



Accountants navigating their new world as *“Accountable Institutions”*

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Let's scrap the agenda -
Hot off the press update!



Recap - why were we grey-listed?

What needed to be fixed?



- The peer review did not go well...
- SA's three most-critical weaknesses are:
 - customer due diligence;
 - terrorist financing offences; and
 - targeted financial sanctions for terrorism and terrorist financing
- The FATF final report, published in October 2021, scored 40 technical areas/legislation adequacy. SA found to be:
 - fully compliant in only 3 of 40
 - partially compliant/non-compliant in 20
- The FATF final report, published in October 2021, scored 11 areas of efficiency of implementing legislation. SA found to be:
 - critically weak on all
- SA put under a one-year observation period in October 2021 - time to address 67 Recommended Actions

Government's plan?



- SA made significant progress during observation period (October 2021 to October 2022):
 - Cabinet approved a raft of new amendment bills in late August 2022
 - Quietly promulgated legislation on 22 and 23 December 2022:
 - To address 14 of the 20 deficiencies identified - Amended the Financial Intelligence Centre Act, the Non-profit Organisations Act, Trust Property Control Act, the Companies Act and the Financial Sector Regulations Act
 - To address 2 of the 20 deficiencies identified - The Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act
- Remaining technical deficiencies (4 of the 20) - addressed through various non-statutory initiatives
- Completed a second round of assessments of money laundering and terrorist financing risks and developed a national strategy to address these
- Other aspects of the FATF review will require a broader political response to correct. Authorities will need to restore confidence in SA's capacity to deliver accountability for state capture crimes and its ability to recoup the funds looted from state institutions by those implicated in high-level state capture offences

How did the FATF react to SA's plan?

We got greylisted!



- January 2023 assessment of SA's progress - SA made significant and positive progress, reducing 67 Recommended Actions to 8 strategic deficiencies, where more progress is required
- The FATF president identified key actions required:
 1. Improve risk-based supervision of non-financial professionals and businesses that can be potentially be used by criminals to facilitate, knowingly or unknowingly, money laundering and terror financing
 2. Make available, in a timely manner, accurate information about the ultimate beneficial owners of entities such as companies, trusts and non-profit organisations
 3. Update the framework used to adopt the targeted financial sanctions published by the United Nations Security Council, and the domestic designation of people suspected of terrorism or terror financing.

What are these 8 strategic actions? SA committed to resolve the remaining 8 strategic actions by January 2025



