CONSULTATION DOCUMENT

PROPOSED AMENDMENTS TO THE
FINANCIAL INTELLIGENCE CENTRE
ACT, 2001

August 2006
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PREFACE

This consultation document is aimed at eliciting comments on proposals to amend the Financial Intelligence Centre Act, 2001 (“the FIC Act”). The comments received will be used to enhance and refine the Centre’s proposals before embarking on a process to introduce draft legislation into the legislative process. The views, conclusions and proposals in this document should therefore not be regarded as the Centre’s final views.

The consultation document is published in full with an example of how the Centre’s proposals may appear in a legislative format, so as to provide persons and bodies wishing to comment or to make suggestions sufficient information to enable them to make informed comments and focussed suggestions for improvement.

Respondents are requested to submit written comments, representations or requests to the Centre by 26 January 2007 to:

The Director
Financial Intelligence Centre
Private Bag X115
PRETORIA
0001
Telefax: (012) 315 5770
E-mail: poovindree.naidoo@treasury.gov.za

The Centre will assume that respondents agree to the Centre quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential.

An electronic version of this consultation document is available on the Internet at:

www.fic.gov.za/docs

The Centre can be contacted for further information at the contact particulars above or at the following telephone number: (012) 309-9200.
INTRODUCTION

1.1 The FIC Act provides in section 45 that it is the responsibility of supervisory bodies to supervise compliance with the Act by the institutions under their supervision. The supervisory bodies referred to here are listed in Schedule 2 to the FIC Act. They are the following:

- the Financial Services Board,
- the South African Reserve Bank,
- the Registrar of Companies,
- the Estate Agency Affairs Board,
- the Independent Regulatory Board for Auditors (previously the Public Accountants and Auditors Board),
- the National Gambling Board,
- the JSE Limited (previously the JSE Securities Exchange South Africa), and
- the Law Society of South Africa

1.2 The FIC Act does, however, not include this responsibility in the objectives or functions of supervisory bodies nor does the Act provide supervisory bodies with specific powers to carry out this responsibility. The FIC Act also does not provide for administrative procedures to collect evidence regarding compliance failures nor to penalise such failures.

1.3 The extent to which other legislation applicable to the various supervisory bodies provide for their exercise of this responsibility as well as the related administrative procedures and penalties, varies greatly. The result is that not all supervisory bodies are equally able to carry out the responsibility of supervising compliance with the FIC Act.

1.4 The international standard for regulation and supervision in relation to compliance with anti-money laundering measures is contained in recommendation 23 of the 40 Recommendations of the Financial Action Task Force on Money Laundering (“the FATF”):
Regulation and supervision

23. Countries should ensure that financial institutions are subject to adequate regulation and supervision and are effectively implementing the FATF Recommendations. Competent authorities should take the necessary legal or regulatory measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest or holding a management function in a financial institution.

For financial institutions subject to the Core Principles, the regulatory and supervisory measures that apply for prudential purposes and which are also relevant to money laundering, should apply in a similar manner for anti-money laundering and terrorist financing purposes. Other financial institutions should be licensed or registered and appropriately regulated, and subject to supervision or oversight for anti-money laundering purposes, having regard to the risk of money laundering or terrorist financing in that sector. At a minimum, businesses providing a service of money or value transfer, or of money or currency changing should be licensed or registered, and subject to effective systems for monitoring and ensuring compliance with national requirements to combat money laundering and terrorist financing. (emphasis added)

1.5 The issue of supervision of compliance with the FIC Act was commented upon by the FATF on the occasion of the mutual evaluation of South Africa in 2003. The FATF recommended that South Africa should give:

……..appropriate and adequate responsibilities and powers to supervisory bodies to enforce the provisions of FICA and that South Africa must amend sector-specific legislation granting authority to supervisors to enforce compliance with FICA provisions.

1.6 It is therefore clear that there are certain structural deficiencies concerning the supervision of compliance with the FIC Act. These deficiencies impact on the proper administration of the FIC Act, and are limiting the effectiveness of the framework to combat money laundering and terrorist financing, particularly in the compliance and enforcement areas. The current deficiencies should therefore be addressed.
ADMINISTRATIVE ENFORCEMENT

2.1 The FIC Act currently provides for enforcement of its provisions through criminal sanctions. Any contravention of or failure to comply with the provisions of the FIC Act constitutes an offence which can be prosecuted in a criminal court of law and in respect of which a fine or a term of imprisonment can be imposed. Enforcement through criminal sanctions require investigations by law enforcement authorities such as police investigators and prosecutions to a criminal standard. This makes enforcement by means of a criminal model inappropriate for measures that are, in fact, regulatory in nature.

