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The Chairman
Portfolio Committee on Finance
Mr Yunus Carrim

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Attention:

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Dear Sir

Financial Intelligence Centre Amendment Bill: B33-2015

1. Following on the public hearings on 11 November 2015, the Portfolio Committee afforded us an opportunity to make further representations on the Financial Intelligence Centre Amendment Bill ("the Bill") after consultation with National Treasury ("NT") and the Financial Intelligence Centre ("FIC"). The Committee also requested that the submission cover critical implementation and compliance issues under the existing FIC Act (and as amended by the proposed Bill) where the industry and NT/FIC are not in consensus, and for an indication of the estimated cost assessment of the impact of the Bill and new compliance requirements.
2. In line with this opportunity a delegation from BASA met with NT on 9 December 2015 to raise its "critical issues" under the Act and the Bill as suggested by the Committee, but unfortunately this (brief) initial meeting only served to highlight that much more consultation is required between the policy makers (NT), the regulators (FIC), the supervisors (SARB/FSB), and the wider affected financial sector, especially given the acknowledged breakdown in prior consultation processes on the Bill, and the wider issues in FICA that remain in contention between the parties. It was accordingly agreed that BASA would continue to prepare a submission to the Portfolio Committee as requested, but also that NT would schedule longer, more focused workshops on the critical issues between the affected parties in the 1st quarter of 2016. Given this extended consultation process NT would also liaise with the Portfolio Committee on the timelines for the Bill going forward.

Critical regulatory and supervisory compliance principles

3. As noted by NT during the Portfolio Committee hearings on 11 November 2015, “the reputational risk of noncompliance exceeds the cost of compliance”. This is because of the standardised international regulatory framework to combat money laundering, terrorist financing and the proliferation of weapons of mass destruction (“AML/CFT”), driven by the Financial Action Task Force’s (“FATF”) 40 Recommendations. The core underpin for South Africa’s anti-money laundering and combatting the financing of terrorism programme is, therefore, domestic compliance with these international FATF 40 Recommendations. This ensures a minimum level and standard of compliance across the world in order to improve the efficacy of the international focus on criminal proceeds and the financing of terrorist acts. Such uniformity is important, inter alia, for 2 very specific reasons:
 - 3.1 The standardised international legislative, regulatory and supervisory framework, which is evaluated on a country basis by outside parties under agreed “Mutual Evaluation” protocols; significantly non-compliant countries are sanctioned by the international community, and change recommendations are made for less significant non-compliance (e.g. the 2009 Mutual Evaluation of South Africa, the 2012 revised 40 Recommendations and the imminent upcoming new Mutual Evaluation of SA, which have underpinned the urgency of the Bill).
 - 3.2 Consistent compliance with this standardised regulatory and supervisory framework within multinational financial groups, which are expected to implement equivalent standardised internal compliance policies and procedures; in this context it is an accepted international supervisory requirement that such financial group policy is based on the regulatory requirements of the home country (i.e. where the holding company is), unless the requirements within a specific subsidiary/ branch host country are higher than these home country requirements, in which case the higher, local standards will prevail.
4. We support this internationally consistent compliance model because it facilitates consistent compliance across jurisdictions for multi-national banks, and as noted by NT “the reputational risk of non-compliance exceeds the cost of compliance”. However, as noted below, the Bill introduces significant deviations from the FATF standards that will introduce cross-jurisdictional compliance challenges.
5. One of the key changes to the 2012 FATF 40 Recommendations was the introduction of a Risk Based Approach (“RBA”) to AML/CFT, at country and institutional levels. The driver for this change was to acknowledge that risks are variable from high to low, and that scarce resources should be targeted at the higher risks, with reduced compliance burdens for lower risks. This RBA starts with a national assessment, to ensure that institutional programmes “to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified. This approach should be an essential foundation to efficient allocation of resources” (Recommendation 1). The FATF Recommendations make provision for practical, risk-based national implementation processes to ensure this strategic focus of resources, and effective mitigation of the risks, given unique country risks. It is clear from the Bill provisions supposedly to implement this RBA that there are significant differences in understanding between the various parties on exactly what such a risk based approach should entail, especially across the two different but related concepts of “identifying” a customer and then “verifying” such identification parameters.

