The Legal Implications of South Africa's Grey-Listing for Money Laundering: Analysis and Recommendations

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SUMMARY

This article analyses the legal implications of South Africa's grey-listing by the Financial Action Task Force (FATF) for money laundering in a concise manner. It examines the deficiencies in South Africa's anti-money laundering and counter-terrorism financing (AML/CFT) regime, which led to its grey-listing, and the measures the country has taken to address them. The article evaluates the effectiveness of South Africa's AML/CFT framework in combating money laundering, highlighting areas for improvement. It also considers the impact of South Africa's grey-listing on the country's financial system, including increased scrutiny from international regulators and potential reputational damage. The article recommends specific legal reforms and policy measures South Africa can adopt to strengthen its AML/CFT regime and enhance its compliance with international standards. These Recommendations cover regulatory oversight, law enforcement cooperation, risk assessment, customer due diligence, and sanctions enforcement. The article provides a practical and policy-oriented guide for policymakers and other South African stakeholders to better understand the legal and regulatory challenges of combating money laundering in a grey-listed jurisdiction and identify strategies for improving the country's AML/CFT framework.

1 INTRODUCTION

Money laundering is a process by which individuals and organisations attempt to conceal the proceeds of illegal activities, such as drug trafficking, corruption, and fraud, by disguising them as legitimate funds.[1] This complex and multifaceted phenomenon poses significant challenges to legal systems worldwide, and in recent years, South Africa has been grappling with the scourge of money laundering and the devastating impact it has on the

[1] De Koker "Money Laundering Control: The South African Model" 2003 *Journal of Money Laundering Control* 27 28; see related discussion by Reuter and Truman *Chasing Dirty Money: The Fight Against Money Laundering* (2004) 1; Durrieu *Rethinking Money Laundering & Financing of Terrorism in International Law: Towards a New Global Legal Order* (2013) 1.

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economy, society, and governance.[2] Against this backdrop, the Financial Action Task Force (FATF) has grey-listed South Africa for its perceived weaknesses in combating money laundering and terrorist financing.[3] The grey-listing imposes significant legal and economic consequences for South Africa, including increased regulatory scrutiny, restricted access to international financial markets, and reputational damage.[4] The South African government has, therefore, been under pressure to strengthen its legal and institutional framework for combating money laundering and terrorist financing, which is in line with international standards and norms.

To fully understand the ethical and moral dimensions of money laundering and its impact on society, it is essential to inquire into the principles of justice, fairness, and equity that guide the fight against money laundering and how they can be applied in South Africa. Furthermore, conducting a thorough legal analysis of the grey-listing and its implications for South Africa's legal system is essential. What are the legal ramifications of the grey-listing, and how can South Africa effectively respond to them? What international legal obligations must South Africa fulfil, and how can it balance these obligations with its domestic legal framework? In light of these questions, this article seeks to provide a comprehensive analysis of the legal implications of South Africa's grey-listing for money laundering. Drawing on various legal perspectives, this article provides recommendations for policymakers, legal practitioners, and other stakeholders on strengthening South Africa's legal and institutional framework for combating money laundering and terrorist financing.

2 OVERVIEW OF MONEY LAUNDERING

Money laundering is a criminal activity involving converting proceeds from illegal activities into legitimate funds. This process often involves three stages: placement, layering, and integration.[5] Placement involves the introduction of illegal funds into the financial system, while layering involves the creation of a complex web of transactions to obscure the source and ownership of the funds.[6] Integration involves the use of the laundered funds for legitimate purposes.[7] In South Africa, money laundering takes various forms, including using front companies, shell companies, and nominee accounts to conceal the true ownership and source of funds. Other common

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2 Alford "Anti-Money Laundering Regulations: A Burden on Financial Institutions" 1994 *North Carolina Journal of International Law and Commercial Regulation* 437 454; see related discussion by Levy *Federal Money Laundering Regulation: Banking, Corporate, & Securities Compliance* (2015) 51.

3 Jayasekara "Deficient Regimes of Anti-Money Laundering and Countering the Financing of Terrorism" 2020 *Journal of Money Laundering Control* 663 665.

4 Jayasekara 2020 *Journal of Money Laundering Control* 663 665.

5 Ncube *The Regulation and Use of Artificial Intelligence to Combat Money Laundering in South African Banking Institutions* (doctoral thesis, North West University) 2022 44.

6 Schott *Reference Guide to Anti-money Laundering and Combating the Financing of Terrorism* (2006) 46.

7 Tuba "Prosecuting Money Laundering the FATF Way: An Analysis of Gaps and Challenges in South African Legislation from a Comparative Perspective" 2012 *African Journal of Criminology & Victimology* 103 105.

forms of money laundering in South Africa include trade-based money laundering, bulk cash smuggling, and virtual currency transactions.[8]

Money laundering poses significant harm and risks to the economy, society, and governance of South Africa. It fuels corruption, organised crime, and terrorism, which undermine the rule of law and threaten national security.[9] Money laundering also distorts markets, undermines financial stability, and erodes public trust in the financial system. Furthermore, money laundering can have negative social and economic consequences, such as decreased tax revenues, reduced foreign investment, and increased inequality.[10] It also perpetuates poverty and impedes economic development by diverting resources from productive activities. South Africa has implemented various legal and regulatory measures to combat money laundering and terrorist financing. The primary legislative framework is the Financial Intelligence Centre Act (FICA),[11] which establishes the Financial Intelligence Centre (FIC) as the primary anti-money laundering and counter-terrorist financing (AML/CFT) regulator.[12] FICA imposes reporting obligations on various entities, such as financial institutions, casinos, and real estate agents, to identify and report suspicious transactions.[13]

In addition to FICA, South Africa has also adopted various international AML/CFT standards and norms, such as the Recommendations of the FATF. The South African Reserve Bank (SARB) is responsible for supervising compliance with these standards by financial institutions and other regulated entities.[14] Despite these efforts, South Africa has been criticised for its weak enforcement of AML/CFT laws and regulations. This has led to the country being grey-listed by the FATF, highlighting the need for further reforms to strengthen the AML/CFT framework in South Africa.

