COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON THE CONSULTATION PAPER ON THE REVIEW OF THE FINANCIAL INTELLIGENCE CENTRE ACT, 2001 (MARCH 2014)

The Law Society of South Africa (LSSA) welcomes the opportunity to comment on the Consultation Paper on the Review of the Financial Intelligence Centre Act, 2001 issued by the Financial Intelligence Centre (FIC) / the Department of National Treasury, which was availed to the various supervisory bodies. We remain committed to engaging continuously with the (FIC) and the Department of National Treasury, to ensure that those who are involved in criminal activities are successfully prosecuted.

The Financial Intelligence Centre Act (FICA) Committee of the LSSA considered the Consultation Paper and wish to respond to the issues raised. In our response, we only deal with the principle issues and will make detailed submissions once the draft legislation are published.

RISK BASED APPROACH

Issue 1:

"Taking the above-mentioned factors, as well as the FATF standards into account, do commentators support a move to amending the FIC Act so as to give express recognition to the application of a risk-based approach to their compliance obligations?"

The LSSA in principle supports the objective of a risk-based approach to determine whether a client's identification is to be obtained and verified.

However, we are concerned that, although the risk-based approach might create a lesser burden to larger firms, which have the expertise to develop a risk matrix, smaller firms might not have the specialized knowledge to develop such a matrix and then have a scorecard to determine the risk level and to apply that each and every time a financial transaction or business relationship is established. The last research conducted by the profession indicated that smaller firms constitute

the bulk of practicing attorneys in South Africa – in excess of 75%.

We are of the view that, because the FICA had been developed mainly for the financial environment, it is important to deal with the non-financial sector separately. We therefore suggest that the attorneys' profession ought to be separately governed through regulations to accommodate the peculiarities and specific needs of the profession.

We propose a combination, which will specifically provide for the categories or nature of attorney / client relationship, which will then require the implementation of compliance obligations. The current exemptions as applicable for attorneys can be used as a basis to redraft such categories, which may be limited to all transactions through a trust account which exceed a specific threshold amount and where there is a conveyance of funds in cross border transactions. In terms of such a hybrid approach, a relationship could in some instances be structured through a rule-based approach, but incorporating a risk-based model to provide for the categories or nature of the attorneys / client relationship. The duties for purposes of reporting suspicious or unusual transactions can still apply.

"Are there particular requirements in the measures to combat money laundering and terror financing which should be implemented on the basis of strict regulatory prescription in spite of a general implementation of a risk-based approach?"

This question is dealt with above.

"Are there any categories of accountable institutions which should be required by law to follow a strict prescriptive approach as opposed to a risk-based approach to the implementation of their compliance obligations?"

This question is dealt with above.

"Are there any products or services that should be identified expressly for reduced CDD measures due to there being substantially less risk of money laundering or terrorist financing associated with

those products or services?"

It is not possible for the LSSA to identify the various types of relationships and / or mandates that can exist between an attorney and his / her client.

"Will a risk-based approach encourage financial institutions to explore more innovative ways of offering financial services to a broader range of customers, thereby bringing previously excluded sectors of society into the formal economy?"

We do not have a specific view in this regard.

"Will a risk based approach reduce the burden on clients of accountable institutions to provide the information that accountable institutions require in order to comply with their obligations under the FIC Act?"

We believe that the answer is in the affirmative, provided that minimum criteria are set.

"Will a risk based approach improve the ease of compliance with the obligations in terms of the FIC Act for accountable institutions and reduce their compliance costs?"

As mentioned above, we believe that, although a risk based approach will possibly ease compliance in respect of the bigger and medium sized firms, it will be more onerous on smaller sized firms.

ELEMENTS OF CUSTOMER DUE DILIGENCE

Issue 2:

"Do commentators support a move to amending the FIC Act so as to refer to the knowledge that an accountable institution is required to have about its customer's identity as well as the

understanding the institution is required to have of the business that the customer is conducting with it?"

Although we agree that an accountable institution should have some basic information on the client, we believe that it is an anomaly to adopt a risk-based approach and at the same time make customer due diligence mandatory.

We note that no cross-reference to the risk-based approach is made in Section 21. It thus appears that the provisions of Section 21 will not be pre-emptory in all instances, but will only become applicable when fitted in within the specific risk model. If that is the case and Section 21 will only become applicable in the high risk environment, we have no difficulties with the proposal.

PURPOSE AND INTENDED NATURE OF THE BUSINESS RELATIONSHIP AND SOURCE OF FUNDS

Issue 3:

"Should the FIC Act be amended to expressly require that information concerning the purpose and intended nature of a business relationship, as well as information on the source of funds that the prospective client expects to use in the course of the business relationship, be obtained at the outset of the business relationship?"

We do not foresee any difficulty with the intended establishment of the nature of the business relationship, since that will clearly appear from the nature of the instruction and / or mandate given to the attorney by his or her client.

BENIFICIAL OWNERSHIP

Issue 4:

"Should express recognition be given in the FIC Act to the principle that accountable institutions

should determine the identity of the beneficial owners of clients that are corporate vehicles?"

As far as attorneys are concerned, we are not in favour of a blanket requirement to interrogate the identity of the beneficial owners of clients that are corporate vehicles. This issue will to a large extent be dictated based on the scope of the mandate between the attorney and his / her client, i.e. the attorney will call for certain information to enable him / her to execute the mandate properly. Furthermore, the risk will be determined through the risk matrix.

