

UNIVERSITY OF THE WESTERN CAPE



FACULTY OF LAW

**An Analysis of the Critical Shortcomings in South Africa's Anti-Money Laundering
Legislation**



Student Number: 3247417

Research paper submitted in partial fulfilment of the requirements for the degree of
Master of Laws (LLM) in Transnational Criminal Justice and Crime Prevention: An
International and African Perspective

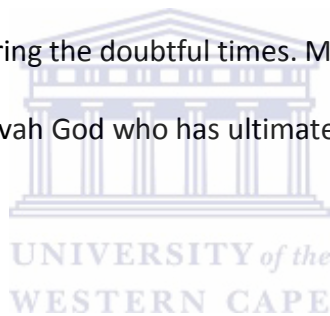
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Declaration

I, Carol Williams, do hereby declare that 'An Analysis of the Critical Shortcomings in South Africa's Anti-Money Laundering Legislation' is my own work, that it has not been submitted for any degree or examination in any other university or academic institution, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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Key Words

Financial Action Task Force

Money Laundering

FATF 40 Recommendations

Financial Intelligence Centre Act

Client Due Diligence

Mutual Evaluation Report

Financial Sector Assessment Programme



List of Abbreviations and Acronyms

BSD	Banking Supervision Department
CDD	Customer Due Diligence
CIPRO	Companies and Intellectual Property Registration Organisation Office
DNFBP	Designated Non-Financial Businesses and Professions
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
EU	European Union
FATF	Financial Action Task Force
FICA	Financial Intelligence Centre Act
FIC	Financial Intelligence Centre
FIU	Financial Intelligence Unit
FSAP	Financial Sector Assessment Programme
ICC	International Criminal Court
IMF	International Monetary Fund
KYC	Know Your Customer
OECD	Organisation for Economic Co-operation and Development
PEP	Politically Exposed Person
POCA	Prevention of Organised Crime Act

STR Suspicious Transaction Report

UN United Nations

US United States of America



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CHAPTER ONE

INTRODUCTION

1.1 Problem Statement

From failing to arrest and surrender Sudanese President Omar Al-Bashir¹ in accordance with its obligations under the Rome Statute of the International Criminal Court² (Rome Statute), to its President acting inconsistently with its Supreme law³, it is evident that the rule of law is under threat in South Africa. Furthermore, South Africa has witnessed the cultivation of a culture of impunity for corruption in high office. South Africa has also experienced an increase in heinous crimes committed against women and children. The South African Rand recently plummeted given that its Minister of Finance Pravin Gordhan, recently faced charges of fraud⁴, as well as the ripple effect caused by the Fees Must Fall Movement.⁵ Against the backdrop of the above-mentioned issues that plague South Africa and hinder its development, the fight against money laundering hardly seems of pivotal importance in achieving the desired stability and development of the country.

¹ The International Criminal Court (ICC) issued an arrest warrant against Omar Al-Bashir. See *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* [2016] ZASCA 17.

² *Rome Statute of the International Criminal Court*, 17 July (1998) 37 ILM 999.

³ *Economic Freedom Fighters v Speaker of the National Assembly and others: Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11.

⁴ ENCA 'Rand still weaker on worries over Gordhan and rating agencies', available at <https://www.enca.com/money/rand-still-weaker-on-worries-over-gordhan-and-rating-agencies> (Accessed on 20 October 2016). See also Powell C 'How the charges against Pravin Gordhan demonstrate a misuse of SA law' Mail&Guardian available at mg.co.za/article/2016-10-19-how-the-charges-against-pravin-gordhan-demonstrate-a-misuse-of-sa-law (Accessed on 20 October 2016).

⁵ Wikipedia 'Fees Must Fall', available at <https://en.m.wikipedia.org/wiki/FeesMustFall> (Accessed on 20 October 2016).

In his speech to the joint plenary of MONEYVAL⁶ and the FATF, Secretary General of the Council of the European Union, Terry Davis ,stated as follows:

'[N]o country can ever say that it is free from money laundering or that opportunities for terrorist financing have been eradicated. We are shooting at a moving target with new methods, techniques, and vehicles for money laundering... being identified every day. That is why we need to remain vigilant... I would like to remind everyone about what is at stake. Financial crime may appear to be discreet and non-violent, but appearances are often deceptive. Money laundering ... [is] a direct threat to the values which ... [we] defend - democracy, human rights and the rule of law.'⁷

There is a public perception that money laundering is a crime of little consequence.⁸ This perception derives from the fact that money laundering does not have a direct impact on its victims and in some instances benefits the economy as it increases the profits for the financial sector and results in a greater availability of credit.⁹ Laundered money arguably is not harmful but rather beneficial to developing economies because money remains money, whether it is proceeds of crime or honestly earned.¹⁰ Although an increase in money is appealing to developing countries, the benefits that accompany laundered money are short-lived as the crime affects society adversely in the long run.¹¹ However, where a country fails to prevent and prosecute money laundering offences, the prevalence of money laundering will impede the development of a state as it not only increases the profitability of crime and

⁶ Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism.

⁷ Davis T Secretary General of the Council of the European Union Speech at the MONEYVAL and FATF plenary 2007, available at <http://www.coe.int/t/dghl/monitoring/moneyval/Activities/Speech/Terry%20Davis%20speech%2010th.pdf> (Accessed on 19 April 2016).

⁸ Unger B & Van der Linde D (eds) *Research Handbook on Money Laundering* (2013) at 20.

⁹ Ferwerda J 'The Effects of Money Laundering' in Unger B & Van der Linde D (eds) *Research Handbook on Money Laundering* (2013) at 35.

¹⁰ Ping H *Money Laundering: Suppression and Prevention – The Research on the Legislation Concerning Money Laundering* (2008) at 9.

¹¹ Ping (2008: 9).

encourages the prevalence of corruption, but it also causes damage to critical financial sector institutions.¹²

Money laundering influences the commission of crimes that generate large amounts of profit, namely, organised crime, which is often described as the twin brother of money laundering.¹³ This is because criminals do not commit crimes to make money only but to enjoy this money as well.¹⁴ However, criminals need to launder their money in order to enjoy the proceeds of their criminal activities without drawing attention to these activities.¹⁵ Countries that combat money laundering effectively make it more difficult for criminals to launder the proceeds of their crimes. It becomes more risky for them to indulge in their ill-gotten gains, thus dissuading them from engaging in economic criminality.¹⁶

Money laundering is a process where the proceeds of crime are concealed and disguised in order to make them appear lawful.¹⁷ Criminals are thus able to enjoy the financial benefits of the crimes they commit.¹⁸ The pervasiveness of money laundering in a country does not only affect the confidence the public have in the country's financial institutions but also undermines the confidence foreign investors and financial institutions have in a developing state's financial institutions.¹⁹ A country can, therefore, run the risk of not benefitting from

¹² Moshi H.P.D 'Fighting Money Laundering: The Challenge in Africa' (2007) Paper 152 *Institute for Security Studies* at 2.

¹³ Ping (2008:10).

¹⁴ Asmal K (President of FATF 2005-2006) 'Foreword' in Muller WH, Kälin CH & Goldsworth JG (eds) *Anti-Money Laundering: International Law and Practice* (2007) at xix.

¹⁵ Asmal K (President of FATF 2005-2006) 'Foreword' in Muller WH, Kälin CH & Goldsworth JG (eds) *Anti-Money Laundering: International Law and Practice* (2007) at xix.

¹⁶ Ping (2008: 9).

¹⁷ International Monetary Fund 'The IMF and the Fight against Money Laundering and the Financing of Terrorism', available at <http://www.imf.org/external/np/exr/facts/aml.htm> (Accessed on 12 April 2016).

¹⁸ Keesoony S 'International Anti-Money Laundering Laws: The Problems with Enforcement' (2016) 19 *Journal of Money Laundering Control*.

¹⁹ Moshi (2007: 2-3).

foreign direct investment.²⁰ The financial institutions rely heavily on what the public think about their integrity.²¹ Money laundering damages the integrity of financial institutions and consequently hinders their ability to conduct business.²² Thus, it is important that states combat money-laundering activities in their respective countries in order to retain the confidence of foreign investors and thus stimulate continuous economic growth. Basic human rights, although promoted and protected by various laws, are of little use to the poor in a nation with a crumbling economy. Hence, it is important that South Africa address all the shortcomings in its anti-money laundering framework in order to ensure that it combats money laundering effectively, thereby eradicating the threat to its economic stability.²³

Furthermore, money laundering leads to inequality in the distribution of wealth, an effect that will eventually have a negative impact on the economy and ultimately lead to the economic instability of a state.²⁴ It is for these latter reasons that combating and prosecuting the crime of money laundering is important. It is here that the anti-money laundering laws play an imperative role in the war against money laundering.

The Financial Action Task Force (FATF), an intergovernmental body established by the leaders of the Group of Seven Nations in Paris in 1989, is the only international body whose

²⁰ Moshi (2007: 2-3).

²¹ Moshi (2007: 2-3).

²² Anderson M 'International Money Laundering: The Need for ICC Investigative and Adjudicative Jurisdiction' (2013) 53 *Virginia Journal of International Law* at 767.

²³ The FATF 40 Recommendations have since been amended by the adoption of new Recommendations in 2012, available at http://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FA_TFRecommendations.pdf (Accessed on 12 April 2016).

²⁴ Keesoony S 'International Anti-Money Laundering Laws: The Problems with Enforcement' (2016) 19 *Journal of Money Laundering Control*.

core mission is to combat money laundering and the financing of terrorism.²⁵ To achieve its aims, the FATF compiled a list of 40+9 Recommendations (FATF /-Recommendations) which sets the international anti-money laundering standards that states are called upon to implement in their respective jurisdictions. The Recommendations focus on improving the anti-money laundering legal regimes of states and on ways of enhancing international co-operation in the fight against money laundering.²⁶

Although the Recommendations are soft law,²⁷ they are enforced by way of conducting mutual evaluations through the FATF, which then publishes the evaluations in reports.²⁸ Another way in which the FATF enforces its Recommendations is by way of naming and shaming countries that refuse to do their part in fighting money laundering in their respective jurisdictions or that have lax anti-money laundering laws.²⁹ These countries are placed on the 'FATF Blacklist'³⁰ and are classified as the Non Co-operative Countries and Territories. Such negative publicity has adverse consequences for the listed countries.³¹ Countries, therefore, should have a solid interest in joining the fight against money laundering in order to avoid sanctions that would otherwise follow.³²

²⁵ Unger B 'Introduction' in Unger B & Van der Linde D (eds) *Research Handbook on Money Laundering* (2013) at 1 - 3.

²⁶ Alexander K 'The International Anti-Money Laundering Regime: The Role of the Financial Task Force' (2001) 4 *Journal of Money Laundering Control* at 239.

²⁷ Soft laws are laws that are not legally binding but rather guidelines, codes of conduct or policy declarations that sets standards. See US Legal 'Soft Law Legal Definition', available at <https://www.definitions.uslegal.com/s/soft-law> (Accessed on 29 August 2016).

²⁸ Unger B 'Introduction' in Unger B & Van der Linde D (eds) *Research Handbook on Money Laundering* (2013) at 1 - 4.

²⁹ Damais A 'The Financial Action Task Force' in Muller WH, Kälin CH & Goldsworth JG (eds) *Anti-Money Laundering: International Law and Practice* (2007) at 78-79.

³⁰ A list that is publicised.

³¹ Sharman JC 'Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States' (2008) 52 *International Studies Quarterly* at 653.

³² Damais A 'The Financial Action Task Force' in Muller WH, Kälin CH & Goldsworth JG (eds) *Anti-Money Laundering: International Law and Practice* (2007) at 78-79.

South Africa underwent its first mutual evaluation when it became a member of the FATF in 2003 and the second mutual evaluation was conducted in 2008.³³ The two evaluations were conducted against the benchmarks set by the 2003 Recommendations and with the use of the corresponding assessment methodology.³⁴ South Africa is scheduled for its next evaluation in October or November 2019 and this time the country will be assessed against the revised 2012 Recommendations.³⁵ As a member of the FATF, South Africa is required to comply with the FATF Recommendations by criminalising money laundering and adopting proactive measures to prevent and prosecute the crime.³⁶

After it assessed South Africa's anti-money laundering and combating of terrorism laws in 2008, the FATF, together with the FATF-style regional body, the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), stated that South Africa has a strong legislative and institutional anti-money framework.³⁷ However, the FATF identified certain shortcomings in South Africa's legislative response to money laundering activities that will be addressed in Chapter Three.³⁸ In answering the research questions, I will focus on South Africa's anti-money laundering regime and not what the country is doing to combat the financing of terrorism.

³³ The findings of the 2008 evaluation were adopted and published as the Mutual Evaluation Report of South Africa 2009. See also Tuba D 'Prosecuting Money Laundering the FATF Way: An Analysis of Gaps and Challenges in South African Legislation from a Comparative Perspective' (2012) 2 *Acta Criminologica: Southern African Journal of Criminology* at 107.

³⁴ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 7.

³⁵ Financial Action Task Force 'Assessment Calendar', available at [http://www.fatf-gafi.org/calendar/assessmentcalendar/?hf=10&b=0&r=%2Bf%2Ffatf_country_en%2Fsouth+afrika%2Fasc\(document_lastmodifieddate\)&table=1](http://www.fatf-gafi.org/calendar/assessmentcalendar/?hf=10&b=0&r=%2Bf%2Ffatf_country_en%2Fsouth+afrika%2Fasc(document_lastmodifieddate)&table=1) (Accessed on 29 August 2016).

