



The Contemporary Gazette

relevant new legislation for your business

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This newsletter

This newsletter overviews new relevant National laws up to **9th October 2017**. Log-in to www.gazette.co.za, peruse the list and follow the hyperlinks to laws that interest you.

Please note that [**words in bold brackets**] in www.gazette.co.za show proposed deletions, and underlined words in www.gazette.co.za show proposed insertions - this allows you to see current and planned requirements at the same time, and helps with giving context to changes/proposed changes.



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Financial

1. FINANCIAL INTELLIGENCE CENTRE ACT: AMENDMENT ACT 2017 PART 3 (RISK MANAGEMENT AND COMPLIANCE PROGRAMME)

In [part 1](#) the focus was on money laundering and terrorist financing proposed requirements that would specifically affect directors. [Part 2](#) considered the new customer due diligence requirements.

In this part the attention shifts to the Risk Management and Compliance Programme requirements that will be required from each accountable institution.

GENERAL REQUIREMENTS

In terms of the Amended Act each [accountable institution](#) must develop, document, maintain and implement a programme for anti-money laundering and counter-terrorist financing risk management and compliance.

This risk management and compliance programme (Programme) must enable the institution to:

- (i) Identify the risk that the provision by the institution of products or services may involve or facilitate [money laundering activities](#) or the [financing of terrorist and related activities](#);
- (ii) Assess that risk;
- (iii) Monitor that risk;
- (iv) Mitigate that risk; and
- (v) Manage that risk.

Existing and prospective clients

The Programme must also provide for the manner in which the institution determines if a person is:

- (i) A prospective client in the process of establishing a [business relationship](#) with the institution; or
- (ii) A [client](#) who has established a business relationship or entered into a single transaction.

Anonymous clients, false or fictitious names

Provision must be made for the manner in which the institution complies with [section 20A](#) which prohibits an accountable institution from establishing a business relationship or concluding a single transaction with an anonymous client or a client with an apparent false or fictitious name.

Identification

[Sections 21](#) and [21A](#), as amended by the Act, require an accountable institution to establish and verify certain information (see [part 2](#)) in the course of concluding a single transaction or establishing a business relationship with a prospective client.

The Programme of an institution must make provision for the manner in which and the processes by which the establishment and verification of identity of such persons is performed in the institution.

Provision must also be made for the manner in which the institution determines whether future transactions that will be performed in the course of a business relationship are consistent with the institution's knowledge of a prospective client.

Legal persons, trusts and partnerships

If a prospective client is a [legal person](#) or is a natural person acting on behalf of a partnership, [trust](#) or similar arrangement between natural persons, further additional due diligence measures will be required by the newly inserted [section 21B](#) (see [part 2](#)).

An accountable institution will have to set out in its Programme the manner in which and the processes by which it conducts additional due diligence measures in respect of legal persons, trusts and partnerships.

Ongoing due diligence

The new [section 21C](#) requires an accountable institution to conduct ongoing due diligence in respect of a [business relationship](#) (see [part 2](#)).

Provision has to be made in the Programme for:

- (i) The manner in which and the process by which ongoing due diligence and account monitoring in respect of business relationships is conducted by the institution;
- (ii) The manner in which the examining of complex or unusually large transactions, is done by the institution;
- (iii) The manner in which the examining of unusual patterns of transactions that have no apparent business or lawful purpose is done by the institution; and
- (iv) How the institution keeps written findings relating to complex or unusually large transactions and unusual patterns of transactions.

Doubts about previously obtained information

A new section deals with what an accountable institution must do, if subsequent to establishing a business relationship or entering into a single transaction, it doubts the veracity or adequacy of previously obtained information which it is required to verify (see [part 2](#)).

The programme of an institution will have to set out the manner in which and the processes by which the institution will confirm information relating to a client when it has doubts about the veracity of previously obtained information.

Suspicious and unusual transactions.