"Should prescriptive norms (such as percentages of shareholding) be set for certain types of corporate vehicles to indicate how ownership and/or control is to be determined?"

We do not agree with this suggestion. It will be difficult and impractical to obtain this kind of information.

DOUBTS ABOUT VERACITY OR ADEQUACY OF PREVIOUSLY OBTAINED CDD INFORMATION

Issue 5:

"Should the FIC Act provide expressly for situations where doubts about the veracity or adequacy of previously obtained customer identification information arise or where there is a suspicion of money laundering or terrorist financing?"

We are not in favour of such requirement being provided for in the Act. This will form part of the risk matrix. Furthermore, money laundering and terrorist financing activities are dealt with elsewhere in the Act.

"What should be expected of an accountable institution in such an instance?"

The question is dealt with above.

FAILURE TO SATISFACTORILY COMPLETE CUSTOMER DUE DILIGENCE

Issue 6:

"Should the FIC Act provide expressly for situations where an accountable institution is unable to complete the identification and verification requirements?"

The proposals regarding the timing of the due diligence process is a major change from the current dispensation in terms of which an attorney is allowed to accept an instruction from client and, if applicable, then complete the necessary identification and verification requirements. In terms of the aove proposal, the due diligence will have to be done before the work can commence. This suggestion cannot be supported by the attorneys' profession, as attorneys often have to deal with issues where time is of the essence, e.g. late night bail applications, where it is impossible to FICA the client before commencing with the work.

We are thus not in favour of the proposal that an accountable institution may not establish a business relation or conclude a single transaction unless the customer due diligence compliance requirement has been complied with. Practitioners should be allowed to commence to execute their mandates whilst verifying clients, if CDD is required in terms of their risk matrix.

"What should be expected of an accountable institution in such an instance?"

If the accountable institution suspects a suspicious transaction, a report in terms of Section 29 must simply be submitted. Suspicious transactions will trigger an automatic report and it is unnecessary to deal with them under general provisions.

ON-GOING DUE DILIGENCE

Issue 7:

"Should the FIC Act expressly provide for an obligation to conduct on-going due diligence on a

business relationship?"

We believe that there should not be prescriptions relating to on-going CDD and that this should be done if the risk matrix requires it.

POLITICALLY EXPOSED PERSONS

Issue 8:

"Should express provisions be inserted in the FIC Act to determine how accountable institutions should treat PEPs as customers?"

The Committee has no difficulty with this proposal.

THRESHOLD FOR SINGLE TRANSACTIONS

The Committee is of the view that, if a risk-based approach is followed, a fixed amount will be of no relevance.

Further, although a threshold amount of R5 000 can be relevant as far as some other industries are concerned, it is totally unacceptable as far as the attorneys' profession is concerned. Taking cognisance of the typical average transactions conducted in attorneys' trust accounts, a minimum threshold of R2 million will be more realistic.

EXAMPLE OF COMPLETED PROVISION ON CUSTOMER DUE DILLIGENCE

With reference to the information to be obtained in the case of a legal entity, we submit that it will be difficult, if not impossible, to obtain all the information listed. For example, in the case of a trust, it will create huge difficulty in practice to verify all possible trustees and beneficiaries.

The accountable institution should be guided by the type of legal entity and the mandate to

determine what information will be required.

RECORD KEEPING

With reference to 'the parties to the transaction' mentioned in Section 22A(2)(b)(iii), we submit that an attorney may not have all the particulars pertaining to all the parties to a transaction. There is a similar provision in the existing Act and we request that the FIC carefully reflect on the specific provision and phrase it more appropriately, taking into account the attorneys' profession as an industry.

REPEAL OF SECTIONS REFERRING TO THE COUNTER MONEY LAUNDERING ADVISORY COUNCIL

Issue 10:

"Commentators are requested to comment on the repeal of Chapter 2 of the FIC Act."

We are of the view that the current Money Laundering Advisory Council should reflect on its experiences and recommend to the Minister its continued existence or abolishment.

ADMINISTRATIVE SANCTIONS VERSUS CRIMINAL SANCTIONS

Issue 11:

"Do commentators support a move to decriminalise certain contraventions of the FIC Act and making those subject to administrative sanctions exclusively?"

We support the proposal to decriminalise certain contraventions of the FIC Act and to make those subject to administrative sanction exclusively. Further, we believe that the sanctions currently being provided for are totally unrealistic for purposes of the attorneys' profession and propose that specific consideration should be given to the attorneys' profession in determining administrative

sanction in the event of non-compliance.

AMENDMENTS TO SCHEDULE 1

Issue 12:

"Can certain existing categories of accountable institutions in Schedule 1 to the FIC Act be considered to be removed from the Schedule? If so, what would be the basis for their removal?"

As you may be aware, the Legal Practice Bill, which introduces a new dispensation for the legal profession, has been approved by Parliament and is with the President for assent. In terms of this legislation, advocates will be allowed to take instructions direct from a member of the public, provided that they operate trust accounts and are in possession of a Fidelity Fund certificate.

PHASE-IN TIME

We believe that sufficient phase-in time in respect of any new dispensation should be allowed.