³⁶ Tuba (2012: 103).

³⁷ This assessment was adopted and published as the 2009 FATF Mutual Evaluation Report.

³⁸ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 8.

1.2 Research Questions

This research paper seeks to answer the following two questions:

- What are the shortcomings in South Africa's anti-money laundering legislation?
- How can South Africa remedy the shortcomings in its anti-money laundering laws?

1.3 Literature Survey

Louis de Koker provides a brief overview of the anti-money laundering laws that existed in South Africa in 2003³⁹ and discusses the core provisions of the Financial Intelligence Centre Act.⁴⁰ De Koker wrote an article also on the low-risk financial products in South Africa and the money laundering risks that accompany them.⁴¹ In her doctoral thesis, Izelde van

Jaarsveld focused on the amendments of the provisions of South African anti-money laundering laws that enable the banking institutions in South Africa to manage certain consequences of money laundering control while simultaneously contributing towards the fight against money laundering activities.⁴²

Moreover, David Tuba provides an analysis of the gaps identified by the FATF and challenges prosecutors face when prosecuting money-laundering activities.⁴³ This Tuba does by comparing South Africa with similar systems in the United States of America and Canada.

Although Tuba addresses some of the gaps in South Africa's anti-money laundering regime as identified by the FATF, he focuses mainly on the shortcomings in relation to the prosecution of money laundering in South Africa. Dr Abraham Hamman and Professor

³⁹ De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control*.

⁴⁰ Act 38 of 2001.

⁴¹ De Koker L 'The Money Laundering Risk Posed by Low-Risk Financial Products in South Africa' (2009) 12 *Journal of Money Laundering Control*.

⁴² Van Jaarsveld I L *Aspects of Money Laundering in South African Law* (LLD thesis: University of South Africa) 2011.

⁴³ Tuba D 'Prosecuting Money Laundering the FATF Way: An Analysis of Gaps and Challenges in South Africa Legislation from a Comparative Perspective' (2012) 2 *Acta Criminologica: Southern African Journal of Criminology*.

Raymond Koen wrote an article specifically focusing on the role attorneys play in the laundering of ill-gotten proceeds.⁴⁴ The latter article highlights the fact that South Africa's anti-money laundering legislation is silent regarding the risk of the abuse of attorneys' trust accounts. However, the article does not address the shortcomings of the anti-money laundering regime of South Africa.⁴⁵ Charles Goredema provides an overview of the challenges and achievements of South Africa's fight against money laundering but he, too, does not address any of its deficiencies as identified by the FATF.⁴⁶ Nicci Whitear-Nel wrote an article pertaining to the constitutionality of Section 2(2) of the Prevention of Organised Crime Act⁴⁷ (POCA), a section which proved to be constitutional.⁴⁸

It is evident that there is not a substantial amount of literature that addresses the shortcomings in South Africa's anti-money laundering laws. There are some articles that address a few of the shortcomings but none that adopt a more holistic approach to analysing the shortcomings in South Africa's anti-money laundering legislation, something this paper will attempt. Moreover, this paper will consider the more recent shortcomings in South Africa's anti-money laundering regime as identified by the International Monetary Fund (IMF).⁴⁹ Based on the reasons provided above, it is hoped that this paper will contribute towards raising awareness about the inadequacies that hamper South Africa's ability to combat and prosecute money laundering more effectively.

⁴⁴ Hamman & Koen & Koen AJ & Koen RA 'Cave Pecuniam: Lawyers as Launderers' (2012) 15 *Potchefstroom Electronic Law Journal*.

⁴⁵ Hamman & Koen & Koen (2012: 72).

⁴⁶ Goredema C (ed), Banda J & Goba R *Confronting the Proceeds of Crime in Southern Africa: An Introspection* (2007).

⁴⁷ Act 121 of 1998 that came into effect on 21 January 1999.

⁴⁸ Whitear-Nel N 'Law of Evidence: Recent Cases' (2015) 1 *South African Journal of Criminal Justice* at 101.

⁴⁹ See Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund*. See also the 2009 FATF Mutual Evaluation Report.

1.4 Scope of the Study

This study will be limited to South Africa's anti-money laundering legal regime. This paper will analyse the shortcomings in South Africa's anti-money laundering legislative framework against the backdrop of the 2009 FATF mutual evaluation report and the International Monetary Fund Financial Sector Assessment Programme 2015. Reference will be made to the 2003 and 2012 FATF Recommendations.

1.5 Research Methodology

This will be a desktop study in which both primary and secondary sources will be consulted.

The primary sources will comprise national anti-money laundering laws, FATF Recommendations, Mutual Evaluation Reports, case law and treaties. The secondary sources will comprise books, journal articles, media reports and electronic sources.

The approach will be to see how far South Africa has come in improving its anti-money laundering deficiencies that were identified by both the 2009 FATF Mutual Evaluation Report and IMF Financial Sector Assessment Programme 2015. Moreover, it will attempt to show why it is necessary to remedy these deficiencies in order to comply with the FATF Recommendations on money laundering.

1.6 Outline of Chapters

This paper consists of four chapters in total. This chapter introduces the background information to the study. It discusses the problem that this paper aims to address and the theoretical basis for this study. This chapter also provides the method of research that will be used.

The second chapter will define money laundering and the history behind money laundering. It will also deal with the international response to money laundering, as well as South Africa's response to money laundering.

The third chapter will focus on all the shortcomings of South Africa's anti-money laundering laws and their implications.

The fourth, concluding chapter will make recommendations on how South Africa can improve on its anti-money laundering shortcomings.



CHAPTER TWO

UNDERSTANDING MONEY LAUNDERING

2.1 Introduction

Some academics hold the opinion that studying and understanding money laundering is a difficult task due to its elusive nature.⁵⁰ Levi and Reuter question whether money laundering is an element of certain crimes or whether it is an independent activity.⁵¹ They contend that there is no connection between the legal construct of money laundering, which consists in acts as simple as placing illicit funds in one's own bank account, and the analytical construct of money laundering, which includes any activity that cleans the dirty money and allows the perpetrator to spend the dirty money as if it has been acquired legitimately.⁵²

Levi and Reuter argue that it is important to know the balance between money laundering as an independent activity and money laundering that constitutes only an element of a crime.⁵³ This proves important in determining the effectiveness of the anti-money laundering regime because where the evidence is used to prove the commission of money laundering, this evidence can also be used to prove the commission of the predicate offence, which then reduces the benefit of treating money laundering as an independent activity and not as an element of a crime.⁵⁴ According to international law, money laundering is a crime in its own right, but is usually prosecuted as an ancillary crime due to its subsidiary nature in that the money laundering process can commence only upon the

⁵⁰ Levi M & Reuter P 'Money Laundering' (2006) 34 *Crime and Justice* at 291.

⁵¹ Levi (2006: 291).

⁵² Levi (2006: 291-292).

⁵³ Levi (2006: 291).

⁵⁴ Levi (2006: 292).

commission of a predicate offence.⁵⁵ The prosecution of money laundering requires the existence of a predicate offence but perpetrators may be convicted of money laundering irrespective of whether they are convicted of the predicate offence.⁵⁶ Thus, the money laundering offence is both dependent on and independent of the predicate offence.⁵⁷ For this reason, money laundering is accepted as a specific offence but some academics argue that Article 6(2)(e) of the United Nations Convention against Transnational Organised Crime⁵⁸ confirms that money laundering is not a specific offence.⁵⁹

Nevertheless, John Madinger opines that it is important that one understands the nature of money, knowing what money is and how it works, as this will essentially cultivate an understanding of money laundering.⁶⁰ The concept of money was birthed thousands of years ago, a concept whereby an object is given a value and consequently used in trade.⁶¹ Before the introduction of money, people traded one item in exchange for another item, which is known as the barter system.⁶² The barter system of exchange was the primary system of exchange used by early civilisations, but later it was replaced by the cash transaction system.⁶³ With the evolution of the primary exchange system came the ever-

⁵⁵ Keesoony S 'International Anti-Money Laundering Laws: The Problems with Enforcement' (2016) 19 *Journal of Money Laundering Control*.

⁵⁶ Keesoony S 'International Anti-Money Laundering Laws: The Problems with Enforcement' (2016) 19 *Journal of Money Laundering Control*.

⁵⁷ Keesoony S 'International Anti-Money Laundering Laws: The Problems with Enforcement' (2016) 19 *Journal of Money Laundering Control*.

⁵⁸ The United Nations Convention against Transnational Organized Crime was adopted in Palermo, Italy in 2000 and came into force on 29 September 2003.

⁵⁹ Art 6(2)(e) of the United Nations Convention against Transnational Organized Crime states that 'If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence'. See also Keesoony S 'International Anti-Money Laundering Laws: The Problems with Enforcement' (2016) 19 *Journal of Money Laundering Control*.

⁶⁰ Madinger J *Money Laundering: A Guide for Criminal Investigators* 3 ed (2012) at 1.

⁶¹ Madinger (2012: 1).

⁶² The barter system is one where an item is traded directly for another item instead of cash. See Heidensohn K, Jackman R & Zafiris N (eds) *et al The Book of Money: A Visual Study of Economics* 1979 at 10-13 and Madinger J *Money Laundering: A Guide for Criminal Investigators* 3 ed (2012) at 1.

⁶³ Madinger (2012: 2).

changing physical form of money, which includes coins, paper currency, credit cards and numbers merely reflected on a computer network.⁶⁴ Although a comprehensive and enlightening discussion on money warrants a word limit well above the one set for this paper, for the purpose of gaining a better understanding of money laundering, what is important to note is the following: the money laundering process is not limited to cash; it involves any form of currency, be it gold, livestock, diamonds, credit card slips, etc.⁶⁵

The question that naturally follows is this: What exactly is money laundering? Although there is no common definition of what money laundering is, Turner describes money laundering as 'the epitome of fraud methodology'.⁶⁶ There is a wide pool of instruments that defines money laundering variously over different jurisdictions.⁶⁷ The FATF defines money laundering in the following terms: '[T]he goal of a large number of criminal acts is to generate a profit for the individual or group that carries out the act. Money laundering is the processing of these criminal proceeds to disguise their illegal origin. This process is of critical importance, as it enables the criminal to enjoy these profits without jeopardising their source.'⁶⁸ However, given the South African context in which this research is conducted, the definition of money laundering provided by South Africa's main anti-money laundering law, the Financial Intelligence Centre Act⁶⁹ (FICA), will be used.

FICA defines money laundering as any activity that has or is likely to have the effect of concealing or disguising the nature, location, source, disposition or movement of the

⁶⁴ Madinger (2012: 2).

⁶⁵ Madinger (2012: 4).

⁶⁶ Turner JE *Money Laundering Prevention: Deterring, Detecting and Resolving Financial Fraud* (2011) at xi.

⁶⁷ Hinterseer K *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context* (2002) at 16.

⁶⁸ Booth R, Farrel QCS & Bastable G *et al Money Laundering Law and Regulation: A Practical Guide* (2011) at 3.

⁶⁹ Act 38 of 2001.

proceeds of unlawful activities or any interest that any person has in such proceeds and it includes any activity which constitutes an offence in terms of section 64 of FICA or sections 4, 5 and 6 of POCA 1998. Put simply, money laundering means ‘turning dirty money into clean money’.⁷⁰

2.2 A Brief Overview of the History of Money Laundering

Money laundering was not a crime in any country before 1986, but is now criminalised in over 170 countries.⁷¹ People had been laundering money for centuries prior to the 1982 *United States v \$4,255,625.39*⁷² case that introduced and legally coined the process by which the true source of money is concealed as ‘money laundering’.⁷³ Some 2000 years before the birth of Christ, merchants concealed the source of their money from the Chinese authorities who proscribed certain commercial trades, by investing their assets in other businesses outside China, proving that money laundering has an ancient history in different manifestations.⁷⁴



Although the practice of money laundering has been around for a very long time, the criminalisation and combating of the laundering of illicit proceeds is something of recent origin.⁷⁵ Money laundering, in its modern manifestation, was first introduced in the United States of America (US) when the manufacturing, transportation and sale of alcoholic drinks exceeding the alcohol limit were prohibited in the 1920s.⁷⁶ This prohibition led to the

⁷⁰ Tuba (2012: 105).

⁷¹ Sharman JC ‘Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States’ (2008) 52 *International Studies Quarterly* at 635.

⁷² *United States v \$4,255,625.39* (1982) 551 F Supp.

⁷³ Hinterseer K *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context* (2002) at 23.

⁷⁴ Tuba (2012: 106).

⁷⁵ International Bar Association Anti-Money Laundering Forum ‘Money Laundering’, available at http://www.anti-moneylaundering.org/Money_Laundering.aspx (Accessed on 4 August 2016).

⁷⁶ Tuba (2012: 104).

establishment of an illegal alcohol market led by gangsters who used clotheslaundries and car-washing businesses to conceal the profit they made as a result of the illegal alcohol business.⁷⁷ In the US case of *United States v \$4,255,625.39*,⁷⁸ Colombian citizens deposited money into a US bank account that was opened with the identity of a fictitious entity, which the court deemed as conduct that constituted money laundering.⁷⁹ However, money laundering was criminalised only in 1986 by the US in response to its 'war on drugs'⁸⁰ campaign, making it the first country to do so.⁸¹ When drug trafficking graduated to become an international problem, the US placed pressure on international bodies to combat drugs and this, in turn, led to the start of the international war against money laundering, but predominantly in the context of drug-related offences.⁸²

2.3 International Response to Money Laundering

The globalisation of the economy facilitated the end of segregation that was caused by domestic financial markets and resulted in an integrated global economic system that led to an increase in trans-border investments, transferring of skills, knowledge, technology and employment.⁸³ However, notwithstanding the advantages that accompany the globalisation of the financial system, it has become easier for criminals to launder and legitimise their ill-

⁷⁷ Tuba (2012: 104).