3 SOUTH AFRICA'S GREYLISTING BY THE FATF

The FATF has grey-listed South Africa, indicating its AML/CFT regime deficiencies.[15] The FATF's evaluation methodology focuses on the effectiveness of AML/CFT measures, which depends on the judgment of assessors on the risk and context of countries rather than just technical compliance.[16] This listing can have significant implications for the country's financial system and international business transactions, as non-compliance with FATF standards signals to the world that it is not safe to do business in the country.[17] The impact of being grey-listed can tarnish a country's

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8 Cassara *Trade-Based Money Laundering: The Next Frontier in International Money Laundering Enforcement* (2015) 2.

9 Alford 1994 *North Carolina Journal of International Law and Commercial Regulation* 437 454.

10 Diane "Spotting Money Launderers: A Better Way to Fight Organized Crime?" 2000 *Syracuse Journal of International Law and Commerce* 199 201.

11 S 38 of 2003 as amended (FICA).

12 S 2(1)(*a*)-(*c*) of the FICA.

13 S 2(1)(*a*)-(*c*) of the FICA.

14 Wixley and Everingham *Corporate Governance* (2015) 246.

15 Jayasekara 2020 *Journal of Money Laundering Control* 666.

16 Jayasekara 2020 *Journal of Money Laundering Control* 664.

17 Clarke "Is There a Commendable Regime for Combatting Money Laundering in International Business Transactions?" 2020 *Journal of Money Laundering Control* 163 166.

reputation and have immediate detrimental effects on its market and economy.[18]

In June 2019, the FATF grey-listed South Africa for its perceived weaknesses in combating money laundering and terrorist financing.[19] The FATF identified several deficiencies in South Africa's AML/CFT framework, including inadequate supervision of financial institutions, insufficient enforcement of AML/CFT laws, and inadequate measures to identify and freeze terrorist assets.[20] Other factors that contributed to South Africa's grey-listing include the high level of corruption and organised crime in the country, and as the significant amount of illicit financial flows associated with the mining and mineral sectors. Consequently, being grey-listed by the FATF has several consequences for South Africa. First, it makes it harder for South African financial institutions to do business with their international counterparts. Many international banks are reluctant to engage with grey-listed countries as they fear that they may be unwittingly facilitating money laundering or terrorist financing.[21] Secondly, grey-listing can have significant economic consequences for South Africa. It can lead to reduced foreign investment, increased borrowing costs, and decreased access to international financial markets.[22] Grey-listing can also undermine the country's reputation as a safe and stable investment destination, which can further discourage foreign investment. Finally, grey-listing can harm South Africa's national security by allowing terrorist organisations and other criminal networks to exploit the country's weak AML/CFT framework to finance their activities.[23]

Since being grey-listed by the FATF, South Africa has made significant progress in addressing AML/CFT deficiencies.[24] The country has introduced several reforms aimed at strengthening its AML/CFT framework, such as the establishment of a dedicated anti-corruption unit within the National Prosecuting Authority (NPA) and the introduction of new regulations to prevent money laundering in the real estate sector. South Africa has also strengthened its cooperation with international partners to combat money laundering and terrorist financing. For example, South Africa has signed agreements with the United States of America and other countries to share financial intelligence and enhance law enforcement cooperation. Furthermore, South Africa was scheduled to undergo a mutual evaluation in 2019, and the final Mutual Evaluation Report (MER) was completed and

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18 Clarke 2020 *Journal of Money Laundering Control* 166.

19 Jayasekara 2020 *Journal of Money Laundering Control* 664.

20 FATF "Jurisdictions under Increased Monitoring" (24 February 2023) fatf-gafi.org (accessed 2023-07-27).

21 Morse "Blacklists, Market Enforcement, and the Global Regime to Combat Terrorist Financing" 2019 *International Organization* 511 515.

22 Idrees, Naazer and Khan "Pakistan and the FATF: Exploring the Role of Diplomacy in Getting Off the Grey List" 2020 *Liberal Arts and Social Sciences International Journal* 413 420.

23 Nanyun and Nasiri "Role of FATF on Financial Systems of Countries: Successes and Challenges" 2020 *Journal of Money Laundering Control* 234–240.

24 According to the IMF country report, South Africa has made good progress in developing its system for combating money laundering and the financing of terrorism since its last FATF mutual evaluation in 2003; see Fund "South Africa: Report on Observance of Standards and Codes" 2010 10(272) *IMF Staff Country Reports* 1.

made available for public perusal by the end of 2021.[25] This suggests that South Africa has been actively engaging with the evaluation process and taking steps to address the identified issues.

In addition, South Africa has been the subject of critical analysis to assess how it deals with money laundering issues, indicating a willingness to undergo scrutiny and improve its legal and regulatory framework on AML.[26] This demonstrates a commitment to learning from comparative studies and implementing measures to enhance its AML regime. Moreover, South Africa has been exploring the current regulatory aspects of money laundering, with policymakers and relevant persons urged to adopt the recommendations provided in research papers to enhance the curbing of money laundering in the country.[27] This indicates a proactive approach to incorporating research findings into policy and regulatory enhancements.

