


Economy 

# Hasty law amendments to avoid SA greylisting face serious pushback

Organisations such as the Fiduciary Institute of Southern Africa and DearSA have raised concerns about proposed changes to legislation.

By Ciaran Ryan 2 Nov 2022 ⌚ 00:19



The country is under pressure to tighten up its anti-money laundering and combating terrorism financing activities. Image: GCIS

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Lawmakers are rushing to push through changes to the law to avoid SA being greylisted by the Financial Action Task Force (FATF) – but they're facing some stiff pushback.

One of the laws being polished before being presented to parliament is the clumsily worded Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill, also known as the anti-terrorism bill.



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Last week parliament's Portfolio Committee on Police heard several presentations from civil society groups concerned about the potential loss of freedoms due to the loose wording of terms like "terrorist activity" in the bill.

More than 26 000 South Africans commented on the bill via the DearSA public participation platform and 99% were against it, mainly for the potentially chilling effect it could have on political protest, free expression, the press and religious activity.

### **Fine line**

"It is clear that SA needs stronger anti-terrorism legislation, but the public participation campaign we ran on this bill suggests we have to get this legislation right or risk losing some of our freedoms," says Rob Hutchinson, CEO of DearSA.

**"There is deep concern in the country over the bill as it is currently worded, particularly the vagueness of what constitutes terrorist activity and the danger that legitimate political protest or religious activity could be deemed terrorism."**

South Africans are definitely concerned about terrorism, but don't want to sacrifice basic

freedoms in the process.

Speaking at a public hearing last week, Portfolio Committee on Police chair Tina Joemat-Pettersson said one of the primary reasons behind the anti-terrorism bill is the greylisting threat.

Read: [Controversial bill aims to clamp down on crypto for terrorism financing](#)

In his medium-term budget speech last week, Finance Minister Enoch Godongwana referenced the greylisting threat and the fact that two bills were currently before parliament “aimed at addressing weaknesses in our legislative framework”.

“This will be a significant step towards meeting the 40 recommendations made by the FATF,” said Godongwana. “We are also required to implement laws on anti-money laundering and corruption more effectively.”

### **Lax regulatory regime**

An issue highlighted by the FATF is the lax regulatory regime for non-financial institutions such as real estate agents, attorneys, casinos and dealers in precious metals and stones.

Also mentioned were virtual asset service providers (Vasps) such as crypto exchanges, virtually all of which pre-emptively screen clients for money laundering (ML) activities and subject them to the same Know Your Customer (KYC) rules applied by the banks.

The recent declaration of cryptos as a financial product under the Financial Advisory and Intermediary Services (Fais) Act, and the fact that crypto companies must now apply to be licensed as financial services providers (FSPs), takes some of the sting out of the greylisting threat.

Read:

[Regulations mean cryptos ‘can now go mainstream’](#)

[D-day for crypto assets has arrived, as FSCA targets scams](#)

[There’s a new sense of optimism from regulators regarding crypto](#)

Another issue highlighted by the FATF is the difficulty in establishing beneficial ownership. “Significant ML [money laundering] risks remain largely unaddressed for beneficial owners of legal persons and trusts, cross-border movement of cash, and criminal justice efforts are not yet directed towards effectively combating higher risks such as ML related to corruption, narcotics, and tax offenses,” says the FATF.

**The ability to peel back the corporate veil, something not yet included in the Companies Act, would have made it easier to stop the Guptas before they inflicted such carnage on the country, as they were able to hide their beneficial ownership in offshore trusts**

## and complex corporate structures.

The Fiduciary Institute of Southern Africa (Fisa) is lobbying the Parliamentary Standing Committee on Finance to redraft sections of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Bill which is being fast-tracked through parliament, and which would in turn introduce changes to the Trust Property Control Act.

In particular, Fisa is concerned about the inclusion of trustees in the definition of 'beneficial owner'.

"Broadly, South Africa is under pressure to tighten its laws relating to anti-money laundering and combating terrorism financing," says Louis van Vuren, CEO of Fisa. "In certain jurisdictions, regulations require 'beneficial owners' of a legal entity to be identified.

"We have no problem with the apparent aim of increased oversight over trust assets under certain conditions, but it would appear that the drafters of the bill have simply lifted the term from foreign legislation without regard for the existing trust law in South Africa."

**Van Vuren says the proposed changes fly in the face of existing trust law, introduces ambiguities into the definition, and is phrased in such a way as to create confusion and potentially make criminals out of those simply fulfilling their fiduciary duty.**

Fisa says it is disappointed that it was not consulted in the drafting of the new legislation, and points out that trusts do not have legal personality in SA law, while some of the proposed amendments seem to work from the assumption that they do.

The effect of the proposed changes may open the door for premature vesting of certain rights of trust beneficiaries, limit trustees' discretion, and curtail the existing rights of trustees and the founder of a trust, says Fisa.

This could be by amending the Trust Property Control Act to:

- › Exclude a trustee from the "beneficial ownership" definition as they are not a beneficial owner of a trust and should not be included in the definition; and
- › Place on the trustee reasonable duties of oversight over who the individuals involved in the trust happen to be by perhaps amplifying the definition of "trustee" and placing those duties on trustees by just including "trustee" next to "beneficial owner" in the relevant sections where appropriate.

George Herman, chief investment officer at Citadel, says it seemed unavoidable that South Africa would be greylisted early next year for failing to take enough steps against illicit money flows, but at least it appears as if National Treasury and parliament are finally starting to take

the right steps to get off the list quickly and stem the inevitably negative impact this fate will have on GDP.

The International Monetary Fund (IMF) recently warned that greylistings strangle legitimate fund inflows into afflicted countries.

Mauritius was greylisted in February 2020 and later blacklisted by the EU as a high-risk country, causing a 1% drop in GDP.

Read: [Greylisting could work for SA](#)

The island nation was removed from the list less than two years later due to compliance actions taken by the government.

“South Africa will have to do the same and really step up its prosecutions of financial crimes, such as corruption and money laundering, to get off the grey list quickly,” says Herman.

**Listen to this special-report podcast in which Ryk van Niekerk finds out more about the greylisting debate from Intellidex founder Stuart Theobald (or read the transcript [here](#)):**