6. We set our detailed comments, in more detail, below.

Preamble

7. The preamble of an Act records the circumstances and the background of, and reasons for, the legislation. It is a well-known principle of our law that because a preamble is part of the full text of an enactment, it may throw a light, for the purpose of construction, on the intention of the legislature with regard to any obscure meaning of provisions in such legislation. This approach has been upheld post-1994 in cases such as *Ngcobo v Salimba CC; Ngcobo v Van Rensburg 1999(2) SA 1057 (SCA)*. It is particularly important in the context of the interpretation of the Financial Intelligence Centre Act ("FICA"), post the enactment of the Bill, that proper context is given to the interpretation of the legislation given that, as noted above, the Bill is, to a great extent, predicated on implementing many of the latest FATF Recommendations as updated in 2012. It is acknowledged that this is required prior to the next anticipated mutual evaluation by FATF of South Africa's compliance with the 40 Recommendations.
8. For this reason we propose an express inclusion in the Preamble of the Bill of the following words:

"To amend the Financial Intelligence Centre Act, 2001, so as to **align it with the standards set by the Financial Action Task Force in its Recommendations**; to define a further defined set of expressions ..."

Definitions

9. We propose the inclusion of the following definitions in line with this compliance with the FATF 40 Recommendations:
 - 9.1 "**FATF**" means the Financial Action Task Force, an inter-Governmental body within the Organisation for Economic Co-operation and Development ("OECD"), established in 1989 which sets standards and promotes effective implementation of legal, regulatory and operational measures for combatting money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction, and other related threats to the integrity of the international financial system.
 - 9.2 "**FATF Recommendations**" means the comprehensive and consistent framework of measures issued by FATF which countries should implement in order to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction, originally issued by FATF in 1990, revised in 1996 and 2004, and last revised in February 2012.
 - 9.3 Section 1(g) of the Bill proposes inserting the definition of "a domestic prominent influential person" after the definition of "Director". Section 1(h) of the Bill also proposes inserting the definition of "foreign prominent public official" after the definition of "entity". We propose deleting those two definitions (as motivated below) and substituting them with definitions of "foreign politically exposed persons" and "domestic politically exposed persons" as follows:

“Foreign Politically exposed persons” means individuals who have been entrusted with prominent public functions by a foreign country, for example Heads of State or of Government, senior politicians, senior Government, judicial or military officials, senior executives of state owned corporations or important political party officials.

“Domestic politically exposed persons” means individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of Government, senior politicians, senior Government, judicial or military officials, senior executives of Organs of State or important political party officials.

These definitions follow the definition of “politically exposed persons” in the general glossary to the FATF Recommendations at page 118.

We deal with our rationale for the substitution of the current definitions of “foreign politically exposed persons” and “domestic politically exposed persons” in the Bill below.

9.4 **“Known close associates”** means:

- (a) an individual who is known to have a joint beneficial ownership of a legal entity or legal arrangement, or any other close business relations, with a politically exposed person; or
- (b) any individual who has sole beneficial ownership of a legal entity or legal arrangement which is known to have been set up for the benefit of a politically exposed person.

This definition follows regulation 14(1)(b) of the Money Laundering Regulations 2007 as it applies in the United Kingdom. The definitions are expanded upon in paragraph 4 of schedule 2 to the Money Laundering Regulations 2007. The inclusion of this definition is important, as the compliance burdens relating to PEP’s (or PIP’s as in the Bill) from a too-wide or confused understanding of “close associates” would dissipate scarce resources unnecessarily by expanding the range of high risk designated individuals. This would also have a potential restrictive effect on financial inclusion, costs of compliance, de-risking, etc. See further paragraphs below.

9.5 **“Risk-Based Approach”**

Given that the Bill, in its preamble, records that one of the purposes of the amendment is “to provide for a risk-based approach to client’s identification and verification”, we believe it is imperative (and given the differences in understanding of this concept noted above) that the term Risk-Based Approach be defined as suggested below:

“Risk-Based Approach” means an approach which adopts a more flexible set of measures, in order to target resources more effectively and apply preventative measures that are commensurate to the nature of the risks, in order to ensure a more focused and sustainable application of the measures.