4 LEGAL ANALYSIS OF SOUTH AFRICA'S AML/CFT FRAMEWORK

South Africa operates under a legal and regulatory structure that oversees AML/CFT. This structure aims to identify, prevent, and address the issues of money laundering and terrorism funding in South Africa. This part of the article explores the effectiveness of existing anti-money laundering measures, such as the Prevention of Organised Crime Act (POCA),[28] Protection of Constitutional Democracy Against Terrorist and Related Activities Act (POCDATARA),[29] and the Financial Intelligence Centre Act (as amended) (FICA),[30] in managing money laundering activities within South African financial institutions. The goal is to uncover any weaknesses present in the FICA and to assess whether these laws have been effective in enhancing the fight against money laundering in the banking sector of South Africa.

4 1 Regulation of Money Laundering under the Prevention of Organised Crime Act

The POCA came into effect in 1999.[31] The POCA was enacted to regulate organised crime in South Africa.[32] In this regard, the POCA prohibits

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25 Bissett, Steenkamp and Aslett "An Analysis of the 2021 South African FATF Mutual Evaluation Report: Terrorist Financing and NPOS" 2023 *Journal of Financial Crime* 1534–1538.

26 Beebeejaun and Dulloo "A Critical Analysis of the Anti-Money Laundering Legal and Regulatory Framework of Mauritius: A Comparative Study With South Africa" 2022 *Journal of Money Laundering Control* 401–407.

27 Chitimira and Munedzi "Historical Aspects of Customer Due Diligence and Related Anti-Money Laundering Measures in South Africa" 2023 *Journal of Money Laundering Control* 138–140.

28 121 of 1998.

29 33 of 2004.

30 38 of 2001.

31 Ncube *The Regulation and Use of Artificial Intelligence to Combat Money Laundering in South African Banking Institutions* 81.

32 Burchell "Organised Crime and Proceeds of Crime Law in South Africa, Albert Kruger: Book Review" 2010 *South African Journal of Criminal Justice* 177.

racketeering activities, criminalises money laundering and requires banks to report certain information.[33] The POCA was also enacted to provide for the recovery of the proceeds of crime.[34] The POCA also criminalises activities related to benefiting from crime and outlines civil proceedings aimed at forfeiting the benefits of crime to the state.[35]

Within the framework of the POCA, money laundering encompasses various offences, including concealment, arrangement, and the handling of proceeds through acquisition, use, or possession.[36] The POCA mandates that any individual who is aware, or ought to be aware, that certain assets are derived from criminal activities and engages in these offences is committing money laundering.[37] The POCA specifically requires knowledge or reasonable suspicion of the illicit nature of the assets for one to be held criminally liable for money laundering.[38] Notably, the accused can also prove that they did not know that the property at issue was part of the proceeds of unlawful activities.[39] It is imperative for individuals to be cognisant of the illegal origins of the assets they handle, with the provision that the defendant can assert ignorance of the assets' illicit origins as a defence. Failure to prove such ignorance, however, results in a conviction for money laundering within South Africa.[40] Consequently, it remains difficult for the prosecuting authorities in South Africa to prove beyond reasonable doubt that the money laundering perpetrator knew that the property at issue was part of the proceeds of unlawful activities. Perhaps this could be the reason why very few money laundering cases have been investigated, and fewer convictions have been made so far.

Moreover, the POCA stipulates that engaging in any activity involving assets known to be the proceeds of crime, whether independently or collaboratively, constitutes money laundering.[41] This includes efforts to conceal or disguise the origins, location, or ownership of such assets, as well as aiding someone involved in these illicit activities.[42] Furthermore, even acquiring, possessing, or using assets known to be from someone else's criminal activities incurs liability under the law. The POCA extends the scope of money laundering offences beyond direct involvement, including those aiding or collaborating in such acts, regardless of the geographical location of the offence.[43]

The POCA marked a significant advancement in the fight against money laundering in South African banks by broadening the scope of what

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33 S 2 and 4 of the POCA; Burchell 2010 *South African Journal of Criminal Justice* 177.

34 Byrnes and Munro *Money Laundering, Asset Forfeiture and Recovery and Compliance – A Global Guide* (2019) 75.

35 See s 37 and 48 of the POCA.

36 See s 6 of the POCA.

37 See s 5(*a*)–(*b*) of the POCA.

38 Van der Linde "The Overlap between the Common Law and Chapter 4 of the Prevention of Organised Crime Act: Is South Africa's Anti-gang Legislation Enough?" 2020 *South African Journal of Criminal Justice* 273 280.

39 *Ibid.*

40 See s 4 of the POCA.

41 See s 4(*b*) of the POCA.

42 See s 5(*a*)–(*b*) of the POCA.

43 Kelly-Louw "Illegality as an Exception to the Autonomy Principle of Bank Demand Guarantees" 2009 *Comparative and International Law Journal of Southern Africa* 339 340.

constitutes money laundering offences beyond drug-related crimes, unlike its predecessors. It criminalises any involvement with assets that are the proceeds of unlawful activities, enhancing the legal framework against money laundering.[44] The POCA's provisions also extend to business conduct and banking employees, obligating them to report suspicious transactions related to the proceeds of illegal activities.[45] Non-compliance with this reporting duty constitutes a money laundering offence, reinforcing the responsibility of individuals and institutions to be vigilant and proactive in identifying and reporting potential money laundering activities. This approach aims to encompass not just direct participants in money laundering but also those who might inadvertently be involved, strengthening the overall regulatory environment against such crimes in South Africa.