⁷⁸ *United States v \$4,255,625.39 (1982) 551 F Supp.*

⁷⁹ Tuba (2012: 104).

⁸⁰ Unger B 'Money Laundering Regulation: From Al Copone to Al Qaeda' in Unger B & Van der Linde D (eds) *Research Handbook on Money Laundering* (2013) at 2 – 22.

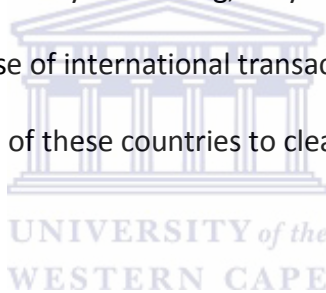
⁸¹ Unger B 'Money Laundering Regulation: From Al Copone to Al Qaeda' in Unger B & Van der Linde D (eds) *Research Handbook on Money Laundering* (2013) at 2 – 23.

⁸² Savona EU & De Feo MA 'International Money Laundering Trends and Prevention/Control Policies' in Savona EU (ed), Bassiouni MC & Bernasconi P *Responding to Money Laundering: International Perspectives* (1997) at 2 – 9.

⁸³ Hintersseer K *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context* (2002) at 24.

gotten gains.⁸⁴ Money laundering is an international problem that affects individual countries, hence an international response through the co-operation of individual states is imperative, for the wider the fight against money laundering, the greater the impact it will have in suppressing this criminal activity.⁸⁵

Given the fact that money laundering was a problem largely experienced by rich countries, the G7 came under pressure to join the war against money laundering, which is when the FATF emerged.⁸⁶ As stated in Chapter One, the FATF introduced 40 Recommendations that set the international standards for national anti-money laundering legislation.⁸⁷ Although the international anti-money laundering standards are not legally binding on states, when states fail to join the war against money laundering, they subject themselves to economic sanctions that include the decrease of international transactions in these countries, making it almost impossible for the banks of these countries to clear their funds through foreign banks.⁸⁸



2.3.1 The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic

Substances

The international efforts to combat money laundering were introduced in 1988 upon the adoption of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances⁸⁹ (UN Drug Convention) by the United Nations. The UN Drug Convention

⁸⁴ International Bar Association Anti-Money Laundering Forum 'Money Laundering', available at http://www.anti-moneylaundering.org/Money_Laundering.aspx (Accessed on 4 August 2016).

⁸⁵ Ping (2008: 10).

⁸⁶ Unger B 'Money Laundering Regulation: From Al Copone to Al Qaeda' in Unger B & Van der Linde D (eds) *Research Handbook on Money Laundering* (2013) at 2 – 23.

⁸⁷ Unger B 'Money Laundering Regulation: From Al Copone to Al Qaeda' in Unger B & Van der Linde D (eds) *Research Handbook on Money Laundering* (2013) at 2 – 23.

⁸⁸ Levi (2006: 291).

⁸⁹ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 28 ILM 493. See also Tuba (2012: 107).

essentially requires states to co-operate with one another in order to freeze and forfeit any illicit proceeds.⁹⁰ However, the latter convention does not specifically make mention of the term 'money laundering'.⁹¹ The UN Drug Convention requires states to criminalise money laundering and to deem money laundering an extraditable crime.⁹² This Convention was the first to deal with the criminalisation of money laundering.⁹³ The Convention paved the way for the international anti-money laundering system by placing a duty on all states to criminalise the laundering of drug-related proceeds.⁹⁴ Although the UN Drug Convention is primarily concerned with the war against drugs, it provides a template for money laundering offences in Article 3 of the Convention, which was subsequently adopted by the FATF.⁹⁵

2.3.2 The Basel Committee Statement of Principles

The UN Drug Convention was not the only instrument that contributed to the fight against money laundering in 1988. The Basel Committee on Banking Regulations and Supervisory Practices adopted a Statement of Principles which dealt with customer identification, banks co-operating with law enforcement agencies and complying with the law in order to combat money laundering.⁹⁶ The representatives of the central banks and supervisory authorities of the Group of Ten Nations constitute the Basel Committee that essentially discusses banking supervision.⁹⁷ It was in the 1980s that the Basel Committee became aware of criminals who

⁹⁰ Bassiouni MC & Gultieri DS 'International and National Responses to the Globalization of Money Laundering' in Savona EU (ed), Bassiouni MC & Bernasconi P *Responding to Money Laundering: International Perspectives* (1997) at 5 – 107.

⁹¹ Tuba (2012: 107).

⁹² Art 3(1)(b). See also Madinger J *Money Laundering: A Guide for Criminal Investigators* 3 ed (2012) at 70.

⁹³ Art 3 of the UN Drug Convention. See also Ping (2008: 18).

⁹⁴ Parkman T '*Mastering Anti-Money Laundering and Counter-Terrorist Financing: A Compliance Guide for Practitioners*' (2012) at 16.

⁹⁵ Booth (2011: 4).

⁹⁶ Ping (2008: 13).

⁹⁷ Ping (2008: 13).

used their financial systems and institutions to launder their illegal proceeds.⁹⁸ In response, the Basel Committee adopted the Statement of Principles in order to ensure that the banks are not used in the process of laundering and hiding illicit proceeds.⁹⁹

2.3.3 The Financial Action Task Force

As explained above, the FATF was established by the Ministers of the G7 in response to the prevalence of money laundering.¹⁰⁰ As an independent task force of the Organisation for Economic Co-operation and Development (OECD), the FATF is tasked with a mandate to promote and develop anti-money laundering measures through its Recommendations at both national and international level.¹⁰¹ After the terrorist attacks were carried out against the US on 11 September 2001, the mandate of the FATF was extended to include the fight against terrorist financing.¹⁰² The FATF consequently developed nine Special Recommendations to combat terrorist financing.¹⁰³ The FATF Recommendations on money laundering and terrorist financing were adopted not only by the IMF and the World Bank in 2002,¹⁰⁴ but also were endorsed also by the United Nations Security Council in Resolution 1617 of 29 July 2005.¹⁰⁵

The FATF did not only develop Recommendations to combat money laundering and the financing of terrorism, but also subjects States to mutual evaluations and self-assessments

⁹⁸ Basel Committee on Banking Regulations and Supervisory Practices (1988) Statement on Prevention on Criminal Use of Banking System for the Purpose of Money Laundering at Preamble.

⁹⁹ Ping (2008: 217).

¹⁰⁰ International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations (2012) at 7.

¹⁰¹ Booth (2011: 7).

¹⁰² Damais A 'The Financial Action Task Force' in Muller WH, Kälin CH & Goldsworth JG (eds) *Anti-Money Laundering: International Law and Practice* (2007) at 71.

¹⁰³ The FATF Recommendations (2012) at 7.

¹⁰⁴ Gordon R 'Losing The War Against Dirty Money: Rethinking Global Standards on Preventing Money Laundering and Terrorism Financing' (2011) 21 *Duke Journal of Comparative & International Law* at 506.

¹⁰⁵ Damais A 'The Financial Action Task Force' in Muller WH, Kälin CH & Goldsworth JG (eds) *Anti-Money Laundering: International Law and Practice* (2007) at 71.

on how they implement the Recommendations, which essentially encourage States to improve their fight against money laundering.¹⁰⁶ However, the burden of implementing the Recommendations is imposed mainly on the private sector.¹⁰⁷ Even though the FATF Recommendations are not legally binding upon states, so far the Recommendations have been domesticated by more than 180 countries and are accepted as the international anti-money laundering and combating of terrorist financing standards.¹⁰⁸ The Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism¹⁰⁹ obligates the EU Member States to adopt and implement the FATF Recommendations.¹¹⁰ Thus, even though the Recommendations are not, technically, hard law, based on their universal implementation, they are accepted as such.

The FATF acknowledges that countries do not have the same legal, administrative, and operational framework or identical financial system.¹¹¹ Thus, countries are unable to implement identical measures.¹¹² For this very reason, the FATF recommends that countries enforce measures that are adapted to the specific circumstances of every individual state.¹¹³ Before countries adopt measures to combat money laundering, they must set out first to

¹⁰⁶ Ping (2008: 54).

¹⁰⁷ Booth (2011: 6).

¹⁰⁸ Damais A 'The Financial Action Task Force' in Muller WH, Kälin CH & Goldsworth JG (eds) *Anti-Money Laundering: International Law and Practice* (2007) at 74. See also International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations (2012) at 7.

¹⁰⁹ An update from its 1990 Convention to include the financing of terrorism. This Convention was adopted in Warsaw, Poland on the 16th of May 2005 and came into force in 2008. Treaty 198. Available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198> (Accessed on 01 September 2016).

¹¹⁰ Art 13(1) of The Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism Treaty No 198.

¹¹¹ Parkman (2012: 27).

¹¹² The FATF Recommendations (2012) at 7.

¹¹³ The FATF Recommendations (2012) at 7.

identify, assess and understand the risks that accompany money laundering.¹¹⁴ The FATF recommends that countries adopt a risk-based approach that will allow them to adopt more flexible measures within the confines of the FATF standards.¹¹⁵ The risk-based approach allows countries to utilise their resources in the most effective way.¹¹⁶ This is because the risk-based approach entails applying 90 per cent of resources towards 10 per cent of business that constitutes the most serious risk.¹¹⁷

The FATF 40 Recommendations were first published in 1990 as an initiative to combat the laundering of drug proceeds.¹¹⁸ Given the evolving money laundering trends, the Recommendations were revised in 1996.¹¹⁹ They were updated comprehensively in both 2003 and 2012.¹²⁰ They will be subject to changes in the light of the evolving nature of money laundering techniques and the threats they pose to the world economy.¹²¹

2.3.4 EU Convention and Directives

In 1990 the Council of the European Union adopted the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime¹²² and issued the EU Member States with Money Laundering Directives in 1991, 2001 and 2005.¹²³ The latter was done in order to ensure that the Recommendations were domesticated by the EU Member States, as the Recommendations were adopted by the European Union as requirements of the Directives

¹¹⁴ The FATF Recommendations (2012) at 8.

¹¹⁵ The FATF Recommendations (2012) at 8.

¹¹⁶ The FATF Recommendations (2012) at 8.

¹¹⁷ Parkman (2012: 99).

¹¹⁸ The FATF Recommendations (2012) at 7.

¹¹⁹ The FATF Recommendations (2012) at 7.

¹²⁰ Parkman (2012: 26).

¹²¹ The FATF Recommendations (2012) at 9.

¹²² Known as the Strasbourg Convention, it was adopted in 1990 in Strasbourg, France and came into effect in 1993. It is the predecessor of the 2005 Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

¹²³ Booth (2011: 5).

that were issued.¹²⁴ It is after the Recommendations and latter initiatives of the European Union that the anti-money laundering measures became part and parcel of the legal framework of countries across the world, hence the foundation for the international countermeasures to money laundering were established between 1988 and 1991.¹²⁵

2.3.5 The Egmont Group

The transfer of money may happen within a matter of seconds across various jurisdictions, a fact that requires investigative authorities to have access to an instant exchange of information, which is where the Egmont Group plays an important role.¹²⁶ The Egmont Group was established in 1995 as an informal government body after international organisations and government agencies met in order to seek solutions to the problem of laundering illicit proceeds.¹²⁷ The Egmont Group consists of Financial Intelligence Units (FIUs) that are located in countries throughout the world.¹²⁸ A FIU is a central, national agency that collects, analyses and disseminates information regarding any suspicious financial transactions and any money laundering or terrorist financing activities.¹²⁹ This information is made readily available to all other FIUs throughout the world, thus making it easier for investigative authorities to track the illicit funds and, in turn, enhance the fight against money laundering.¹³⁰

¹²⁴ Booth (2011: 5).

¹²⁵ Booth (2011: 4).

¹²⁶ Muller WH, Kälin CH & Goldsworth JG (eds) *Anti-Money Laundering: International Law and Practice* (2007) at 85.

¹²⁷ Muller (2007: 86).

¹²⁸ Madinger (2012: 86).

¹²⁹ Muller (2007: 86).

¹³⁰ Muller (2007: 86).

2.3.6 United Nations Convention against Organised Crime

The United Nations Convention against Organised Crime (Palermo Convention)¹³¹ was created in order to foster international co-operation in order to combat and prevent organised crime,¹³² to which money laundering was identified as a form of organised crime.¹³³ The Palermo Convention endorsed the principles developed by the Basel Committee, FATF Recommendations and initiatives of the European Union, as explained above, and included measures to combat and prevent money laundering.¹³⁴

The money laundering offences in the Palermo Convention, although similar to the money laundering offences listed in Article 3 of UN Drug Convention, have been broadened in that they do not relate to drug trafficking offences only but to all serious crimes within the context of the Convention.¹³⁵ Thus, although the Palermo Convention endorsed the anti-money laundering measures developed in the 1980s and 1990s, it extended the scope of the anti-money laundering measures and, as a result, widened the reach of the measures to combat and prevent money laundering.