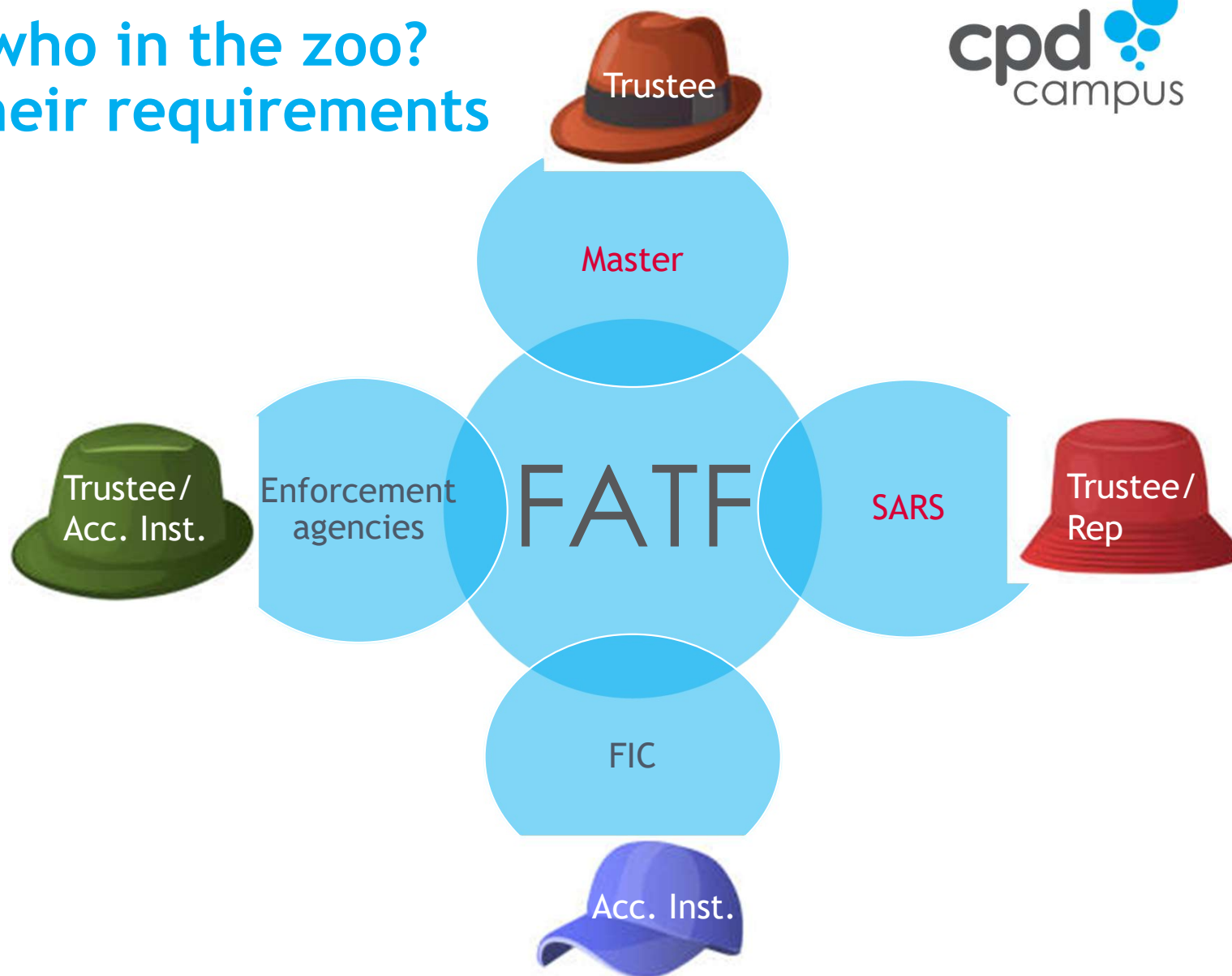
Industries and professions outside of financial sector (banking, insurance, asset management and stock exchange), through which money laundering can occur

1. Demonstrate a sustained increase in outbound Mutual Legal Assistance requests that help facilitate money laundering/terrorism financing (ML/TF) investigations and confiscations of different types of assets in line with its risk profile;
2. **Improve risk-based supervision of Designated Non-Financial Businesses and Professions (DNFBPs) and demonstrate that all AML/CFT supervisors apply effective, proportionate, and effective sanctions for noncompliance;**
3. Ensure that competent authorities have timely access to accurate and up-to-date Beneficial Ownership (BO) information on legal persons and arrangements and applying sanctions for breaches of violations by legal persons to BO obligations;
4. **Demonstrate a sustained increase in law enforcement agencies' requests for financial intelligence from the Financial Intelligence Centre for its ML/TFML/TF investigations;**
5. Demonstrate a sustained increase in investigations and prosecutions of serious and complex money laundering and the full range of terrorist financing activities in line with its risk profile;
6. Enhance its identification, seizure, and confiscation of proceeds and instrumentalities of a wider range of predicate crimes, in line with its risk profile;
7. Update its terrorist financing risk assessment to inform the implementation of a comprehensive national counter-financing of terrorism strategy; and
8. Ensure the effective implementation of targeted financial sanctions and demonstrate an effective mechanism to identify individuals and entities that meet the criteria for domestic designation.

FIC

FIC

Who is who in the zoo? Know their requirements



Money Laundering - through trusts and companies

- ✧ Criminal act of legitimising the money acquired through illegal or unethical means by disguising the origin of the crime
- ✧ Usually involves the creation of assets to conceal the relationship between the funds and their dirty sources
- ✧ People do laundering by often exploiting the vulnerabilities of legal or financial systems
- ✧ 3 stages of money laundering:



Placement



Layering



Why are TCSPs targeted?

Given the unique nature of the services they offer, TCSPs are vulnerable to abuse by entities seeking to misuse corporate structures to facilitate the movement of illicit funds

Accountants: Bringing in the 'gatekeepers' into the FIC fold, as accountants are often viewed as providing access into the financial system by acting as intermediaries in terms of financial transactions. Specialised tax services such as tax opinions could be seen as "creation, operation or management".