4 2 Regulation of Money Laundering under Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004

South Africa enacted the POCDATARA to combat terrorism-related activities and the financing of terrorism and related activities and align government action against money laundering.[46] The POCDATARA came into operation in 2005. Furthermore, the POCDATARA was enacted to give effect to international instruments dealing with terrorist and related activities in South Africa.[47] Interestingly, the POCDATARA does not expressly prohibit money laundering. Instead, the POCDATARA prohibits terrorist activities and offences associated with such activities.[48] Consequently, money laundering activities may be outlawed under the POCDATARA if they are used to commit or help offenders to commit terrorism.[49]

Any person who engages in money laundering to support and finance terrorist activities will be liable for an offence under the POCDATARA.[50] Under the POCDATARA, any person who has reason to suspect that any other person intends to commit or has committed terrorism or other offences associated or connected with terrorist activities like money laundering has a duty to report such suspicion to any police official in South Africa as soon as reasonably possible.[51] A person who fails to report any suspicions of terrorism or other offences associated or connected with terrorist activities, like money laundering offences, is guilty of a money laundering offence.[52] However, the prohibition of money laundering under the POCDATARA is not adequate to curb money laundering. For instance, the POCDATARA does not provide for, among other things, customer due diligence, the obligation to

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44 See s 5 of the POCA.

45 Kalule "Uganda Money Laundering Law Gathers Momentum: Africa Uganda" 2016 *Without Prejudice* 28 28–29.

46 S 2 and 3 of the POCDATARA.

47 S 2 and 3 of the POCDATARA.

48 S 3 of the POCDATARA.

49 S 3 of the POCDATARA.

50 Cachalia "Counter-terrorism and International Cooperation against Terrorism – An Elusive Goal: A South African Perspective" 2010 *South African Journal on Human Rights* 510 512.

51 S 12(1)(*a*)(*b*) of the POCDATARA.

52 S 12(2) of the POCDATARA.

keep identity and verification and transaction records, and to provide for a risk-based approach to bank client identification and verification. The author is of the view that different statutes should not regulate money laundering. This combating of money laundering under different pieces of legislation could have contributed to the inconsistent enforcement of money laundering in South Africa.

4 3 Regulation of Money Laundering under the Financial Intelligence Centre Act

The FICA mandates South African financial institutions to identify proceeds from illegal activities to combat money laundering effectively.[53] The FICA requires banks to confirm and establish a client's identity prior to initiating any business dealings or transactions.[54] In this regard, banks that fail to identify their clients properly risk being implicated in money laundering offences.[55] For instance, to identify potential clients, banks must gather information on the individuals they engage with, including verifying their identity and place of residence, a process commonly referred to as "Know Your Customer" (KYC).[56] KYC practices enable banks to evaluate and manage the risks associated with their clients, thereby facilitating more effective monitoring of potential money laundering activities.[57] It is crucial for banks to understand the nature of their client's business activities to mitigate the risks of money laundering, financial fraud, and the support of criminal entities. However, during the COVID-19 Pandemic and Lockdown in South Africa,[58] South African banking institutions and the general public were not permitted to meet in person/contact. This has made it difficult for banks to comply with FICA's client identification process. For instance, FICA's requirements for client verification, which can include fingerprinting and photography, were difficult to adhere to during periods of social distancing, potentially making it easier for money laundering activities to go undetected. This demonstrates that COVID-19 significantly impacted client identification, which may have encouraged illicit money laundering perpetrators to easily penetrate South African banking institutions and commit money laundering activities. Perhaps contributing to South Africa being grey-listed.

The FICA distinguishes between ongoing business relationships and isolated transactions, specifying that transactions below R5000 do not qualify as significant single transactions.[59] Consequently, banks that cannot verify the identities and transactions of their clients are held accountable for

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53 S 21 of the FICA.

54 S 21(1) 21 read with s 21A of the FICA.

55 S 21 of the FICA.

56 S 26 of the FICA; see related discussion by De Koker "Client Identification and Money Laundering Control: Perspectives on the Financial Intelligence Centre Act 38 of 2001" 2004 *Tydskrif vir die Suid-Afrikaanse* 715 716.

57 S 21B (1) of the FICA.

58 Heratha and Herath "Coping with the New Normal Imposed by the COVID-19 Pandemic: Lessons for Technology Management and Governance" 2020 *Information Systems Management* 277 279.

59 S 1A of the FICA; see related discussion by Kersop and Du Toit "Anti-Money Laundering Regulations and the Effective Use of Money in South Africa" 2015 *Potchefstroom Electronic Law Journal* 1603 1620.

money laundering offences.[60] To comply with FICA, banks must discontinue any business relationships or transactions with clients whose identities cannot be verified.[61]

Banks are required to gather detailed information about prospective clients, including the nature of the business relationship, to assess the risk of money laundering.[62] Certain indicators may suggest a higher risk of money laundering, such as clients holding multiple bank accounts within the same region, making cash deposits into foreign banks' general accounts, or requesting credit and debit cards be sent to addresses other than their own.[63] High-risk categories include politically exposed individuals and complex banking arrangements like cross-border correspondent banking. However, FICA does not explicitly outline these risk factors, leaving a gap in the legislation that might warrant future amendments to better identify high-risk clients.[64] This flaw remains unsolved under the FICA. Notably, banks need to understand the intended purpose behind a client's business relationship. There is an implicit suggestion that those inadvertently involved in money laundering could be exempt from penalties if they prove ignorance of their client's motives. This potential loophole suggests that FICA may offer inadvertent protection for those involved in money laundering, underlining a need for clarification within the act. The possibility for banks to argue a lack of knowledge regarding a client's intentions for money laundering further highlights this issue, suggesting that FICA might provide unintended defences for those involved in such illicit activities within the South African banking sector.