2.3.7 The Wolfsberg Group

The Wolfsberg Group consists of 13 global banks which work together in order to achieve the same common goal, namely, to provide guidance and develop a framework for the financial service industry standards where there are financial crime risks, specifically Know

¹³¹ The United Nations Convention against Transnational Organized Crime was adopted in Palermo, Italy in 2000 and came into force on 29 September 2003.

¹³² Art 1 of the Palermo Convention 2000.

¹³³ Art 6 and 7 of the Palermo Convention 2000.

¹³⁴ Ping (2008: 30).

¹³⁵ Booth (2011: 11).

Your Customer, Anti-Money Laundering and Counter Terrorist Financing policies.¹³⁶ The group was established in 2000 after the global banks met in Switzerland where they developed and adopted the Wolfsberg Global Anti-Money Laundering Guidelines for Private Banking.¹³⁷ What the Wolfsberg Group attempts to attain through its primary goal, is to cultivate a culture where the regulatory agencies adopt a risk-based approach to money laundering at both national and international level.¹³⁸ This is reflected in its Guidelines of 2000, the standards it sets on the Know Your Customer (KYC), Common Customer Due Diligence (CDD), training and other means of monitoring.¹³⁹ The Wolfsberg Group continues to play a crucial role in furthering the fight against money laundering.

2.3.8 The International Monetary Fund

The IMF is an organisation tasked with fostering global monetary co-operation between states, reducing poverty, ensuring financial stability, and facilitating international trade.¹⁴⁰

The IMF essentially acts in the interests of the global economy. Created in 1945, the organisation enjoys a membership of 189 countries to whom it is accountable and governed by.¹⁴¹

The IMF has been involved in combating money laundering at a national level for a very long time.¹⁴² Given its global membership, the IMF is a natural forum where countries exchange

¹³⁶ Booth (2011: 459). See also: The Wolfsberg Group 'Global Banks: Global Standards', available at www.wolfsberg-principles.com (Accessed on 02 September 2016).

¹³⁷ These Guidelines were adopted in October 2000. The Guidelines were revised in 2002 and again in 2012. See The Wolfsberg Group 'Global Banks: Global Standards', available at www.wolfsberg-principles.com (Accessed on 02 September 2016).

¹³⁸ Booth (2011: 97).

¹³⁹ Booth (2011: 96).

¹⁴⁰ International Monetary Fund 'About the IMF', available at <http://www.imf.org> (Accessed on 07 October 2016).

¹⁴¹ International Monetary Fund 'About the IMF', available at <http://www.imf.org> (Accessed on 07 October 2016).

¹⁴² Parkman (2012: 35).

the necessary information about issues that threaten the stability of the international economy, such as money laundering. In 1999 the IMF, together with the World Bank, established the Financial Sector Assessment Programme (FSAP) that evaluates the financial system of countries and assists countries to address the weaknesses identified in their financial system.¹⁴³ The IMF Executive Board decided to include the FATF Recommendations as part of IMF work and created a donor-supported trust to render financial assistance in anti-money laundering efforts.¹⁴⁴

2.4 South Africa's Response to Money Laundering

Before the 1990s, people who laundered illicit proceeds were prosecuted as accessories after the fact in terms of South African common law.¹⁴⁵ This is illustrated in *S v Dustigar*.¹⁴⁶ Known as the biggest robbery case in South African history, 19 people were convicted of numerous crimes committed during a robbery.¹⁴⁷ Of the 19 accused, seven used their banks accounts to launder money and were convicted of money laundering in terms of the South African common law, as accessories after the fact.

The 1980s and 1990s marked an important period for the development of anti-money laundering measures at the international level, as discussed above. South Africa adopted the international approach to combating money laundering by developing a statutory framework for the prevention and prosecution of the crime.¹⁴⁸ The very first statutory

¹⁴³ Parkman (2012: 35).

¹⁴⁴ Parkman (2012: 35).

¹⁴⁵ De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 166.

¹⁴⁶ *S v Dustigar* (Durban and Coast Local Division) Unreported case CC6/2000.

¹⁴⁷ De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 166.

¹⁴⁸ This may have been influenced by the fact that South Africa adopted United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988. See Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism:

money laundering offences were created by way of the Drugs and Drug Trafficking Act¹⁴⁹ which introduced money laundering as an independent offence.¹⁵⁰ The latter Act criminalised money laundering in the context of drug-related offences and required the appropriate instances to report any suspicious transactions, but only insofar as they were connected to the profits of any drug-related crimes.¹⁵¹ The reach of the South African authorities in combating money laundering was, therefore, very limited.¹⁵² In response to this limitation, the Proceeds of Crime Act¹⁵³ was enacted. This law repealed the Drugs and Drug Trafficking Act entirely.¹⁵⁴ The Proceeds of Crime Act broadened the fight against money laundering by introducing a money laundering offence that was not restricted to drug-related offences, but this extension still proved ineffective in combating money laundering in South Africa.¹⁵⁵ In an effort to combat both organised crime and money laundering, South Africa repealed the Proceeds of Crime Act when it adopted POCA.¹⁵⁶

2.4.1 The Prevention of Organised Crime Act

When POCA came into effect on 21 January 1999, it became the main statute criminalising money laundering in South Africa.¹⁵⁷ Two sets of money laundering offences are created by POCA.¹⁵⁸ The first set consists of general money laundering offences.¹⁵⁹ Here money

¹⁴⁹ South Africa' 26 February 2009 at 30. See also De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 166.
¹⁵⁰ Act 140 of 1992.

¹⁵¹ Tuba (2012: 106).

¹⁵² De Koker 'Money Laundering in South Africa' (2002) *Institute for Security Studies* at 3.

¹⁵³ De Koker 'Money Laundering in South Africa' (2002) *Institute for Security Studies* at 3.

¹⁵⁴ Act 76 of 1996.

¹⁵⁵ Tuba (2012: 122).

¹⁵⁶ De Koker 'Money Laundering in South Africa' (2002) *Institute for Security Studies* at 3.

¹⁵⁷ De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 166.

¹⁵⁸ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 30.

¹⁵⁹ De Koker 'Money Laundering in South Africa' (2002) *Institute for Security Studies* at 4.

Provided for in Chap 3, Art 4-6 of POCA.

laundering is criminalised under three separate provisions of POCA.¹⁶⁰ The second set of money laundering offences concerns the proceeds of a pattern of racketeering.¹⁶¹

Money laundering is criminalised under chapter 3 of POCA, specifically sections 4, 5 and 6.

According to section 4 of POCA, a person is guilty of money laundering where any person knows or reasonably ought to have known that property is or forms part of illicit proceeds and such person continues to commit acts in connection with such property, which is likely to have or has the following two effects.¹⁶² Firstly, it results in the concealment or disguising of the nature, location, movement, ownership or interest a party may have in respect of such property.¹⁶³ Secondly, it may also result in assisting or enabling a person who has committed crimes in South Africa or abroad, to evade prosecution, diminish or eliminate any property acquired as a result of any proscribed act committed.¹⁶⁴ Here the accused is the perpetrator who commits the predicate offence and the one who disguises or conceals the proceeds of the predicate offence.¹⁶⁵ Predicate offences are criminal offences that give rise to money laundering because the predicate offences generate the illegal proceeds, which, in turn, generate the need to have the money laundered.¹⁶⁶ The *De Vries v S*¹⁶⁷ case illustrates the prerequisites of section 4 of POCA. In this case, Achmat Mather was convicted of both theft as a continuing crime and money laundering in terms of section 4 of POCA.

Mather purchased stolen cigarettes from a gang who hijacked trucks transporting cargo of

¹⁶⁰ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 6.

¹⁶¹ Dealt with in Chap 2 of POCA. See De Koker 'Money Laundering in South Africa' (2002) *Institute for Security Studies* at 6.

¹⁶² Sec 4(a) – (b) of POCA.

¹⁶³ Sec 4(b)(i) of POCA.

¹⁶⁴ Sec 4(b)(ii) of POCA.

¹⁶⁵ Tuba (2011: 109).

¹⁶⁶ Unger B 'Implementing Money Laundering' in Masciandaro D, Takats E & Unger B *Black Finance: The Economics of Money Laundering* (2007) at 114.

¹⁶⁷ *De Vries v S* (130/11) [2011] ZASCA 162.

the British American Tobacco Company of South Africa. Mather argued that because the charge of theft and money laundering both flowed from his dealings with the stolen cigarettes, he ought to be convicted of money laundering only and not theft.¹⁶⁸

The court referred to section 4 of POCA and held that Mather made himself guilty of theft as a continuing crime the moment he received the cigarettes, knowing that it was stolen. The court went on to hold that he acted in contravention of section 4 when he used the stolen cigarettes as though they were legally obtained, thereby concealing their illegal nature and assisting the gang which stole the cigarettes. The court held that the two crimes ultimately involved different actions and theft required a different element from the crime of money laundering.¹⁶⁹

Anyone who assists another party to benefit from the proceeds of criminal activities will be prosecuted for money laundering.¹⁷⁰ Section 5 provides that where any party besides the perpetrator enters into any agreement, transaction, or arrangement with anyone in order to retain, control, or make the illegal proceeds available to the perpetrator, such party will be guilty of money laundering.¹⁷¹ Here the third party either knew or reasonably ought to have known that the perpetrator, in whose favour the third party is acting, obtained the proceeds from illegal activities.¹⁷²

The third instance where a person may be guilty of a money laundering offence is where that person acquires, uses or is in possession of proceeds of illegal activities, knowing or reasonably ought to have known that the proceeds derive from the unlawful activities of

¹⁶⁸ *De Vries v S* (130/11) [2011] ZASCA 162 at para 56.

¹⁶⁹ *De Vries v S* (130/11) [2011] ZASCA 162 at para 56.

¹⁷⁰ Sec 5 of POCA.

¹⁷¹ Sec 5(a)-(b) of POCA.

¹⁷² Sec 5 of POCA. See also De Koker 'Money Laundering in South Africa' (2002) *Institute for Security Studies* at 5.

another party.¹⁷³ Self and third-party money laundering are dealt with in section 4.¹⁷⁴ However, sections 5 and 6 only deal with third-party money laundering.¹⁷⁵ According to the FATF, the fact that section 6 fails to extend liability to the perpetrator of the predicate offence for the acquisition, possession or use of the ill-gotten proceeds, represents a gap in the section.¹⁷⁶ However, South African authorities argue that section 6 does not criminalise money laundering. Instead, section 6 is deemed complementary to section 4, as it applies to people who are indirectly associated with money laundering and where there is insufficient evidence to secure a conviction in terms of section 4.¹⁷⁷

South African authorities stated that the language used in both the UN Drug Convention and the Palermo Convention suggests that the acquisition, use or possession of proceeds of illegal activities apply only to any party other than the person who committed the predicate offence. The South African authorities went on to say that charging a perpetrator under both sections 4 and 6 would amount to a duplication of charges, which is in contravention of South Africa's constitutional principles and legal system.¹⁷⁸ For purposes of this paper, the latter issue will not be considered any further except to state that, notwithstanding the issue around section 6 of POCA, it was found to be largely compliant with Recommendation

1.¹⁷⁹

¹⁷³ Sec 6 of POCA.

¹⁷⁴ Tuba (2011: 109).

¹⁷⁵ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 32.

¹⁷⁶ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 32.

¹⁷⁷ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 33.

¹⁷⁸ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 33.

¹⁷⁹ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 33.

In all three instances where conduct constitutes a money laundering offence, a party may be prosecuted for money laundering only where that party knew or reasonably ought to have known that the property constituted the proceeds of illegal activities.¹⁸⁰ According to section 1(2) of POCA, a party has knowledge of a particular fact where that person possesses actual knowledge of that fact or where that person fails to confirm the existence of such fact, or where that person suspected the reasonable existence of the said fact. On the other hand, a person may be convicted of money laundering where that person negligently failed to realise that the property was or formed part of the proceeds of illegal activities.¹⁸¹ An accused may rely on the fact that she or he reported a suspicion or knowledge of a fact in terms of section 29 of FICA as a defence against a charge of money laundering due to negligence.¹⁸²

The proceeds of unlawful activities consist of property that goes beyond money. Any movable, immovable, corporeal or incorporeal thing, including rights, privileges, securities and claims constitute “property”.¹⁸³ Any property or part thereof, including any service, advantage or reward that derives directly or indirectly from illegal activities committed in South Africa or abroad, is deemed as proceeds of any activity that is criminalised or prohibited in terms of South African law.¹⁸⁴ South Africa adopts an “all crimes approach”, meaning that the ambit of the money laundering offence applies to any conduct

¹⁸⁰ De Koker ‘Money Laundering in South Africa’ (2002) *Institute for Security Studies* at 6.

¹⁸¹ Section 1(3) of POCA states the following: ‘[A] person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both – (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and (b) the general knowledge, skill, training and experience that he or she in fact has’.

¹⁸² Sec 7A of POCA. See also De Koker ‘Money Laundering in South Africa’ (2002) *Institute for Security Studies* at 6.

¹⁸³ Sec 1 of POCA.

