



FIRST ROUND MUTUAL EVALUATIONS - POST EVALUATION PROGRESS REPORT OF SOUTH AFRICA

Covering the period August 2016 – July 2017

ESAAMLG (2017), First Round Mutual Evaluation - Post Evaluation Progress Report of South Africa on Anti-Money Laundering and Counter-Terrorist Financing Measures.

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A. Introduction

1. The Republic of South Africa was evaluated jointly by FATF and ESAAMLG (by virtue of it being a member of the two bodies) in February 2009. Its Mutual Evaluation Report (MER) was adopted by the ESAAMLG Council of Ministers in August 2009.
2. According to the MER, out of the Core and Key Recommendations, the jurisdiction was rated PC in respect of Recommendations 5, 10, 23 and Special Recommendation (SR) III. It did not register any NC on the Core and Key Recommendations. Details of South Africa's PC and NC ratings for all Recommendations are set out in Tables 1 and 2 below:

Table 1: Ratings of compliance with Core and Key Recommendations

Core Recommendation	1	5	10	13	SR - II	SR - IV
Rating	LC	PC	PC	LC	LC	LC

Key Recommendation	3	23	26	35	36	40	SR-I	SR-III	SR-V
Rating	C	PC	LC	LC	LC	C	LC	PC	LC

Table 2: Ratings of compliance with Non-Core and Non-Key Recommendations

Non- core & Non-key recommendations	2	4	6	7	8	9	11	12	14	15	16	17	18	19	20	21
Rating	LC	C	NC	NC	PC	NC	PC	NC	C	PC	PC	PC	PC	C	C	NC

22	24	25	27	28	29	30	31	32	33	34	37	38	39	VI	VII	VIII	IX
NC	PC	PC	LC	C	PC	LC	C	PC	NC	PC	C	LC	LC	PC	PC	PC	PC

B. Overview of Progress made by South Africa

3. During the ESAAMLG meeting in September 2014, the Task Force discussed South Africa's Follow-up report. It was noted that the country had made progress on several Recommendations, including R.9, R.12, R.16, R.23 and SR.VI. However, the authorities indicated that the Financial Intelligence Centre (the Centre) had conducted a comprehensive review of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001, the FIC Act) and had made proposals to the Minister of Finance on the legislative amendments aimed at strengthening the customer due diligence (CDD) requirements and the proper application of a risk-based approach (RBA) by financial institutions and DNFBPs. The proposed amendments also included consequential amendments to the record-keeping requirements and the exemptions from some of the CDD and record keeping requirements.
4. The proposed amendments to the FIC Act and subordinate regulations were intended to address the identified deficiencies with respect to R.5, R.10 and other Recommendations, including R.6, R.8, R.9, R.11, R.12 and R.15.
5. It was, therefore, recommended that South Africa's Follow-up report that would be submitted to the FATF for discussion during the June 2017 meeting should be submitted to the Review Group with any additional changes that may take effect between then and the next Task Force meeting in accordance with the decision of the Council of Ministers in September 2010.

C. Discussion of South Africa's progress

6. South Africa was on the FATF regular follow-up process. However, in June 2014, as the FATF third round follow-up process was terminated, its Plenary decided to place South Africa in the targeted follow-up process. The country was therefore requested to report on the old R.5 and R.10, only.
7. In line with the decision of the Council of Ministers with respect to the nature and content of progress report which South Africa is supposed to present to the ESAAMLG, the country has submitted the same report which it had submitted to the FATF June 2017 Plenary.
8. In May 2016, the FIC Amendment Bill was adopted by both Houses of Parliament, and referred to the President of South Africa for assent. On 28 November 2016, the

President of South Africa referred the FIC Amendment Bill back to the National Assembly for reconsideration of the Bill's constitutionality relating to warrantless searches in terms of Section 79 of the South African Constitution. The Standing Committee on Finance had its deliberations on the Bill and referred it back to both Houses of Parliament. The Bill was passed by both Houses of Parliament and referred back to the President for assent.