The FICA provides for customer due diligence.[65] This involves banks getting to know their clients and understanding the nature of their business dealings, essentially eliminating anonymous banking activities.[66] This initiative under FICA is crucial for identifying and deterring potential money laundering activities by making it difficult for perpetrators to remain anonymous.[67] This was a good effort by the FICA to combat money laundering in South African banking institutions because, for example, illicit money laundering perpetrators will be easy to identify. Furthermore, customer due diligence will deter illicit money laundering perpetrators from committing money laundering offences since their identities will be known. However, FICA currently lacks specific provisions requiring enhanced scrutiny for high-risk individuals, such as politically exposed persons or

60 S 20A of the FICA.

61 S 21E of the FICA.

62 S 10(*a*) if the FICA.

63 Pierre-Laurent, Zerzan, Noor, Dannaoui and De Koker *Protecting Mobile Money against Financial Crimes: Global Policy Challenges and Solutions* (2011) 71.

64 Uford "Electronic Banking Application and Sterling Bank Customers' Adoption: Issues, Challenges and Benefits" 2018 *Business and Social Sciences Journal* 1 8.

65 Henning and Ebersohn "Insider Trading, Money Laundering and Computer Crime" 2001 *Transactions of the Centre for Business Law: Combating Economic Crime* 105 115.

66 Hugo and Spruyt "Money Laundering, Terrorist Financing and Financial Sanctions: South Africa's Response by Means of the Financial Intelligence Centre" 2018 *Journal of South African Law* 227 235.

67 Cox *Handbook of Anti-Money Laundering* (2014) 315.

those involved in international banking relationships.[68] There is a pressing need for FICA to be revised to impose stricter due diligence obligations on banks when dealing with such high-risk categories to safeguard financial institutions from the threats of money laundering.

Customer due diligence encompasses a range of practices, including the identification and ongoing verification of clients, understanding the business and financial activities of clients, and continuous monitoring of their transactions.[69] This includes identifying the true beneficial owners behind legal entities to prevent misuse for money laundering purposes. Banks are expected to implement additional controls to grasp the potential risks posed by their clientele fully.[70] Should a bank fail to identify a client or perform ongoing due diligence adequately, it is prohibited from establishing or continuing a business relationship or conducting transactions with the client.[71] FICA grants banks the autonomy to determine the level of due diligence necessary to meet their objectives of knowing their clients and their business activities.[72] Failure to comply with these due diligence measures results in the termination of the business relationship in alignment with the bank's Risk Management and Compliance Program.[73] Despite these measures, there are challenges in effectively implementing customer due diligence, such as the complex identification and verification processes that can allow money laundering activities to go unnoticed. Expertise is often required to navigate these intricate processes effectively.

For clients that are legal entities, trusts, or partnerships, banks must implement enhanced due diligence, particularly concerning beneficial ownership. Continuous monitoring of customer transactions is essential for detecting suspicious activities. Yet, this strategy has limitations, particularly in monitoring transactions within unregulated sectors, allowing some money laundering activities to evade detection owing to the absence of a formal transaction record in such environments. This gap in FICA's customer due diligence provisions remains a significant challenge in the fight against money laundering.[74]

Under FICA, banks must gather essential customer information, including names, permanent addresses, nationality, dates and places of birth, identity numbers, signatures, occupations, any public positions held, employers' names, and details about the account and banking relationship.[75] Moreover, banks are also required to maintain records of this information, ensuring that they include either copies of or references to the documentation used to verify an individual's identity.[76] For business relationships, these records should also detail the nature and purpose of the relationship and the origin of

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68 Njotini "The Transaction or Activity Monitoring Process: An Analysis of the Customer Due Diligence Systems of the United Kingdom and South Africa" 2000 *Obiter* 556 566–567.

69 S 1 and s 21B of the FICA.

70 S 21A of the FICA.

71 S 21E of the FICA.

72 S 21B of the FICA.

73 S 21(*a*)–(*c*) of the FICA.

74 S 21D of the FICA.

75 S 21–21H of the FICA.

76 S 22(1) of the FICA.

the funds involved.[77] The rationale behind maintaining such comprehensive records is to distinguish between legitimate and suspicious customers, aiding in effective transaction monitoring and preventing money laundering within the South African banking sector.[78] Banks are required to retain these records for a minimum of five years following the termination of a business relationship, the completion of a transaction, or the submission of a report to the FIC.[79] However, the five-year record retention requirement may be considered a limitation, potentially allowing money launderers to escape prosecution if their activities fall outside this timeframe.[80]

Record-keeping serves as a deterrent against money laundering, preserving the integrity of the banking system and aiding in tracing illicit activities. Enhancements such as integrating artificial intelligence could further bolster the effectiveness of these measures.[81] While the FICA's requirements for reporting and whistleblowing are designed to strengthen the fight against money laundering, the effectiveness of these measures may be challenged by the prevailing cash-based economy and the high levels of corruption and fraud in South Africa. Encouraging whistleblowing and providing immunity for informants are crucial steps in bolstering the efforts of the FIC and banks to counteract money laundering within the nation's banking institutions.

5 ANALYSIS OF INTERNATIONAL AML/CFT STANDARDS

The Basel AML Index, Global Standards and Best Practices, and the FATF represent key international frameworks and benchmarks in the fight against money laundering, to which South Africa is committed as part of its global obligation to regulate and prevent financial crimes. The Basel AML Index evaluates countries based on their risk exposure to money laundering and terrorist financing, offering a comprehensive overview that helps in understanding the effectiveness of regulatory measures and the level of risk in different jurisdictions.[82] On the other hand, Global Standards and Best Practices encompass a wide array of protocols and guidelines established by various international bodies aimed at harmonising anti-money laundering (AML) efforts across borders, enhancing the integrity of the global financial system, and facilitating international cooperation.