2.2 Although criminal sanctions have an important role to play in the process, an administrative process will prevent creating additional pressure on the formal justice system, and provide a more flexible and efficient means to address contraventions of the FIC Act.

2.3 The Centre proposes the introduction of an administrative enforcement model in respect of failures to comply with the FIC Act. This requires amendments to the FIC Act to provide the appropriate administrative framework within which administrative penalties under the FIC Act can be applied in deserving matters. The key features of this enforcement model are the following:

- a clear expression of the mandate of supervisory bodies to supervise compliance with the obligations on accountable institutions under the FIC Act,
- broad range of powers to assist the Centre and supervisory bodies to determine when compliance failures occur,
- a broad range of administrative penalties which may be imposed in cases of non-compliance with the FIC Act, and
- a review procedure concerning the sanctions imposed by the Centre or another supervisory body.
Commentators are requested to indicate whether they agree with the principle of establishing a framework for the administrative enforcement of the obligations which apply to accountable institutions in terms of the FIC Act.

OBJECTIVES OF SUPERVISORY BODIES

3.1 As was pointed out above the FIC Act does not expressly insert the responsibility to supervise compliance with the Act in the statutory objectives and functions of supervisory bodies. This leads to variations in interpretations of the FIC Act and creates uncertainty in some supervisory bodies as to their statutory function in relation to supervision of compliance with the Act.

3.2 The Centre proposes that the FIC Act be amended to make it clear that supervisory bodies must also supervise compliance with the FIC Act by adding the responsibility to supervise compliance with the FIC Act to the objectives and functions of all supervisory bodies. This should remove all uncertainty as to the role of supervisory bodies in relation to their functions in terms of the FIC Act and would oblige supervisory bodies to include supervision of compliance with the FIC Act in their objectives and structuring of their functions. This may also include a discretion for supervisory bodies to recover the costs of their actions from accountable institutions. (See clause 10 of the proposed Bill.)

3.3 The Centre also proposes that the FIC Act be amended in order to provide particular powers to supervisory bodies to assist in the carrying out of their supervisory functions in relation to the FIC Act. One such power is the authorisation of inspections by supervisory bodies of the affairs of accountable institutions in relation to compliance with the FIC Act.

3.4 Other powers of supervisory bodies may include the following:

• instituting proceedings against an accountable institution in the High Court compelling an accountable institution to comply with any provision of the Act or to cease contravening a provision of the Act,
issuing a directive to an accountable institution to furnish it with certain information or documents,

requesting an accountable institution to appear before it for questioning,

applying to a court for an order restraining an accountable institution from continuing business pending an application to court,

where a supervisory body grants any license, registration or approval to carry on a business, to impose as a condition to qualify for a license, registration or approval an obligation on the applicant to comply with the obligations imposed on that applicant by the Act, and

where it is a requirement in terms of a law that a person who is to hold office in an accountable institution is a fit and proper person, to take into account whether that person has been involved in money laundering or terrorist related activities.

(See clause 10 of the proposed Bill.)

Commentators are requested to indicate whether the proposed amendment will fully enable supervisory bodies to carry out supervisory functions in relation to compliance by accountable institutions with the FIC Act.

Commentators are requested to provide their views on the proposed powers for supervisory bodies to fulfil the function of supervision of compliance with the FIC Act.

POWER OF THE CENTRE TO CONDUCT INSPECTIONS

4.1 Not all accountable institutions and reporting institutions under the FIC Act are subject to supervision by the supervisory bodies listed in Schedule 2 to the Act. This problem will increase as the categories of accountable institutions under the FIC Act are expanded over time. In order to fill this supervisory gap in respect of institutions that are unregulated or are relatively loosely regulated, the Centre would be expected to fulfil the functions of a supervisory agency.
4.2 With this in mind the Centre proposes that its objectives and functions be expanded to include the promotion and supervision of compliance with the obligations of the FIC Act. (See clauses 4 and 5 of the proposed Bill.)