This definition is in line with the FATF Recommendations and has regard to the reference in chapter 4 of the Joint Money Laundering Steering Group Guidance ("JMLSG") in the United Kingdom referencing regulations 7(3)(a), 14(1) and 20, which describe a risk-based approach as one that recognises that money laundering/ terrorist financing threat to firms varies across customers, jurisdictions, products and delivery channels and allows management to differentiate between their customers in a way that matches the risk in their particular business, further allowing senior management to apply its own approach to the firm's procedures, systems and controls and arrangements in particular circumstances and hopes to produce a more cost-effective system.

- 9.6 **"Personal information"** means "personal information" as set out in the Protection of Personal Information Act, 2013.

Current difficulties with the implementation of section 21 of FICA and section 21B of the Bill

10. Section 21 of FICA read with the Money Laundering and Terrorist Financing Control Regulations require accountable institutions to establish (identify) and verify, under a prescribed rules basis:
 - 10.1 In the case of a company for the manager of the company and each natural person who purports to be authorised to establish a business relationship or to enter into a transaction with the accountable institution on behalf of the company;
 - 10.2 In the case of partnerships, of each partner, including every member of the partnership *en commandite*, an anonymous partnership or any similar partnership, the person who exercises executive control over the partnership and each natural person who purports to be authorised to establish a business relationship or to enter into a transaction with the accountable institution on behalf of the partnership; and
 - 10.3 In the case of trusts, of each trustee of the trust, and each natural person who purports to be authorised to establish a business relationship or to enter into a transaction with the accountable institution on behalf of the trust.
11. These prescriptive requirements (based on the current rules-based Regulations) are largely echoed in new section 21B proposed to be introduced by section 10 of the Bill.
12. Our members find it increasingly onerous, and sometimes impossible, to identify and verify, to the extent prescribed, every person specified, especially where all the parties in the corporate vehicle are widely dispersed, and where the realities of a particular geographic location prevent such verification.
13. We propose that FICA, the Bill and the Money Laundering and Terrorist Financing Control Regulations be amended to limit this requirement to those directors, managers, partners and trustees who have influence or control over the client and the ability to transact or move funds on behalf of the client in accordance with a true risk-based approach. In fact, the whole of section 21 as amended by the Bill should be workshopped by NT as noted above to determine a genuine

risk-based approach to customer identification and verification as required by the current FATF Recommendations and the national risk assessment, and as would be implemented by financial institutions under their approved Risk Management Programmes.

14. In this regard we point out that FATF Recommendations 1 and 10 allow for residential address verification to be obtained on a risk-based approach and permit institutions to determine in which instances the address verification documents should be obtained. Similarly the JMLSG Guidance does not prescribe that these documents must be obtained in all instances. In practice companies in the United Kingdom do not request this information from their clients, e.g. refer in this regard to paragraph 5.1.5 of the JMLSG Guidance. The Financial Crime Enforcement Network (“FinCen”) Guidance similarly contains no express provision for verification of residential address but this is largely academic as address verification is facilitated in the United States by reference to a national social security system which electronically enables instantaneous address verification. It is strongly recommended, therefore, that given these existing international precedents, and the realities of South Africa’s residential housing context, that the current mandatory address verification be critically restricted to key, assessed high risk individuals on a risk based approach.
15. The effective implementation of a proper RBA, as now provided for in the 40 Recommendations, including country adaptations given their unique country risks, is especially significant for South Africa in rolling out, and maintaining, extended “financial inclusion”, which is also an agreed international and FATF requirement. The detailed prescriptions in the new section 21 of the Bill would, especially in the banking sector with its existing “risk based approach” to its entire regulated and supervised business, impose excessive compliance requirements that could have unintended consequences for the wider financial inclusion processes. As noted in this submission this is one of the issues that, we trust, will be workshopped by NT with all affected parties.

Section 21 of FICA and prospectivity (“prospective” clients)

16. Section 9 of the Bill introduces an amendment to section 21 of FICA in terms of which an accountable institution must establish and verify the identity of a “prospective client” when that accountable institution engages with the “prospective client”. The term “prospective client” is used generally and in other contexts throughout the Bill. Exemption 2 to FICA, however, currently exempts prospective clients from such verification requirements. It reads:

“Every accountable institution may by way of exemption from section 21 of the Act, accept a mandate from a prospective client to establish a business relationship or to conclude a single transaction, or take any similar preparatory steps with a view to establishing a business relationship or concluding a single transaction, before the accountable institution verified the identity of that prospective client in accordance with section 21 of the Act, subject to the condition that the accountable institution will have completed all steps which are necessary in order to verify the identity of that client in accordance with section 21 of the Act before the institution—

- (a) concludes a transaction in the course of the resultant business relationship, or

(b) performs any act to give effect to the resultant single transaction.”

