across the borders of South Africa if the cash exceeds the prescribed limit and there are reasonable grounds to suspect that an offence under s. 54 (intentional failure to report conveyance of cash in excess of prescribed amount across border) has been or is about to be committed. If a person is convicted of the offence, the court must, in addition to any punishment that may be imposed, declare the cash amount that should have been reported, to be forfeited to the state. A similar duty is imposed on the court if a person is convicted under s. 64 &conducting transactions to avoid giving rise to a reporting duty under FICA). The forfeiture may not affect the interests of any innocent party in the cash or property concerned if that person proves:

(a) that he or she acquired the interest in that cash or property in good faith; and
(b) that he or she did not know that the cash or property in question was:
i. conveyed as contemplated in s. 30(1) or that he or she could not prevent such cash from being so conveyed; or

ii. used in the transactions contemplated in s. 64 or that he or she could not prevent the property from being so used, as the case may be.\(^{110}\)

FICA also provides that innocent parties who meet the above criteria may approach the court within three years of the forfeiture order in order to retrieve their property or interests or to receive compensation. Although FICA provides protection for the rights and interests of innocent third parties, it is important to note that the protection does not extend to interested parties who were merely unaware of the intention to commit an offence. It is limited to parties who can prove that they did not know that the cash or property was to be conveyed across the borders of South Africa or used in transactions contemplated in s. 64.

AMENDMENTS AND EXEMPTIONS

FICA provides procedures in terms of which the minister may make amendments to the lists of accountable institutions (Schedule 1), supervisory bodies (Schedule 2) and reporting institutions (Schedule 3).\(^{111}\) The procedures allow for consultation and additions or deletions from the list requires parliamentary approval.

The minister may also, after consulting the MLAC and the FIC and on conditions and for a period determined by the minister, exempt a person, an accountable institution or a category of persons or accountable institutions from compliance with a provision of FICA. Such an exemption may also be granted in respect of categories of transactions. Proposed exemptions must be tabled in Parliament before publication in the Gazette. An exemption may be withdrawn or amended by the minister after consultation with the MLAC and the FIC.

CONCLUSION

FICA and POCA provides a comprehensive legislative framework for money laundering control in South Africa. Although FICA ensures that the South African legislation will be substantially compliant with the 40 Recommendations of the Financial Action Task Force (FATF), it is important to appreciate that the South African money laundering control model has many unique elements and that it is more comprehensive than those of many of the members of the FATF. These unique elements were specifically included to ensure that money laundering control could be implemented effectively in South Africa. However, the practical effectiveness of the legislative framework will be determined by the way in which the legislation is implemented.

Some of the provisions of FICA may be open to challenge in terms of the progressive Bill of Rights of South Africa. Constitutional litigation may follow in respect of issues such as the infringement of privacy and the breach of confidentiality under FICA, the information sharing provisions that allow the South African Revenue Service to disclose certain information of tax payers, the proportionality concerns that are raised by the forfeiture provisions of FICA and a denial of access to sensitive information and records held by the FIC.\(^{112}\) The success of such challenges will depend largely on the way in which the relevant powers are exercised by relevant bodies. If they are mindful of the civil liberties issues that the legislation raises, they may circumvent potential constitutional pitfalls by refraining from exercising the more controversial powers that FICA affords them.
The effectiveness of the FIC will also be determined by the relationships that it forms with the main role players in the criminal justice system, with the supervisory bodies and also with its international counterparts. If the FIC succeeds in creating facilitative and open working relationships with these parties, it will become a vital support unit for law enforcement in general in the criminal justice system.

