

REPUBLIC OF SOUTH AFRICA

FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL

*(As amended by the Portfolio Committee on Finance (National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF FINANCE)

[B 18B—2008]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Financial Intelligence Centre Act, 2001, so as to define or further define certain words and expressions; to clarify the application of the Act in relation to other laws; to extend the objectives and functions of the Centre; to change the name of the Money Laundering Advisory Council; to clarify certain provisions; to update references to legislation; to provide for the sharing of information by the Centre and supervisory bodies; to provide for the issuance of directives by the Centre and supervisory bodies; to provide for the registration of accountable and reporting institutions; to clarify the roles and responsibilities of supervisory bodies; to provide for written arrangements relating to the respective roles and responsibilities of the Centre and supervisory bodies; to authorise the Centre and supervisory bodies to conduct inspections; to regulate certain applications to court; to provide for administrative sanctions that may be imposed by the Centre and supervisory bodies; to establish an appeal board to hear appeals against decisions of the Centre or supervisory bodies; to make further provision for offences; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 38 of 2001, as amended by section 27 of Act 33 of 2004

1. Section 1 of the Financial Intelligence Centre Act, 2001 (hereinafter referred to as the principal Act), is hereby amended— 5

(a) by the insertion in subsection (1) after the definition of “accountable institution” of the following definitions:

“**‘administrative sanction’** means a sanction referred to in section 45C;

‘appeal board’ means the appeal board established by section 45E;”;

(b) by the insertion in subsection (1) after the definition of “authorised officer” of the following definition:

“**‘bearer negotiable instrument’**, for the purposes of this Act, means any instrument that may on demand by the bearer thereof be converted to the currency of the Republic or that of another country, and includes, amongst others, cheques, promissory notes or money orders;”;

- (c) by the substitution in subsection (1) for the definition of “Council” of the following definition:
 “**‘Council’** means the **[Money] Counter-Money Laundering Advisory Council** established by section 17;”;
- (d) by the insertion in subsection (1) after the definition of “entity” of the following definition:
 “**‘inspector’** means a person appointed in terms of section 45A;”;
- (e) by the insertion in subsection (1) after the definition of “National Director of Public Prosecutions” of the following definition:
 “**‘non-compliance’** means any act or omission, and ‘fails to comply’, ‘failure to comply’ and ‘not complying’ have the same meaning;”;
- (f) by the insertion in subsection (1) after the definition of “supervisory body” of the following definition:
 “**‘terrorist and related activities’** has the meaning assigned to it in section 1 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004);”;
- (g) by the substitution in subsection (1) for the definition of “this Act” of the following definition:
 “**‘this Act’** includes **[a regulation made in terms of section 77] any regulation made or exemption given under this Act;**”.

Insertion of section 1A in Act 38 of 2001

2. The following section is hereby inserted in the principal Act after section 1:

“Application of Act when in conflict with other laws

1A. If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law existing at the commencement of this Act, save the Constitution, the provisions of this Act prevail.”.

Amendment of section 3 of Act 38 of 2001, as amended by section 27 of Act 33 of 2004

3. Section 3 of the principal Act is hereby amended—
- (a) by the substitution in subsection (2) for paragraphs (a) and (b) of the following paragraphs, respectively:
 “(a) to make information collected by it available to investigating authorities, supervisory bodies, the intelligence services and the South African Revenue Services to facilitate the administration and enforcement of the laws of the Republic;
- (b) to exchange information with **[similar]** bodies with similar objectives in other countries regarding money laundering activities, the financing of terrorist and related activities, and other similar [offences.] activities;”;
- (b) by the addition of the following paragraph:
 “(c) to supervise and enforce compliance with this Act or any directive made in terms of this Act and to facilitate effective supervision and enforcement by supervisory bodies.”.

Amendment of section 4 of Act 38 of 2001

4. Section 4 of the principal Act is hereby amended—
- (a) by the substitution for paragraph (c) of the following paragraph:
 “(c) monitor and give guidance to accountable institutions, supervisory bodies and other persons regarding the performance and compliance by them of their duties and **[their compliance with the provisions]** obligations in terms of this Act or any directive made in terms of this Act;”;

(b) by the addition of the following paragraphs:

- “(e) annually review the implementation of this Act and submit a report thereon to the Minister;
- (f) implement a registration system in respect of all accountable institutions and reporting institutions; and
- (g) supervise and enforce compliance with this Act or any directive made in terms of this Act by accountable institutions, reporting institutions and other persons to whom the provisions of this Act apply that—
 - (i) are not regulated or supervised by a supervisory body in terms of this Act or any other law;
 - (ii) are regulated or supervised by a supervisory body in terms of this Act or any other law, if that supervisory body fails to enforce compliance despite any recommendation of the Centre made in terms of section 44(b).”.

Substitution of heading to Chapter 2 of Act 38 of 2001

5. The following heading is hereby substituted for the heading to Chapter 2:
 “[**MONEY**] **COUNTER-MONEY LAUNDERING ADVISORY COUNCIL**”.

Amendment of section 17 of Act 38 of 2001

6. The following section is hereby substituted for section 17 of the principal Act:

“Establishment

17. [A Money] A Counter-Money Laundering Advisory Council is hereby established.”.

