

Regulatory Changes and Structuring Options

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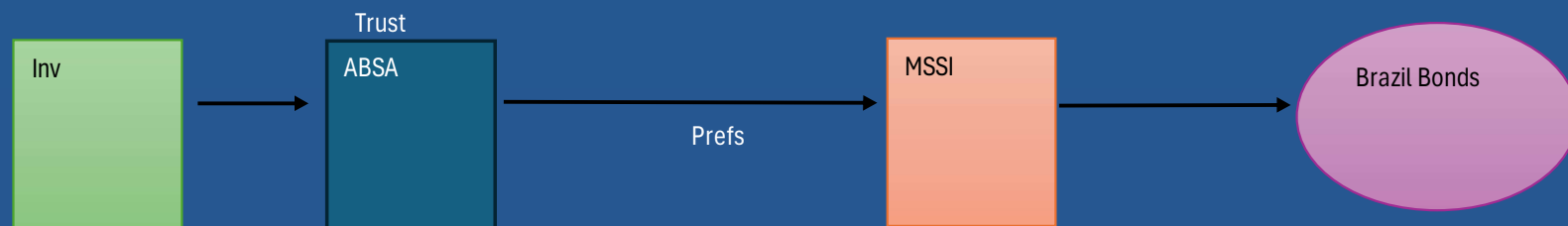
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Introduction

- South Africa is in strange place at the moment; there is a sense of general optimism, but there are clear warning signs for those paying attention.
- We have experienced some unwarranted complacency from clients and deal procrastination
- Certain legal developments have also made planning more tricky, and we address these today.
- But we are clear that the best structuring option remains offshore, and these legal developments only reinforce this view.

GAAR: ABSA Case

The Simplified Structure



3 Key Takeaways: Objective Intention Test; Broad Formulation of “Tax Benefit”; “Arrangement”/ “Any Party”

Exchange control reform: Draft Capital Flow Management Regulations

1933

1961

2026



Currency and Exchanges Act

Exchange Control Regulations

Draft Capital Flow Management
Regulations

Macro objective

Manage cross-border capital flows while supporting growth, global integration and monetary stability.

Policy direction

Fewer transaction pre-approvals; greater reliance on reporting and surveillance.

Risk focus

High-impact/high-risk flows and illicit financial flows become central supervisory targets.

Exchange control reforms: Draft Capital Flow Management Regulations

Implementation of exchange control rules in South Africa

- Currency and Exchanges Act: In effect, the Act says nothing.
- Exchange Control Regulations, 1961: The Regulations are the primary source of exchange control law and in a very detailed fashion says “no” (transaction by transaction).
- Currency and Exchanges Manual for Authorised Dealers: The Currency and Exchanges Manual for Authorised Dealers is generally regarded as policy and administrative guidance, not legislation.
- Do decisions taken by the South African Reserve Bank constitute “*administrative action*” as contemplated in the Promotion of Administrative Justice Act?
- Principle of legality?
- Authoritative case: *South African Reserve Bank and Another v Shuttleworth and Another* [2015] ZACC 17.

Exchange control reforms: Draft Capital Flow Management Regulations

High-level overview of the draft Capital Flow Management Regulations

- The proposed regulations retain the same format as the Exchange Control Regulations.
- Introduced a formal definition of “*capital*”:
 - Capital includes, *inter alia*, anything with a monetary value, or which can be converted to money or disposed of for monetary consideration, including crypto assets, excluding immovable property.
- This follows the decision by the Supreme Court of Appeal in the case of *Standard Bank of South Africa Ltd v South African Reserve Bank and Others*, where the court explicitly refrained from judicial overreach, respecting the separation of powers by declining to stretch the exchange control framework to encompass cryptocurrency: “*Given the punitive nature of the Excon Reg, there is no room for an unnatural and fictitious reading into the Regulations to cover cryptocurrency*”.
- Under the proposed Capital Flow Management Regulations, there is a big focus on three asset classes: Crypto, gold and foreign assets.
- Proposed Capital Flow Management Regulations are no longer merely focused on residents and cross-border capital flows – It is much broader and apply to numerous persons one would not expect.
- There remains a big question on the constitutionality and legality of the proposed regulations.

Alarming aspects of the proposed regulations

Crypto Assets

- Draft Regulations refers to “a person” or “any person” not a “person resident in the Republic”.
- Restriction on purchase, sale and loan of crypto assets.
- No person may export crypto assets from the Republic without prior permission from National Treasury.
- All crypto assets must be offered to National Treasury at a price to be determined by National Treasury. Price to be paid for the crypto assets must be in Rand.
- National Treasury will determine the terms and conditions under which foreign crypto assets may be sold – This is very broad.
- Draft Regulation 10 - “Any person” in the Republic who has in their possession crypto assets, must make a declaration in writing to National Treasury.
- Draft Regulation 10(4) states that “any person who has at any time since the date of publication of this regulation been in the Republic must be deemed, until the contrary is proved by the person, to have been resident in the Republic.”

Foreign Currency / Foreign assets

- Draft Regulations refers to “a person” or “any person” not a “person resident in the Republic”.
- Restriction on purchase, sale and loan of foreign currency..
- No person may export foreign currency from the Republic without prior permission from National Treasury.
- All foreign currency and foreign assets must be offered to National Treasury at a price to be determined by National Treasury. Price to be paid for the assets must be in Rand.
- National Treasury will determine the terms and conditions under which foreign assets may be sold – This is very broad.
- Draft Regulation 10 - “Any person” in the Republic who has in their possession foreign assets, must make a declaration in writing to National Treasury.
- Draft Regulation 10(4) states that “any person who has at any time since the date of publication of this regulation been in the Republic must be deemed, until the contrary is proved by the person, to have been resident in the Republic.”

Gold

- Restriction on purchase, sale and loan of gold.
- Every person resident in the Republic who wants to sell gold, must offer it to National Treasury first, at a price that National Treasury may fix.
- Every person resident in the Republic who becomes entitled to sell or to procure the sale of any gold, with a value in excess of the determined threshold must, within 30 days after becoming so entitled, offer the gold or cause the gold to be offered, for sale to the National Treasury.
- The National Treasury or the authorised person may, within 30 days after receipt of the offer, purchase the gold at the price that the National Treasury or the authorised person may fix.

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