

Laws aimed at preventing greylisting 'are flawed'

AT THE end of last year, Parliament passed two bills aimed at preventing South Africa from being greylisted by the Financial Action Task Force (FATF), an international body that monitors and combats money laundering and terrorism financing.

While the laws will probably go some way in stemming shady dealings (but won't necessarily prevent us from being greylisted), they are the latest in a long line of measures that make financial transactions for law-abiding citizens more admin-heavy, with more boxes needing to be ticked to ensure compliance. And although the bills underwent a public consultation process, there is a widely-held view in financial services circles that the process was rushed and the enacted legislation contains some serious flaws.

A week ago, National Treasury issued a press statement on these new laws, which now go by the names of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act (referred to hereafter as the Amendment Act) and the Protection of Constitutional Democracy Against Terrorism and Related Activities Amendment Act (referred to as the Anti-Terrorism Act).

Treasury said in the statement: "These laws will strengthen the fight against corruption, fraud and terrorism, and also assist South Africa in meeting the international standards on anti-money laundering and combating terrorism financing, and reduce the prospect of greylisting by the FATF."

Changes to existing laws

Treasury outlined how existing financial legislation will change. The



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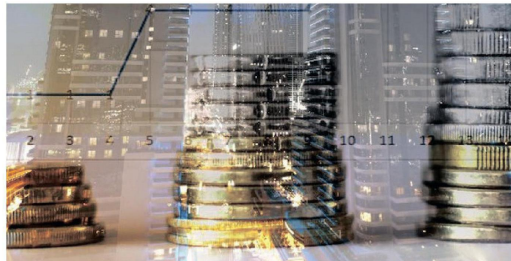
MARTIN HESSE

Amendment Act amends five Acts: the Trust Property Control Act, Nonprofit Organisations Act, Financial Intelligence Centre Act, Companies Act, and Financial Sector Regulation Act.

● Financial Intelligence Centre Act. Treasury says that, among other things, the amendments improve the provisions that require financial and other institutions to perform due diligence in respect of their customers.

"This ensures that these institutions have more reliable information about their customers and are in a better position to manage money laundering and terrorist financing risks in their businesses."

● Trust Property Control Act and Companies Act. Changes to these laws "lay the basis for South Africa to develop a comprehensive mechanism to bring transparency to the beneficial ownership of corporate vehicles such as trusts and companies. This is a significant step in strengthening the ability of investigators and other authorities to pierce the corporate veil and determine who the natural persons that deal with financial and other institutions at arm's length through trusts and



companies are. These measures will boost the ability of the authorities to fight against crime and corruption perpetrated by criminal syndicates," Treasury says.

● Nonprofit Organisations Act. Here, the amendments "establish a regulatory framework to protect nonprofit organisations which transfer funds overseas from possible exploitation by facilitators and financiers of terrorist organisations. This ensures that nonprofit organisations that transfer funds overseas abide by standards of good governance and financial management and are supervised according to the requirements of the Act."

● Financial Sector Regulation Act. Treasury says the amendments will "improve the ability of financial sector regulators to apply fit and properness scrutiny to the beneficial owners of licensed financial institutions."

Objections and criticism

In November last year, Personal Finance content editor Ruan Jooste

reported on the push-back from different quarters on various aspects of the two bills during the consultation process ("Trustees wrongly targeted in rush to avoid greylisting"). For instance, civil society groups were concerned about the potential loss of freedoms due to the loose wording of terms such as "terrorist activity".

Other objections came from the Fiduciary Institute of Southern Africa (Fisa), which petitioned the Parliamentary Standing Committee on Finance on the inappropriate use of the term "beneficial owner" in the amendments to the Trust Property Control Act.

It appears Fisa's interventions went unheeded. In a statement issued this week, Fisa says the legislation as passed demonstrates a lack of understanding of the nature of trusts in South African law.

"Fisa is disappointed about the equating of trusts with corporate structures in the media statement of National Treasury. Our concerns are summarised as:

- Our impression of a serious lack of understanding on the part of Treasury of the legal nature of trusts in South African law appears to be confirmed;
- Trusts are not corporate structures, as trusts do not have legal personality, but are, according to the Supreme Court of Appeals, accumulations of assets and liabilities;
- The South African concept of trust differs substantially from the Anglo-American legal systems' concept of trust, from which the amendments seem to originate."

Louis van Vuren, CEO of Fisa, said further that the amendments contain serious conflicts with existing provisions of the Trust Property Control Act. "A trustee in South African law can never be the 'beneficial owner' of the trust property, as is borne out by the definition of 'trust' in section 1 of the Act, yet the Amendment Act forces a trustee into the straight-jacket created by the importation of concepts from other legal systems without any regard for the principles of SA trust law."

Van Vuren says that the changes were "ramrodded" through Parliament despite sound comment by Fisa, supported by two eminent South African trust law experts, professors Francois du Toit of the University of Cape Town and Bradley Smith of Varsity College and the University of the Free State.

Fisa says it understands the need for clear identification of the parties to a trust to help combat abuse of trusts for money laundering and/or the financing of terrorism, but holds the view that this can be achieved without violating the established principles of South African law.