9. At the February 2017 FATF Plenary, South Africa indicated that the Standing Committee on Finance of South Africa's National Assembly had adopted a report proposing amendments to the FIC Amendment Bill. The Plenary decided to defer discussion on issuing of a Public Statement until the Plenary meeting in June 2017, at which point it would consider what progress had been achieved with respect to the deficiencies that South Africa was expected to address under the targeted follow-up process.
10. Following the February Plenary, the National Assembly finished its reconsideration of the FIC Amendment Bill, and referred the Bill back to the President with some further amendments. The FIC Amendment Act was signed into law by the President on 26 April 2017 after satisfaction that the amendments now addressed the constitutional concerns previously raised regarding warrantless searches. The Amendment Act was published in the Government Gazette on 2nd May 2017 but the determination of the commencement date was left to the Minister of Finance in terms of Section 61 of the Act (Annex A). On 13 June 2017, the Minister issued Notice No. 563 to announce the commencement of the Act (Annex B). In terms of the Notice, the implementation of different provisions of the FIC Amendment Act will start on different dates; 13th June 2017, 2 October 2017 and dates to be determined after 2nd October 2017 (but expected to be no later than the end of 2018).
11. The first set of provisions which commenced on 13th June do not require changes to existing regulations, exemptions or internal systems of institutions to enable compliance with the FIC Act. The provisions deal mainly with information sharing, consultation arrangements, constitutional concerns relating to inspection powers, and improved functioning of the FIC Act Appeal Board.
12. The second set of provisions will commence on 2nd October 2017. These provisions, which give effect to new concepts and approaches including customer due diligence (CDD) requirements, beneficial ownership, Prominent (Influential)

Persons and “Politically Exposed Persons” and freezing of assets, will require changes to existing regulations and exemptions under the FIC Act, as well as staff training and major changes to systems by supervisors, the Office of the Chief Procurement Officer, and accountable institutions. Further, a move to a risk-based approach, which modernises the manner institutions undertake customer due diligence, implies less regulations but necessitates more guidance to clarify the expectations of supervisors on how institutions should appropriately implement the legislation.

13. One of the new features that will be introduced by the Amendment Act is a requirement for institutions to determine whether there are specific money laundering or terrorist financing risks associated with relationships with prominent persons in companies doing business of a certain value with the State. This provision, which relates to Schedule 3A, will commence on 2 October 2017, but will require operationalising later by notice, once a monetary value threshold has been finalised and the State is able to generate such a database or capability. Treasury is currently working with the Chief Procurement Office in this regard.
14. The commencement and operationalisation dates of the two remaining set of provisions in the FIC Amendment Act, namely sections 26A to 26C dealing with the freezing of assets in terms of the UN Security Council Resolutions on targeted financial sanctions, and Schedule 3A dealing with the setting of a monetary value threshold for companies doing business with the State, will be determined after October 2017. The Authorities indicated that the delay on sections 26A to 26C is to enable consultations within Government, and allow for internal systems development.
15. In view of the above, it is apparent that in order for the legislation to come into force, South Africa will need to take a number of further steps. The Review Group understands that the South African authorities have been working through these processes. Changes to the Money Laundering and Terrorist Financing Control Regulations (the implementing regulations under the FIC Act) and the current exemptions that have been made under the FIC Act will need to be considered. Consultation with financial institutions and DNFBPs impacted by the new provisions were needed to be completed, as part of the process to finalise the changes to the Regulations and exemptions. Consultations with the industry and supervisory bodies have been taking place this year. The Authorities indicated that Draft Guidance Note that was developed jointly by the FIC, SA Reserve Bank,

Financial Services Board and National Treasury was released on 15th June 2017 with a document on “A new approach to combat money laundering and terrorist financing” from National Treasury on how best to implement the new measures. A second draft of the relevant consultation documents was released for further comments on 30th August 2017. The revised regulations and exemptions, with supporting guidance, will be issued in time to come into operation by 2nd October 2017.

D. Analysis of the FIC Act on deficiencies to R.5

16. The Assessors recommended that there should be specific legal obligation for an accountable institution to undertake CDD when there is a suspicion of money laundering or terrorist financing or when it has doubts about the veracity or adequacy of previously obtained customer identification data.
17. Section 21D of the Amendment Act requires an accountable institution to repeat all CDD steps when it has doubts about the veracity or adequacy of previously obtained customer identification data. There is however no provision which explicitly requires CDD when there is a suspicion of ML or TF. The authorities explained that they would be issuing a detailed guidance note regarding this matter, and that despite the absence of an express provision about repeating the CDD steps where there is no suspicion of ML, the reporting entities still perform risk based CDD.

Conclusion

The recommendation is not sufficiently addressed.

18. The Assessors recommended that the 2001 FIC Act be amended to require accountable institutions to verify the identification information relating to directors and senior management by comparison with the CM29 form filed with CIPRO.
19. Section 21B(2)(a)(iii) of the Act requires accountable institutions to verify the identity of the natural person who exercises control over the management of the juristic person, including his/her capacity as executive officer, director, manager, etc. South Africa advised that the CM29 form filed with CIPRO (Companies and Intellectual Property Registration Office) is no longer in use.

Conclusion

The recommendation is addressed.