Despite the significance of these standards in shaping South Africa's AML regulatory landscape, this article will specifically focus on the FATF, owing to its recent actions affecting the country. South Africa's engagement with the FATF is particularly noteworthy, given the organisation's decision to place the country on its grey list owing to deficiencies in compliance with these Recommendations. This designation indicates that South Africa is under increased monitoring by the FATF, with the expectation to address specific

77 S 21(2) of the FICA.
78 S 22(2)(*a*)(i)-(iii) of the FICA.
79 S 22A (1) of the FICA.
80 See s 22A(1) of the FICA.
81 Koh *Suppressing Terrorist Financing and Money Laundering* (2006) 153.
82 Louis and Hočevar *Financial Intelligence Units: An Overview* (2004) 17.

regulatory weaknesses within agreed timelines to strengthen its AML/CFT regime. The implications of this grey-listing for South Africa are profound, affecting not only its international financial relations but also necessitating significant adjustments within its domestic legal and regulatory frameworks to meet the FATF's stringent compliance requirements.

5 1 The Financial Action Task Force's Role in Combating Money Laundering

The FATF is an independent international body established in 1989 at the Organisation for Economic Co-operation and Development (OECD) economic summit held in Paris.[83] The FATF aims to develop and promote national and international strategies to combat money laundering offences.[84] As a policy-making body, the FATF attempts to generate the necessary political will to bring about national legislative and regulatory reforms to combat money laundering.[85] The FATF conducts mutual evaluations of member and non-member countries to assess their compliance with the AML/CFT standards.[86] It identifies countries that are non-compliant or have significant deficiencies in their AML/CFT framework and may issue public statements warning other countries about the risks associated with these jurisdictions. Furthermore, the FATF promotes the implementation of effective AML/CFT measures by providing guidance and assistance to countries. In this regard, the FATF, of which South Africa is a member, has significantly impacted national laws and the global fight against money laundering.[87] In 1998, it was recognised that there was a need to expand the membership of the FATF to a limited number of strategically important countries that could play a significant regional role in combating money laundering.[88] In this regard, Argentina, Brazil, and Mexico were admitted as members in 2002, and then South Africa and Russia were admitted in 2003.[89]

The FATF first published its Recommendations aimed at governments and financial institutions in 1990 to regulate money laundering effectively in banking institutions.[90] The FATF Recommendations aim to provide a

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83 Schiavone *International Organizations: A Dictionary and Directory* (2005) 140.

84 Fondo Monetario Internacional South Africa: Report on the Observance of Standards and Codes – FATF Recommendations for Anti-Money Laundering and Combating the Financing of Terrorism (2004) 2.

85 OECD Global Forum on Transparency and Exchange of Information for Tax Purposes: *Germany 2017 (Second Round) Peer Review Report on the Exchange of Information on Request: Peer Review Report on the Exchange of Information on Request* (2017) 20.

86 Harvey "Evaluation of Money Laundering Policies" 2005 *Journal of Money Laundering Control* 401.

87 Schott *Reference Guide to Anti-money Laundering and Combating the Financing of Terrorism* 8.

88 Hopton *Money Laundering a Concise Guide for All Business* (2016) 17.

89 Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, European Commission, France, Finland, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, The Gulf Co-operation Council, United Kingdom, United States of America; Hopton *Money Laundering a Concise Guide for All Business* 18.

90 Chamberlin *The Fight against Money Laundering* (2001) 9.

comprehensive regime against money laundering and have been accepted worldwide as one of the most comprehensive bases for tackling money laundering.[91] However, the FATF was limited to drug trafficking offences.[92] In this regard, the Vienna Convention[93] was enacted to limit the retraction of money laundering offences to drug trafficking-related offences.[94] Consequently, the FATF reviewed and extended its Recommendations to cover all crimes.

The FATF sets out a comprehensive set of Recommendations that establish a framework for countries to prevent, detect, and prosecute money laundering and terrorist financing activities. The FATF's Recommendations are divided into 40 different areas, covering topics such as customer due diligence, record-keeping, reporting suspicious transactions, and international cooperation. The Recommendations are designed to be flexible so that they can be implemented in a manner that is appropriate for each country's unique circumstances. The FATF Recommendations stipulate that countries should adopt measures that enable their competent authorities to confiscate property, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value without prejudicing the rights of bona fide third parties.[95] The FATF stipulates that such measures should include the authority to identify, trace, and evaluate property that is subject to confiscation;[96] and carry out provisional measures, such as freezing and seizing, to prevent dealing, transferring, or disposal of such property.[97] Furthermore, the FATF Recommendation also provides for steps that will prevent or void actions that prejudice the State's ability to recover property that is subject to confiscation;[98] and take any appropriate investigative measures.[99]

One of the key Recommendations of the FATF is for countries to implement a risk-based approach to AML/CFT measures. This means countries should assess the risks of money laundering and terrorist financing in their jurisdictions and tailor their AML/CFT measures accordingly. A risk-based approach ensures that countries can allocate their resources effectively and efficiently and focus on the highest-risk areas. The FATF also recommends that countries establish a legal and institutional framework to combat money laundering and terrorist financing.[100] This includes the criminalisation of money laundering and terrorist financing, the establishment

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91 Hopton *Money Laundering A Concise Guide for All Business* 19.

92 Hopton *Money Laundering a Concise Guide for All Business* 19.

93 The United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1998, see article 3 and 5.

94 *Ibid*.