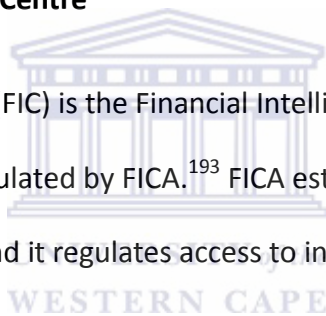
¹⁸⁴ Sec 1 of POCA. See also Financial Action Task Force ‘Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa’ 26 February 2009 at 31-32.

criminalised under South African law.¹⁸⁵ The penalties for money laundering offences are anything but lenient.¹⁸⁶ Any person who is convicted of money laundering in terms of sections 4,5, and 6 may be fined an amount not exceeding R100 million or imprisoned for a period of not more than 30 years.¹⁸⁷ If the money laundering offence was committed in relation to proceeds of racketeering, the accused will be fined no more than R1 billion or face life imprisonment.¹⁸⁸ The broad ambit of the POCA provisions have enabled the South African authorities to enforce them with ease.¹⁸⁹ However, South Africa's lack of general money laundering framework hindered the effectiveness of POCA.¹⁹⁰ The adoption of FICA closed the gaps caused by the lack of a general money laundering control framework.¹⁹¹

2.4.2 The Financial Intelligence Centre

The Financial Intelligence Centre (FIC) is the Financial Intelligence Unit of South Africa.¹⁹²

The Centre is established and regulated by FICA.¹⁹³ FICA established also the Counter-Money Laundering Advisory Council¹⁹⁴ and it regulates access to information and obligations for



¹⁸⁵ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 34. See also Tuba (2011: 110).

¹⁸⁶ De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 167.

¹⁸⁷ Sec 8(1) of POCA.

¹⁸⁸ Sec 3(1) of POCA. See also De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 167.

¹⁸⁹ De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 167.

¹⁹⁰ De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 167.

¹⁹¹ De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 167.

¹⁹² Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 7.

¹⁹³ Sec 2(1) of FICA.

¹⁹⁴ Established by sec 17 of FICA, the Council's primary function is to advise the Minister of Finance on his/her powers under FICA and the best policies and practices to counter money laundering. Moreover, the Council provides the FIC with advice on the Centre's performance and functions. See sec 18 of FICA. See also De Koker 'Money Laundering in South Africa' (2002) *Institute for Security Studies* at 24.

money laundering control.¹⁹⁵ The creation of a financial intelligence unit can be traced back to 1996, when the South African Law Commission published a Money Laundering Control Bill.¹⁹⁶ Unfortunately, due to tardiness on the part of the government, the necessary mechanisms and structures to enhance the fight against money laundering were approved only in 2002, when FICA came into effect.¹⁹⁷

The Financial Intelligence Centre became a member of the Egmont Group of Financial Intelligence Units in 2003.¹⁹⁸ The primary objective of the Centre is to render assistance in the identification of illicit proceeds and the following up of money laundering activities, financing of terrorism and other related activities.¹⁹⁹ The Centre is also required to provide information it collects to the respective South African authorities responsible for combating money laundering.²⁰⁰ Moreover, the Centre is obligated to exchange information with similar anti-money laundering bodies, to supervise and enforce compliance with FICA, and to assist other supervisory bodies in carrying out the latter function.²⁰¹

The Centre collects, retains, compiles, and analyses all the information it obtains by virtue of FICA.²⁰² However, it bears noting that the Centre does not investigate money laundering offences.²⁰³ It furnishes only relevant information, advice, and assistance to intelligence

¹⁹⁵ Long title of FICA. See also De Koker 'Money Laundering in South Africa' (2002) *Institute for Security Studies* at 21.

¹⁹⁶ South African Law Commission *Money Laundering and Related Matters* (1996) Project 104, Pretoria. See also De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 168.

¹⁹⁷ De Koker 'Money Laundering in South Africa' (2002) *Institute for Security Studies* at 21.

¹⁹⁸ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 64.

¹⁹⁹ Sec 3(1) of FICA.

²⁰⁰ Sec 3(2)(a) of FICA.

²⁰¹ Sec 3(2)(b)-(c) of FICA.

²⁰² De Koker 'Money Laundering in South Africa' (2002) *Institute for Security Studies* at 22.

²⁰³ De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 169.

services, investigative authorities and the South African Revenue Services (SARS).²⁰⁴ Furthermore, the Centre provides only guidance to and monitors accountable institutions and is not empowered to supervise them.²⁰⁵ FICA provides for the general money laundering control framework by placing various entities under a plethora of obligations.²⁰⁶ These entities have a duty to identify clients,²⁰⁷ keep records,²⁰⁸ to report, and to provide access to information.²⁰⁹ They are required also to implement measures to promote compliance by accountable institutions²¹⁰ and to supervise and make referrals where necessary.²¹¹

POCA and FICA make up the core structure of South Africa's anti-money laundering regime.²¹² The general money laundering offences as defined by POCA and FICA provide for a detailed money laundering control framework that gives rise to obligations that are imposed on businesses.²¹³ Louis de Koker opines that both POCA and FICA provide for a comprehensive anti-money laundering framework in South Africa.²¹⁴ However, De Koker warns that the constitutionality of the provisions in FICA and POCA may be challenged – a

²⁰⁴ Sec 44 of FICA.

²⁰⁵ Schedule 1 of FICA provides a list of accountable institutions that includes attorneys, estate agents, long-term insurers, banks, foreign exchange dealers, etc. See also secs 4, 44 and 45 of FICA. Refer also to De Koker 'Money Laundering in South Africa' (2002) *Institute for Security Studies* at 21.

²⁰⁶ De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 169.

²⁰⁷ Sec 21 of FICA.

²⁰⁸ Sec 22-26 of FICA.

²⁰⁹ Sec 27-41 of FICA.

²¹⁰ Sec 42-43B of FICA.

²¹¹ Sec 44-45 of FICA.

²¹² De Koker L 'Client identification and money laundering control: Perspectives on the Financial Intelligence Centre Act 38 of 2001' (2004) 4 *J.S.Afr.L* at 716.

²¹³ De Koker L 'Client identification and money laundering control: Perspectives on the Financial Intelligence Centre Act 38 of 2001' (2004) 4 *J.S.Afr.L* at 717.

²¹⁴ De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 176.

warning that has already become a reality when parties accused of fraud, corruption and money laundering challenged section 2(2) of POCA.²¹⁵

De Koker recommends that the relevant bodies exercise the powers conferred upon them, taking into account the constitutional rights of others.²¹⁶ De Koker also suggests that the relevant bodies exercise powers that are the least controversial.²¹⁷ Although South Africa has a comprehensive legal framework that enables it to combat money laundering, much depends on how it is implemented.²¹⁸ In addressing the shortcomings in South Africa's anti-money laundering legislation, this paper will address both POCA and FICA in greater detail in Chapter Three.

2.5 Process of Money Laundering

Many people comprehend the process of money laundering to be a complex one, a process that is complicated to understand.²¹⁹ But the process of money laundering is, in fact, common and relatively easy to understand.²²⁰ Although the money laundering process has been encapsulated in a number of steps,²²¹ the process is primarily a triadic one, a trio of steps that consist of the following: placement, layering and integration.²²²

In order to understand the money laundering process, consider the following hypothetical situation: Mr Merchant, a successful drug dealer on the Cape Flats accumulates large sums

²¹⁵ See the case of *Savoi v National Director of Public Prosecutions* 2014 (5) BCLR 606 (CC).

²¹⁶ De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 176.

²¹⁷ De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 177.

²¹⁸ De Koker 'Money Laundering in South Africa' (2002) *Institute for Security Studies* at 48.

²¹⁹ Turner (2011: 1).

²²⁰ Turner (2011: 1).

²²¹ Woods BF *The Art and Science of Money Laundering: Inside the Commerce of the International Narcotics Traffickers* (1998) at 1.

²²² Savona EU & De Feo MA 'International Money Laundering Trends and Prevention/Control Policies' in Savona EU (ed), Bassiouni MC & Bernasconi P *Responding to Money Laundering: International*

Perspectives (1997) at 2 - 23.

of money as a result of his drug dealing, but he is unable to explain how he came to be in possession of that money. Naturally, Mr Merchant wants to avoid attracting unwanted attention, so he tries to conceal the criminal proceeds by converting the cash into another form that would enable him to spend his money without raising any suspicion, which is known as placement.²²³ Mr Merchant wants to separate himself from the dirty money as far as possible; this constitutes the second stage, layering.²²⁴ Mr Merchant then integrates the dirty money into the lawful economy by making it appear as if he came into possession of the money in a legitimate way, which constitutes the stage of integration.²²⁵

Placement of the ill-gained money into the legitimate financial system initiates the money laundering process.²²⁶ Placement is the stage where the perpetrator wants to hide the money accumulated as a result of criminal activity by depositing the money into a bank account, through smurfing,²²⁷ placing the money in a trust account or purchasing high value items such as paintings or jewellery.²²⁸ Money launderers are said to be most vulnerable at the placement stage because they attempt to move the illicit proceeds into the legitimate financial system by disposing a significant amount of cash into the financial system, which attracts the attention of authorities.²²⁹ The perils that lurk at the placement stage make it

²²³ Madinger (2012: 7).

²²⁴ Tuba (2012: 106).

²²⁵ Turner (2011: 8).

²²⁶ Hamman & Koen & Koen (2012: 80).

²²⁷ Smurfing involves the use of numerous anonymous people to divide a huge transaction into small parts by depositing a portion of the transaction into each of the anonymous people's account in order to avoid raising any flags by not making any money transfer that exceeds the legal limit and would otherwise be reported. See Savona EU & De Feo MA 'International Money Laundering Trends and Prevention/Control Policies' in Savona EU (ed), Bassiouni MC & Bernasconi P *Responding to Money Laundering: International Perspectives* (1997) at 2 - 23.

²²⁸ Turner (2011: 9).

²²⁹ Kochan N *The Washing Machine: How Money Laundering and Terrorist Financing Soils Us* (2005) at 217.

the most difficult stage for the money launderer, for law enforcement agencies want to exploit the launderer's vulnerability at this stage.²³⁰

The first step of the money laundering process is then followed by what is called layering.²³¹

In the name of obscuring the true source of money, launderers layer their money by creating various layers of financial transactions designed specifically to interrupt any audit trail.²³² The money launderers can layer the money by performing multiple transnational transactions.²³³ Moving money from one account to another, purchasing property and legitimate businesses and the purchase of equipment constitute only a handful of the undesirably creative ways in which perpetrators launder their money.²³⁴ The more layers the launderers add to the money laundering process, the more difficult it becomes to follow the money trail and to prove that the money is the proceeds of criminal activity.²³⁵

Integration is the step that concludes the money laundering process.²³⁶ This is the stage at which the money launderer, confident that the risk of being caught is not imminent, reintroduces the money which has been severed from its illicit origins, into the economy.²³⁷

Financial instruments such as securities, bills of guarantees, cheques, and letters of credit are used to integrate the dirty money. It becomes almost impossible to prove that the money, which now appears legitimate, has a criminal provenance.²³⁸

²³⁰ Woods BF *The Art and Science of Money Laundering: Inside the Commerce of the International Narcotics Traffickers* (1998) at 1.

²³¹ Turner (2011: 8).

²³² Savona EU (ed), Bassiouni MC & Bernasconi P *Responding to Money Laundering: International Perspectives* (1997) at 26.

²³³ Hamman & Koen & Koen (2012: 82).

²³⁴ Turner (2011: 9).

²³⁵ Turner (2011: 9).

²³⁶ Tuba (2012: 106).

²³⁷ Hamman & Koen (2012: 83).

²³⁸ Hamman & Koen (2012: 83).

CHAPTER THREE

THE SHORTCOMINGS IN SOUTH AFRICA'S ANTI-MONEY LAUNDERING REGIME

South Africa's legal and institutional anti-money laundering framework is accepted as a relatively strong and comprehensive one.²³⁹ Some go as far as stating that South Africa's money laundering control model is more comprehensive than that of the other FATF member states.²⁴⁰ Compliments aside, the South African anti-money laundering regime still requires improvement. This is because the FATF, together with ESAAMLG, identified certain deficiencies in South Africa's anti-money laundering regime when it underwent its last mutual evaluation in 2008.²⁴¹

The FATF rates a country's compliance with its Recommendations according to four levels, namely, compliant, largely compliant, partially compliant, and non-compliant, and in certain exceptional cases, it may be deemed 'not applicable'.²⁴² Having undergone its second evaluation in 2008, in relation to the 2003 FATF Recommendations, South Africa was found to be compliant with nine of the Recommendations, largely compliant with 10 Recommendations, partially compliant with 14 of the Recommendations and non-compliant with seven of the Recommendations.²⁴³ In addressing the shortcomings in South Africa's

²³⁹ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 8. See also De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 176; De Koker 'Money Laundering in South Africa' (2002) *Institute for Security Studies* at 48.

²⁴⁰ De Koker L 'Money Laundering Control: the South African Model' (2003) 6 *Journal of Money Laundering Control* at 176.

²⁴¹ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 8.

²⁴² Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 215.

²⁴³ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 215-222.

anti-money laundering legislation, reference will be made to some of the recommendations to which South Africa is non-compliant and partially compliant.

3.1 Politically Exposed Persons

Recommendation 6²⁴⁴ requires financial institutions to develop appropriate risk management systems that enable them to identify politically exposed persons (PEPs).²⁴⁵ Where a customer is identified as a PEP, the financial institution must request the approval of senior management before it establishes a business relationship with such customer.²⁴⁶ In the event that the financial institution establishes a business relationship with a PEP, the institution must take reasonable measures to establish the source of the PEP's wealth and conduct ongoing enhanced monitoring of its relationship with the PEP.²⁴⁷

A politically exposed person is defined as an individual who is or was entrusted with prominent public functions by a foreign country or domestically.²⁴⁸ Examples of PEPs include heads of states or governments, senior politicians, senior military, judicial or government officials, senior executives of state owned corporations and officials of important political parties.²⁴⁹ Individuals who are or have been entrusted with a prominent function by an international organisation also constitute PEPs.²⁵⁰ There is, however, no universal definition

²⁴⁴ Recommendation 6 applies to financial and non-financial businesses and professions so designated. See the interpretive note annexed to the Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 21.

