



# MONEY LAUNDERING & ANTI-CORRUPTION

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2015 / 2016

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### Introduction

As a member of the Financial Action Task Force on Money Laundering, South Africa has several pieces of anti-corruption legislation including:

- the Prevention of Organised Crime Act, No. 121 of 1998 (POCA), which creates the main money laundering offences and provides for the forfeiture of proceeds of crime;
- the Financial Intelligence Centre Act, No. 38 of 2001 (FICA), which places money laundering control obligations on all major financial institutions;
- the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, No. 33 of 2004 (POCDATARA); and
- most importantly, the Prevention and Combating of Corrupt Activities Act, No. 12 of 2004 (PCCA).

### Prevention of Organised Crime Act

Money laundering in South Africa is combated in part by POCA, which provides for offences relating to the proceeds of unlawful activities (ie any property or any service advantage, benefit or reward derived, received or retained, directly or indirectly, as a result of any unlawful activity carried out by any person).

POCA was introduced to combat organised crime, money laundering and criminal gang activities. It repeals the Proceeds of Crime Act, No. 76 of 1996, but reincorporates most of its provisions in amended form.

POCA creates the following offences in respect of money laundering:

- racketeering;
- money laundering;
- assisting another to benefit from proceeds of unlawful activities; and
- the acquisition, possession or use of proceeds of unlawful activities.

A person can only commit one of these offences where he or she “knows or ought reasonably to have known” that the property is, or forms part of, the proceeds of unlawful activity. Unless this state of mind is present on the part of the accused, he or she cannot be successfully prosecuted under POCA.

Any person convicted of one of the above offences will be liable to a fine not exceeding ZAR 100 million or to imprisonment for a period not exceeding 30 years.

### The Financial Intelligence Centre Act

The object of FICA is to complement POCA by introducing mechanisms and measures aimed at combating money laundering activities. FICA sets up an anti-money-laundering regulatory regime that encourages voluntary compliance and self-regulation by institutions that may be exploited for money-laundering purposes.

FICA establishes a body, known as the Financial Intelligence Centre (the Centre), that collects, retains, compiles and analyses all information disclosed to it in terms of FICA. It also conducts investigations into money laundering offences. The Centre is an independent statutory body accountable to the Minister of Finance. Its functions include:

- collecting, processing, analysing and interpreting information obtained by it;
- informing, advising and co-operating with investigating authorities;
- supervising compliance with FICA; and
- giving guidance to institutions to combat money-laundering activities.

FICA places a reporting obligation on persons who carry on a business, are in charge of or manage a business undertaking or who are employed by a business undertaking, to report suspicious transactions to the Centre.

A person who forms a suspicion about a transaction may continue with that transaction, provided he or she ensures that all records relating to the transaction are kept and all reasonable steps are taken to discharge the disclosure obligation. Obviously, however, a person who knows the transaction is tainted may not, and should not, continue with the transaction. Failure to report a suspicious transaction is an offence and carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding ZAR 10 million.

FICA places onerous identification, record-keeping and reporting burdens upon the so-called “accountable institutions” which are listed in Schedule 1. These accountable institutions have been determined by the legislature as being the most likely institutions to come into contact with money-laundering activities and include, inter alia: banks, authorised users of the exchanges, investment managers, investment advisers, attorneys, accountants and estate agents.

The institutions are required to formulate and implement internal administrative systems to ensure that they know their customers, report suspicious transactions to the Centre and keep records of their customers. They are also required to train their employees to recognise and deal with suspected money-laundering transactions.

Enforcement of the provisions of FICA are backed by penal and administrative sanctions. The administrative sanctions apply only to accountable institutions and provide for non-judicial procedures that may be used by the Centre provided certain conditions are met.

### **Protection of Constitutional Democracy Against Terrorist and Related Activities Act**

With the enactment of the new anti-terrorist legislation, POCDATARA, South Africa moved into substantial compliance with the combating of the terrorist-financing requirements of the Financial Action Task Force on money laundering.