Amendment of section 26 of Act 38 of 2001

7. Section 26 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) An authorised representative of the Centre has access during ordinary working hours to any records kept by or on behalf of an accountable institution in terms of section 22 or section 24, and may examine, make extracts from or copies of, any such records for the purposes of obtaining further information in respect of a report made in terms of section 28, 28A, 29, 30(1) or 31.”.

Amendment of section 30 of Act 38 of 2001

8. Section 30 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) A person **[intending to convey]** who intends conveying or who has conveyed or who is conveying an amount of cash or a bearer negotiable instrument in excess of the prescribed amount to or from the Republic must, [before that person conveys the cash into or out of the Republic] on demand, report the prescribed particulars concerning that conveyance to a person authorised by the Minister for this purpose.”.

Amendment of section 34 of Act 38 of 2001, as amended by section 27 of Act 33 of 2004

9. Section 34 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) Subsection (1) does not apply to the carrying out of a transaction to which the rules of an exchange licensed in terms of the **[Stock Exchanges Control Act, 1985, or the Financial Markets Control Act, 1989]** Securities Services Act, 2004 (Act No. 36 of 2004), apply.”.

Amendment of section 36 of Act 38 of 2001

10. Section 36 of the principal Act is hereby amended —

(a) by the substitution for subsections (1) and (2) of the following subsections, respectively:

“(1) If a supervisory body or the South African Revenue Service 5
knows or suspects that an accountable institution[, **as a result of a
transaction concluded by or with the accountable institution,**]
wittingly or unwittingly has received or is about to receive the proceeds
of unlawful activities or has been used or may be used in future for 10
money laundering purposes or for the purpose of any transaction
contemplated in section 29(1)(b), it must advise the Centre and any
authority, service or body contemplated in section 3 or any other
supervisory body that, in the opinion of the supervisory body or the
South African Revenue Service, may have an interest therein, of that fact
and furnish **[the Centre] them** with all information and any records 15
regarding that knowledge or suspicion which **[the Centre] they** may
reasonably require **[for the achievement of its objectives]** to identify
the proceeds of unlawful activities or to combat money laundering
activities or financing of terrorist and related activities.

(2) If the Centre believes that a supervisory body or the South African 20
Revenue Service may have information indicating that an accountable
institution[, **as a result of a transaction concluded by or with the
accountable institution,**] wittingly or unwittingly has received or is
about to receive the proceeds of unlawful activities or has been used or
may be used in future for money laundering purposes or for the purpose 25
of any transaction contemplated in section 29(1)(b), the Centre may
request that supervisory body or the South African Revenue Service to
confirm or rebut that belief and the supervisory body or South African
Revenue Service, as the case may be, must do so and, if that belief is
confirmed, must furnish the Centre and any authority, service or body 30
referred to in section 3 or any other supervisory body identified by the
Centre that may have an interest in that matter with all information and
any records regarding that knowledge or suspicion which the Centre may
reasonably require for the achievement of its objectives.”.

Amendment of section 37 of Act 38 of 2001

11. Section 37 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Subject to subsection (2), no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution, supervisory body, reporting institution, the South African Revenue Service or any other person with a provision of this Part, Part 4 and Chapter 4.”;

Amendment of section 38 of Act 38 of 2001

12. Section 38 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 45

“(1) No action, whether criminal or civil, lies against an accountable institution, reporting institution, supervisory body, the South African Revenue Service or any other person complying in good faith with a provision of this Part, Part 4 and Chapter 4, including any director, employee or other person acting on behalf of such accountable institution, reporting institution, supervisory body, the South African Revenue Service 50
or such other person.”.

Amendment of section 40 of Act 38 of 2001, as amended by section 27 of Act 33 of 2004

13. Section 40 of the principal Act is hereby amended by the addition of the following subsection: 55

“(7) The Centre may make available any information obtained by it during an inspection to an organ of state, a supervisory body, other regulatory authority, self-regulating association or organisation that is affected by or has an interest in that information.”.

Insertion of sections 43A and 43B in Act 38 of 2001

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14. The following sections are hereby inserted in Part 4 of Chapter 3 of the principal Act, after section 43:

“Directives

43A. (1) The Centre may, by notice in the *Gazette*, issue a directive to all institutions to whom the provisions of this Act apply, regarding the application of this Act. 10

(2) The Centre or a supervisory body may, in writing, issue a directive to any category of accountable institutions or category of reporting institutions or other category of person to whom the provisions of this Act apply, regarding the application of this Act. 15

(3) The Centre or a supervisory body may in writing, over and above any directive contemplated in subsection (1) or (2), issue a directive to any accountable institution, category of accountable institutions, reporting institution, category of reporting institutions or other person to whom the provisions of this Act apply, to— 20

(a) provide the Centre or that supervisory body, as the case may be—

(i) with the information, reports or statistical returns specified in the notice, at the time or at the intervals specified in the notice; and

(ii) within the period specified in the notice, with any document in its possession or custody or under its control; 25

(b) cease or refrain from engaging in any act, omission or conduct in contravention of this Act;

(c) perform acts necessary to remedy an alleged non-compliance with this Act; or 30

(d) perform acts necessary to meet any obligation imposed by this Act.