The Programme of an accountable institution must provide for the manner in which and the processes by which the institution will perform the customer due diligence requirements in accordance with [section 21](#), [21A](#), [21B](#) and [21C](#) when, during the course of a business relationship, it suspects that a transaction or activity is suspicious or unusual as contemplated in [section 29](#).

Inability to conduct customer due diligence

A new [section 21E](#) requires an accountable institution to terminate an existing business relationship with a client if it is unable to:

- (i) Establish and verify the identity of a client or other relevant person in accordance with [sections 21](#) or [21B](#);
- (ii) Obtain the information contemplated in [section 21A](#); or

(iii) Conduct ongoing due diligence as contemplated in [section 21C](#).

The manner in which the institution will terminate an existing business relationship under these circumstances must be set out in the institution's Programme.

Foreign prominent public officials and domestic prominent influential persons

In keeping with international financial sector requirements a greater extent of due diligence is required:

- (i) By the new [section 21F](#) inserted by the Bill in respect of foreign prominent public officials (see [part 2](#)); and
- (ii) By a new [section 21G](#) in respect of domestic prominent influential persons (see [part 2](#)); and
- (iii) By a new [section 21H](#) in respect of family members and known close associates of such foreign or domestic prominent persons.

The programme of an accountable institution must provide for the manner in which and the processes by which the institution determines whether a client is a foreign prominent public official or a domestic prominent influential person.

Risk differentiation

An accountable institution must in its Programme provide for the manner in which and the processes by which enhanced due diligence is conducted for higher-risk business relationships and when simplified customer due diligence might be permitted in the institution.

RECORD KEEPING

The Programme must provide for the manner in which and the place at which records are kept in terms of [Part 2](#) of Chapter 3.

Customer due diligence records

The new requirements under [section 22](#) will be that an accountable institution will have to keep a record of information it is required to obtain pursuant to [sections 21 to 21H](#) pertaining to a client or prospective client.

Without limiting this general requirement, the records must:

- (i) Include copies of, or references to, information provided to or obtained by the institution to verify a person's identity; and
- (ii) In the case of a [business relationship](#), reflect the information obtained by the institution under section 21A concerning:
 - The nature of the business relationship;
 - The intended purpose of the business relationship; and
 - The source of funds which the prospective client is expected to use in concluding transactions in the course of the business relationship.

Transaction records

The new [section 22A](#) will require an accountable institution to keep a record of every transaction as is reasonably necessary to enable that transaction to be readily constructed. This requirement applies to a single transaction as well as to a transaction concluded in the course of a business relationship which that institution has with the client.

Without limiting the generality of this requirement, the following information must be reflected in the records:

- (i) The amount involved and the currency in which it was denominated;
- (ii) The date on which the transaction was concluded;
- (iii) The parties to the transaction;
- (iv) The nature of the transaction;
- (v) Business correspondence; and
- (vi) If the accountable institution provides account facilities to its clients, the identifying particulars of all accounts and the account files at the institution that are related to the transaction.

Period for keeping records

Records which relate to the establishment of a business relationship must be kept for at least 5 years from the date on which the business relationship is terminated.

Records relating to a transaction (whether a single transaction or one concluded in the course of a business relationship) have to be kept for at least 5 years from the date on which that transaction is concluded.

Records relating to a transaction or activity which gave rise to a report of suspicious or unusual transactions in terms of [section 29](#) must be kept for at least 5 years from the date on which the report was submitted to the Financial Intelligence Centre.

Form of record keeping

Records may be kept in electronic form and must be capable of being reproduced in a legible document.

The record keeping duties of an accountable institution may be performed by a third party on behalf of that institution, subject to the following requirements:

- (i) The accountable institution must have free and easy access to the records; and
- (ii) The records must be readily available to the Financial Intelligence Centre and the relevant supervisory body for the purposes of performing its functions in terms of the Act.

If such a third party fails to properly comply with its recordkeeping duties on behalf of the accountable institution concerned, the institution will be liable for that failure.

When an institution appoints a third party to perform its recordkeeping duties it must forthwith provide the Financial Intelligence Centre and the supervising body concerned with the prescribed particulars regarding the third party as set out in [regulation 20](#).