²⁴⁵ Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 3.

²⁴⁶ Recommendation 6(b) of Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 3.

²⁴⁷ Recommendation 6(c) and (d) of Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 3.

²⁴⁸ International Standards on Combating Money Laundering the Financing of Terrorism and Proliferation: The FATF Recommendations (2012) at 119-120.

²⁴⁹ International Standards on Combating Money Laundering the Financing of Terrorism and Proliferation: The FATF Recommendations (2012) at 120.

²⁵⁰ International Standards on Combating Money Laundering the Financing of Terrorism and Proliferation: The FATF Recommendations (2012) at 120.

of a PEP.²⁵¹ South Africa defines a PEP as a natural person who has been or is presently assigned to a prominent public position in a specific country.²⁵²

There is currently no law in South Africa that places an obligation on accountable institutions to identify PEPs and to adopt the necessary measures as required by Recommendation 6.²⁵³ Although the Financial Intelligence Centre of South Africa published a Guidance Note²⁵⁴ in 2005 on client identification, it is not applicable to all accountable institutions and it is not enforceable against the institutions to which it applies.²⁵⁵ Thus, there is no binding obligation on the accountable institutions to identify PEPs and comply with the rest of Recommendation 6.²⁵⁶ It is for this reason that South Africa was found to be non-compliant with Recommendation 6.²⁵⁷

In acknowledging this shortcoming, the Standing Committee on Finance introduced enhanced measures and ongoing due diligence procedures that accountable institutions have to adopt when establishing a business relationship with people in prominent private or public sector positions.²⁵⁸ The proposed FICA amendments submitted in 2015 were approved by Parliament and have subsequently been referred to the President for his assent

²⁵¹ Ahlers C *The South African Anti-Money Laundering Regulatory Framework Relevant to Politically Exposed Persons* (MPhil Degree: University of Pretoria) 2013 at 68.

²⁵² Financial Intelligence Centre 'FAQ', available at <https://www.fic.gov.za/Pages/FAQ.aspx?p=2> (Accessed on 28 October 2016). See also Ahlers (2013: 68)

²⁵³ Recommendation 6(b) of Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 3. See also Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 103.

²⁵⁴ It was published in July 2005 and is titled as Financial Intelligence Centre Guidance Note 3: Guidance for banks on customer identification and verification and related matters.

²⁵⁵ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 103, para 444.

²⁵⁶ The Guidance Notes only provide guidance on the existing obligations created by FICA and its Regulations. See Financial Intelligence Centre 'FAQ', available at <https://www.fic.gov.za/Pages/FAQ.aspx?p=2> (Accessed on 28 October 2016).

²⁵⁷ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 104.

²⁵⁸ Financial Intelligence Centre Amendment Bill 2015 ISBN 978-1-4850-0000-0 at 36.

and signature.²⁵⁹ However, there has been controversy around the adoption of the FICA Amendment Bill 2015. The Progressive Professionals Forum pleaded with the President not to sign the Bill into law.²⁶⁰ He responded positively to the objection raised by the Progressive Professionals Forum by delaying the promulgation of the Bill. The failure to place accountable institutions under a legal obligation to identify PEPs and to take the necessary measures will remain a shortcoming in South Africa's anti-money laundering legislation until such time as the President signs the FICA Amendment Bill 2015 into law.

3.2 Correspondent Banking

Correspondent banking refers to a relationship between banks, for example, where Bank A (the "correspondent bank") renders its service to Bank B (the "respondent bank").²⁶¹ Usually the large international banks act as correspondent banks for numerous banks around the world.²⁶² Recommendation 7 provides that an obligation must be placed on financial institutions to conduct enhanced due diligence on cross-border correspondent banking and other similar relationships.²⁶³ This means that the correspondent bank must gather sufficient information in relation to the respondent bank, specifically to determine the reputation and supervision of the respondent bank and if it is subject to anti-money laundering investigation or regulatory actions.²⁶⁴ The correspondent bank must also assess

²⁵⁹ Financial Intelligence Centre 'Notice: Amendment of the Schedules to the Financial Intelligence Centre Act, 2001 (Act 38 of 2001)' at 2, available at <https://www.fic.gov.za/Pages/Home.aspx> (Accessed on 28 October 2016).

²⁶⁰ Mkwanazi S 'Zuma urged not to sign financial bill', available at www.iol.co.za/business/news/zuma-urged-not-to-sign-financial-bill-2064818 (Accessed on 28 October 2016).

²⁶¹ General Glossary - International Standards on Combating Money Laundering the Financing of Terrorism and Proliferation: The FATF Recommendations (2012) at 112.

²⁶² General Glossary - International Standards on Combating Money Laundering the Financing of Terrorism and Proliferation: The FATF Recommendations (2012) at 112.

²⁶³ Recommendation 7 of the 2003 FATF Recommendations is adopted as Recommendation 13 of the 2012 revised FATF Recommendations.

²⁶⁴ Recommendation 7(a) of Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 4.

the anti-money laundering control of the respondent bank and obtain approval from senior management when it intends to form new correspondent relationships.²⁶⁵ Furthermore, financial institutions must also document the responsibilities that each bank bears.²⁶⁶ With regard to “payable-through accounts”, the correspondent bank must be satisfied that the verification of identification and conducting of ongoing due diligence on customers that have direct access to its accounts, are done by the respondent bank, which must be able to furnish the correspondent bank with customer identification data.²⁶⁷

In South Africa there is no law or regulation that obligates financial institutions to conduct enhanced due diligence on cross-border correspondent banking and similar relationships.²⁶⁸

It is for this reason that the FATF, together with ESAAMLG, rated South Africa as non-compliant with regard to Recommendation 7.²⁶⁹ However, it must be acknowledged that even though there is no legal obligation to do so, South African financial institutions choose to implement enhanced measures as regards their cross-border correspondent relationships.²⁷⁰ Furthermore, Guidance Note 3 deals with correspondent banking by referring banks to the requirements of Recommendation 7 and encourages banks to take precaution where they have a relationship with respondent banks that are located in jurisdictions that are listed as “non-cooperative” or have weak Know Your Customer (KYC)

²⁶⁵ Recommendation 7(b) and (c) of Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 4.

²⁶⁶ Recommendation 7(d) of Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 4.

²⁶⁷ Recommendation 7(e) of Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 4.

²⁶⁸ Financial Action Task Force ‘Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa’ 26 February 2009 at 216.

²⁶⁹ Financial Action Task Force ‘Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa’ 26 February 2009 at 216.

²⁷⁰ Monetary and Capital Markets Department ‘Financial Sector Assessment Programme: South Africa’ 2015 *International Monetary Fund* at 5.

standards.²⁷¹ Guidance Note 3 also refers banks to the Basel Committee Core Principles and Wolfsberg Principles in order to ensure that South African financial institutions adopt measures in relation to their correspondent banking relationships that are in line with the international standards.²⁷² Although Guidance Note 3 is not legally enforceable, the Banking Supervision Department (BSD) stated that its anti-money laundering supervision benchmark is set against the Guidance Notes and the revised 2012 FATF Recommendations.²⁷³ Financial institutions that fail to adopt the measures advocated in the Guidance Notes are required to furnish the BSD with an explanation.²⁷⁴ In this way, financial institutions are pressured to comply with Recommendation 7 even if no such obligation exists in law or regulation. However, FICA must be amended to place an obligation on financial institutions to comply with Recommendation 7.

South Africa was found to be partially compliant with Recommendation 18.²⁷⁵ This is because the financial institutions are not specifically prohibited from establishing or continuing correspondent banking relationships with shell banks, even though South African licencing requirements prevent the establishment of shell banks.²⁷⁶ Moreover, South African financial institutions are not required to ensure that they establish correspondent relations

²⁷¹ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 104, para 449.

²⁷² Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 2003 at 105, para 451.

²⁷³ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 15.

²⁷⁴ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 15.

²⁷⁵ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 218. Recommendation 18 of the 2003 FATF Recommendations is adopted as Recommendation 13 of the 2012 revised FATF Recommendations.

²⁷⁶ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 132, para 576-581.

only with foreign financial institutions that do not permit their accounts to be used by shell banks.²⁷⁷

3.3 The Risk-Based Approach

The 2003 FATF Recommendations made provision for the risk-based approach only in certain areas.²⁷⁸ However, this changed in 2012 when the FATF revised and updated its Recommendations in an attempt to strengthen the global fight against financial crime.²⁷⁹ One of the primary changes introduced by the revised FATF Recommendations is the increased emphasis they place on the risk-based approach.²⁸⁰ The risk-based approach is now deemed as the “essential foundation” of a country’s anti-money laundering framework.²⁸¹

A risk-based approach means that countries, together with their competent authorities and accountable institutions, identify, assess and understand the money laundering risks that they face and consequently adopt anti-money laundering measures that are proportionate to the risks.²⁸² The risk-based approach enables countries to utilise their resources in the most cost-effective way.²⁸³ It is important to note that while the risk-based approach requires a greater amount of resources to be directed at higher risk situations, it does not

²⁷⁷ Financial Action Task Force ‘Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa’ 26 February 2009 at 218. See also Recommendation 18 of Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 6.

²⁷⁸ Financial Action Task Force ‘Guidance for a Risk-Based Approach: The Banking Sector’ October 2014 at 6.

²⁷⁹ Financial Action Task Force ‘Guidance for a Risk-Based Approach: The Banking Sector’ October 2014 at 6.

²⁸⁰ Financial Action Task Force ‘Guidance for a Risk-Based Approach: The Banking Sector’ October 2014 at 6.

²⁸¹ Recommendation 1 of the 2012 revised FATF Recommendations.

²⁸² Financial Action Task Force ‘Guidance for a Risk-Based Approach: The Banking Sector’ October 2014 at 6. See also Interpretive Note to Recommendation 1 of the 2012 revised FATF Recommendations at 31.

²⁸³ Recommendation 1 of the 2012 revised FATF Recommendations.

exempt countries, competent authorities, and accountable institutions from mitigating low money laundering risks.²⁸⁴

The accountable institutions in South Africa are not compelled by law to apply a risk-based approach to their anti-money laundering efforts.²⁸⁵ Consequently, some accountable institutions subject all their customers to the same standard criteria.²⁸⁶ This “one-size-fits-all” approach has its disadvantages. For instance, a retired state pensioner would be treated precisely in the same way as a businessman who receives large amounts of money from a country notorious for producing blood diamonds.²⁸⁷ The implication of the “one-size-fits-all” approach is that the KYC, identification and account monitoring principles will apply equally to both customers.²⁸⁸ This means that an already limited amount of resources will be wasted on the low-risk customers who are unnecessarily subjected to stringent scrutiny.²⁸⁹ The risk-based approach introduces an alternative that negates the adverse effects of a non-risk-based approach. The risk-based approach provides for a system where 90 per cent of the available resources are applied to 10 per cent of customers who constitute the greatest risk.²⁹⁰ This would result in less paperwork, more pleasant customer service, and ensuring that the ‘greatest risk receives the greatest attention’.²⁹¹ Given the importance and advantages of the risk-based approach, the fact that it is not advocated, prioritised, and

²⁸⁴ Financial Action Task Force ‘Guidance for a Risk-Based Approach: The Banking Sector’ October 2014 at 6.

²⁸⁵ Monetary and Capital Markets Department ‘Financial Sector Assessment Programme: South Africa’ 2015 *International Monetary Fund* at 4.

²⁸⁶ Financial Action Task Force ‘Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa’ 26 February 2009 at 28, para 69.

²⁸⁷ Parkman (2012: 98).

²⁸⁸ Parkman (2012: 99).

²⁸⁹ Parkman (2012: 99).

²⁹⁰ Parkman (2012: 99).

²⁹¹ Financial Intelligence Centre Amendment Bill 2015 ISBN 978-1-4850-0000-0 at 41. See also Parkman (2012: 99).

embedded in its legislation constitutes a shortcoming in South Africa's anti-money laundering framework.

Cognisant of the latter shortcoming, Clause 9 was included in the most recent proposed amendments to FICA. Clause 9 of the FICA Amendment Bill 2015 remedies this shortcoming by making provision for a risk-based approach to CDD.²⁹² However, not compelling accountable institutions to apply a risk-based approach will remain a shortcoming in South Africa's anti-money laundering legislation until such time as the proposed amendments become operative. In the meantime, accountable institutions, notably the financial institutions, have taken the initiative to apply a risk-based approach to their anti-money laundering measures.²⁹³

3.4 National Risk Assessment

Countries are tasked with conducting a national risk assessment of the money laundering and financing of terrorism risks posed in their respective countries.²⁹⁴ Here countries must identify and assess the money laundering and financing of terrorism risks on a continuous basis.²⁹⁵ The national risk assessment serves three main purposes. Firstly, it provides information on the potential changes to the country's anti-money laundering laws, regulations and other measures.²⁹⁶ Secondly, it plays an imperative role in the successful implementation of the risk-based approach to money laundering as it helps establish the high, medium and low money laundering risks.²⁹⁷ Thirdly, it provides the accountable

²⁹² Financial Intelligence Centre Amendment Bill 2015 ISBN 978-1-4850-0000-0 at 41.

²⁹³ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 15.

²⁹⁴ Interpretive Note to Recommendation 1 of the 2012 revised FATF Recommendations at 32.

²⁹⁵ Interpretive Note to Recommendation 1 of the 2012 revised FATF Recommendations at 32.