(4) The Centre or supervisory body may examine a document submitted to it in terms of subsection (3)(a) or make a copy thereof or part thereof.

(5) The costs incurred in complying with a directive must be borne by the accountable institution, reporting institution or person concerned. 35

(6) (a) The Centre, in respect of any accountable institution or category of accountable institutions regulated or supervised by a supervisory body in terms of this Act or any other law, may issue a directive in accordance with subsections (2) and (3) only if a supervisory body— 40

(i) failed to issue a directive despite any recommendation of the Centre made in terms of section 44(b); or

(ii) failed to issue a directive within the period specified by the Centre.

(b) A supervisory body may issue a directive in terms of this section only after consulting the Centre on that directive.

Registration by accountable institution and reporting institution

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43B. (1) Every accountable institution referred to in Schedule 1 and every reporting institution referred to in Schedule 3 must, within the prescribed period and in the prescribed manner, register with the Centre.

(2) The registration of an accountable institution and a reporting institution contemplated in subsection (1) must be accompanied by such particulars as the Centre may require. 50

(3) The Centre must keep and maintain a register of every accountable institution and reporting institution registered in terms of subsection (1).

(4) A registered accountable institution or reporting institution must notify the Centre, in writing, of any changes to the particulars furnished in terms of this section within 90 days after such a change.”. 55

Amendment of section 45 of Act 38 of 2001

15. Section 45 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) **[Each] Every** supervisory body is responsible for supervising and enforcing compliance with **[the provisions of this Chapter by each accountable institution]** this Act or any order, determination or directive made in terms of this Act by all accountable institutions regulated or supervised by it.”; and

(b) by the insertion after subsection (1) of the following subsections:

“(1A) (a) The obligation referred to in subsection (1) forms part of the legislative mandate of any supervisory body and constitutes a core function of that supervisory body.

(b) Any Act that regulates a supervisory body or authorises that supervisory body to supervise or regulate any accountable institution must be read as including subsection (1), and a supervisory body may utilise any fees or charges it is authorised to impose or collect to defray expenditure incurred in performing its obligations under this Act or any order, determination or directive made in terms of this Act.

(1B) A supervisory body, in meeting its obligation referred to in subsection (1), may—

(a) in addition to any powers it has in terms of another Act, exercise any power afforded to it in this Act;

(b) delegate the exercise of any power contemplated in paragraph (a) to any of its members, employees or any other suitable person;

(c) take any measures it considers necessary or expedient to meet its obligations imposed by this Act or any order, determination or directive made in terms of this Act, or to achieve the objectives of the Centre or this Act;

(d) require an accountable institution supervised or regulated by it to report on that institution’s compliance with this Act or any order, determination or directive made in terms of this Act in the form, manner and timeframes determined by the supervisory body;

(e) issue or amend any licence, registration, approval or authorisation that the supervisory body may issue or grant in accordance with any Act, to include the following conditions:

(i) compliance with this Act; and

(ii) the continued availability of human, financial, technological and other resources to ensure compliance with this Act or any order, determination or directive made in terms of this Act; and

(f) in making a determination in accordance with any Act applicable to it as to whether a person is fit and proper to hold office in an accountable institution, take into account any involvement, whether directly or indirectly, by that person in any non-compliance with this Act or any order, determination or directive made in terms of this act, or, prior to the commencement of this Act or at any time thereafter, any involvement in—

(i) any money laundering activity; or

(ii) any terrorist or related activity.

(1C) A supervisory body must submit to the Centre, within the prescribed period and in the prescribed manner, a written report on any action taken against any accountable institution in terms of this Act or any order, determination or directive made in terms of this Act.

(1D) The Centre and a supervisory body must co-ordinate their approach to exercising their powers and performing their functions in terms of this Act to ensure the consistent application of the Act, and must enter into a written memorandum of understanding in respect thereof.”.

Amendment of Chapter 4 of Act 38 of 2001

16. Chapter 4 of the principal Act is hereby amended—

(a) by the substitution for the heading to that Chapter of the following heading:

“[OFFENCES AND PENALTIES] COMPLIANCE AND ENFORCEMENT”; and

(b) by the insertion in that Chapter, after section 45, of the following sections:

“Appointment of inspectors

45A. (1) The Director or the head of a supervisory body, as the case may be, may appoint any person in the service of the Centre or supervisory body or any other suitable person as an inspector. 5

(2) The Director or the head of a supervisory body may determine the remuneration to be paid to a person who is appointed in terms of subsection (1) that is not in the full-time service of the Centre or supervisory body. 10

(3) (a) The Director or the head of a supervisory body must issue an inspector contemplated in subsection (1) with a certificate of appointment signed by the Director or the head of that supervisory body.

(b) A certificate of appointment must specify—

(i) the full name of the person so appointed; 15

(ii) his or her identity number;

(iii) his or her signature;

(iv) his or her photograph;

(v) a description of the capacity in which he or she is appointed; and 20

(vi) the extent of his or her powers to inspect.