However, probably the most important relationship that must be nurtured is the relationship between the FIC and the business community. The leading members of the business community have already shown their commitment to money laundering control. Their businesses have maintained money laundering compliance programmes in the absence of statutory requirements to have such programmes. The South African criminal justice system does not have sufficient resources to enforce compliance by all businesses. However, it may harness the goodwill of the business community, its commitment to the principles of good corporate governance and corporate citizenship and its will to combat crime in South Africa and coopt the community into a self-regulatory partnership. A partnership approach was followed in the drafting of the legislation. If this partnership is sustained and fostered, it will provide a dynamic basis for effective money laundering control in South Africa.
REFERENCES

1) Notice 6 of 2002, published in Government Gazette 23078 of 31st January, 2002. In terms of the notice the following sections of the Act came into operation: ss. 1, 2±16, 17±20, 72±82 (except s. 79).

2) Representatives of the FIC initially indicated that they aim to finalise the regulations by June 2002. Although key portions of the regulations will be at an advanced stage in June 2002, it was clear from the outset that this deadline was too ambitious in view of the highly consultative drafting process that they embarked upon. The deadline was generally viewed as an indication of the seriousness with which the National Treasury approached its obligations under FICA. The first quarter of 2003 seems to be a more realistic deadline.


5) The Drugs and Drug Trafficking Act 140 of 1992 also provided for confiscation orders relating to proceeds of relevant offences, forfeiture of the instrumentalities of those offences as well as relevant international assistance. See, in general, de Koker, L. (1997) ‘South African Money Laundering Legislation - Casting the Net Wider’, Journal for Juridical Science, Vol. 1, No. 17, pp. 23±25. When general provisions relating to confiscation were enacted in the Proceeds of Crime Act 76 of 1996 the confiscation provisions of the Drugs and Drug Trafficking Act were repealed. The international assistance provisions were repealed by the International Cooperation in Criminal Matters Act 75 of 1996. However, forfeiture of the instrumentalities after a conviction for a drug offence is still possible in terms of ss. 25±27 of the Drugs and Drug Trafficking Act 140 of 1992.


9) B118±98.

10) See de Koker, L. and Pretorius, J. L. ‘Confiscation Orders in Terms of the Proceeds of Crime Act - some Constitutional Perspectives', in de Koker and Henning, ref. 8 above, p. 96.


12) This consolidation partially addressed the criticism about the diffusion of money laundering legislation which was expressed in de Koker, ref. 5 above, p. 33. POCA contained all the relevant laundering legislation and until the Financial Intelligence Centre Act 38 of 2001 was promulgated. As a result the anti-laundering provisions are again split between two Acts.


