

COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA ON THE ISSUE PAPER ON GUIDANCE REQUIRED TO IMPLEMENT THE FINANCIAL INTELLIGENCE CENTRE AMENDMENT ACT, 2016

INTRODUCTION

The Law Society of South Africa (LSSA) represents more than 24 000 practising attorneys and almost 6 000 candidate attorneys countrywide. It is the umbrella body of the attorneys' profession in South Africa and its constituent members are the Black Lawyers Association (BLA), the National Association of Democratic Lawyers (NADEL) and the four statutory provincial law societies, namely the Cape Law Society (CLS), the KwaZulu-Natal Law Society (KSNLS), the Law Society of the Northern Provinces (LSNP) and the Law Society of the Free State (LSFS).

A total number of 12 373 firms consisting, of mostly smaller law firms of which 10 182 are sole practitioners, are operating in South Africa. This is perhaps the single most challenging factor that the legal profession in South Africa will face in complying with the provisions of the Financial Intelligence Centre Amendment Act, 2016. Smaller law firms and sole practitioners will require substantial guidance.

A: ISSUES RELATING TO RISK ASSESSMENT OF PRODUCTS AND SERVICES

The Centre would appreciate receiving the views of commentators on their understanding of the concept of risk and how it should be contextualised in relation to ML/TF risk

The LSSA is of the view that a contextualised industry-specific approach in the form of a guideline be prepared by the Centre in co-operation with the profession, on the issues referred to in paragraphs 1.7 to 1.17, as a large number of smaller law firms and sole practitioners operate in South Africa.

Commentators are requested to comment on the application of the concept of risk given the context in their particular institution.

It will be important to clarify the balance that will be required in matters where a risk factor may have a low probability of materialising, but may result in high impact if the risk materialises. Guidance should be provided in the form of a contextualised risk matrix, as prepared by the Centre in collaboration with the statutory law societies.

What other risk factors particular to your industry and institution do you think should be considered when conducting a risk assessment?

The large number of smaller law firms and sole legal practitioners will constitute a key risk factor. This may require the production of a guideline and risk matrix that must be specific to the legal profession.

Are there any products or services that are a lesser risk for money laundering or terrorist financing?

Those services exempted by the Minister of Finance under Paragraph 4 of Part 1 (General Exemptions) and Paragraph 10 of Part 4 (Exemptions for Attorneys and Administrators of Property) as well as the services of debt collections of small amounts, eviction claims, curator estates, property transfers of less than R50,000 value.

Are there any products or services that are a higher risk for money laundering or terrorist financing?

Those services that are not exempted by the Minister of Finance under Paragraph 4 of Part 1 (General Exemptions) and Paragraph 10 of Part 4 (Exemptions for Attorneys and Administrators of Property) and advice on tax evasion.

Are there any other factors particular to your institution to be taken into consideration when categorising a business relationship as a higher risk or lower risk?

Further services that present a higher risk for money laundering or terrorist financing may include advising and representing clients facing criminal charges on white collar and/or income generating crimes.

International corporate or individual clients whereby the beneficial ownership/party may be masked and not be identifiable via structures or States in foreign jurisdictions that have limited information or financial intelligence available.

What is the expectation of commentators on the extent of guidance that the Centre should provide in relation to identifying the risks and the conducting of the risk assessment across the different sectors?

The LSSA recommends that industry-specific risks should be identified and an industry-specific risk matrix should be developed for the legal profession by the Financial Intelligence Centre (the Centre) in collaboration with the statutory law societies.

What is the expectation of commentators on the extent of guidance that the Centre should provide in relation to developing a risk matrix?

As stated above, the LSSA recommends that industry-specific risks should be identified and an industry-specific risk matrix should be developed for the legal profession by the Centre in collaboration with the statutory law societies.

Would smaller firms have difficulty conducting a risk assessment and if so what challenges are institutions faced with when assessing risk?

Yes, smaller firms and sole practitioners may have limited capacity, infrastructure and resources to conduct risk assessments.

Would de-risking pose a threat to the concept of a risk-based approach?

Yes, de-risking will erode a risk-based approach as it will be risky to conclude that some services are void of risk.

B: ISSUES RELATING TO THE MANAGEMENT OF RISK:

What mechanisms are available to accountable institutions to manage higher ML/TF risk?

Accountable institutions may access the institutions listed below to access information relating to clients to manage higher ML/TF risk:

- a) Companies and Intellectual Property Commission
- b) Master of the High Court
- c) documents of legal entities, e.g. share registers, co-operation agreements such as shareholders agreements and directors agreements, etc., as received from corporate clients' auditors where consent has been obtained from the client.

Accountable institutions may also be in a position to use a questionnaire to be completed by the client – as developed by the Centre in collaboration with the statutory law societies.

Are there sector specific measures available to categories of accountable institutions to manage higher ML/TF risk?

See comments made above.

What guidance would accountable institutions require from the Centre to manage higher ML/TF risk as opposed to lower risk?