17. We submit that the inclusion of the word “prospective” in the text of section 21 will render any preliminary engagement with the client an offence against the meaning of Exemption 2 to FICA, making implementation of section 9 of the Bill impractical and imposing a significant burden on the financial sector. The requirements relating to “prospective” clients should therefore be deleted, and the risk-based approach facilitated by the current Exemption 2 retained.

Beneficial owner

18. Section 1 of the Bill proposes a definition of “beneficial owner” as meaning, in respect of a legal person, a natural person who, independently or together with another person, directly or indirectly:

- (a) Owns the legal person; or
- (b) Exercises effective control of the legal person.

19. The use of the words “effective control” is however not defined in the Bill.

20. Footnote 30 to the FATF Interpretive Note to Recommendation 10 (which are part of the Recommendation) states that “controlling ownership interest depends on the ownership structure of the company and may be based on a threshold, e.g. any person owning more than a certain percentage of the company (e.g. 25%)”.

21. The JMLSG Guidance, in the glossary of terms, defines “beneficial owner” as “the individual who ultimately owns or controls the customer on whose behalf transaction or activity is being conducted. Reference is also made to Money Laundering Regulation 6 which provides definitions of “beneficial owner” in relation to individuals, partnerships, trusts and other unspecified legal entities or legal arrangements. In the case of a body corporate, partnership or trust, “beneficial owner” means:

- i. Where the individuals who benefit from the entity or arrangement have been determined, any individual who benefits from at least 25% of the property of the entity or arrangement;
- ii. Where the individuals who benefit from the entity or arrangement have yet to be determined, the class of persons in whose main interest the entity or arrangement is set up or operates;
- iii. Any individual who exercises control over at least 25% of the property of the entity or arrangement.”

22. Having regard to the fact that the FICA Money Laundering and Terrorist Financing Control Regulations currently prescribe, in regulations 7 and 8, that the details of “each natural, or legal person, partnership or trust holding 25% or more of the voting rights at a general meeting of the company” be established and verified, we propose that a similar provision for an ownership threshold be retained in the Bill. For the past 15 years the banking industry has done customer identification and verification on companies and corporate entities on

this basis. Not only will a provision designating “effective control” as meaning something less than 25% of the voting rights in a company mean that industry members will have to re-design their systems to obtain this information, but it will also mean that every existing corporate customer of the industry would need to be re-identified and verified. In any event, the current requirement as it is enacted in the Money Laundering Control Regulations is compliant with international best practice across a number of jurisdictions.

23. In this context it should also be noted that there are no obligations in law on legal entities to declare their beneficial ownership, or ultimate beneficial ownership, as defined at a natural person level, or to keep such declarations up-to-date, nor are there any state registers or databases with which to verify any such beneficial ownership. The impositions under the Bill, while compliant with the FATF requirements, need to be underpinned with additional regulatory interventions to make the determination and verification of “beneficial ownership” by financial institutions practically implementable, failing which the ownership threshold provision should prevail.

Politically exposed persons

24. As noted above we propose that the current Bill definitions for “domestic prominent influential person” as stated in section 1(b) of the Bill should be deleted in its entirety, and replaced with the internationally-compliant definition for “domestic politically exposed person”. In the alternate, if this recommendation were not to be followed, we strongly urge that the following sections be deleted from the definition in the Bill in that they extend the scope of the Bill beyond its focus on AML/CFT, and as noted below:

~~“(i) chairperson of the board of directors;
(ii) chairperson of the audit committee;
(iii) chief executive officer; or
(iv) chief financial officer, of a company as defined in the Companies Act, 2008 (Act No. 71 of 2008) if the company provides goods or services to an organ of state and the annual transactional value of the goods or services or both exceeds an amount determined by the Minister by notice in the Gazette”.~~