²⁹⁶ Interpretive Note to Recommendation 1 of the 2012 revised FATF Recommendations at 32.

²⁹⁷ Interpretive Note to Recommendation 1 of the 2012 revised FATF Recommendations at 32.

institutions with the necessary information when a money laundering risk assessment is conducted by them.²⁹⁸

Although informal discussions have taken place between the Financial Intelligence Centre and law enforcement agencies, South Africa is yet to launch a formal national risk assessment of the money laundering and financing of terrorism risks present in the country.²⁹⁹ South African authorities stated that they intend to conduct the risk assessment in an inclusive manner, by allowing the involvement all government agencies that play a role in combating money laundering, but failed to shed light on the role of the accountable institutions in the private sector.³⁰⁰ The more the South African authorities delay the launch of a national risk assessment, the more difficult the task will be for accountable institutions to apply a risk-based approach to anti-money laundering measures. In February 2003, the FATF published a Guidance Note for countries conducting national risk assessments, one that South Africa may refer to in order to accelerate the launch of its national risk assessment.³⁰¹

3.5 Beneficial Ownership

A beneficial owner is someone who essentially owns or controls a customer and/or the natural person on whose behalf a transaction is concluded.³⁰² A person who exercises ultimate effective control over a legal person or arrangement also constitutes a beneficial

²⁹⁸ Interpretive Note to Recommendation 1 of the 2012 revised FATF Recommendations at 32.

²⁹⁹ Know Your Country 'South Africa anti-money laundering summary', available at www.knowyourcountry.com/southafrica1111.html (Accessed on 22 September 2016). See also Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 10.

³⁰⁰ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 10.

³⁰¹ Financial Action Task Force 'Guidance on National Money Laundering and Terrorist Financing Risk Assessment' February 2013.

³⁰² General Glossary - International Standards on Combating Money Laundering the Financing of Terrorism and Proliferation: The FATF Recommendations (2012) at 110.

owner.³⁰³ Put simply, a beneficial owner refers to someone who ultimately controls an asset and is able to benefit from it.³⁰⁴ In the context of the money laundering crime, a beneficial owner is someone who controls or has an interest in illicit proceeds but conceals this fact through the misuse of corporate vehicles.³⁰⁵ Corporate vehicles refer primarily to companies, foundations, trusts, fictitious entities and unincorporated economic organisations.³⁰⁶

Beneficial ownership in the money laundering context is dealt with under Recommendations 5, 34, and 35 of the 2003 FICA Recommendations. Recommendation 5 is incorporated as Recommendation 10 under the 2012 revised FATF Recommendations. Similarly, Recommendations 34 and 35 are incorporated as Recommendation 24 and 25 respectively under the 2012 FATF Recommendations. Given the increased risk that accompany alternative money laundering techniques, the use of corporate vehicles has become the preferred method to launder ill-gotten gains.³⁰⁷ In the light of this, when the FATF revised its Recommendations in 2012, it expanded significantly the ambit of the requirements in relation to the establishment of the beneficial owner.³⁰⁸ In particular, Recommendation 10³⁰⁹ of the 2012 revised FATF Recommendations provides for a step-by-step process that must be adopted when identifying the beneficial owner.³¹⁰ Moreover,

³⁰³ General Glossary - International Standards on Combating Money Laundering the Financing of Terrorism and Proliferation: The FATF Recommendations (2012) at 110.

³⁰⁴ Van der Does de Willebois E, Halter EM & Harrison RA et al *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (2011) at 18.

³⁰⁵ Van der Does de Willebois E, Halter EM & Harrison RA et al *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (2011) at 17.

³⁰⁶ Van der Does de Willebois E, Halter EM & Harrison RA et al *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (2011) at 33.

³⁰⁷ Van der Does de Willebois E, Halter EM & Harrison RA et al *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (2011) at 11.

³⁰⁸ Parkman (2012: 33).

³⁰⁹ Recommendation 10 of the 2012 revised FATF Recommendations.

³¹⁰ Parkman (2012: 33).

countries are now required to make provision for a system that keeps record of and provides information on beneficial ownership.³¹¹

Recommendations 24 and 25³¹² require countries and their accountable institutions to adopt measures that will establish the identity of the beneficial owner and any information in relation to the beneficial owner or the corporate vehicle being used.³¹³ These Recommendations require the accountable institutions to adopt the measures provided in both Recommendations 10 and 22.³¹⁴ The FATF ranked South Africa as non-compliant with respect to the recommendations pertaining to beneficial owners when it evaluated South Africa in both 2003 and 2008.³¹⁵

There is no law that requires accountable institutions to establish and verify the identity of beneficial owners.³¹⁶ Accountable institutions are required only to identify and verify the identity of any person who acts on behalf of the customer.³¹⁷ However, where the customer is a legal person, the accountable institution is not required to establish the identity of the natural person controlling the legal person.³¹⁸ Moreover, there are only limited measures that ensure accurate, adequate, and timely information on the beneficial owner.³¹⁹ It is for this reason that South Africa was found to be non-compliant. Notwithstanding the fact that

³¹¹ Parkman (2012: 33).

³¹² Recommendation 24 and 25 of the 2012 revised FATF Recommendations.

³¹³ See Recommendation 24 and 25 of the 2012 revised FATF Recommendations.

³¹⁴ Recommendation 12 of the 2003 FATF Recommendations is adopted as Recommendation 22 of the 2012 revised FATF Recommendations.

³¹⁵ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 29 para 71.

³¹⁶ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 95 para 405.

³¹⁷ Sec 21 of FICA.

³¹⁸ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 95 para 406.

³¹⁹ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 222.

South Africa's shortcomings in relation to the beneficial owner are addressed in the FICA Amendment Bill 2015, it will remain a deficiency until the amendments are promulgated.

Given the absence of legal requirements to identify and verify the identity of beneficial owners, accountable institutions implement a variety of measures in this regard.³²⁰

Although accountable institutions, specifically the banks, adopt measures to identify beneficial owners in high-risk situations, most banks only go as far as establishing legal ownership.³²¹ It bears noting that establishing and verifying the identity of beneficial owners remains a remarkable challenge to accountable institutions, one that requires enhanced guidance.³²² What makes this even more challenging is the lack of information on beneficial owners.³²³

The new enhanced recommendations require countries to create a system that provides information pertaining to beneficial owners. The Companies and Intellectual Property Registration Organisation Office (CIPRO) is the national company registry of South Africa.³²⁴

Although CIPRO is accessible to all, the information is not verified and does not constitute adequate information on the beneficial owner of legal persons.³²⁵ However, the Trust Registry proves useful in identifying the beneficial owner of legal arrangements as the it keeps record of trusts, including the parties to the trust, but the accuracy of the information

³²⁰ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 12.

³²¹ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 12.

³²² Parkman (2012: 33).

³²³ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 12.

³²⁴ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 12 para 31.

³²⁵ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 12 para 31.

must be verified.³²⁶ Moreover, the difficulty in obtaining information on beneficial owners hinders the ability of accountable institutions to detect suspicious transactions, which in turn, hampers possible money laundering convictions.³²⁷ It is evident that South Africa needs to establish a sound system that provides information on the beneficial owner in an adequate, accurate and timely manner.

3.6 Uncovered Financial Institutions

There are currently 16 categories of accountable institutions listed in Schedule 1 of FICA. The accountable institutions comprise the financial and non-financial institutions that are placed under numerous obligations such as identifying customers, reporting information, keeping records and implementing the internal rules dealing with the latter obligations.³²⁸

There are 34 255 accountable institutions registered with the Financial Intelligence Centre of South Africa.³²⁹ The number of registered accountable institutions increases annually.³³⁰

However, 43 licensed service providers that offer investment advice fall outside the ambit of accountable institutions.³³¹ Similarly, finance companies, moneylenders other than banks and lease companies, among others, are also 'uncovered financial institutions'.³³²

The financial institutions that fall outside the scope of accountable institutions create an undesirable ripple effect as these institutions are not required to implement CDD, keep

³²⁶ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 17. See also Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 12 para 31.

³²⁷ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 12.

³²⁸ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 89 para 383.

³²⁹ Financial Intelligence Centre Annual Report 2015/2016 at 12.

³³⁰ Financial Intelligence Centre Annual Report 2015/2016 at 12.

³³¹ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 90 para 384.

³³² Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 90 para 384.

records and comply with the requirements stipulated in FICA.³³³ This creates unfair competition between accountable financial institutions, which are burdened with the task of complying with FICA, and the financial institutions that are able to conduct their business without the limitations imposed by FICA.³³⁴ Although the amendment to Schedule 1 of FICA, through the inclusion of item 12,³³⁵ broadens the scope of financial service providers that fall under accountable institutions, many critics opine that the amendment fails to address the issue pertaining to uncovered financial institutions.³³⁶

Despite the fact that uncovered financial institutions are required to comply with the reporting obligations under FICA, the issue created by the exclusion of these financial institutions from the other FICA requirements is not negated.³³⁷ Such exclusions are yet to be justified by way of demonstrating that they pose a low risk to money laundering.³³⁸ The exclusions create a gap in South Africa's anti-money laundering legislation and affect South Africa's compliance with the FATF Recommendations negatively.³³⁹

³³³ Portfolio Committee on Finance 'Comments on the FIC Amendment Bill', available at [https://www.google.co.za/url?sa=t&source=web&rct=j&url=http://www.banking.org.za/docs/default-source/market-conduct-division/comments-on-fic-amendment-bill-101215-\(v4\).pdf%3Fstatus%3DTemp%26sfvrsn%3D0.6690277485176921&ved=0ahUKEwiAgoKUv-3QAhWIK8AKHVGuA2oQFqgwMAM&usq=AFQjCNGRptqo0dDXQwoF6AesvcduT_W2Zq](https://www.google.co.za/url?sa=t&source=web&rct=j&url=http://www.banking.org.za/docs/default-source/market-conduct-division/comments-on-fic-amendment-bill-101215-(v4).pdf%3Fstatus%3DTemp%26sfvrsn%3D0.6690277485176921&ved=0ahUKEwiAgoKUv-3QAhWIK8AKHVGuA2oQFqgwMAM&usq=AFQjCNGRptqo0dDXQwoF6AesvcduT_W2Zq) (Accessed on 12 December 2016) at 13.

³³⁴ Portfolio Committee on Finance 'Comments on the FIC Amendment Bill' at 13.

³³⁵ The amendment to Schedule 1 of FICA introduced by Government Notice No 1104 of 2010 reads as follows: '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 (Act 37 of 2002), to provide advice and intermediary services in respect of the investment of any financial product (but excluding a short term insurance contract or policy referred to in the Short term Insurance Act, 1998 (Act 53 of 1998) and a health service benefit provided by a medical scheme as defined in section 1(1) of the Medical Schemes Act, 1998 (Act 131 of 1998)'.

³³⁶ Portfolio Committee on Finance 'Comments on the FIC Amendment Bill' at 13.

³³⁷ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 91 para 385.

³³⁸ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 91 para 385.

³³⁹ The ratings with regard to South Africa's compliance with the FATF Recommendations are negatively affected by above mentioned exclusions, specifically Recommendation (2003) 5, 6, 8, 9, 10, 11, 15, 21 and 22. See also Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 91 para 385.

In acknowledging the adverse effects that follow the exclusion of certain businesses and professions as accountable institutions, the Financial Intelligence Centre of South Africa has initiated a discussion on amendments to Schedule 1 of FICA.³⁴⁰ The Centre proposes to include those businesses and professions that fall outside the scope of accountable institutions, in order to advance South Africa's countermeasures against money laundering.³⁴¹ Advancement will follow where the latter proposal assumes an enforceable change to the current list of accountable institutions.

3.7 Higher Risk Countries

Recommendation 21³⁴² stipulates that financial institutions afford special attention to their business relationships and transactions with both natural and legal persons from countries which fail to comply sufficiently with the FATF Recommendations. The background and purpose of these business relationships and transactions must be examined when their business or legal purpose is not apparent.³⁴³ The findings of the examination must be recorded in writing and be made accessible to competent authorities.³⁴⁴ In this situation, financial institutions must be able to implement countermeasures.³⁴⁵

³⁴⁰ Financial Intelligence Centre 'Notice: Amendment of the Schedules to the Financial Intelligence Centre Act, 2001 (Act 38 of 2001)', available at <https://www.fic.gov.za/Pages/Home.aspx> (Accessed on 28 October 2016).

³⁴¹ Financial Intelligence Centre 'Notice: Amendment of the Schedules to the Financial Intelligence Centre Act, 2001 (Act 38 of 2001)', available at <https://www.fic.gov.za/Pages/Home.aspx> (Accessed on 28 October 2016).

³⁴² Adopted as Recommendation 19 of the 2012 revised FATF Recommendations.

³⁴³ Recommendation 21 of Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 7.

³⁴⁴ Recommendation 21 of Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 7.

³⁴⁵ Recommendation 21 of Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 7.