- **Creation** includes the registration or administrative processes with relevant government organisations for the client to commence with trading using the type of institution
- **Operation** of the company entails the assisting with the daily operations of the client
- **Management** would entail managing the company, for example being on the board of management and making management decisions regarding the company

NO BLANKET INCLUSION/EXCLUSION!

Why are TCSPs targeted? (cont.)

Given the unique nature of the services they offer, TCSPs are vulnerable to abuse by entities seeking to misuse corporate structures to facilitate the movement of illicit funds

Accountants: Bringing in the 'gatekeepers' into the FIC fold, as accountants are often viewed as providing access into the financial system by acting as intermediaries in terms of financial transactions.

Guidance to Section 4(c) of the FIC Act:

PUBLIC COMPLIANCE COMMUNICATION No. 6A (PCC 6A) - guidance on trust and company service providers as item 2 in schedule 1 of the financial intelligence centre act, 2001 (Act 38 of 2001).
Replaced PCC 6

Objective: Provides clarity on item 2 of Schedule 1 + highlights vulnerabilities faced by TCSPs + provides risk indicators when determining ML (Money Laundering), TF (Terrorist Financing) and PF (Proliferation Financing) risks in clients.

Authoritative in nature - Non-compliance where guidance have been provided - may result in enforcement action. If not followed guidance, then have to demonstrate that it complied with obligations under FIC Act in equivalent manner.

Who are “accountable institutions” for FIC? - from 19 December 2022



Definition dealing with trust and company service providers (item 2 in Schedule 1) in the Financial Intelligence Centre Act

Based on activity - therefore includes different professions - financial institutions/legal professionals and accountants - only in respect of clients that fall within the TCSPs activities

FATF Recommendation 22 - Institutions regarded as designated non-financial businesses and professions (DNFBPs) - includes TCSPs; therefore to be regulated from an anti-money laundering, combating terrorist financing and proliferation financing perspective.

6 June 2023 FIC presentation

- Invite topic: Registration, RBA & FICA obligations: Accountants
- Presentation topic: Registration, risk-based approach and compliance obligations of trust and company service providers
- PCC 6A (Draft):
 - 'operation or management' - accounting, auditing and tax services (tax returns, PAYE and VAT schedules on behalf of employers)

BUT IT CHANGED ON 18 AUGUST 2023! SO IGNORE!

PCC 6A - Schedule 1, item 2 (TCSP)



Public Compliance Communication 6A guidance on the definition regarding a trust and company service provider as Item 2 in Schedule 1 of the Financial Intelligence Centre Act – 18 August 2023

- “Person” refers to both natural persons and legal persons
- “Carries on the business of” is not defined in the FIC Act. The ordinary meaning of the term, within the context of the FIC Act is applied
- “Business” is that of a commercial activity or institution, as opposed to a charitable undertaking or government institution. Therefore, persons who are appointed as providing TCSP functions in a personal capacity, as opposed to doing so on a commercial basis as a feature of their business for clients are not required to be registered as a TCSP. A commercial basis includes where a person offers such TCSP activities to be conducted as part of their service offering, regardless of the number of clients that take up this service.
 - Trustee - when trust services activity performed is done as part of a business undertaking; not in personal capacity???? Commercial basis????
- Client - entered into a business relationship /single transaction with accountable institution
 - Excluded if providing TCSP activities as employee for employer’s legal structure

Schedule 1, item 2 (TCSP) - Companies & CCs



“(a) A person who carries on the business of preparing for (to make something/somebody ready to be used or to do something) or carrying out (to do and complete a task), transactions for a client, where- (i) the client is assisted (to help something to happen more easily/to help somebody do something) in the planning (the act or process of making plans for something) or execution (the act of doing a piece of work, performing a duty, or putting a plan into action) of-

(aa) the organisation of contributions (assisting clients to raise capital/funding - advising on sourcing of funding/liaising with donors/investors) necessary for the creation (assisting a client on the registration or administrative processes to register a particular legal person/corporate vehicle - include advising on legal requirements associated with the legal structure or creation of an entity, drafting of any formation, or formation related documentation, and any form of secretarial or facilitation of the registration process), operation (assisting with the ongoing operations of the client – planning/execution) or management (playing active role/making decisions for client’s business - steers direction) of a company, or of an external company or of a foreign company, as defined in the Companies Act, 2008 (Act 71 of 2008);

