

OPINION

Greylisting measures in perspective for trustees

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A LOT has recently been said in the media about the possibility and impact of a Financial Action Task Force (FATF) greylisting for South Africa in February this year. Although measures were legislated in late December 2022 to strengthen South Africa's anti-money laundering and terror financing law, in an attempt to prevent a potential greylisting, few are aware of exactly what is expected of them as a result.

What is the FATF?

The FATF was established in 1989 to co-ordinate an international effort to combat money laundering. Although the initial mandate was to combat drug trafficking, it expanded its mandate in 2001 to include money laundering and financing terrorism, and again later to finance the development of weapons of mass destruction. The FATF set up a framework of forty recommendations with best practice to combat money laundering and promote international co-operation to achieve that.

What is greylisting?

Greylisting a country means that it has been recognised as having compliance issues, but has committed to address identified inadequacies to counter money laundering and terrorist financing within a given time frame. When a country is put on the grey list, it is closely monitored by the FATF, and stringent regulations are imposed on them.

Although other countries are not prohibited from doing business with greylisted countries, they are encouraged to apply enhanced due diligence in financial transactions with greylisted countries to ensure that the guidelines of the FATF are not breached.

What does greylisting mean for South Africa?

South Africa joined the FATF in 2003. A review was conducted in November 2019, but only published in October 2021 due to Covid. The report confirmed that South Africa's technical compliance was very low, as it failed to meet twenty of the forty FATF recommendations. Greater emphasis was placed in this report on the effectiveness of the implementation of FATF recommendations, and South Africa failed in all 11 effectiveness measures.

The initial lack of reaction by the South African government confirmed that they had not treated the report as seriously as they should have.

It is believed that this lack of action was as a result of appreciation of the complexities to respond sufficiently to the report, as well as a perception of



interference by the Western countries in South Africa's political independence.

The public outcry from the banking industry got the attention of National Treasury and the Police ministry to introduce appropriate amendments to legislation. Due to delays, the changes had to be rushed through the legislative process without proper consultation with relevant bodies, such as the Fiduciary Institute of South Africa (as far as amendments to trust legislation was concerned). Some industry experts are of the view that the amended legislation is in contradiction to established law, which may even lead to it being taken on judicial review.

According to a Business Leadership South Africa (BLSA) report in collaboration with Intellidex, published in October 2022, there is an 85% chance that South Africa will end up on the greylist by the end of this month (February 2023).

The expected economic impact of greylisting could be minimal or severe, depending on the actions South Africa may take. It is estimated that the impact could cost less than 1% of GDP if the government acts with speed, or up to 3% of GDP if South Africa does not respond sufficiently to the list of issues identified.

Although it is expected that greylisting should not seriously impede foreign investment in South Africa, and trade with other countries will continue (especially as this country has raw materials which are in high demand), capital flows will be subject to more complex due diligence procedures, which could have a cost implication.

It is also expected that interest rates may increase, because capital flows from certain foreign institutional

investors will no longer be available (certain institutional investors being precluded by internal rules or by rules imposed by regulators from investing in greylisted institutions). This may have a negative effect on the rand exchange rate. Similarly, the cost of funding government debt will increase.

The words "beneficial owner" is used by the FATF to identify a 'warm body' who financially benefits from transactions. A beneficial owner is an individual who gets to enjoy ownership benefits even though the title to some form of the property is in the name of another individual.

It also means any individual or group of individuals who, either directly or indirectly, has/have the power to vote or influence the transaction decisions regarding a specific security, such as shares in a company.

The FATF believes that these persons should be identified and reported on.

The FATF issued a guidance document on Transparency and Beneficial Ownership in October 2014. Recommendation 24 applies broadly to "legal persons", meaning any entities, other than natural persons, that can establish a permanent customer relationship with a financial institution, or otherwise own property.

The following is quoted from the guidance document:

"Trusts enable property to be managed by one person on behalf of another, and are a traditional feature of common law. They also exist in some civil law countries, or are managed by entities in these countries, and have a wide range of legitimate uses.

Given the ease with which some types of trust can be established, the involvement of an external professional such as a notary or TCSP is

not always necessary to establish one. Specific registration requirements for trusts are uncommon, though information may be required in tax declarations if the administration of the trust generates income. On the other hand, trusts usually do not possess a separate legal personality and so cannot conduct transactions or own assets in their own right, but only through their trustees.

Some countries have implemented measures that may improve the transparency of trusts.

"Trust law countries (any country whose law allows for the creation and recognition of trusts) should require the trustees of any express trust governed under their law to obtain and hold adequate, accurate and current beneficial ownership information regarding the trust. This information should be kept as accurate, current and up-to-date as possible by updating it within a reasonable period following any change. In this context, beneficial ownership information includes:

a) information on the identity of the settlor, trustee(s), protector (if any), beneficiary or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust, and

b) basic information on other regulated agents of, and service providers to the trust, including investment advisers or managers, accountants, and tax advisers.

The purpose of these requirements is to ensure that trustees are always responsible for holding this information (in whichever country the trustee is, and regardless of where the trust is located).

Conclusion

It is imperative that trustees understand that they will have the duty to meet these new requirements and that if they fail to comply, they may be fined or imprisoned. Family trustees can no longer blindly assume their accountants and trust service providers will keep them out of trouble.

Trustees will have to ensure that proper digital systems are implemented to store information in electronic form to take care of their obligations to provide it to competent authorities upon request within a set time period.

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