25. We note in particular that the obligation imposed on accountable institutions as proposed in section 10 of the Bill, and as it relates to the proposed section 21G, becomes wholly unmanageable, inter alia because any prospective or current client who is not a “domestic prominent influential person” at the time of their entering into a single transaction or establishing a business relationship with an accountable institution may very well later become one unbeknown to the financial institution, i.e. a client might not be providing goods and services on the date it engages with the accountable institution but might be successful in a response to a government procurement process at any later time.
26. We understand that the inclusion of this provision is aimed at addressing money laundering through procurement irregularities and tender fraud. We submit the following in this regard:
- 26.1 There have been reports in the press for some time about the establishment of the Office of the Chief Procurement Officer (“OCPO”) and the Central Supplier Database (“CSD”) to aid in the regulation of

public procurement in South Africa, although the legislation and regulations which are applicable to public procurement in South Africa have not yet been formally amended to provide for the OCPO or the CSD. Although the OCPO and CSD have not yet been formally incorporated into our legislation or regulation, both already appear to have been established under the auspices of the NT and have functioning websites. Without a reliable and extensive legislative and regulatory foundation for the CSD, accountable institutions cannot be expected to know or understand whether a client or prospective client is a company that “provides goods or services to an Organ of State” and whether the annual transactional value of the goods or services or both exceeds the amount to be determined by the Minister by notice in the Government Gazette.

- 26.2 We note further that the Prevention or Combatting of Corrupt Activities Act, 2004 (“PRECCA”) in section 13 creates a specific offence in respect of corrupt activities relating to the procuring and withdrawal of tenders and also makes provision in section 29 for the creation of a Register for Tender Defaulters within the NT and that section 28 of PRECCA allows the NT to terminate an agreement with a party convicted of an offence in terms of PRECCA.
- 26.3 In addition, under Section 34 of PRECCA certain persons (including CEOs, managers and partners, etc.), who hold a position of authority, are compelled to report their knowledge or suspicion of any form of corruption or common law offences such as, *inter alia*, fraud and theft to the South African Police Service Directorate Priority Crime Investigations. Failure to do so constitutes an offence.
- 26.4 Additionally, the Broad Based Black Economic Empowerment Amendment Act, 2013 (“BBBEE Amendment Act”) has formally defined tender fronting and introduced criminal sanctions. Any person convicted of an offence in terms of the BBBEE Amendment Act may not contract or transact with any Organ of State or public entity for a period of 10 years from date of the conviction. A Broad Based Black Economic Empowerment Commission will be established under the BBBEE Amendment Act which will be responsible for enforcement of Black economic empowerment. One of the functions of the BEE Commission will be to oversee, supervise and promote adherence with the BEE Act in the interest of the public. The BEE Commission will also be responsible for investigating any BEE initiatives and alleged fronting practices, either on a proactive basis or in a response to a complaint.
- 26.5 We submit, therefore, that corruption as it relates to public procurement and tendering and BEE fronting is adequately dealt with in the BEE Amendment Act and PRECCA and ought not now also to be brought within the ambit of FICA by the introduction of the definition of “domestic prominent influential person”, thereby imposing obligations on accountable institutions which are impossible to meet absent a fully functional and comprehensive CSD. Also as noted, the change from the international standard of “politically exposed person” to “prominent influential person” in this context introduces significant international financial group and correspondent banking compliance challenges.

Deviations from FATF Definitions or Concepts – “Politically Exposed Persons”

27. The internationally-accepted and supported FATF standard refers to “foreign” and “domestic” Politically Exposed Persons, in the context of such persons being more susceptible to corruption and therefore subjected to enhanced AML/CFT procedures. As such, countries, multi-national and major banks must introduce “PEP compliance programmes” within their AML/CFT programmes. Correspondent banks, especially in the USA, UK and Europe, will demand equivalent “PEP compliance programmes” from their counter-parties in other jurisdictions. Multi-national banks will also introduce “PEP programmes” across their group structures, for internationally consistent application and compliance. Vendors will develop and sell access to such “PEP registers” (already available).
28. But the draft Bill deviates from this extensive, international consensus and compliance with the FATF Recommendations by introducing a different definition and concept – that of “prominent influential person” (“PIP”). This deviation from the internationally accepted terminology introduces significant risk to local banks’ international correspondent relations (e.g. Question from the USA/UK/EU bank: “Does your bank implement an internationally compliant PEP programme?” Answer from local bank: “No, we implement a PIP programme”. Anticipated response from US/UK/EU bank: “Never heard of it. Your line of credit or correspondent relationship or transaction is cancelled for non-compliance with our PEP requirement”).
29. Furthermore, in terms of standard international and domestic banking sector supervisory norms, multi-national banking groups must implement “the higher of home or host country supervisory standards”. For local banking groups with branches or subsidiaries in other African countries, this would in most cases default to SA standards. Foreign bank branches or subsidiaries of SA banks would, therefore, have to implement “PIP” programmes whereas the domestic foreign standard may require “PEP” programmes, in compliance with the international standard.
30. We therefore recommend that the Bill be amended to refer to “Politically Exposed Persons”, rather than the current “Prominent Influential Person”, to obviate the challenges of local law deviating from the widely-accepted international standards, and the unintended consequences this may cause.
31. Failing this, we recommend that the National Government, National Treasury and the FIC be instructed by Parliament to lobby the FATF to either amend its definition of “PEP” to one of “PIP”, or to extend the FATF definition of “PEP” to include, as an alternate, the “equivalent definition of PIP for use in other jurisdictions”.
32. In this latter case, countries other than SA could also elect to use the concept “PIP”, with full acknowledgement of compliance with the FATF standard relating to “PEP” or “PIP”.