(bb) the creation, operation or management of a company, or of an external company or of a foreign company, as defined in the Companies Act, 2008; or

(cc) the operation or management of a close corporation, as defined in the Close Corporations Act, 1984 (Act 69 of 1984)

Schedule 1, item 2 (TCSP) - Companies & CCs



Schedule 1, item 2(a)(i) (aa), (bb) and (cc) EXCLUDES:

- Recording/capturing/book-keeping
- Administrative submissions for legislative purposes eg tax returns
- Activities not amounting to decision-making within client's business activities
- Activities that do not steer, impact or influence client's business operations
- Statutory functions - liquidation of entity/ business rescue - not operations or management

Schedule 1, item 2 (TCSP) - Companies & CCs



(b) A person who carries on the business of-
(i) acting for a client as a nominee (person acting as registered holder of securities/interest in securities on behalf of other persons) as defined in the Companies Act, 2008 (Act 71 of 2008); or
(ii) arranging for another person to act for a client such as a nominee.”

EXCLUDES:

Custodial services as required by law obo financial service provider

Schedule 1, item 2 (TCSP) - Trusts

A “board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act, 1988 (Act 57 of 1988)” replaced with:

“...

(c) A person who carries on the business of creating a trust (trusts created between parties (*inter vivos*) and includes trusts both established locally (i.e. in South Africa) and foreign trusts (i.e. trusts established outside of South Africa)) arrangement for a client.

(d) A person who carries on the business of preparing for or carrying out transactions (including as a trustee) related to the investment, safe keeping, control or administering of trust property within the meaning of the Trust Property Control Act, 1988 (Act 57 of 1988).”

The following trusts are **excluded** from the TCSP definition, as read with section 1 of the FIC Act:

- Trusts created by a testamentary disposition
- Trusts created by a court order
- Trusts created for person under curatorship
- Trusts created by the trustees of a retirement fund in respect of benefits payable to the beneficiaries of that retirement fund

PCCA 6A Schedule 1, item 2 (TCSP) - Registrations



- Register either as company service provider, trust service provider or both
- Nothing to do with profession - activity based
- Obligations of registration and other FIC Act requirements applies to accountable institution, not individually to each professional employee - no separate registration
- Dual registration - if performing TCSP functions and registered under other items (Draft PCC 5D)

Public Compliance Communication PCC 6A - Guidance on trust and company service providers for the purpose of schedule 1 of the FIC Act – Risk indicators



- TCSPs are included as accountable institutions given their susceptibility to exploitation by those looking for methods to launder criminal proceeds or raise funds for terrorist activity.
- Legal persons i.e. business entities, can be used to attempt to disguise beneficial ownership, and the TCSPs involvement therein could provide an appearance of legitimacy
- Shelf companies may be used to conceal beneficial ownership, or enhance the perception of legitimacy - create the impression that the company is reputable and trading in the ordinary course because it has been in existence for many years and complicating structures to conceal beneficial ownership
- TCSPs are considered to be gatekeepers in providing potential access points into the financial system for criminals to do business with financial institutions without revealing their own identities
- Multiple engagements across different services could intensify the disguising of a potential criminal entity or trust to such an extent that the client's identity is mainly linked to the TCSP themselves.

Inherent ML, TF or PF risks posed by the TCSP sector



- Disguising ultimate beneficial owners through a corporate structure, to limit the detection of a sanctioned or designated person, an associated sanctioned person, a politically exposed person (PEP), such as a foreign politically exposed person (FPEP) or domestic politically exposed person (DPEP), a prominent influential person (PIP) or a person linked to criminal activity.
- Facilitating the movement of illegal proceeds from a foreign client's country to South Africa - source of funds and wealth
- Companies based in foreign countries hiding the origin of their money, while attempting to distance themselves from the source of funds and to avoid paying tax in South Africa.