(4) (a) Where the head of a supervisory body is authorised by any other Act to appoint inspectors, the head may extend the appointment and functions of inspectors under that Act to include the undertaking of inspections under this Act. 25

(b) An inspector whose appointment or functions have been extended under paragraph (a) may, in undertaking inspections under this Act, in addition to the functions afforded to such inspector under the Act contemplated in paragraph (a), perform the functions afforded in this Act.

(c) Any extension contemplated in paragraph (a) must be reflected in any certificate or appointment document issued by the head of the supervisory body to an inspector under the Act contemplated in that paragraph. 30

(5) When an inspector undertakes an inspection in terms of this Act, the inspector must—

(a) be in possession of a certificate of appointment issued in terms of subsection (3) or contemplated in subsection 4(c); and 35

(b) on request, show that certificate to any person who is—

(i) affected by the performance of the functions of the inspector; or

(ii) is in charge of any premises to be inspected. 40

Inspections

45B. (1) For the purposes of determining compliance with this Act or any order, determination or directive made in terms of this Act, an inspector may at any reasonable time and on reasonable notice, where appropriate, enter and inspect any premises at which the Centre or, when acting in terms of section 45(1), the supervisory body reasonably believes that the business of an accountable institution, reporting institution or other person to whom the provisions of this Act apply, is conducted. 45

(2) An inspector, in conducting an inspection, may—

(a) in writing direct a person to appear for questioning before the inspector at a time and place determined by the inspector; 50

(b) order any person who has or had any document in his, her or its possession or under his, her or its control relating to the affairs of the accountable institution, reporting institution or person—

(i) to produce that document; or

(ii) to furnish the inspector at the place and in the manner determined by the inspector with information in respect of that document; 55

- (c) open any strongroom, safe or other container, or order any person to open any strongroom, safe or other container, in which the inspector suspects any document relevant to the inspection is kept;
- (d) use any computer system or equipment on the premises or require reasonable assistance from any person on the premises to use that computer system to—
- (i) access any data contained in or available to that computer system; and
 - (ii) reproduce any document from that data;
- (e) examine or make extracts from or copy any document in the possession of an accountable institution, reporting institution or person or, against the issue of a receipt, remove that document temporarily for that purpose; and
- (f) against the issue of a receipt, seize any document obtained in terms of paragraphs (c) to (e), which in the opinion of the inspector may constitute evidence of non-compliance with a provision of this Act or any order, determination or directive made in terms of this Act.
- (3) An accountable institution, reporting institution or other person to whom this Act applies, must without delay provide reasonable assistance to an inspector acting in terms of subsection (2).
- (4) The Centre or a supervisory body may recover all expenses necessarily incurred in conducting an inspection from an accountable institution, reporting institution or person inspected.
- (5) (a) Subject to section 36 and paragraph (b), an inspector may not disclose to any person not in the service of the Centre or supervisory body any information obtained in the performance of functions under this Act.
- (b) An inspector may disclose information—
- (i) for the purpose of enforcing compliance with this Act or any order, determination or directive made in terms of this Act;
 - (ii) for the purpose of legal proceedings;
 - (iii) when required to do so by a court; or
 - (iv) if the Director or supervisory body is satisfied that it is in the public interest.
- (6) (a) An inspector appointed by the Director may, in respect of any accountable institution regulated or supervised by a supervisory body in terms of this Act or any other law, conduct an inspection only if a supervisory body failed to conduct an inspection despite any recommendation of the Centre made in terms of section 44(b) or failed to conduct an inspection within the period recommended by the Centre.
- (b) An inspector of a supervisory body may conduct an inspection, other than a routine inspection in terms of this section, only after consultation with the Centre on that inspection.
- (c) An inspector appointed by the Director may on the request of a supervisory body accompany and assist an inspector appointed by the head of a supervisory body in conducting an inspection in terms of this section.
- (7) No warrant is required for the purposes of an inspection in terms of this section.

Administrative sanctions

- 45C.** (1) The Centre or a supervisory body may impose an administrative sanction on any accountable institution, reporting institution or other person to whom this Act applies when satisfied on available facts and information that the institution or person—
- (a) has failed to comply with a provision of this Act or any order, determination or directive made in terms of this Act;
 - (b) has failed to comply with a condition of a licence, registration, approval or authorisation issued or amended in accordance with section 45(1B)(e);
 - (c) has failed to comply with a directive issued in terms section 34(1) or 43A(3); or
 - (d) has failed to comply with a non-financial administrative sanction imposed in terms of this section.