Attorneys may unknowingly provide services in a higher ML/TF risk context. Conversely, attorneys may have assessed a matter to be a higher ML/TF risk, but may be unclear on how to deal with the matter. The Centre should, in collaboration with the statutory law societies, develop appropriate guidelines for attorneys on how to identify, assess and mitigate risks for attorneys.

C: ISSUES RELATING TO THE WITHDRAWAL OF EXEMPTIONS:

Exemption 2 relating to timing of verification

The LSSA is of the view that this exemption should not be withdrawn as it is unrelated to a risk-based approach.

Exemption 4 relating to reliance on another accountable institution to establish and verify a client's identity

The Exemptions (relating to the legal profession) to be maintained as mentioned in C.1 above and an industry-specific guideline and risk matrix be prepared by the Centre in collaboration with the statutory law societies.

Exemption 5 relating to reliance on verification done by an institution in a foreign country

See our comments in paragraph A.4 above.

Exemption 6 relating to publicly listed companies

The LSSA is of the view that this exemption should not be withdrawn.

Exemptions 7 – 9:

The relevant industries are better placed to comment.

Exemption 10 related to services performed by attorneys and administrators of property

The LSSA is of the view that, if this exemption is removed, accountable institutions will be required to conduct risk assessments in all matters. The exemption provides useful guidelines for low-risk matters.

Exemption 11 – 17:

The relevant industries are better placed to comment.

Commentators' views are sought on how they would apply graduated customer due diligence measures (varying from simplified due diligence for low risk relationships to enhanced due diligence for high-risk relationships) in the absence these exemptions

The LSSA is of the view that that the exemptions should be maintained, otherwise the benefits of a risk-based approach may be eroded.

Commentators' views are sought on whether there are areas of their business which pose no ML/TF risk and may therefore continue to be exempted completely from compliance with the customer due diligence requirements of the FIC Act.

What guidance would accountable institutions require from the Centre to apply customer due diligence measures in the absence of the relevant exemptions?

The LSSA recommends that the Centre should develop guidelines, in collaboration with the statutory law societies, in situations where reliance are placed on the verification done by other accountable institutions. Written confirmation will be required from the other accountable institutions as a basic requisite.

D: ISSUES RELATING TO ESTABLISHING AND VERIFYING CLIENTS' IDENTITIES:

What information would an accountable institution typically use to establish the identity of a natural person?

Obtaining the original client identity document or driver's licence or passport and making clear copies thereof.

What means of verification would an accountable institution use to confirm a natural person's identity? Are there examples of documents or other means of verification particular to your institution that may be used to establish and verify the identity of lower risk clients?

The LSSA is of the view that the driver's licence, identity document or passport will offer the most basic method to establish and verify the identity of lower risk clients.

Are there examples of documents or other means of verification particular to your institution that may be used to establish and verify the identity of higher risk clients?

The LSSA is of the view that the driver's licence, identity document or passport will suffice for natural persons. With reference to legal entities, the company or trust documents and, in some cases, verification by an auditor will suffice.

Are there more flexible verification mechanisms available to accountable institutions such as digital data enabled verification and if so, please provide specific examples?

This may be accessible to institutions like banks, but at this stage not to the legal profession.

What is the expectation of commentators on the extent of guidance that the Centre should provide in relation to establishing and verifying the identity of a lower risk clients across the different sectors taking into account that much of the regulations and exemptions relating to identification and verification of clients will be withdrawn?

The LSSA reiterates that the exemptions should not be withdrawn for lower risk clients, but, if these exemptions are withdrawn, guidance should be provided to the legal profession. In such context the existing regulations could serve as a guideline on how verification and a customised client due diligence questionnaire can be utilised.

What is the expectation of commentators on the extent of guidance that the Centre should provide in relation to establishing and verifying the identity of a higher risk clients across the different sectors taking into account that much of the regulations and exemptions relating to identification and verification of clients will be withdrawn?

Same as above.

To what extent will accountable institutions continue to rely on the existing regulations and exemptions as a benchmark to establish and verify the identities of clients, as a transition to a more mature application of a risk-based approach?

Same as above.

E ISSUES RELATING TO A SINGLE TRANSACTION THRESHOLD:

What is the expectation of commentators on the value of the single transaction below which no identification and verification will be conducted?

The LSSA is of the view that the value at should be increased to R50 000-00.

What information will be considered sufficient to ensure that accountable institutions do not transact with anonymous clients?

Legal practitioners should not transact with an anonymous person. Formal identification, including driver's licence, identity document or passport will have to be obtained.

F: ISSUES RELATING TO UNDERSTANDING AND OBTAINING INFORMATION ON BUSINESS

RELATIONSHIP:

What is the expectation of commentators on the extent of guidance that the Centre should provide in relation to understanding and obtaining information on business relationships across the different sectors?

Attorneys deal with business transactions in the ordinary course of their practice. No guidance will be required in this context.