Risk in the ordinary course of business for a TCSP:

- The client is using multiple companies or trusts which add layers of complexity to the ownership where those layers seem unnecessary e.g. trusts where the beneficiary of a trust is another trust.
- Other professionals are assisting customers to use schemes that can disguise income, assets or ownership of such assets.
- The number of intermediaries or professionals used seems unnecessary, or at the outset, it is apparent that there is no need for a professional TCSP.
- Establishing a business primarily for the purpose of collecting funds from various sources, which are then transferred to local or foreign bank accounts that have no apparent ties to the legal entity.
- The transfer of funds in the form of “forgivable loans” to individuals from trusts and shell companies but the loans make little or no business sense. The loans repayments may be for comparatively small amounts to the amount loaned or for excessively long periods of time (e.g. repayment is over the course of 10 or 15 years.) A forgivable loan is a form of loan in which its entirety or a portion of it can be forgiven or deferred for a period of time by the lender when certain conditions are met.
- Appearance of the same parties in multiple transactions within a short period of each other. Specifically, where it would make no business sense or logically impossible to enter such transactions within a short time.
- The purchase of companies that have no obvious commercial purpose.
- Companies which continuously make substantial losses.

Client risk indicators:



- A company is registered by a non-resident with no links or activities in South Africa or the jurisdiction where the company is established.
- The parties are native to, resident in, or incorporated in a high-risk geographic area.
- The money flow generated by a company is not in line with its underlying business activities.
- The client is unwilling or refuses to provide information including documentary evidence of himself or beneficial owners of trusts or companies.
- The client is involved with transactions for themselves or on behalf of a company that does not match their background.
- The beneficial ownership is veiled in complexity, making it impossible to determine who is the ultimate beneficial owner.
- The client is secretive about the reasons for and the way a company structure is being set up.
- Searches on a client or close associates show adverse media attention, or they have been disqualified from professions due to convictions of dishonesty or association with bribery in relation to contract procurement or tenders.
- Where the client is or appears to be acting on behalf of another person but is unwilling to provide the names of the person they are acting on behalf of.
- The person acting as a director or representative does not appear to be a suitable representative or does not appear to have the expertise that the role requires.
- Clients whose owners or directors that have a lavish lifestyle that appears to exceed known sources of income.
- Frequent changes in ownership, officers, beneficiaries, or trustees.
- Irregularity or limited duration of the client relationship. Once-off engagements for the establishment of complex trust, company or other arrangements involving legal entities without ongoing involvement from the client.
- Where there is a suspicion that the client's directors or the ultimate beneficial owner are designated individuals on a targeted financial sanctions list or a resolution of the United Nations Security Council (UNSC.)
- Where the customer requests that a company or legal entity is registered with a designated person (in terms of a targeted financial sanctions list or UNSC resolution) as the director, trustee or any other beneficial owner of such entity.

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You are a trustee - then you are in!

- Become a FIC “expert” to identify who are accountable institutions
- Keep a register of accountable institutions trustees deal with (New subsection 11(1)(e))
- Inform accountable institution that trustee is acting in their capacity as trustee (New subsection 10(2)):
- Paperwork!!!!
 - Discipline - Engagement Letter, indemnify!
 - Resolution of board of trustees
 - Confirmation to accountable institution - in writing

Careful FIC can cross-check between what trustees do (as required by law) and what accountable institutions do (as required by law)

Therefore REALTIME! Do not leave to catch up every now and again!
Get a system to collect evidence and track trustee discipline!

You qualify as “accountable institution”, now what?