Record keeping in the Republic

33. Section 14 of the Bill seeks to introduce a requirement that documents obtained from clients of an accountable institution pursuant to the provisions of section 21 must be stored in South Africa.
34. This proposed requirement fails to recognise the international nature of data

storage and transfer in the modern world. The advent of cloud computing as well as other digital storage mediums has enabled companies to efficiently store data around the world in a cost effective manner whilst still being able to instantly retrieve that data. Requiring data to be stored intra-territorially is therefore a retrogressive step with significant in-country cost implications.

35. The question of the cross-border transfer of data is also an issue that data protection legislators around the world have grappled with for a number of years. Rather than prohibit the cross-border transfer and storage of data, global best practice is to ensure that the confidentiality and integrity of the data is maintained in the country to which it is transferred.
36. South Africa's new data protection legislation, the Protection of Personal Information Act, 2013 ("POPI") (the operative provisions of which are yet to come into force) is no different. Section 72 allows for the cross-border transfer of personal information in the following circumstances:

34.1 Adequate protection: Where the personal information will be adequately protected after the transfer in terms of:

- (a) a law;
- (b) a binding agreement between the transferor and the foreign recipient; or
- (c) binding corporate rules (policies or undertakings with which the transferor and foreign recipient must comply);

which uphold principles similar to those in POPI regarding the lawful processing of personal information and further cross-border transfers of personal information (section 72(1)(a)).

34.2 Conclusion or performance of a contract:

- (a) Where the transfer is necessary for the performance of a contract between the data subject and the transferor, or for the implementation of pre-contractual measures taken in response to the data subject's request (section 72(1)(c)).
- (b) Where the transfer if necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the transferor and a third party (section 72(1)(d)).

34.3 Consent:

Where the data subject (the person to whom the personal information relates) consents to the transfer (section 72(1)(b)).

34.4 Benefit of the data subject:

Where the transfer is for the benefit of the data subject and it is not reasonably practicable to obtain their consent to the transfer, but if it were reasonably practicable, the data subject would be likely to give consent (section 72(1)(e)).

- 35 The information provided by individuals and legal entities pursuant to the provisions of section 21 of FICA (as amended) is largely personal information as defined in POPI. The protections afforded to personal information in POPI would therefore apply to such information when stored in foreign jurisdictions for purposes of FICA.
- 36 We submit that the provisions of POPI generally, and the cross-border data transfer provisions in particular, are adequate in their protection of information and in line with international best practices and legislation. Indeed, POPI goes further than the equivalent legislation in many other countries by protecting corporate personal information too. (Section 1 defines “personal information” as “information relating to an identifiable, living, natural person and where it is applicable, an identifiable, existing juristic person...”)
- 37 The proposed section 14 of the FIC Amendment Bill contradicts what is intended by POPI and creates an anomalous situation in which information collected for the purposes of FICA may not be stored in a foreign jurisdiction but the same information collected for a different purpose may be stored in a foreign jurisdiction.
- 38 On the basis of the above, it is therefore our submission that the proposed inclusion of new section 24(5) of FICA:
- 38.2 negates the legislative intent behind South Africa’s privacy laws, as the provision undermines, and is in conflict with, the adequate protections afforded by POPI;
 - 38.3 constitutes an unjustified limitation on the rights of individuals to conduct their business in the manner they desire, which is not rationally connected to the purpose for which the amendment is sought to be introduced;
 - 38.4 is not rationally connected to the objectives of FICA and serves no purpose in that the FIC Amendment Bill proposes an amendment to section 24(1) which already permits record keeping by a third party but strictly conditional upon “the records [being] readily available to the Centre and the relevant supervisory body for the purposes of performing its function in terms of [FICA]”. Clearly therefore, even data which is stored extra-territorially is accessible to the Centre and the relevant supervisory body; and
 - 38.5 disregards the substantial costs which will necessarily be incurred to comply with the proposed introduction of section 24(5) some 14 years after the promulgation of FICA.