14) See de Koker, ref. 3 above; Smit, ref. 7 above, pp. 36±49.
15) Section 4 of POCA.
16) Sections 5 and 6 of POCA.
17) Section 75(1) of POCA.
18) Section 7 of POCA.
20) Section 1(2) of POCA.
21) Section 1(3) of POCA. This statutory standard for negligence was partially inspired by s. 214 of the Insolvency Act 1986 of the UK. See, in this respect, de Koker, L. (1996) Die roekelose en bedrieglike dryf van besigheid in die Suid-Afrikaanse maatskappiereg, LLD thesis, UOFS, pp. 283±284. For the initial recommendation in this regard, see deKoker, ref. 5 above, p. 36.
22) See FATF, ref. 19 above, para. 24, for examples of countries that have specific lists of predicate offences, for example Canada (45 offences), Greece (20 offences) and the USA (more than 100 offences) and countries that link laundering offences to predicate offences with a specified minimum period of imprisonment, for example, Austria (more than three years) and New Zealand (more than five years).
23) FATF, ref. 19 above, para. 69: `Some countries also limit the criminality to which the suspicion must be linked. Thus in Greece, a suspicious transaction report (STR) is only made if there is a suspicion of money laundering, while in France it must be linked to drug trafficking or organised crime.’ The reporting obligation will expand even further under FICA. See `Suspicious and unusual transactions' below.
24) See de Koker, ref. 4 above, Annexure 3, &http://general.rau.ac.za/law/English/CenSec_2.htm) for statistics.
25) de Koker, ref. 4 above, paras 4.1 and 4.4, &http://general.rau.ac.za/law/English/CenSec_2.htm) for brief discussions of the two cases.
26) S v Dustigar (Case no. CC6/2000 &Durban and Coast Local Division) unreported). This first statutory laundering conviction was handed down in this matter.
27) S v Gayadin (Case no. 41/900/01 &Durban Regional Court) unreported). The accused operated several illegal casinos and admitted to laundering the proceeds of the illegal gambling activity by entering into arrangements with certain people to hide the proceeds in offshore bank accounts in the Isle of Man and Jersey. More than R11m were transferred to accounts in these jurisdictions. This information was supplied by the prosecutor, Adv Anton Steynberg (Deputy Director of Public Prosecutions, Directorate of Special Operations, Kwa-Zulu Natal). Adv Steynberg also prosecuted the laundering charges in S v Dustigar.
28) The relevant rules are contained in the regulations under the Currency and Exchanges Act 9 of 1933. The exchange control system is administered by the Exchange Control Department of the South African Reserve Bank. Although the controls have been relaxed in the past few years, they are still fairly strict.
29) Cf. for example, Kwa-Zulu-Natal Gambling Regulations reg. 98 which prohibits inter alia casinos from exchanging cash for cash other than to enable clients to participate in gambling where cash is used as the stake or to convert such cash after participation in gaming.
30) Cf. for example, Kwa-Zulu-Natal Gambling Regulations reg. 99, which requires a host of specified gaming transactions that involved more than R25,000 to be reported. Reg. 101 requires all relevant cash transactions of a client during a 24-hour period to be aggregated for purposes of such a report.
31) Cf. for example, Kwa-Zulu-Natal Gambling Regulations reg. 100 that requires a casino, prior to concluding a transaction contemplated in reg. 99, to obtain or reasonably attempt to obtain
the client's particulars and to verify certain details. Maintenance of appropriate internal control procedures are also required (reg. 102). Provisions similar to regs 98±102 can, for instance, be found in the Mpumalanga Gaming Regulations (regs 58±62) and the Western Cape Gambling and Racing Regulations (regs 46±48).

32) See Rule 5.15 (Client acceptance and maintenance procedures) of the JSE Securities Exchange Rules.

33) See, for instance, KwaMashu Bakery Ltd v Standard Bank of South Africa Ltd 1995 1 SA 377 (D); Powell v ABSA Bank Ltd (t/a Volkskas Bank) 1998 2 SA 807 (SEC); Energy Measurements (Pty) Ltd v First National Bank of South Africa Ltd 2001 (3) SA 132 (W) and Columbus Joint Venture v ABSA Bank Ltd 2002 1 SA 90 (SCA).

34) The Forum is a non-governmental non-profit organisation, which assists its members to develop a thorough understanding of money laundering control, to network, to exchange information and to share experiences. The Forum was founded in 1995 by individuals who were concerned about money laundering control in South Africa. The Forum has assisted many of its members to establish money laundering control functions in their respective industries and to give input into the drafting of the relevant legislation. The Forum has been chaired since its formation by Ursula M'Crystal and currently has a membership (individual and corporate) of about 300.

35) The Compliance Institute of South Africa is an association for compliance professionals. See http://www.compliance-sa.org. The Institute has been very active in formulating industry standards relating to money laundering control and assisting in the development of relevant training courses. One example is the RAU Certificate programme in money laundering control. This six-month tertiary programme was developed for compliance officers and is accredited by the Compliance Institute of South Africa. The sixth programme will be presented in 2002.


39) Smit, ref. 7 above, p. 59.


41) See n. 1 for further particulars.


43) Section 1 read with Schedule 1 to FICA.

44) Section 1 read with Schedule 3 to FICA.
45) The Attorneys Act 53 of 1979 uses the terms 'practice', 'practitioner' and even 'practising practitioner' (s. 78(1)) to refer to admitted and enrolled attorneys who are practising.

46) Section 3. Mr Murray Michell, Adv Pieter Smit and Mrs Ursula M'Crytal of the FIC read an earlier draft of this paper and made helpful comments, especially regarding the FIC and the MLAC

47) Section 44.

48) Section 4.

49) Sections 44 and 45.

