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THE FINANCIAL INTELLIGENCE CENTRE ACT IS AMENDED: IT NOW NEEDS IMPLEMENTATION

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With South Africa already on precarious ground as a result of its alleged 'state capture'; not least also the effects of South Africa being downgraded to "junk-status" by Standard and Poors and Fitch rating agencies, it was in the nick of time that President Jacob Zuma signed the Financial Intelligence Centre Amendment Act 1 of 2017 ('the Amendment Act') into law on 28 April 2017.

The Amendment Act has been on the table since 2015. It was drafted with the aim of ensuring that South Africa's legal framework continues to meet international standards and best practices in respect of combating financial crimes. As South Africa is a member of the International Monetary Fund and the Financial Action Task Force ('FATF'), it is duty-bound to meet certain prerogatives and recommendations of the international community. The FATF has published a list of forty recommendations, which have formed benchmarks in formal peer review and evaluation processes to test the robustness of a country's measures against illicit activities and the integrity of a country's financial system.

By not keeping up to date with the latest of these recommendations in the form of its Financial Intelligence Centre Act, 2001 ('FICA'), South Africa would have been declared non-compliant with international Anti-Money Laundering ('AML') and Combating the Financing of Terror ('CFT') standards.

Why the delay?

The signature of the Amendment Act into law was delayed on the basis that President Zuma was concerned that it allowed for warrantless searches in certain circumstances.

But prior to the proposed amendment, FICA also provided for warrantless searches, and this was addressed in 2014. In the matter of *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd & Others* 2014 (3) SA 106 (CC); the Constitutional Court stated that parts of FICA were unconstitutional, to the extent that they allowed for inspections without a warrant in certain instances.

"Effective anti-money laundering and combating the financing of terrorism regimes are essential to protect the integrity of markets and of the global financial framework, as they help mitigate the factors that facilitate financial abuse. Action to prevent and combat money laundering and terrorist financing thus responds not only to a moral imperative, but also to an economic need."

Min Zhu, Deputy Managing Director of the International Monetary Fund (2016)

The declaration of invalidity by the Constitutional Court was suspended for 24 months to allow Parliament to amend the section pertaining to warrantless searches. In addressing this constitutional concern, the Amendment Act now sets out the specific circumstances where a warrant is, or is not, required in order to conduct a search. A warrant *is not* required for inspectors to enter the premises of an institution to determine compliance with the Amendment Act, while a warrant *is* required for an inspector to enter a private residence. This is only possible if it is reasonably believed that the residence is being used for a business to which the provisions of the Amendment Act apply. Where an inspector enters premises without a warrant,

they must do so at a reasonable time; on reasonable notice, where appropriate; and with strict regard to decency and good order, including to a person's right to dignity, freedom, security and personal privacy. As such, the authority of an inspector performing warrantless inspections has been clarified to ensure constitutionality and to prevent arbitrary exercises of power or abuse.

Scrutiny of influential persons

In addition to the controversial provision for warrantless searches, the Amendment Act has also been criticised insofar as it requires accountable institutions to implement enhanced due diligence measures for domestic Prominent Influential Persons ('PIPs') and foreign Prominent Public Officials ('PPOs'), as well as the family members and known close associates of PIPs and PPOs.

"The Financial Intelligence Centre Amendment Bill is one of the most important legislative weapons in the fight against corruption in South Africa."

David Maynier, DA Member of Parliament (2017)

PIPs are referred to as those persons who hold prominent *public* functions, as well as those who hold prominent *private* positions. If a customer is a PIP or PPO, the accountable institution will assess whether or not the customer brings higher risk than other customers. If so, then the accountable institution will need to undertake certain additional steps to ensure compliance, such as obtaining senior management approval for the relationship; taking reasonable steps to establish the source of wealth and funds; and conducting enhanced monitoring of the business relationship.

The purpose and impact of the amendments

Among other things, changes are made to FICA to provide for a risk-based approach to customer due diligence. The supervisory powers and information-sharing requirements of the Financial Intelligence Centre (FIC) are enhanced, as are its administrative and enforcement mechanisms. The amendments to FICA are intended to improve the efficacy of AML and CFT measures in South Africa, thus keeping the country compliant with the FATF standards and recommendations, and are seen as essential to improving the transparency and integrity of the country's financial system.

The way forward

The effective date of the Amendment Act is still to be announced by the Minister of Finance, Malusi Gigaba, and they must be published in the Government Gazette. Any further delay in its implementation could expose South Africa to increased money laundering and terror financing risks, as well as attract further scrutiny from the FATF. Moreover, by not acting in an expeditious manner to show the country's seriousness to arrest criminals who undermine the country's financial systems through unlawful behaviour, the current negative foreign investor sentiment may yet be further exacerbated.

Any failure by the Finance Ministry to provide for adequate funding or resourcing of the FIC -- post the effective date -- could further negatively impact the effectiveness of South Africa's regulatory environment to address AML and CFT risks. But having said this, whilst the funding required to resource the FIC itself may

have its own challenges, it may be even more challenging for the FIC to *actually* identify those persons considered to be Prominent Influential Persons, not least also identifying their family members and close associates, both locally and internationally. One can only imagine what kind of databases will be required to fulfil this function; and the extent to which the FIC personnel will need to infiltrate social networks and other data mediums in order to understand the various connections between these 'connected' persons.

Now that the Amendment Act has been signed by President Zuma, all eyes will be on the Finance Minister to see just how he intends implementing this legislation, and whether or not it will function in the manner for which it was originally intended. Notwithstanding these challenges, it is of utmost importance that the Finance Minister urgently takes decisive action and stipulates clear timeframes and budgets for the implementation of the Amendment Act.

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