We therefore strongly recommend that section 24(5) be deleted.

Accountable institutions, reporting institutions and persons subject to reporting obligations to advise FIC of clients

- 39 Section 18 of the Bill introduces an amendment to section 27 of FICA by introducing sub-section (d) which reads: “whether a **number** specified by the

Centre was allocated by that accountable institution, reporting institution or person to a person with whom that accountable institution, reporting institution or person has or has had a business relationship" [emphasis added]. In this provision, reference to "**number** [...]allocated to a person" is unclear.

Accountable institutions

- 40 Section 1 of FICA contains a definition of "accountable institution" as meaning a person referred to in Schedule 1 to FICA. We have significant ongoing concerns about the formulation of Schedule 1 and the "unlevel competitive playing fields" it creates, which we have raised over the years (including to the original draft FIC Bill), to no avail. The Schedule also continues to be non-compliant with the requirements of the FATF Recommendations in certain aspects.
- 41 FICA is predicated on proposing an AML/CFT requirement, at great cost across the economy, on certain defined "accountable institutions". However, non-designated entities providing identical products or services have no equivalent compliance obligations and pose significant risk to the economy for both money laundering and terrorist financing as recent events in South Africa have demonstrated.
- 42 We note that paragraphs 383 to 385 of the FATF Mutual Evaluation Report on South Africa dated 26 February 2009 have been ignored. We quote from the report:
- "There are, however, 43 licensed financial service providers which give investment advice and which do not fall within the category of "accountable institution". Additionally, the following financial institutions are not accountable institutions for the purposes of [FICA]: finance companies, leasing companies, collective investment scheme custodians, money lenders other than banks, and securities custodians licensed under the FAIS Act (collectively referred to as "uncovered financial institutions"). These exclusions create a scope issue. Since they are not accountable institutions, the Uncovered Financial Institutions are not subject to the customer due diligence, record keeping and internal control requirements of [FICA]. These exclusions have not been justified based on demonstrated low risk for ML/FT."
- 43 We also do not believe that the issue was addressed by the amendment of item 12 to Schedule 1 as it pertains to "a person who carries on the business of a financial services provider requiring authorisation in terms of the Financial Advisory and Intermediary Services Act, 2002" which amendment was introduced by Government Notice No 1104 of 2010 with effect 1 December 2010.
- 44 It is therefore recommended that, as a matter of urgency, Schedule 1 be reformulated to cover all providers of financial services or products equally, rather than on the basis of authorised legal entity. This would also be consistent with the provisions being contemplated under the new Financial Sector Conduct Authority regulations, currently within NT, which will provide for the regulation of all financial service or product providers on the basis of such products or services, not the legal status of the provider.

Close associates and immediate family members

- 45 Section 21H renders the provisions of section 21F and 21G applicable to immediate family members and "known close associates" of a person in a foreign or domestic prominent position. To give clarity we proposed above that the term "known-close associate" be defined.
- 46 The Bill proposes that section 21H, expanding the obligations imposed by sections 21F and 21G to "immediate family members" also applies to "the previous spouse, civil partner or life partner, if applicable", of a person in a foreign or domestic prominent position. The concept "previous" in this context is not defined, and could prove impossible to implement. Furthermore, having regard to other jurisdictions and the definition of "immediate family members" in those jurisdictions, we propose that this reference in section 21H(2)(b) be deleted, including due to the lack of any state databases or registers of civil or life partners for verification purposes.
- 47 The JMLSG Guidance defines "immediate family members" as including a spouse, a partner, children and their spouses or partners; and the parents.
- 48 The FinCen Guidance in the United States defines "immediate family members" in 31CFR1010.605(p)(2)(ii) as "spouses, parents, siblings, children and spouses parents and siblings".
- 49 In contrast to most of the developed, Western world, South Africa is a traditionally polygamist society, and the inclusion of a person's step-siblings, and their spouses (and parents?), in the context of PEP's or PIP's, stands to expand the range of potential high risk identification and verification requirements substantially. It is unclear how this will be implemented in practice, absent any state-provided registers or databases of such relationships. Further discussion is required in this context, alternatively the words "step sibling and their spouse, civil partner or life partner" should be deleted from new subsection 21H(2)(e) in order to balance the approach to mitigating risks and the need for effective service provision.