50) It is not clear why the Registrar of Companies was listed as a supervisory body. The Registrar can at best be described as a regulator of companies. The Registrar primarily ensures that companies are correctly registered, that their public information is correctly filed and that their public records in Pretoria are maintained in accordance with the Companies Act 61 of 1973. However, if the Registrar has to supervise compliance with the provisions of FICA (as required by s. 45(1)) by all accountable institutions that are companies, his field of authority will overlap substantially with those of the other supervisory bodies. Furthermore, the effectiveness of the Registrar as a supervisory body may be doubted. The Nel Commission of Inquiry into the Affairs of the Masterbond Group and Investor Protection in South Africa (1997) First Report, Vol. 1, p. 40, commented as follows on the Companies Registration Office: 'The factual situation is that the Companies Registration Office has become little more than an antiquated filing room which cannot cope with the demands of modern commerce. The Registrar does not have sufficient staff with the necessary expertise to enable him to carry out the functions conferred upon him by the Act and has thus no hope of determining whether a prospectus contains a fair presentation of the state of affairs of the company concerned. Not only does the Registrar not have an inspectorate with the necessary expertise, he has no inspectorate at all.' Although great strides have been made since 1997 to improve electronic access to, and communication with, the Office and the management of the Office has been restructured in the Department of Trade and Industry, it still lacks an own inspectorate. It is difficult to see how the Registrar will carry out the investigations envisaged in s. 45 of FICA. (This question also arises in respect of the other supervisory bodies that lack an investigative capacity.) Last, if it is maintained that the Registrar was indeed correctly listed as a supervisory body, it will be difficult to justify the exclusion of the Registrar of Close Corporations from the list of supervisory bodies. The Registrar of Companies regulates about 300,000 companies while the Registrar of Close Corporations regulates more than 600,000 close corporations.

51) Section 45(1) stipulates that each supervisory body will be responsible for supervising compliance with the provisions of FICA by the accountable institutions regulated or supervised by it. Section 72 affirms that FICA does not detract from any of the existing powers and duties of supervisory bodies in respect of the accountable institutions which they supervise. If the FIC refers a suspected offence by an accountable institution to a supervisory body, it must investigate the matter and may, after consultation with the FIC, take such steps as it considers appropriate. If a supervisory body fails to take adequate steps to ensure that a suspected contravention ceases or that the suspected failure is rectified, the FIC may, after appropriate consultation, take steps within the scope of its powers to remedy the matter. However, FICA does not provide the FIC with a set of appropriate supervisory powers that may be exercised under those circumstances. In general, the FIC may institute and defend legal actions in its own name and engage in any lawful activity, whether alone or together with any other organisation in South Africa or elsewhere, aimed at promoting its objectives (s. 4). Such powers will have to be employed creatively to remedy those matters that supervisory bodies fail to address.

52) See 'Grounds for a suspicious or unusual transaction report' below.
53) Section 36. SARS may also follow the new procedure outlined in s. 19 of the Second Revenue Laws Amendment Act 60 of 2001 and apply ex parte to a judge in chambers for permission to disclose information relating to money laundering or any other serious offence to the police or to the National Director of Public Prosecutions. Sections 36 and 19 allow SARS to disclose information that was previously protected by its secrecy and confidentiality obligations.

54) Section 18.

55) See `Amendments and exemptions' below.

56) Section 19. MLAC will have to be representative in order to be an effective consultative forum. However, some of the accountable institutions do not have clearly defined representative bodies or are fractured and have a number of representative bodies. MLAC will have to be steered between the dangers of under-representation and over-representation. In addition, membership will have to be carefully controlled to ensure that it can still act effectively as an advisory body.

57) Section 21(1). Identification and verification of the identity of the principal and the authority of the agent are also required when the client acts or appears to be acting on behalf of someone else. When an agent acts on behalf of the client the agent's identity and authority must be established (s. 21(1)). A 'business relationship' is defined as an arrangement between a client and an accountable institution for the purpose of concluding transactions on a regular basis. A 'single transaction' refers to a transaction that is not concluded in a business relationship and a 'transaction' is a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution (s. 1).