95 See Recommendation 3 of the FATF.

96 See Recommendation 13 of the FATF.

97 See Recommendation 3 of the FATF.

98 Gilmore *Dirty Money: The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism, Volume 599* (2004) 262.

99 Norton and Walker *Banks: Fraud and Crime* (2014) 418.

100 FATF "Anti-money Laundering and Counter-Terrorist Financing Measures – South Africa, Fourth Round Mutual Evaluation Report, FATF" (2021) Paris http://www.fatfgafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html (accessed 2023-10-16) 24.

of competent authorities to supervise and regulate AML/CFT measures, and the provision of resources and training for law enforcement and other relevant authorities.[101] A risk-based approach ensures that countries can allocate their resources effectively and efficiently and focus on the highest-risk areas. The FATF also recommends that countries establish a legal and institutional framework to combat money laundering and terrorist financing.[102] This includes the criminalisation of money laundering and terrorist financing, the establishment of competent authorities to supervise and regulate AML/CFT measures, and the provision of resources and training for law enforcement and other relevant authorities.

The FATF also provides that banking institutions should not keep anonymous accounts or accounts in obviously fictitious names.[103] In this regard, banking institutions should undertake customer due diligence measures, including identifying and verifying the identity of their customers.[104] Furthermore, the FATF requires financial institutions to perform normal due diligence measures in relation to cross-border correspondent banking and other similar relationships.[105] Furthermore, the FATF mandates banking institutions to pay special attention to any money laundering threats that may arise from new or developing technologies that might favour anonymity and take measures, if needed, to prevent their use in money laundering schemes.[106] However, it should be noted that while the FATF allows for the use of technology that could be used to commit money laundering crimes in financial institutions, it does not explicitly allow for the use of artificial intelligence measures to detect and prevent money laundering in banking institutions.[107]

Another important recommendation of the FATF is for countries to enhance international cooperation and information sharing to combat money laundering and terrorist financing.[108] This includes cooperation between countries, law enforcement agencies, financial institutions, and other relevant stakeholders. The FATF encourages countries to share information on suspicious transactions and to cooperate in investigations and prosecutions of money laundering and terrorist financing activities. In addition to these Recommendations, the FATF also provides guidance on specific topics, such as virtual assets,[109] proliferation financing,[110] and the risk-based approach for casinos and other gambling establishments.[111]

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101 See Recommendation 13 of the FATF.

102 See recommendation 3 of the FATF.

103 OECD *Improving Access to Bank Information for Tax Purposes* (2000) 26.

104 See Recommendation 5 of the FATF.

105 See Recommendation 7 of the FATF.

106 See Recommendation 8 of the FATF.

107 See Recommendation 8 of the FATF.

108 See Recommendation 10 of the FATF.

109 See Recommendation 15 of the FATF which requires countries to regulate virtual asset service providers and apply a risk-based approach to new technologies.

110 See Recommendation 7 (targeted financial sanctions related to proliferation), with additional references to proliferation finance risks in Recommendations 1 and 2 (risk assessment and domestic coordination).

Notably, the FATF's Recommendations provide a comprehensive and adaptable framework for countries to prevent, detect, and prosecute money laundering and terrorist financing activities. Countries that follow the FATF's standards and best practices can better protect their financial systems from abuse and contribute to the global fight against money laundering and terrorist financing. South Africa, like all member countries, is expected to comply with these Recommendations.

In its 2021 Mutual Evaluation Report, the FATF noted that South Africa had made progress in implementing the Recommendations, but there were still significant weaknesses that needed to be addressed.[112] The Report highlighted several areas where South Africa's implementation of the Recommendations fell short of international standards. For example, the FATF noted that South Africa's AML/CFT framework did not adequately cover all types of financial institutions and designated non-financial businesses and professions (DNFBPs).[113] The FATF recommended that South Africa should extend the scope of its AML/CFT framework to cover all financial institutions and DNFBPs.

The FATF also highlighted weaknesses in South Africa's customer due diligence requirements.[114] The FATF recommended that South Africa should require financial institutions to identify and verify the identity of beneficial owners and to conduct ongoing monitoring of customers' transactions and activities.[115] Furthermore, the FATF noted that South Africa's regulatory and supervisory framework needed strengthening to ensure effective enforcement of AML/CFT obligations. The FATF recommended that South Africa should increase its capacity to conduct risk assessments and take enforcement actions against non-compliant institutions.[116]

In light of the FATF's Recommendations, South Africa has taken steps to strengthen its AML/CFT framework. For example, in 2019, South Africa introduced new AML/CFT regulations that provide detailed guidance on implementing AML/CFT obligations under FICA. The regulations set out specific requirements for customer due diligence, record-keeping, and reporting suspicious transactions. Overall, the FATF's Recommendations provide a comprehensive framework for countries to prevent, detect, and prosecute money laundering and terrorist financing activities. While South Africa has made progress in implementing the Recommendations, there is still work to be done to bring its AML/CFT framework in line with international standards.

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111 Casinos and other gambling establishments are treated as "designated non-financial businesses and professions," and the risk-based approach for them appears chiefly under Recommendation 22 (customer due diligence obligations for DNFBPs, including casinos) and Recommendation 28 (regulation/supervision of DNFBPs).

112 FATF http://www.fatfgafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html 6.

113 FATF http://www.fatfgafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html 6.

114 FATF http://www.fatfgafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html 4.

115 FATF http://www.fatfgafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html 157.

116 *Ibid*.