REPORTS TO THE CENTRE

The Risk Management and Compliance Programme which an accountable institution must compile will have to:

- (i) Enable the institution to determine when a transaction or activity is reportable to the Financial Intelligence Centre under [Part 3](#) of Chapter 3 of the Act; and
- (ii) Provide for the processes for reporting information to the Centre under [Part 3](#) of Chapter 3.

The manner of reporting is prescribed by [regulation 22](#).

Cash transactions

[Section 28](#), read with [regulation 22B](#), requires that cash transactions of R25 000 or more must be reported to the Centre, also when a transaction is broken into smaller amounts.

Suspicious and unusual transactions

An accountable institution is subject to [section 29](#), which requires reports to be made by a person who:

- (i) Carries on a business (which would include an accountable institution);
- (ii) Manages a business; or
- (iii) Is employed by a business.

Such a person is required to make a report to the Financial Intelligence Centre if he or she knows or ought reasonably to have known or suspected any of the following:

- (i) The business has received or is about to receive the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;
- (ii) A transaction or series of transactions to which the business is a party:
 - Facilitated or is likely to facilitate the transfers of the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;
 - Has no apparent business or lawful purpose;
 - Is conducted for the purpose of avoiding a reporting duty under the Act;
 - May be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for SARS;
 - Relates to an offence relating to the financing of terrorist and related activities; or
 - Relates to the contravention of a prohibition under [section 26B](#);
- (iii) The business has been used or is about to be used in any way for [money laundering purposes](#) or to facilitate the commission of an offence relating to the financing of terrorist and related activities.

The person concerned must report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions. This has to be done within the prescribed period

after the knowledge was acquired or the suspicion arose. The information to be reported is set out in [regulation 23](#).

Where a transaction or transactions have not been concluded, a person who carries on; is in charge of; manages or is employed by a business may have to make a report to the Centre. This will be required if that person knows or suspects that a transaction or a series of transactions about which enquiries are made, may, if concluded, have caused any of the consequences referred to in (i), (ii) or (iii) above.

Secrecy regarding report

A person who made or must make a report in terms of [section 29](#) is prohibited from disclosing that fact or any information regarding the contents of any such report to any other person, including the person in respect of whom the report is or must be made.

This prohibition does not apply if a copy of the report or facts or information relating to the report is demanded by an inspector in terms of [section 45B\(2A\)](#).

The prohibition also extends to a person other than the one who makes the reports, if that other person knows that a report has been or is to be made.

In both cases exceptions to the prohibition apply if the disclosure is made:

- (i) Within the scope of the powers and duties of the person making the disclosure in terms of any legislation;
- (ii) For the purpose of carrying out the provisions of the FICA act;
- (iii) For the purpose of legal proceedings, including any proceedings before a judge in chambers; or
- (iv) In terms of an order of court.

Other provisions on reporting

Other provisions relating to reporting include:

- (i) [Section 31](#) (which has not commenced yet) which will require an accountable institution to report an electronic transfer into or out of South Africa on behalf of another person of an amount in excess of a prescribed amount.
- (ii) [Section 32](#) which requires that reports must be made “in the prescribed manner”; and deals with the furnishing of additional information.
- (iii) [Section 37](#) which provides that no duty or secrecy or confidentiality affects the reporting duties, except for the right to legal professional privilege; and
- (iv) [Section 38](#) which deals with the protection of persons making reports.

FOREIGN OPERATIONS

The requirements for the Risk and Compliance Programme of an accountable institution in respect of its branches, subsidiaries or other operations in foreign countries are that provision must be made for:

- (i) The manner in which the Programme is implemented in those foreign branches, subsidiaries or other operations so as to enable the institution to comply with its obligations under this Act;
- (ii) The manner in which the institution will determine if the host country of a foreign branch or subsidiary permits the implementation of measures required under the Act; and
- (iii) The manner in which the institution will inform the Financial Intelligence Centre and supervisory body concerned if the host country does not permit the implementation of measures required under the Act.