58) Section 21(2).

59) An accountable institution will commit an offence if it performs any act that gives effect to a business relationship or single transaction without identifying the client or person concerned as required by s. 21(1) and s. 46(1). An accountable institution that concludes any transaction in the course of a business relationship that existed before FICA took effect without identifying the client or person concerned and tracing the relevant accounts as required by s. 21(2) will also commit an offence. These offences carry a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10m (s. 68).

60) Mr Stuart Grobler of the Banking Council of South Africa confirmed that they have proposed a blanket exemption or, alternatively, an exemption of all accounts and transactions involving less than R1m as well as a 24-month period before the obligation must be met.


62) See s. 29 and 'Grounds for a suspicious or unusual transaction report' below.

63) Section 21(2). These records may be kept in electronic form (s. 22(2)). Accountable institutions are allowed to outsource the duty to keep these records, but are liable for any failure by the third party to comply with the requirements of the Act (s. 24). If an accountable institution appoints a third party to perform such duties it must provide the FIC forthwith with prescribed information regarding the third party (s. 24(3)).

64) Records relating to the establishment of a business relationship must be kept for at least five years from the date on which the business relationship is terminated while records relating to a transaction must be kept for at least five years from the date on which the transaction is concluded (see s. 23). An accountable institution that fails to keep a record of information in terms of s. 22(1) & record to be kept of business relationship and transactions; or keep such records in terms of s. 23 (period for which records must be kept) or s. 24(1) (records may be kept by third parties), comply with the provisions of s. 24(3) (providing the FIC with the details of the third party appointed to keep the records); or give all reasonable assistance to a representative of the FIC in accordance with s. 26(5) (FIC's access to records), commits an
offence (ss. 47 and 49). Any person who wilfully tampers with a record kept in terms of s. 22 (record to be kept of business relationship and transactions) or s. 24(1) (records may be kept by third parties); or destroys such a record, otherwise than in accordance with s. 23 (period for which records must be kept), commits an offence (s. 48). These offences carry a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10 million (s. 68).

65) Section 26.

66) Section 28. An accountable institution or reporting institution that fails, within the prescribed period, to report to the FIC the prescribed information in respect of a cash transaction in accordance with s. 28 commits an offence (s. 51). The offence carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10m (s. 68).

67) The same argument applies in respect of non-accountable institutions and the obligation to report suspicious transactions under s. 29 of FICA.

68) Section 30&2). Any person who wilfully fails to report the conveyance of cash into or out of South Africa in accordance with s. 30(1) commits an offence (s. 54). It is important to note that this offence can only be committed by a person who wilfully fails to report the conveyance. This offence carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10m (s. 68). If the person referred to in s. 30(2) fails to send a report regarding the conveyance of cash to the FIC in accordance with that section, he commits an offence under s. 55. This offence carries a penalty of imprisonment for a period not exceeding five years or a fine not exceeding R1m (s. 68(2)).

69) Section 31. An accountable institution that fails to comply with this obligation commits an offence (s. 56). This offence carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10m (s. 68).


71) Section 79 read with s. 82(2) and Schedule 4.

72) The provision of FICA that will effect this amendment is not yet in force. In terms of s. 81 of FICA reports must be submitted in terms of s. 7 of POCA until s. 79 of FICA comes into operation. After the commencement of s. 79, any investigation of a prior offence in terms of s. 7 of POCA and any prosecution for such an offence may continue as if s. 79 had not come into operation (s. 81(2) and (3)).

73) Section 29 does not address the same aspects that are addressed by s. 7 of POCA. Section 29, for instance, also regulates whistle-blowing, which is addressed by s. 75 of POCA. The format of the report and requests for further information &s. 7(2), (3) and (4) of POCA are regulated by s. 32. The right to continue with a transaction (s. 7(6) of POCA) is regulated by ss. 33 and 34 and the offences (s. 77) of POCA) are now set out in Chapter 4 of FICA.