- (2) When determining an appropriate administrative sanction, the Centre or the supervisory body must consider the following factors:
- (a) The nature, duration, seriousness and extent of the relevant non-compliance;
 - (b) whether the institution or person has previously failed to comply with any law; 5
 - (c) any remedial steps taken by the institution or person to prevent a recurrence of the non-compliance;
 - (d) any steps taken or to be taken against the institution or person by— 10
 - (i) another supervisory body; or
 - (ii) a voluntary association of which the institution or person is a member; and
 - (e) any other relevant factor, including mitigating factors.
- (3) The Centre or supervisory body may impose any one or more of the following administrative sanctions: 15
- (a) A caution not to repeat the conduct which led to the non-compliance referred to in subsection (1);
 - (b) a reprimand;
 - (c) a directive to take remedial action or to make specific arrangements;
 - (d) the restriction or suspension of certain specified business activities; or 20
 - (e) a financial penalty not exceeding R10 million in respect of natural persons and R50 million in respect of any legal person.
- (4) The Centre or supervisory body may—
- (a) in addition to the imposition of an administrative sanction, make recommendations to the relevant institution or person in respect of compliance with this Act or any order, determination or directive made in terms of this Act; 25
 - (b) direct that a financial penalty must be paid by a natural person or persons for whose actions the relevant institution is accountable in law, if that person or persons was or were personally responsible for the non-compliance; 30
 - (c) suspend any part of an administrative sanction on any condition the Centre or the supervisory body deems appropriate for a period not exceeding five years.
- (5) Before imposing an administrative sanction, the Centre or supervisory body must give the institution or person reasonable notice in writing— 35
- (a) of the nature of the alleged non-compliance;
 - (b) of the intention to impose an administrative sanction;
 - (c) of the amount or particulars of the intended administrative sanction; and 40
 - (d) that the institution or person may, in writing, within a period specified in the notice, make representations as to why the administrative sanction should not be imposed.
- (6) (a) After considering any representations and the factors referred to in subsection (2), the Centre, subject to paragraph (c), or supervisory body may impose an administrative sanction the Centre or supervisory body considers appropriate. 45
- (b) Upon imposing the administrative sanction the Centre or supervisory body must, in writing, notify the institution or person—
- (i) of the decision and the reasons therefor; and 50
 - (ii) of the right to appeal against the decision in accordance with section 45D.
- (c) The Centre must, prior to taking a decision contemplated in paragraph (a), consult the relevant supervisory body, if applicable.
- (7) (a) Any financial penalty imposed must be paid into the Criminal Assets Recovery Account established by section 63 of the Prevention Act within the period and in the manner as may be specified in the relevant notice. 55
- (b) If the institution or person fails to pay the financial penalty within the specified period and an appeal has not been lodged within the required period, the Centre or supervisory body may forthwith file with the clerk or registrar of a competent court a certified copy of the notice contemplated in 60

subsection (6)(b), and the notice thereupon has the effect of a civil judgment lawfully given in that court in favour of the Centre or supervisory body.

(8) An administrative sanction contemplated in this section may not be imposed if the respondent has been charged with a criminal offence in respect of the same set of facts.

(9) If a court assesses the penalty to be imposed on a person convicted of an offence in terms of this Act, the court must take into account any administrative sanction imposed under this section in respect of the same set of facts.

(10) An administrative sanction imposed in terms of this Act does not constitute a previous conviction as contemplated in Chapter 27 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(11) Unless the Director or supervisory body is of the opinion that there are exceptional circumstances present that justify the preservation of the confidentiality of a decision the Director or supervisory body must make public the decision and the nature of any sanction imposed if—

- (a) an institution or person does not appeal against a decision of the Centre or supervisory body within the required period; or
- (b) the appeal board confirms the decision of the Centre or supervisory body.”.

Appeal

45D. (1) (a) Any institution or person may appeal against a decision of the Centre or supervisory body made in terms of section 45C(6) to the appeal board.

(b) An appeal must be lodged within 30 days in the manner, and on payment of the fees, prescribed by the Minister.

(2) An appeal under subsection (1) shall take place on the date and at the place and time determined by the appeal board.

(3) An appeal is decided on the affidavits and supporting documents presented to the appeal board by the parties to the appeal.

(4) Despite the provisions of subsection (3) the appeal board may—

- (a) summon any person who, in its opinion, may be able to give information for the purposes of the appeal or who it believes has in his, her or its possession, custody or control any document which has any bearing upon the decision under appeal, to appear before it at a time and place specified in the summons, to be questioned or to produce that document, and retain for examination any document so produced;
- (b) administer an oath to or accept an affirmation from any person called as a witness at an appeal; and
- (c) call any person present at the appeal proceedings as a witness and interrogate such person and require such person to produce any document in his, her or its possession, custody or control, and such a person shall be entitled to legal representation at his or her own expense.

(5) The chairperson of the appeal board determines any other procedural matters relating to an appeal.

(6) Any party to an appeal is entitled to be represented at an appeal by a legal representative.

(7) The appeal board may—

- (a) confirm, set aside or vary the relevant decision of the Centre or supervisory body; or
- (b) refer a matter back for consideration or reconsideration by the Centre or the supervisory body concerned in accordance with the directions of the appeal board.

(8) The decision of a majority of the members of the appeal board shall be the decision of that board.

(9) The decision of the appeal board must be in writing, and a copy thereof must be made available to the appellant and the Centre or supervisory body.

(10) (a) If the appeal board sets aside any decision of the Centre or supervisory body, the fees contemplated in subsection (1)(b) paid by the

appellant in respect of the appeal in question must be refunded to the appellant.

(b) If the appeal board varies any such decision, it may in its discretion direct that the whole or any part of such fees be refunded to the appellant.

(11) (a) Subject to paragraph (b), a decision of the appeal board may be taken on appeal to the High Court as if it were a decision of a magistrate in a civil matter.