6 RECOMMENDATIONS

To enhance its (AML/CFT) efforts, South Africa must fortify its regulatory and legal frameworks, addressing the gaps highlighted by the (FATF).[117] This involves not only the development but also the diligent enforcement of comprehensive laws and measures aimed at overcoming the shortcomings identified in the FATF evaluations. Furthermore, South Africa should intensify its participation in international cooperation and diplomatic endeavours to navigate the challenges of its grey-listing effectively. Such diplomatic engagement is crucial for securing support and understanding from the global community and facilitating the resolution of AML/CFT deficiencies.[118] Compliance with the FATF's Recommendations is another critical area for South Africa, necessitating the alignment of its domestic legal and regulatory structures with the FATF's standards. This alignment should particularly focus on enhancing customer due diligence, strengthening enforcement mechanisms, and bolstering law enforcement capabilities, as underscored in the 2021 South African FATF Mutual Evaluation Report.[119]

Learning from international best practices offers significant benefits for South Africa. Examining the successful strategies employed by countries like Mauritius in addressing grey listing challenges can provide valuable insights and practical approaches for South Africa to emulate.[120] Mauritius was placed on the (FATF) grey list in February 2020. The grey-listing was a result of deficiencies in the country's (AML/CFT) framework.[121] This led to increased scrutiny of Mauritius' financial practices and regulatory mechanisms, particularly in relation to financial crimes and money laundering activities. The grey-listing prompted Mauritius to respond through legislative measures and regulatory reforms to address the identified deficiencies. The country's financial sector, including banks and investment companies, faced enhanced due diligence requirements during business dealings, reflecting the impact of the grey-listing on regulatory practices and compliance standards.[122] In response to the grey-listing, Mauritius undertook significant reforms to strengthen its AML/CFT framework.[123]

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117 Jayasekara 2020 *Journal of Money Laundering Control* 665.

118 Idrees, Naazer and Khan 2020 *Liberal Arts and Social Sciences International Journal* 415.

119 Bissett, Steenkamp and Aslett 2023 *Journal of Financial Crime* 1534 1545.

120 Mahadew "Mauritius Responds to its 'Grey-Listing' by the Financial Action Task Force Through Statutes: An Informative Review" 2023 44(3) *Statute Law Review* 2.

121 Beebeejaun and Dulloo 2022 *Journal of Money Laundering Control* 401–407.

122 *Ibid*.

123 This involved enacting new laws and amending existing ones to address the FATF's concerns. Key legislative changes included:

(1) The introduction of the Financial Services (Special Purpose Fund) Rules to enhance the regulatory framework for special purpose funds.

(2) Amendments to the Banking Act and the Financial Intelligence and Anti-Money Laundering Act to strengthen CDD measures and improve the monitoring and reporting of suspicious transactions.

(3) The enactment of the Virtual Asset and Initial Token Offering Services Act to regulate virtual assets and related services, reflecting the global shift towards recognizing and addressing the risks associated with virtual currencies and assets.

The potential impact of grey-listing on South Africa's financial flows and international capital markets cannot be overlooked. It is essential for South Africa to understand these implications and devise targeted legal and regulatory strategies to mitigate any adverse effects on its financial sector.[124]

Lastly, embracing technological advancements, particularly in the context of virtual assets, is also recommended for South Africa. With the FATF placing increased emphasis on virtual asset regulations, South Africa should update its legal frameworks to address emerging money laundering risks associated with these assets.[125] In this regard, the FATF describes cryptocurrencies as a decentralised virtual currency based on mathematical algorithms and secured through cryptography, though it does not offer a uniform definition. In South Africa, the Crypto Assets Regulatory Working Group (CARWG), part of the Intergovernmental Fintech Working Group (IFWG), proposed a definition in their Position Paper on Crypto Assets, viewing them as crypto assets rather than currencies. Hence, this article uses "crypto asset/s" and "cryptocurrency/s" interchangeably, defining a crypto asset as a digital value representation not issued by central banks but tradeable, transferable, or storable electronically, employing cryptographic methods and distributed ledger technology.[126] Subsequently, the Financial Sector Conduct Authority (FSCA) categorised crypto assets as financial products under the FAIS Act, aiming to foster a fair, transparent, and accountable financial services sector in South Africa by incorporating crypto assets under its regulatory scope.[127] In this regard, cryptocurrency exchanges must secure the appropriate licenses and adhere to the FAIS Act enhancing consumer protection and ensuring compliance with conduct, disclosure, and operational standards. Additionally, financial advisors and intermediaries dealing with crypto assets must follow the FAIS Act's mandates, including proper record-keeping, suitability assessments, and fair customer treatment. While the IFWG's classification of cryptocurrencies as crypto assets subjects them to regulation as financial products under the FAIS Act, relying solely on this classification could impede the effective regulation of cryptocurrencies. This is because traditional financial assets, unlike cryptocurrencies, do not utilise innovative blockchain technology, making the current regulatory framework inadequate for addressing the complex technological aspects of cryptocurrencies and combating money laundering effectively.

7 CONCLUSION

The grey-listing of South Africa by the FATF for its perceived weaknesses in combating money laundering and terrorist financing has significant legal implications for the country. This study has provided a comprehensive

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[124] Jonsson, Pettersson, Larson and Artzi "The Impact of Blacklists on External Deposits: One Size Does Not Fit All" 2021 *Journal of Money Laundering Control* 4–8.

[125] Emerald Insight "FATF Will Strengthen Its International Recommendations" (2023) Emerald Expert Briefings https://doi.org/10.1108/oxan-db280226 (accessed 2023-11-30).

[126] Ncube and Kabwe "The Regulation of Cryptocurrencies to Combat Money Laundering Crimes in South African Banking Institutions" 2023 *De Jure Law Journal* 368.

[127] Financial Sector Conduct Authority: Policy Document Supporting the Declaration of a Crypto Asset as a Financial Product under the Financial Advisory and Intermediary Services Act (2022)

analysis of the international AML/CFT standards, including the FATF Recommendations, the Basel AML Index, and global standards and best practices. The study has also examined the legal and regulatory framework for AML/CFT in South Africa and identified key policy Recommendations for strengthening the country's AML/CFT framework.