20. The Assessors recommended that there be a specific requirement in law or regulation that requires accountable institutions to identify beneficial owners (i.e. the natural persons who ultimately controls and owns the customer) or to verify their identities. Therefore, there was no obligation to identify the beneficial owner before or during the course of establishing a business relationship or conducting transactions for occasional customers.
21. Section 21B on additional due diligence measures relating to corporate vehicles requires an accountable institution to establish the ownership and control structure of the client. If a client is a legal person, the identity of the beneficial owner of the client needs to be established, and reasonable measures have to be taken to verify the identity of the beneficial owner.

Conclusion

The recommendation is addressed.

22. The Assessors recommended that there be a specific requirement to understand the ownership and control structure of a customer that is a legal person or arrangement, beyond the requirements described above to identify: the manager and 25% shareholders of a company; the members of a close corporation; the partners in a partnership; and the founders, trustees and beneficiaries of a trust.
23. Section 21B(1) on additional due diligence requires an accountable institution to establish the ownership and control structure of the client.

Conclusion

The recommendation is addressed.

24. The Assessors recommended that there be an explicit requirement that information on the purpose of a business relationship be obtained.

25. Section 21A of the Amendment Act requires an accountable institution, when it engages with a client to establish a business relationship, to obtain the information describing the nature and purpose of the business relationship.

Conclusion

The recommendation is addressed.

26. The Assessors recommended that there be an explicit requirement to conduct on-going due diligence.
27. Section 21C requires an accountable institution to conduct on-going due diligence, which includes (a) monitoring of transactions throughout the course of the business relationship, including the source of funds, and (b) keeping information obtained for the purpose of establishing and verifying the identities of clients up-to-date.

Conclusion

The recommendation is addressed.

28. The Assessors recommended that there be a specific requirement that accountable institutions apply enhanced due diligence for higher risk categories of customers, business relationships or transactions.
29. Section 42 requires accountable institutions to (among others) mitigate and manage ML and TF risks, by means of a Risk Management and Compliance Programme which must specify how CDD is to be implemented in the institution in order to achieve this. An accountable institution may include measures for enhanced due diligence for higher risk customers in its Programme and conduct its CDD in accordance with the Programme.

Conclusion

The recommendation is addressed.

30. The Assessors recommended that certain exemptions should comply with the FATF Recommendations in that they fully exempt certain accountable institutions from all CDD requirements (as well as some or all record keeping requirements).

Conclusion

The recommendation is not addressed.

31. The Assessors recommended that once a business relationship has been established, there should be a specific requirement to terminate the business relationship or to consider filing an STR if doubts about the veracity or adequacy of previously obtained customer identification data arise.
32. Section 21D of the Act requires an accountable institution to repeat all CDD steps under section 21 through 21B, when it has doubts about the veracity or adequacy of previously obtained customer identification data. Section 21E requires an accountable institution, when it is unable to establish and verify the identity of a client, not to establish a business relationship nor conduct a transaction with the client, or terminate any existing business relationship with the client and consider filing an STR under Section 29 of the Act.

Conclusion

The recommendation is addressed.

33. The Assessors recommended that Uncovered Financial Institutions should be subjected to the CDD obligations of the FIC Act.
34. The coverage of the FIC Act, which appears in Schedule 1 of the Act has a list of accountable institutions, which has not been changed.

Conclusion

The recommendation is not addressed.

E. CONCLUSION AND RECOMMENDATIONS

35. South Africa was advised by the FATF to report on the old FATF Recommendations 5 and 10 only, by virtue of it being placed under a targeted

review process. The report contained updates on these Recommendations, with no substantive progress as per ESAAMLG standards.

36. In addition to this, since the Follow-up report did not cover the rest of the Recommendations, it is not possible to establish South Africa's position with respect to Recommendations 6, 8, 9, 11, 12 and 15 which were noted as outstanding as per the June 2014 report which was submitted to the ESAAMLG for discussion at its meeting in September 2014.
37. The Review Group has undertaken analysis of the FIC Amendment Act on the basis of the text published in the Gazette. While it appears that the legislation rectifies a number of deficiencies relating to the old Recommendation 5, a complete analysis will not be possible until South Africa has prepared the implementing regulations and decided whether any exemptions will apply.
38. On the basis of the information provided in the June 2017 Follow up report, it is evident that there has been progress (*as per ESAAMLG definition of 'progress'*) on the old Recommendation 5. At the February 2017 FATF Plenary, it was decided that a decision on whether a public statement should be issued be delayed. Considering the need to promptly address the deficiencies identified under South Africa's targeted follow-up process, the FATF Plenary in June 2017 decided that South Africa reports back to the Plenary in October 2017.
39. In view of the foregoing, the Review Group recommends that South Africa be requested to submit to the ESAAMLG Secretariat the Follow-up report that the country will submit to the FATF for the October 2017 meeting for consideration at the March/April 2018 meetings.