POCDATARA was enacted to criminalise the offence of terrorism and other related offences and to provide for measures to prevent and combat terrorist and related activities. POCDATARA aims to provide clarity on the definition of terrorism and to curb the incidents of terrorism by criminalising, not only the offence itself, but also actions by individuals and organisations which would, directly or indirectly, aid or further terrorist activities.

### **The Prevention and Combating of Corrupt Activities Act**

The PCCA aims to strengthen measures to prevent and combat corruption and corrupt activities. It applies to both public and private sector officials and employees as well as public and private entities, including Government, Parliament and the judiciary.

The preamble of the PCCA states that it is desirable to unbundle the crime of corruption in terms of which, in addition to the creation of a general, broad and all-encompassing offence of corruption, various specific corrupt activities are criminalised.

The following penalties may be imposed by different courts following a conviction under the PCCA:

- High Court: a fine or imprisonment for up to “life”;
- Regional court: a fine or imprisonment for up to 18 years; or
- Magistrate’s Court: a fine or imprisonment for up to five years.

In addition to the above penalties, a court may impose a fine equal to five times the value of the gratification involved in the offence. Section 3 provides for a general offence of corruption. It provides that any person who directly or indirectly accepts or offers to accept any gratification from any other person (whether for the benefit of himself/herself or for the benefit of another person) in order to act (personally or by influencing another person so to act) in a manner that amounts to the illegal, dishonest, unauthorised, incomplete, or biased exercise, carrying out, or the performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation, that amounts to the abuse of a position of authority, a breach of trust, the violation of a legal duty or a set of rules designed to achieve an unjustified result or that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities.

“Gratification” includes:

- money, whether in cash or otherwise;
- any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;
- the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;
- any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;
- any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
- any forbearance to demand any money or money’s worth or valuable thing;
- any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended, or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;
- any right or privilege;
- any real or pretended aid, vote, consent, influence or abstention from voting; or
- any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage.

In addition to the general offence of corruption, the PCCA also provides for a number of specific offences of corruption applicable in defined circumstances. The most important of these specific statutory offences are offences in respect of corrupt activities relating to:

- public officers (Section 4);
- foreign public officials (Section 5);
- agents (Section 6);
- receiving or offering of unauthorised gratification by or as party to an employment relationship (Section 10);
- contracts (Section 12); and
- procuring and withdrawal of tenders (Section 13).

The definitions and offences in the PCCA are all fairly wide and open-ended, but the underlying principle is that an offence is committed where any person, directly or indirectly, offers any benefit to any other person, improperly, to influence that person in the performance of his or her duties or functions or to induce that person to do or not do anything.

When determining whether a particular action amounts to corruption, the intention of the parties will determine whether the giving and receiving of gratification constitutes the crime of corruption. It is a subjective test based on inferential reasoning which takes into account the parties’ actions and the surrounding circumstances.

An interesting feature of the PCCA is that it criminalises corrupt actions undertaken outside South Africa by any South African citizen, anyone domiciled in South Africa, or any foreigner, if:

- the act concerned is an offence under that country’s law;
- the foreigner concerned is present in the Republic of South Africa; or
- the foreigner concerned is not extradited.

Another significant feature of the PCCA is that it makes it an offence not to report attempted or actual corrupt transactions. Under Section 34 of the Act, a person in a position of authority, who has knowledge or ought to have knowledge that another person has committed an offence under the PCCA has duty to report this to a police official.

## Conclusion

Companies are required to focus on anti-corruption and anti-money-laundering measures as part of their mechanisms to express corporate responsibility and to protect their reputations and the interests of their stakeholders. Anti-corruption systems are increasingly being extended to a range of ethics and integrity issues, and a growing number of investment managers are looking to these systems as evidence that companies are well managed and employ good business practices.

It will therefore become increasingly important for companies operating in South Africa to ensure that they adhere to the required standards of conduct.