Accountable institutions are required to keep a record of the nature of their business relationships and transactions which they conclude with their clients.³⁴⁶ However, there is no express requirement for financial institutions to pay special attention to their business relationships and transactions that they conclude with persons from countries that do not comply with FATF Recommendations.³⁴⁷ Financial institutions must pay special attention, specifically where the business or legal purpose of the latter business or transaction is not apparent.³⁴⁸ It is worth noting that South Africa has put some mechanisms in place to enable financial institutions to take certain precautions when conducting business with countries that are not compliant with the FATF anti-money laundering standards.³⁴⁹ However, these mechanisms are not enforceable.³⁵⁰ Section 29(1) of FICA requires accountable institutions to examine and submit a report to the Financial Intelligence Centre regarding any business relationship or transaction where there is no apparent business or legal purpose. This reporting obligation applies in respect of countries with no or insufficient compliance with the FATF Recommendations. Based on the general obligation created by s29(1) of FICA, one could argue that this provision complies with Recommendation 21. However, there is no express requirement to examine and prepare the findings in writing in order to make them available to the competent authorities.³⁵¹ Moreover, there is a lack of specific provisions for financial institutions to apply countermeasures when they have a business relationship or when they conclude transactions with persons or entities from

³⁴⁶ Sec 22(1)(e) of FICA.

³⁴⁷ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 122 para 523-526.

³⁴⁸ Recommendation 21 of Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 7.

³⁴⁹ For instance, Guidance Note 3 recommends that accountable institutions apply scrutiny to anti-money laundering systems in non-FATF countries.

³⁵⁰ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 122 para 523-526.

³⁵¹ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 122 para 525.

countries that are not compliant with the anti-money laundering standards.³⁵² For the reasons provided above, South Africa's anti-money laundering controls remain non-compliant with Recommendation 21.

3.8 Designated Non-Financial Businesses and Professions

Recommendation 12 states that the customer due diligence and record-keeping requirements stipulated by Recommendations 5, 6 and 8 to 11 also apply to the designated non-financial businesses and professions (DNFBP).³⁵³ Moreover, FICA, together with Exemptions 2 and 3 to FICA and the anti-money laundering regulations that apply to financial institutions, also apply to DNFBPs.³⁵⁴ Thus, the shortcomings identified in the latter recommendations, laws and regulations apply to the DNFBPs as well.³⁵⁵ Attorneys, notaries, trust service providers, real estate agents, dealers in precious metals and stones, casinos, and public accountants constitute the DNFBPs in South Africa.³⁵⁶

When the FATF conducted its last mutual evaluation of South Africa in 2008³⁵⁷ it found South Africa to be non-compliant with Recommendation 12 for the following reasons:

Casinos are allowed to apply a reduced level of CDD when required to conduct CDD.³⁵⁸

Exemption 14 discharges the onus on casinos to collect and verify the income tax

³⁵² Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 7. See also Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 122 para 526.

³⁵³ Adopted as Recommendation 22 of the 2012 revised FATF Recommendations.

³⁵⁴ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 159 para 712.

³⁵⁵ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 217.

³⁵⁶ Dealers in precious metals and stones are not listed as accountable institutions. See also Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 11 para 25.

³⁵⁷ Report on the mutual evaluation was only released in 2009.

³⁵⁸ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 160 para 717.

registration number and residential address of its clients.³⁵⁹ Moreover, attorneys enjoy complete exemption from all CDD requirements and certain or all record keeping requirements when they render services that fall outside the purview of services listed in Exemption 10(1)(a).³⁶⁰

Only accountants who provide investment advice or render investment broker services are deemed an accountable institution.³⁶¹ The implication of this is that all accountants who render services other than the services listed in Schedule 1 of FICA, are not required to conduct CDD.³⁶² Moreover, because dealers in precious metals and stones are not listed as an accountable institution, the only obligation such dealers incur is to report suspicious transactions.³⁶³ This results in the issues discussed section 3.6 above. Presently, South Africa has not made much progress in addressing its lack of compliance with Recommendation 12.

3.9 Statistics

Where a country lacks comprehensive statistics and data, it proves impossible to obtain an accurate picture of the effectiveness of its anti-money laundering control.³⁶⁴ When the FATF conducted South Africa's mutual evaluation in 2008, it stated that the country's lack of

³⁵⁹ Exemption 14 of Exemptions in terms of the Financial Intelligence Centre Act, 2001 GNR.1596 of 20 December 2002.

³⁶⁰ International Bar Association Anti-Money Laundering Forum 'Money Laundering', available at http://www.anti-moneylaundering.org/Money_Laundering.aspx (Accessed on 4 August 2016). See also Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 162 para 724-725.

³⁶¹ Schedule 1, Item 12 of FICA.

³⁶² Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 161 para 722.

³⁶³ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 162 para 728.

³⁶⁴ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 7 para 5.

statistics and data on money laundering made it difficult to conduct an adequate assessment of the effectiveness of the anti-money laundering regime in South Africa.³⁶⁵

Recommendation 32³⁶⁶ requires countries to furnish competent authorities with comprehensive statistics and data on mechanisms concerning the effectiveness of its anti-money laundering control. Comprehensive statistics and data include statistics on suspicious transaction reports (STRs) received and disseminated; money laundering investigations; prosecutions and convictions; mutual legal assistance rendered and requested; and property that is frozen, seized and confiscated.³⁶⁷

Although South Africa provides sufficient statistics on STRs received and disseminated, it fails to maintain detailed data on money laundering investigations, prosecutions, convictions and mutual legal assistance.³⁶⁸ South Africa compiles only basic data on the total number of money laundering investigations, prosecutions and convictions.³⁶⁹ To date, South Africa has not made any progress in its approach to collecting statistics and data concerning money laundering matters.

³⁶⁵ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 36 para 107.

³⁶⁶ Adopted as Recommendation 33 of the 2012 revised FATF Recommendations.

³⁶⁷ Recommendation 32 of Financial Action Task Force on Money Laundering: The Forty Recommendations 2003 at 13.

³⁶⁸ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 22. See also Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 40 para 13.

³⁶⁹ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 78 para 325.

Table 1: South Africa's statistics on its money laundering investigations and prosecutions for the years 2009-2013³⁷⁰		
Year	ML Investigations	ML Convictions
2009	6	0
2010	21	0
2011	38	18
2012	29	13
2013	37	11

Based on table 1, it is evident that the number of money laundering investigations and convictions have increased from 2009 to 2011. It is clear that South African authorities have improved in relation to money laundering investigations and convictions.³⁷¹ However, there remains room for more enhanced countermeasures against money laundering.³⁷²

³⁷⁰ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 20.

³⁷¹ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 19.

³⁷² Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 19.

CHAPTER FOUR

RECOMMENDATIONS AND CONCLUSION

‘Attacking the profits of offences such as drug trafficking, money laundering and people smuggling is attacking both the motivation and ability to commit further serious crimes.’

- Chris Ellison

This quotation emphasises the importance of an effective anti-money laundering regime.

Thus, addressing the critical shortcomings in South Africa’s anti-money laundering

legislation becomes imperative. As the National Treasury rightly stated during a

Parliamentary Portfolio Committee hearing³⁷³ “the reputational risk of noncompliance exceeds the cost of compliance”.³⁷⁴ This stresses the importance of remedying the

deficiencies in South Africa’s money laundering control model.

This study commenced by looking at the problem of money laundering, the implications thereof, and the importance of combating it. The origin of money and the various forms that money may assume in the context of money laundering were considered. The study then looked briefly at the history of money laundering and the response by both countries and the international community. The paper then proceeded to study the anti-money laundering regime of South Africa and its critical shortcomings. Recommendations in regard to these critical shortcomings will follow below.

³⁷³ Portfolio Committee hearing dated 11 November 2015.

³⁷⁴ Portfolio Committee on Finance ‘Comments on the FIC Amendment Bill’, available at [https://www.google.co.za/url?sa=t&source=web&rct=j&url=http://www.banking.org.za/docs/default-source/market-conduct-division/comments-on-fic-amendment-bill-101215-\(v4\).pdf%3Fstatus%3DTemp%26sfvrsn%3D0.6690277485176921&ved=0ahUKEwiAgoKUv-3QAhWIK8AKHVGuA2oQFqgwMAM&usq=AFQjCNGRptqo0dDXQwoF6AesvcduT_W2Zq](https://www.google.co.za/url?sa=t&source=web&rct=j&url=http://www.banking.org.za/docs/default-source/market-conduct-division/comments-on-fic-amendment-bill-101215-(v4).pdf%3Fstatus%3DTemp%26sfvrsn%3D0.6690277485176921&ved=0ahUKEwiAgoKUv-3QAhWIK8AKHVGuA2oQFqgwMAM&usq=AFQjCNGRptqo0dDXQwoF6AesvcduT_W2Zq) (Accessed on 12 December 2016).

4.1 Remedies for the critical shortcomings in South Africa's anti-money laundering legislation

With respect to PEPs, South African authorities need to place an express obligation on all accountable institutions to implement the necessary measures in order to identify PEPs and comply with Recommendation 6. South African authorities have acknowledged the shortcomings in relation to PEPs and have proposed amendments to FICA. However, the proposed amendments that address these shortcomings still have to be signed into law.

With regard to correspondent banking, financial institutions need to be obligated to conduct enhanced due diligence on cross-border correspondent banking and similar relationships. Moreover, financial institutions must be prohibited from establishing or continuing correspondent banking relationships with shell banks.

As the essential foundation of any country's anti-money laundering framework,³⁷⁵ the risk-based approach must be free from any deficiencies. Therefore, it is imperative that South Africa compel its accountable institutions to apply the risk-based approach to money laundering. There is a pressing need for the President of South Africa to sign the FICA Amendment Bill 2015 into law as soon as possible. The enactment of the FICA Amendment Bill 2015 will render Clause 9 thereof enforceable and this will have the effect remedying the deficiency in relation to the risk-based approach.

Another shortcoming that South Africa authorities need to address is the delay in instituting an official national risk assessment of the money laundering threats.³⁷⁶ A risk-based approach necessitates the conducting of a national risk assessment. When the South African

³⁷⁵ Recommendation 1 of the 2012 revised FATF Recommendations.

³⁷⁶ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 6.

authorities conduct the national risk assessment, they will need ensure that it is done in a manner that is comprehensive and includes all accountable institutions and not only government agencies.³⁷⁷ Furthermore, the exclusion of certain businesses and professionals as accountable institutions affects the successful implementation of not only the risk-based approach procedures, but also of the overall quality of the countermeasures adopted against money laundering. By allowing certain businesses and professionals to fall outside the ambit of accountable institutions, negative consequences will continue to ensue, as explained in Chapter Three. It is for this reason that the discussion initiated by the Centre regarding the amendments to the Schedules of FICA, to make the list of accountable institutions more inclusive proves important.³⁷⁸ When this discussion progresses to enforceable amendments to FICA, it will resolve the issues concerning uncovered financial institutions and DNFBPs. By including more businesses and professionals under the accountable institutions umbrella, the South African authorities will enhance the fight against money laundering.³⁷⁹



In respect of beneficial owners, accountable institutions must be required by law to establish and verify the identification of beneficial owners. South African authorities have already identified this shortcoming and addressed it in the FICA Amendment Bill 2015. Moreover, when it comes to higher risk countries, accountable institutions must be placed under a legal duty to pay special attention to their business relationships and transactions, and this obligation should extend to people from countries that are non-compliant or

³⁷⁷ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 6.

³⁷⁸ Financial Intelligence Centre 'Notice: Amendment of the Schedules to the Financial Intelligence Centre Act, 2001 (Act 38 of 2001)', available at <https://www.fic.gov.za/Pages/Home.aspx> (Accessed on 28 October 2016).

³⁷⁹ Interpretive Note to Recommendation 1 of the 2012 revised FATF Recommendations at 31.

insufficiently compliant with the FATF Recommendations. This is particularly important where there is no apparent business or logical legal purpose for the business relationship or transaction.

In order to ensure that South Africa complies with Recommendation 12³⁸⁰ in its next round of mutual evaluation, the authorities must expand the ambit of FICA. The FATF provides for a more detailed set of recommendations that South African authorities can adopt in order to comply with Recommendation 12.³⁸¹ This includes covering more accountants as accountable institutions, requiring attorneys to apply the money laundering countermeasures when rendering services beyond those described in FICA and listing dealers in precious stones and metals as accountable institutions.³⁸²

Furthermore, given the important role statistics play in assessing the effectiveness of a country's anti-money laundering regime, it is imperative that South Africa collect data and statistics in a comprehensive manner so as to provide a detailed account of the money laundering investigations, prosecutions, convictions and the special money laundering investigate techniques used by competent authorities.³⁸³

4.2 Concluding Remarks

This study has illustrated that even though South Africa is said to have an overall quality anti-money laundering legislative framework, it requires improvement. The more the South African authorities delay in remedying these critical shortcomings, the bigger the problem of

³⁸⁰ Adopted as Recommendation 22 of the 2012 revised FATF Recommendations.

³⁸¹ Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 165 para 747.

³⁸² Financial Action Task Force 'Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism: South Africa' 26 February 2009 at 165 para 747.

³⁸³ Monetary and Capital Markets Department 'Financial Sector Assessment Programme: South Africa' 2015 *International Monetary Fund* at 22.

money laundering will become. Understandably, money laundering cannot be portrayed as one of the most serious crimes in South Africa that poses an imminent threat to the lives of its citizens. However, just because the money laundering crime does not victimise people directly, does not mean that we should be slow in our actions aimed at combating this problem in the most effective way. Money laundering poses an additional threat to the stability of South Africa's already vulnerable economy. Given the adverse effects that accompany a lack of compliance with the FATF Recommendations and ineffective money laundering control framework, immediate action by South African authorities is warranted.

Words: 19 578



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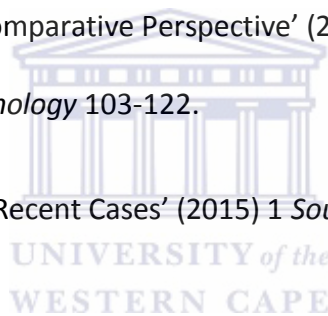
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