G: ISSUES RELATING TO BENEFICIAL OWNERSHIP

Are there any products and services, or clients in respect of which reduced or simplified measures should be applied (due to there being substantially less risk of money laundering or terrorist financing) in so far as the requirement to obtain beneficial ownership information is concerned?

See our comments under A.4 above.

Should guidance provide an indication of a percentage of shareholding or ownership interest to indicate who may be a beneficial owner?

No, guidance should not be provided based upon a percentage. This will be too prescriptive. It can however be introduced as one of the non-prescriptive considerations.

If so, what percentage of shareholding or ownership interest would realistically indicate who may be a beneficial owner?

See comment above.

What reliable sources of information do accountable institutions envisage using to verify information relating to legal persons?

As commented above, accountable institutions may access the institutions listed below to access information relating to clients to manage higher ML/TF risk:

- a) Companies and Intellectual Property Commission;
- b) Master of the High Court; and
- c) Documents of legal entities, e.g. share registers, co-operation agreements, etc., as received from corporate clients' auditors where consent has been obtained from the client.

Which of the concepts or terminology used in the provisions creates uncertainty and requires guidance so that it can be contextualized in greater detail?

The LSSA is of the view that the terminology is clear and no further guidance is required.

Are there specific challenges in relation to applying customer due diligence measures for legal persons, trusts and partnerships that commentators believe should be addressed in guidance?

As stated in its submission on the Bill, the LSSA is of the firm view that the additional due diligence measures incorporated under Section 21B (clause 10) will be too onerous to implement. It is submitted that the Centre should, in collaboration with the statutory law societies, provide guidance notes, as well as make reference resources available to all accountable institutions.

The LSSA is not in favour of a blanket requirement to interrogate the identity of beneficial owners or clients that are corporate vehicles. The scope of mandate between an attorney and his or her client will to a large extent determine the information required by the attorneys' firm. The attorneys' firm will have to maintain the due diligence processes required by the circumstances, for example, to ensure that transactions are not measures to siphon monies or funds out of the country.

H. ISSUES RELATING TO FOREIGN PROMINENT PUBLIC OFFICIALS AND DOMESTIC PROMINENT INFLUENTIAL PERSONS:

Commentators are requested to express their views on the challenges in developing its RMCP to provide for the manner in which and processes by which institutions determine whether a prospective client is a foreign prominent public official or a domestic prominent influential person.

The LSSA considers the publication of a list containing the names of foreign prominent public officials or a domestic prominent influential persons to be critical in this regard. Attorneys will rely largely on information provided by the Centre and the information volunteered by the client. For example, a confirmation from a client should suffice.

Are there specific challenges in relation to applying additional customer due diligence measures for clients who are foreign prominent public officials or a domestic prominent influential persons?

Same as above.

I. ISSUES IN RELATION TO THE RISK MANAGEMENT AND COMPLIANCE PROGRAM:

Commentators are requested to specify any challenges in relation to the development of the RMCP that may require guidance in order to ease the compliance obligations.

The LSSA is of the view that the Centre should, in collaboration with the statutory law societies, provide attorneys with appropriate guidance.

J. ISSUES RELATING TO RECORD KEEPING REQUIREMENTS:

Commentators are requested to specify any challenges in the implementation of the record keeping requirements that may require guidance in order to ease the compliance obligations?

The LSSA is of the view that the Rules of the Attorneys' Profession make adequate provision for retention and security of communications and records by attorneys. This allows for sufficient internal controls for purposes of record keeping requirements.

Commentators are requested to provide examples of electronic forms of storage that accountable institutions could utilise for storage of records?

Same as above.

Commentators are requested to specify any challenges it anticipates in respect of the Centre, supervisory bodies and law enforcement accessing electronically stored records for inspection and investigative purposes.

Same as above, save to say that the Rules of the Attorneys' Profession and applicable governing legislation provide for adequate procedure to access information held by attorneys.

K ISSUES RELATING TO IMPLEMENTATION OF UNSCR AND FREEZING OF ASSETS:

Commentators are requested to specify any challenges in relation to the screening of clients to determine whether a client of the institution appears on the sanctions list.

The LSSA recommends that the sanctions list be widely circulated and disseminated. It should, in particular, be disseminated to all the accountable institutions.

Commentators are requested to specify any challenges in the implementation of the UNSCR and freezing of assets requirements that may require guidance in order to ease the compliance obligations?

The nature of the relationship between the attorney and the client, including professional legal privilege must be taken into account. Attorneys are independent practitioners providing advice to their clients. Freezing the accounts of client based upon the UNSCR resolutions may accordingly pose a challenge.

L ISSUES RELATING TO IMPLEMENTATION OF THE FIC ACT IN RESPECT OF PROSPECTIVE AND EXISTING CLIENTS:

Commentators are requested to specify any challenges and/or issues that may arise when implementing the amended FIC Act in relation to existing clients that may require guidance

This will require significant resources and be time-consuming for attorneys to comply with. The Financial Intelligence Centre Amendment Act, 2016 is not intended to be implemented retrospectively. The frequency to confirm will be determined by the compliance framework of the attorney.