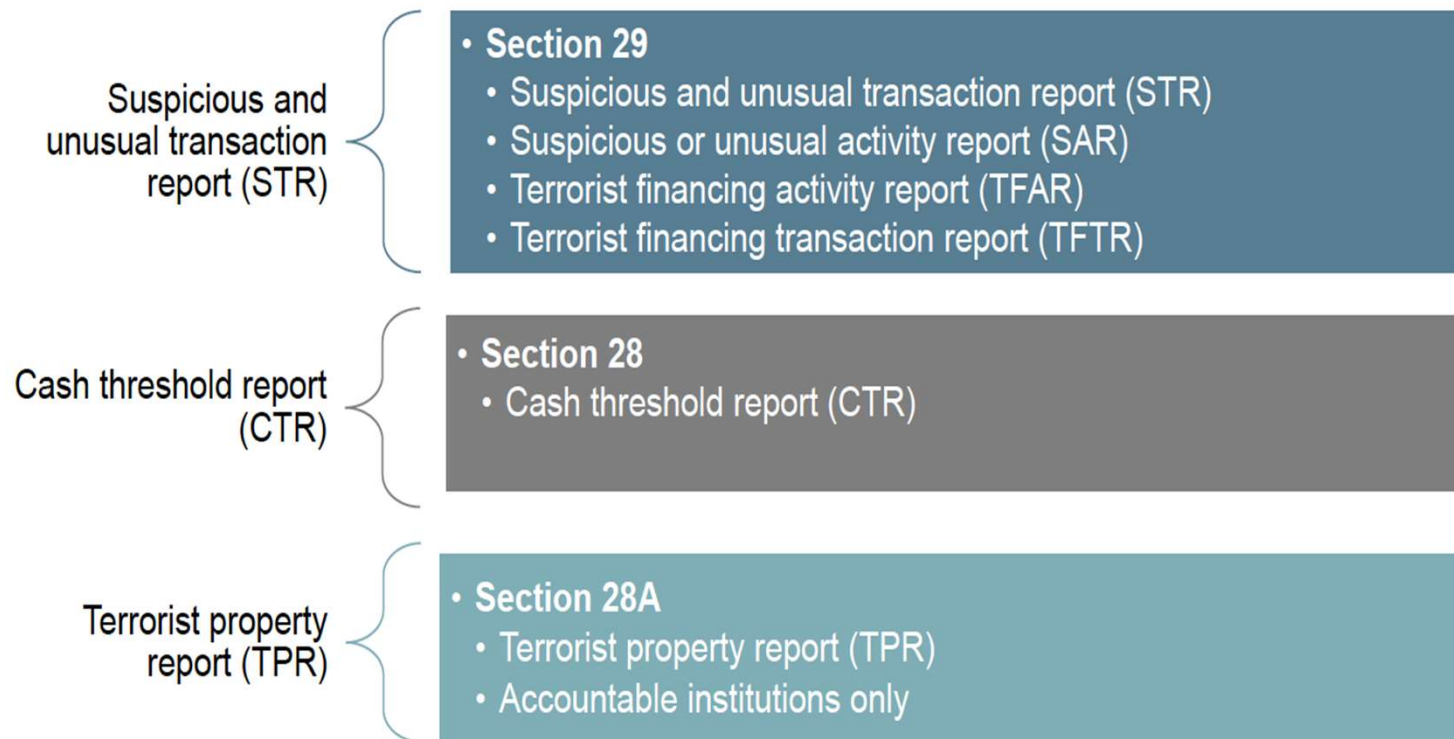
- Registration with the FIC
- Submitting regulatory reports to the FIC, including cash threshold reports and suspicious and unusual transaction reports
- Implementing a risk-based approach to customer due diligence including customer identification and verification
- Develop, document, maintain and implement a risk management and compliance programme (RMCP)
- Obligation to keep certain records
- Evaluation of all clients information to identify designated persons or entities that are listed on the targeted financial sanctions (TFS) list in terms of S26A of the FIC Act or the TFS list as published in terms of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004
- Determine whether clients are a foreign prominent public official or a domestic prominent influential person
- Implement a compliance function and appoint a person responsible for compliance
- Train employees on how to comply with the FIC Act

Promulgated an effective 19 December 2022

- No formal transitional provisions communicated, but the FIC stated in a media release that in the first 18 months from the date of commencement of the amendments - FIC and supervisory bodies will focus on entrenching the FIC Act risk and compliance provisions and implementation for new “accountable instituitotns”
- Supervisory bodies to conduct inspections and, where warranted, issue remedial administrative sanctions (risk-based approach) - correct identified areas of non-compliance.
- New sectors, including TCSPs - no financial penalties for non-compliance with the FIC Act during the transitional 18-month period

FIC Reporting

Reports that can be submitted



Directive 6 - submission was due on 31 May 2023



- Submit information regarding their understanding of money laundering (ML), terrorist financing (TF) and proliferation financing (PF) risks and their assessment of compliance with obligations in terms of the FIC Act to the FIC through a risk and compliance return.
- Can still submit
- Administrative penalty for non-submission!

The end