(b) The launching of appeal proceedings in terms of paragraph (a) does not suspend the operation or execution of a decision, unless the chairperson of the appeal board directs otherwise.

Establishment of appeal board

45E. (1) An appeal board is hereby established.

(2) The Minister must appoint as members of the appeal board so many persons as the Minister may consider necessary, with an alternate for each of them, of whom—

- (a) one must be an advocate or attorney with at least ten years experience, who will be the chairperson; and
- (b) at least two must be persons with experience and expert knowledge of financial institutions and financial services.

(3) A member of the appeal board holds office for a period of three years and is eligible for reappointment on the expiration of his or her term of office.

(4) An alternate acts as a member when—

- (a) a member is absent, has recused himself or herself or is suspended; or
- (b) the filling of a vacancy on the appeal board is pending.

(5) Any vacancy that occurs on the appeal board must be filled in accordance with subsection (2) and any person so appointed holds office for the unexpired portion of the period of office of his or her predecessor.

(6) The appeal board may co-opt any person having expert knowledge of a particular matter to assist the board in considering an appeal.

(7) A person co-opted under subsection (6) may not participate in any decision of the appeal board.

(8) If before or during the consideration of any appeal it transpires that any member of the appeal board has any direct or indirect personal interest in the outcome of that appeal, that member must recuse himself or herself and must be replaced by the alternate member.

(9) The Minister may terminate the period of office of a member of the appeal board—

- (a) if the performance of the member is unsatisfactory; or
- (b) if the member, either through illness or for any other reason, is unable to perform the functions of office effectively.

(10) (a) The Minister may, if the performance of the appeal board is unsatisfactory, terminate the period of office of all the members of the appeal board.

(b) In the event of the dismissal of all the members of the appeal board, the Minister may appoint persons to act as caretakers until competent persons are appointed in terms of subsection (2).

(11) A member of the appeal board may be paid such remuneration and allowances as the Minister may from time to time determine.

(12) The Centre must provide administrative support for the appeal board.

(13) The Centre is responsible for the expenditure of the appeal board.

Application to court

45F. (1) (a) The Centre, in respect of any accountable institution regulated or supervised by a supervisory body in terms of this Act or any other law, may institute proceedings in accordance with this section only if a supervisory body failed to institute proceedings despite any recommendation of the Centre made in terms of section 44(b) or failed to institute proceedings within the period recommended by the Centre.

(b) A supervisory body may institute proceedings in accordance with this section only after consultation with the Centre on that application to court.

(2) Subject to subsection (1), the Centre or any supervisory body may institute proceedings in the High Court having jurisdiction against any accountable institution, reporting institution or person to whom this Act applies, to—

- (a) discharge any obligation imposed on the Centre or supervisory body in terms of this Act;
- (b) compel that institution or person to comply with any provision of this Act or to cease contravening a provision of this Act;
- (c) compel that institution or person to comply with a directive issued by the Centre or supervisory body under this Act; or
- (d) obtain a declaratory order against that institution or person on any point of law relating to any provision of this Act or any order, determination or directive made in terms of this Act.

(3) Subject to subsection (1), if the Centre or a supervisory body has reason to believe that an institution or person is not complying with this Act or any order, determination or directive made in terms of this Act, it may, if it appears that prejudice has occurred or might occur as a result of such non-compliance, apply to a court having jurisdiction for—

- (a) an order restraining that institution or person from continuing business pending an application to court by the Centre or supervisory body as contemplated in subsection (2); or
- (b) any other legal remedy available to the Centre or supervisory body.”.

Insertion of section 51A in Act 38 of 2001

17. The following section is hereby inserted in the principal Act after section 51:

“Failure to report property associated with terrorist and related activities

51A. (1) An accountable institution that has in its possession or under its control property owned or controlled by or on behalf of, or at the direction of an entity contemplated in section 28A(1), and that fails, within the prescribed period, to report that fact and the prescribed information in respect of such property to the Centre in accordance with that section, is guilty of an offence.

(2) An accountable institution that fails to comply with a direction by the Director in accordance with section 28A(2), is guilty of an offence.”.

Substitution of section 54 of Act 38 of 2001

18. The following section is hereby substituted for section 54 of the principal Act:

“Failure to report conveyance of cash or bearer negotiable instrument into or out of Republic

54. Any person who wilfully fails to report the conveyance of cash or a bearer negotiable instrument into or out of the Republic in accordance with section 30(1), is guilty of an offence.”.

Substitution of section 55 of Act 38 of 2001

19. The following section is hereby substituted for section 55 of the principal Act:

“Failure to send report to Centre

55. A person referred to in section 30(2) who fails to send a report regarding the conveyance of cash or a bearer negotiable instrument to the Centre in accordance with that section, is guilty of an offence.”.

Substitution of section 57 of Act 38 of 2001

20. The following section is hereby substituted for section 57 of the principal Act:

“Failure to comply with request

57. An accountable institution, reporting institution or any other person that fails to comply with a request made by—
 (a) the Centre or an investigating authority acting under the authority of an authorised officer in terms of section 32(2); or
 (b) a supervisory body in terms of section 45(1B)(d),
 is guilty of an offence.”