74) Section 29(1).

75) Section 29(1). Transactions in respect of which enquiries were made but which were not concluded must also be reported if they may have caused any of the above consequences (s. 29(2)). Some of the obligations under s. 29(1)(b) will be very difficult to meet. For instance, s. 29(1)(b)(ii) calls for a judgment as to whether a particular transaction has an apparent business or lawful purpose. In practice it will be virtually impossible to train all employees to identify such transactions or to design systems that will accurately detect all such transactions. It is probable that only those transactions that have been structured so crudely that they obviously fall within the ambit of s. 29(1)(b)(ii) will be identified as such. Section 29(1)(b)(iii) calls for the reporting of all transactions that may be relevant to the investigation of an evasion or attempted evasion of a tax, duty or levy administered by SARS. In essence, all transactions may be relevant to such an investigation. The section does not state whether such an investigation must have been launched and that the institution must have been notified about the investigation or whether the institution should anticipate such an investigation. The transaction does not need to constitute an act of tax evasion. It must simply
be relevant to an investigation of attempted tax evasion. An institution must therefore also judge whether SARS will regard a particular transaction as relevant to such an investigation. These duties are so onerous that it would have been preferable for the wording to be clear and the ambit of the duties to be more limited.

76) Any person within the ambit of s. 29(1) or (2) who fails, within the prescribed period, to report to the FIC the prescribed information in respect of a suspicious or unusual transaction or series of transactions or enquiry in accordance with s. 29; or who reasonably ought to have known or suspected that any of the facts requiring the submission of a report regarding suspicious or unusual transactions in terms of s. 29, and who negligently fails to report the transaction, the series of transactions or the enquiry commits an offence (s. 52(1) and (2)). These offences carry a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10m (s. 68).

77) Section 29(3) and (4). Such a person who discloses a fact or information contemplated in that section, otherwise than in the circumstances or for the purposes authorised in that section commits an offence in terms of s. 53. The offence carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10m (s. 68).

78) See also ref. 50 above in respect of the fact that the Registrar of Companies was listed as a supervisory body but not the Registrar of Close Corporations.

79) Section 79 read with Schedule 4 of FICA.

80) See also ref. 50 above in respect of the fact that the Registrar of Companies was listed as a supervisory body but not the Registrar of Close Corporations.

81) Section 33. An accountable institution that fails to comply with a directive by the FIC to suspend a transaction commits an offence (s. 58) that carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10m (s. 68).

82) It is doubtful whether this power will be exercised often. The international experience in this regard is not very positive. FATF, ref. 19 above, para. 72: ’A number of other issues were commented upon in several reports. One was the power . . . to suspend transactions that were the subject of an STR. Where a formal power exists to order such a suspension, the length of time of the suspension varies between 24 hours and five days, and in many countries it seems to have been very rarely used. Despite this, Swiss law provides that all transactions are automatically suspended for a five-day period, and it was felt that (this) period is sufficient to gather the evidence needed to commence proceedings. However, the practical experience in other members indicates that the power may be occasionally helpful, but is not likely to be a significant tool (particularly when institutions will often cooperate with law enforcement voluntarily to increase the time it takes to process a transaction.)

83) For purposes of calculating the five-day period, Saturdays, Sundays and proclaimed public holidays are not taken into account (s. 34(2)).

84) Section 34(3).

85) Section 38(1).

86) Section 38(2). No evidence regarding the identity of that person is admissible as evidence in criminal proceedings unless that person testifies at those proceedings (s. 38(3)). Section 38(3) also excludes evidence concerning the 'contents or nature of such additional information and grounds' unless the person testifies.