IMPLEMENTATION

The Programme must also provide for the processes for the institution to implement its Risk Management and Compliance Programme.

PRESCRIBED MATTERS

Provision must further be made for any matter prescribed by regulation.

NON-APPLICABILITY OF ELEMENTS

An accountable institution must indicate in its Risk Management and Compliance Programme if any of the content requirements for a Programme is not applicable to that institution, and the reason why it is not applicable.

APPROVAL

The board of directors, senior management or other person or persons exercising the highest level of authority in an accountable institution must approve the Programme of that institution.

REVIEW

An accountable institution must review its Programme at regular intervals to ensure that it remains relevant to the operations of the institution and the achievement of the requirements set for it in the Act.

DISSEMINATION

An accountable institution must make documentation describing its Risk Management and Compliance Programme required for purposes of FICA available to each of its employees involved in transactions to which this Act applies.

It must also, on request, make a copy available to:

- (i) The Financial Intelligence Centre; and
- (ii) A supervisory body which performs regulatory or supervisory functions in respect of that institution.

The next newsletter will contain Part 4 (Administrative sanctions).

GN601 GG40939/28 June 2017 (Incorporated into the [Financial Intelligence Centre Act](#) and [Regulations](#))



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Financial

2. FINANCIAL INTELLIGENCE CENTRE ACT:REGULATIONS

The [regulations](#) were amended on 2 October 2017 to, amongst others, provide for the following:

All entities

(i) [New definitions](#): Cash threshold report, reporter, suspicious or unusual activity report, suspicious or unusual transaction report, terrorist financing activity report, terrorist financing transaction report, and terrorist property report definitions have been introduced;

(ii) Various types of section 29 reports: [Suspicious or unusual transaction report](#), [suspicious or unusual activity report](#), [terrorist financing transaction report](#) and [terrorist financing activity report](#);

Note: [Section 29](#) of the Act (suspicious and unusual transactions), upon which these reports are based, apply to all entities

(iii) Additional information: The manner and time in which [additional information](#) must be made available to the Centre;

Note: This requirement is relevant to all entities, as it includes additional suspicious and unusual transaction information requests.

(iv) Offences and sanctions: 12 further forms of [offences or non-compliance](#) are introduced, for example, failure to provide the information to be reported concerning a cash threshold report as required; and

Note: All entities should note that failure to comply with the [regulations 23, 23A, 23B or 23C](#) may result in an offence, and in an administrative sanction.

(v) Guidance by FIC: The [Centre may issue guidance](#) on the application of a risk-based approach to establish and verify the identity of a client, customer due diligence measures, the duty to keep records, financial sanctions, reporting duties, any obligations imposed on supervisory bodies or accountable institutions under the Act.

Note: This regulation is relevant to all entities, as it may include guidance on suspicious and unusual transaction reporting requirements.

Accountable institutions and/or reporting institutions

- (i) Repeal of exemptions: The general exemptions, prepaid instruments exemption, and cross-border remittance exemption were amended;

Note: These exemptions are implied in the Act as amended from 2 October 2017. One notable change relates to attorneys, who will now have to determine which services pose a lower or higher risk for money laundering, and apply the necessary customer due diligence requirements in accordance with its risk management and compliance programme.

- (ii) [Prescribing value for a 'single transaction'](#): R5000 or more;

Note: This definition does not apply where a [client is anonymous or provides a false name](#).

- (iii) Third party records: A [third party keeping records](#) for an accountable institution must also provide prescribed information to a supervisory body;

- (iv) Accountable or reporting institution reports: [Terrorist property reports](#) and [cash threshold reports](#) have been substantially updated; and

Note: For example, amongst many other changes, reference should be made to the source of identifying information, and details regarding a director in the company being reported on must also be provided.

- (v) Supervisory body access: Criteria for a [supervisory body to request information](#), from an accountable institution under investigation, and relating to one of the four types of suspicious and unusual transaction report.