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Substitution of section 58 of Act 38 of 2001

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21. The following section is hereby substituted for section 58 of the principal Act:

“Failure to comply with [direction by Centre] directives

58. An accountable institution that fails to comply with a [direction by] directive of the Centre or a supervisory body in terms of section 34(1), 43A(3) or 45C(c)(3), is guilty of an offence.”

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Amendment of section 60 of Act 38 of 2001

22. Section 60 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) discloses confidential information held by or obtained from the Centre otherwise than in accordance with section 40 or 41;”

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Insertion of section 61A in Act 38 of 2001

23. The following section is hereby inserted in the principal Act after section 61:

“Failure to register with Centre

61A. Any accountable institution or reporting institution that—
 (a) fails to register with the Centre in terms of section 43B; or
 (b) fails to provide information in terms of section 43B,
 is guilty of an offence.”

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Insertion of sections 62A, 62B and 62C in Act 38 of 2001

24. The following sections are hereby inserted in the principal Act after section 62:

“Offences relating to inspection

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62A. A person who—
 (a) fails to appear for questioning in terms of section 45B(2)(a);
 (b) fails to comply with an order contemplated in section 45B(2)(b);
 (c) wilfully gives false information to an inspector;
 (d) fails to comply with any reasonable request by an inspector in the performance of his or her functions; or
 (e) wilfully hinders an inspector in the performance of his or her functions,
 is guilty of an offence.

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Hindering or obstructing appeal board

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62B. Any person who wilfully interrupts the proceedings of the appeal board or who wilfully hinders or obstructs the appeal board in the performance of its functions, is guilty of an offence.

Failure to attend when summoned

62C. Any person who, having been summoned to attend and give evidence or to produce any book, document or object before the Centre or a supervisory body or the appeal board—

- (a) fails without sufficient cause to appear at the time and place specified or to remain in attendance until excused; or
- (b) attends as required, but—
 - (i) refuses to take an oath or to make affirmation; or
 - (ii) fails to produce a book, document or other item as ordered, if it is in the possession of, or under the control of, that person, is guilty of an offence.

Failure to answer fully or truthfully

62D. Any person who, having been sworn in or having made an affirmation before the Centre or a supervisory body or the appeal board—

- (a) fails to answer any question fully and to the best of that person's ability; or
- (b) gives false evidence, knowing or believing it to be false, is guilty of an offence."

Amendment of section 68 of Act 38 of 2001

25. The following section is hereby substituted for section 68 of the principal Act: 20

"Penalties

68. (1) A person convicted of an offence mentioned in this Chapter, other than an offence mentioned in subsection (2), is liable to imprisonment for a period not exceeding 15 years or to a fine not exceeding [R10 000 000] R100 million.

(2) A person convicted of an offence mentioned in section 55, 61, [or] 61A, 62, 62A, 62B, 62C or 62D, is liable to imprisonment for a period not exceeding five years or to a fine not exceeding [R1 000 000] R10 million."

Amendment of section 70 of Act 38 of 2001

26. Section 70 of the principal Act is hereby amended by the substitution for the word "cash", wherever it occurs, of the words "cash or bearer negotiable instrument". 30

Amendment of Index to Act 38 of 2001

27. The Index to the principal Act is hereby amended—

- (a) by the substitution for the heading relating to Chapter 2 of the following heading: 35
 "Chapter 2 [MONEY] COUNTER-MONEY LAUNDERING ADVISORY COUNCIL 17-20"; and
- (b) by the substitution for the heading relating to Chapter 4 of the following heading: 40
 "Chapter 4 [OFFENCES AND PENALTIES 46-71] COMPLIANCE AND ENFORCEMENT 45A-71".

Substitution of long title of Act 38 of 2001

28. The following long title is hereby substituted for the long title to the principal Act:

"To establish a Financial Intelligence Centre and a [Money] Counter-Money Laundering Advisory Council in order to combat money laundering activities and the financing of terrorist and related activities; to impose certain duties on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities; to clarify the application of the Act in relation to other laws; to provide for the sharing of

information by the Centre and supervisory bodies; to provide for the issuance of directives by the Centre and supervisory bodies; to provide for the registration of accountable and reporting institutions; to provide for the roles and responsibilities of supervisory bodies; to provide for written arrangements relating to the respective roles and responsibilities of the Centre and supervisory bodies; to provide the Centre and supervisory bodies with powers to conduct inspections; to regulate certain applications to Court; to provide for administrative sanctions that may be imposed by the Centre and supervisory bodies; to establish an appeal board to hear appeals against decisions of the Centre or supervisory bodies; to amend the Prevention of Organised Crime Act, 1998, and the Promotion of Access to Information Act, 2000; and to provide for matters connected therewith.”.