87) If a person who has made, initiated or contributed to a report in terms of s. 28 (transaction involving cash in excess of a prescribed amount), s. 29 (unusual and suspicious transactions) or s. 31 (electronic transfer of money across the border) or who has furnished additional information concerning such a report or the grounds for the report in terms of FICA declines to give evidence, the FIC may, by way of the certificate, disclose as evidence the information received in the initial report. However, the identity of the reporter as well as the contents and nature of any additional information may not be disclosed in the certificate.
88) See also `Duty to keep records' above.
89) Section 27. Failure to furnish this information to the FIC constitutes an offence (s. 50) that carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10m (s. 68).
90) Section 32. See also `Request for further information' above.
91) Section 35(4).
92) Section 35(2). An accountable institution that fails to comply with such an order commits an offence (s. 59) that carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10m (s. 68).
93) Section 36(1).
94) Section 36(2).
95) Section 36(2).
96) Section 40(1)(b) and 40(4) and (5).
97) No person may disclose confidential information held by or obtained from the FIC except within the scope of that person's statutory powers and duties, for purposes of carrying out the provisions of FICA, with the permission of FICA, or for the purposes of legal proceedings or in terms of a court order (s. 41). Any person who discloses confidential information held by or obtained from the FIC or who uses such information contrary to s. 40 or who wilfully destroys or in any other way tampers with information kept by the FIC for the purposes of FICA; or knows, suspects or ought reasonably to have known or suspected that information has been disclosed to the FIC or that an investigation is being, or may be, conducted as a result of information that has been or is to be disclosed to the FIC, and who directly or indirectly alerts, or brings information to the attention of another person which will or is likely to prejudice such an investigation, commits an offence (s. 60&1)). These offences carry a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10m (s. 68).
98) FICA enforces the requirements of Recommendation 20 of the 40 Recommendations of the Financial Action Task Force in all but two respects: it does not explicitly require an accountable institution to have adequate screening procedures to ensure high standards when hiring employees and does not require the institution to have an audit function to test its compliance system. However, in practice the majority of financial institutions maintain comprehensive management systems that provide for screening of employees as well as internal audit and compliance systems that will audit the effectiveness of their money laundering control systems.
99) Section 42(1). These rules, which must comply with prescribed requirements, must be made available to every employee involved in transactions to which FICA applies (s. 42(3) and (4)). The FIC and the relevant supervisory body may also request copies of the rules.
100) Section 43(a).
101) An accountable institution that fails to formulate and implement the internal rules; or to make them available to its employees in accordance with s. 42(3) or to the FIC or a supervisory body in terms of s. 42(4); or to provide training to its employees in accordance with s. 43(a); or to appoint the person referred to in s. 43(b) &person with responsibility to ensure compliance) commits an offence under s. 62. This offence carries a penalty of imprisonment for a period not exceeding five years or a ®ne not exceeding R1m. See s. 68(2).
102) Newton, A. (1998) Compliance: Making Ethics Work in Financial Services, Financial Times Pitman Publishing, London, pp. 72±74; Sharpe, B. (1996) Making Legal Compliance Work, CCH Australian Ltd, NSW, pp. 55±56: `While the compliance staff engage in compliance activities, they do not comply for the company on a day-to-day basis. Their proper role is to cause other people [operating people] to carry out effective compliance and to assist, coordinate and ensure the consistency of the whole system.'
103) Section 68.
Section 63. Section 64. This offence addresses *inter alia* `smurfing`. Smurfing takes place where a transaction involving cash in excess of the threshold is structured and divided into smaller transactions involving amounts below the threshold in order to avoid being reported. However, the provision also overlaps with many of the money laundering offences in terms of POCA, for instance the offences that can be committed where persons structure transactions to hide or disguise the true nature of ill-gotten gains. They normally attempt to structure the transactions in such a way as to avoid detection and reporting. Such persons can be prosecuted under the relevant provisions of POCA and/or under s. 64, if the transactions meet the requirements of s. 64.

Section 65(1).

Section 65(2).

Section 66. Various terms used in ss. 65 and 66 are defined in s. 67.

Section 70(4). This provision obviously raises excessive fines and proportionality concerns. See US v Bajakajian 118 S.Ct 2028 (1998).

Section 70&6).

Sections 73, 75 and 76.

See, in particular, the Promotion of Access to Information Act 2 of 2000.

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