GN1061 GG41153 / 29 September 2017 (Incorporated into the [Financial Intelligence Centre Act and Regulations](#))



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General

3. NOTABLE ONE LINERS

Competition Act: The [Western Cape citrus producers forum](#) conditional exemption has been extended to 31 December 2017.

Critical Infrastructure Protection Bill : This Bill should be considered together with the [Cybercrimes and Cybersecurity Bill](#). Note: Related laws, of interest to potential 'persons in control' or service providers, include the [section 24D](#) Income Tax Act deductions and the [section 2A](#) National Strategic Intelligence Act vetting provisions.

Customs and Excise Act: The rule regarding customs and excise warehouses which may be licensed for the primary manufacture (VMP), secondary manufacture (VMS) or storage of spirits, [has been amended](#).

Electronic Communications Act: The market definition regulation in the [call termination regulations](#) has been amended to provide that "the market definitions contained in this regulation do not include internationally originated voice traffic terminating on a mobile and/or fixed location within the Republic of South Africa."

Films and Publications Act: A [review of physical content and online distribution tariffs](#) has been gazetted. Comment deadline 30 days from 29 September 2017.

Foodstuffs, Cosmetics and Disinfectants Act : The [sodium reduction in foodstuffs regulations](#) were amended 6 October 2017 to, amongst others, [redefine](#) processed meats and read-to-eat savoury snacks for the purposes of the regulations; amend the [sodium reduction amounts and time-table](#) for various listed items (also see '[commencement](#)'); and amend the [methodology or testing of total sodium](#).

Government Employees Pension Law: The [rules were amended 1 October 2017](#), and the amendments included an increase in funeral benefits.

[Independent Communications Authority of South Africa Act](#): A discussion document on the [inquiry into subscription television broadcasting services](#) (to determine openness, competitiveness and sustainability issues) is available from ICASA. The comment deadline has been extended to 14 November 2017.

[Merchandise Marks Act](#): Notice given to restrict use of the [FIC logo](#) and [Department of Planning, Monitoring and Evaluation backchat logo](#). *Note: It is an offence to contravene an absolute/conditional prohibited use of a logo, figure, etc.*

[National Environmental Management Waste Act](#) : The [waste tyre regulations](#) create general waste tyre duties (relating to prohibitions, duty to register, and duty to maintain a storage and stockpile abatement plan), as well as specific tyre dealer duties (relating to classification of tyres, and mutilation and management of waste tyres). *Note: The REDISA management plan was also withdrawn on 1 October 2017.*

[National Heritage Resources Act](#): The [Evangelical Lutheran Church Complex](#), and the [Owl House](#), have been declared national heritage sites, which means prohibitions on damage, removals or alterations and possible protections relating to access and use control.

[National Regulator for Compulsory Specifications Act](#): A [draft compulsory specification for aquacultured live and chilled raw bivalve molluscs](#) (VC9107) has been gazetted. Comment deadline: 6 December 2017. *Note: Boarding houses, eating houses, hotels, restaurants, over the counter fish shops and primary transportation businesses will be excluded from the proposed operation of VC9107.*

[National Water Act](#) : The comment deadline for the [draft mine water management policy](#) has been extended to 30 days from 6 October 2017. *Note: You may wish to consider the [past overview](#) of this draft policy.*

[Prescription Act](#): The Constitutional Court (CT200/16) held that knowledge of legal conclusion or that a creditor has a legal remedy is not required for the purposes of [section 12\(3\)](#), only knowledge of the identity of the debtor and facts giving rise to the debt is required.

[Special Investigating Units and Special Tribunals Act](#) : The parameters for the [second of three investigations into the State Information Technology Agency](#) (relating to Department of Rural Development and Land Reform activities) has been extended to lengthen the dates under investigation and to include the Vryburg deeds registration system. *Note: [Section 5 of the Act](#) provides for the powers of a special investigating unit.*

[Superior Courts Act](#): The [Supreme Court of Appeal rules \(attorneys fees\)](#) will be amended on 1 November 2017.



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