Short title and commencement

29. This Act is called the Financial Intelligence Centre Amendment Act, 2008, and comes into operation on a date determined by the Minister by notice in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL, 2008

1. BACKGROUND TO BILL

- 1.1 The main purpose of the Bill is to enhance the administrative enforcement structures and powers under the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001). The lack of express provisions establishing administrative enforcement structures and powers impacts negatively on the proper administration of the principal Act, and is limiting the effectiveness of the anti-money laundering and counter-terrorist financing regime, particularly in the compliance and enforcement areas.
- 1.2 The Bill aims to ensure consistency with international standards for regulation and supervision in relation to compliance with anti-money laundering measures as contained in the recommendations of the Financial Action Task Force (FATF) on Money Laundering. FATF is an inter-governmental body that sets standards, and develops and promotes policies to combat money laundering and terrorist financing. FATF commented on the supervision of compliance with the Act during the mutual evaluation of South Africa in 2003 and recommended that South Africa should give appropriate and adequate responsibilities and powers to supervisory bodies to enforce the provisions of the Act.
- 1.3 The Act currently provides for enforcement of its provisions through criminal sanctions only. Any contravention of or failure to comply with the provisions of the Act constitutes an offence which can be prosecuted in a criminal court and in respect of which a fine or a term of imprisonment can be imposed. Enforcement through criminal sanctions requires investigations by law enforcement authorities such as police investigators and prosecutions to a criminal standard. This makes enforcement by means of criminal sanctions inappropriate for measures that are, in fact, regulatory in nature. Although criminal sanctions in respect of certain contraventions remain important, an administrative enforcement process will prevent additional pressure on the formal justice system, and provide a more flexible and efficient manner in which to address regulatory contraventions of the Act.
- 1.4 The main objective of the Bill is to provide for an administrative enforcement framework within which administrative sanctions under the principal Act can be applied in deserving matters. The key features of the administrative enforcement framework are:
 - 1.4.1 To extend the powers and functions of the Centre to enhance supervision and enforcement of compliance with the Act in a coordinated and integrated manner together with supervisory bodies, and to fulfil the responsibilities of a supervisory body in respect of persons not supervised or regulated by a supervisory body in terms of a law;
 - 1.4.2 to clearly express the mandate of supervisory bodies to supervise and enforce compliance with the obligations on accountable institutions regulated by them under the Act; and to authorise supervisory bodies when granting any licence, registration or approval to impose, as a condition thereof, an obligation to comply with the Act; and, where it is a requirement in terms of a law that a person who is to hold office in an accountable institution is a fit and proper person, to take into account whether that person has been involved in money laundering or terrorist-related activities;
 - 1.4.3 to empower the Centre and supervisory bodies to undertake inspections, issue directives, request information, impose administrative sanctions and apply to the courts for an interdict or mandamus, where appropriate;
 - 1.4.4 to ensure consistency in the enforcement powers afforded to supervisory bodies;
 - 1.4.5 to enhance cooperation and sharing of information between the Centre, supervisory bodies and law enforcement agencies;
 - 1.4.6 to create an appeal mechanism against decisions of the Centre or supervisory bodies; and

- 1.4.7 to provide for every accountable institution and every reporting institution to register with the Centre. This will ensure that the Centre is aware of the number of institutions that fall within the ambit of the Act and the type of business conducted by these institutions. Registration does not constitute approval to conduct business. Accordingly, while failure to register will be an offence, it will not present any bar to an institution carrying on the business of an accountable institution or reporting institution.

2. OBJECTS OF BILL

The main objective of the Bill is to provide for an administrative enforcement framework within which administrative sanctions under the Act can be applied in deserving matters.

3. ORGANISATIONS AND INSTITUTIONS CONSULTED

- 3.1 A consultation document containing recommendations for amendments to the Financial Intelligence Centre Act, 2001, was circulated in November 2006 to all supervisory bodies and the representatives serving on the Money Laundering Advisory Council for comment.
- 3.2 The document was also placed on the Financial Intelligence Centre's website inviting interested parties to comment. The closing date for the receiving of comments was initially 26 January 2007, but late comments were also considered.
- 3.3 Comments were received from the following persons:
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| ABSA | Prof Louis de Koker |
| Association of Collective Investment Schemes | South African Police Service |
| Casino Association of South Africa | South African Revenue Service |
| FirstRand Banking Group | South African Institute for Chartered Accountants (SAICA) |
| Investec | South African Insurance Association |
| Independent Regulatory Board for Auditors | South African Post Office |
| JSE Securities Exchange | South African Reserve Bank |
| Land Bank | South African Secret Service |
| Life Offices' Association | Standard Bank |
| Linked Investment Service Providers Association (LISPA) | The Banking Association of South Africa |
| National Prosecuting Authority | Trans-Caledon Tunnel Authority |
- 3.4 All comments were evaluated and taken into account in the drafting of the Bill.

4. FINANCIAL IMPLICATIONS FOR STATE

- 4.1 The Bill will have organisational and personnel implications for the Centre because of the extension of the powers of the Centre. Costs associated with the additional organisational and personnel implications for the Centre will be funded from the *fiscus* over the next MTEF.
- 4.2 Some supervisory bodies have indicated that the Bill will have additional organisational and personnel implications despite the fact that the Act does not impose additional obligations on these bodies, but only seeks to enhance their existing supervisory functions under the Act. Costs associated with the additional organisational and personnel implications of supervisory bodies will be provided for through the existing funding mechanisms of these bodies.

5. CONSTITUTIONAL IMPLICATIONS

None.

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the National Treasury are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.