Additional due diligence measures relating to corporate vehicles

- 50 Section 10 of the Bill seeks to introduce a new section 21B in the Act which requires additional due diligence measures relating to legal persons, trusts and partnerships. We submit that the concepts of principal and agent are confused in this section inasmuch as the additional due diligence measures are triggered when a client contemplated in section 21 "is a legal or a natural person acting or purporting to act on behalf of a partnership, trust or similar arrangement between natural persons". We suggest that in such instance the actual client of the accountable institution is indeed the "partnership, trust or similar arrangement between natural persons". The section should be amended as appropriate.

Exemptions and consultation

- 51 In the FATF Mutual Evaluation Report at page 226, paragraph 3.2, it was recommended that the South African authorities review the provisions of the

current Exemptions to FICA to ensure that current practices of exempting full CDD requirements in situations where the application of simplified or reduced due diligence would be more appropriate, are addressed. Many of the current Exemptions facilitate compliance with FICA and ensure meaningful implementation of the legislation.

- 52 It is clear that the Money Laundering Control Regulations and the Exemptions will need to be reviewed and significantly amended in light of the provisions in the Bill, if enacted.
- 53 To ensure proper consultation by NT, the FIC and the regulators/supervisors on new regulations, guidance and the transition from current framework to the new one, including the wide range of industries to which the Financial Intelligence Centre Act applies, we propose the insertion of provisions into the Bill similar to sections 97 to 104 and section 278 of the Financial Sector Regulation Bill [B34/2015] which is also currently being considered by the Portfolio Committee.

Penalties and sanctions

- 54 Section 45C of FICA enables the FIC or supervisory body to impose an administrative sanction on an accountable institution when satisfied on available facts and information that the institution or person has failed to comply with the provision of FICA or any order, determination or directive made in terms of FICA.
- 55 The Bill in section 1(l) defines "non-compliance" as "any act or omission that constitutes a failure to comply with the provision of [FICA] or any order, determination, or directive made in terms of FICA which does not constitute an offence in terms of [FICA]". However, the Bill further creates various "acts of non-compliance". For example, section 37 of the Bill introduces an act of non-compliance in regard to a failure to keep records (the proposed amendment to section 47(c) to FICA). It is clear that determining the limits of non-compliance in a definition counteracts its purpose where other acts of non-compliance are designated in other provisions. Thus in light of the provisions of section 45C(a) of FICA, we submit that designating certain acts as "an act of non-compliance" is confusing and superfluous to the extent that the phrase "non-compliance" is itself defined in the Bill.

Costs to implement the Bill

- 56 Unfortunately it has not been possible to determine any costs to implement the Bill in this "silly season", given the short time frame, the absence of key staff, the costs and savings from a true risk-based approach, and the changes necessary from the current FICA business models to new ones under the transition processes (i.e. changes to the Regulations and Exemptions, and the relevant time frames). However, the costs are expected to be significant, in the region of billion Rands for the banking sector, given the need to redesign corporate client identification databases (new thresholds, ultimate beneficial ownership), the population of the new data items and the time lines allowed for this, new PEP's/PIP's and their high risk assessments (including family and close associates as finally defined), the development of Approved Risk Management Programmes and associated training throughout the institutions, etc. On the other hand, there could be substantial savings to institutions and clients alike with the deletion of mandatory residential address verification (largely "garbage in, garbage out" in the SA housing situation for most clients), and a true risk-based approach to

client identification and verification.

- 57 The outcomes of the workshops to be arranged by NT, as noted above, and any constructive consensus on practical and pragmatic approaches, within the SA context, to full compliance with the FATF Recommendations, will also have a significant impact on both costs to comply, as well as savings from the risk-based approach.

Yours sincerely



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SENIOR GENERAL MANAGER
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