4.3 Enabling the Centre to take on a more supervisory role in relation to accountable institutions will in practice require close cooperation and coordination between the Centre and existing supervisory bodies to avoid duplication of efforts in relation to accountable institutions that are supervised by established supervisors. The division of labour, resources etc. in this regard will have to be dealt with in terms of practical arrangements between the Centre and each of the supervisory bodies.

4.4 Such an expansion of the Centre’s objectives and functions will necessitate an enhancement of the Centre’s monitoring powers in relation to compliance with the provisions of the FIC Act. It is therefore proposed that the Centre be enabled to conduct inspections of the affairs of persons to whom the provisions of the FIC Act apply, to determine whether they are complying with the Act. (See clause 12 of the proposed Bill.)

4.5 An amendment to provide the Centre with the statutory power to conduct inspections implies that provision be made for the powers an inspector may exercise and the manner in which an inspection may be conducted. An inspector cannot function effectively without a range of statutory powers at his or her disposal. Some of the proposed powers of inspectors are the following:
• directing a person to appear for questioning,
• entering and searching a premises,
• ordering the production of documents, and
• using a computer system on a premises to access data.
(See clause 14 of the proposed Bill.)

4.6 The Centre proposes that it should have the discretion to recover the costs associated with a particular inspection, in particular where a person who is not
in the Centre’s service is appointed as an inspector on a remunerated basis. (See clause 16 of the proposed Bill.)

Commentators are requested to provide their views on the principle of allocating an inspection function to the Centre.

Commentators are requested to provide their comments on the proposed powers to be exercised in the course of an inspection.

Commentators are requested to provide their comments on the recovery of the costs associated with inspections.

ADMINISTRATIVE ACTION

5.1 If information gathered through an inspection, or another form of investigation, reveals a failure to comply with the provisions of the FIC Act the Centre, or another supervisory body as the case may be, should be able to address such a failure by imposing an appropriate administrative penalty.

5.2 The Centre believes that the broadest range of administrative penalties possible should be at the disposal of the Centre or a supervisory body when deciding on the appropriate manner to address a particular failure to comply with the FIC Act. The Centre and supervisory bodies will be faced with compliance failures that vary in nature and the circumstances relating to each case will also vary. It is therefore important that the Centre and supervisory bodies be able to select the most appropriate penalty with a measure of accuracy. This implies that there should be a graduated series of penalties which will allow the Centre and supervisory bodies to respond effectively to all kinds of breaches of the FIC Act from minor infractions to the most serious cases on non-compliance.

5.3 The contraventions of the FIC Act which the Centre and supervisory bodies would have to address would be regulatory in nature. The most important
objective for the Centre and supervisory bodies, and the administrative enforcement system as a whole, would be to ensure that a particular compliance failure does not recur in future. The Centre believes that these concerns should also be reflected in the range of penalties which the Centre and supervisory bodies would be able to impose in cases of non-compliance with the FIC Act. The Centre is of the view that, while the inherent punitive nature of a penalty cannot be excluded, the penalties at the disposal of the Centre and supervisory bodies should include a focus on remedial action. This will allow the Centre and supervisory bodies to decide on the appropriate balance between remedying a particular failure and the punitive effect of a penalty, based on the circumstances of a given case.

5.4 Against this background the Centre proposes the following range of administrative penalties for failures to comply with the FIC Act:

- a caution not to repeat a particular conduct,
- a reprimand,
- a direction to take a particular action or cease a particular action or make arrangements with the supervisory body concerned,
- a monetary penalty,
- a direction to terminate the employment of a particular person, and
- where a supervisory body grants any license, registration or approval to an accountable institution to carry on a business, to direct that supervisory body to suspend, impose a condition or withdraw the license, registration or approval for a particular period.

(See clause 17 of the proposed Bill.)

5.5 The Centre or a supervisory body should also be able to direct, in certain circumstances, that a natural person pay a monetary penalty in his or her personal capacity. This is intended to deal with circumstances where the tribunal finds that the individual was personally involved in a particular case of non-compliance.
5.6 The Centre also proposes that it and the supervisory bodies be able to draw on some guidance on which to base its decision as to the appropriate penalty in a given case. For this reason the Centre proposes that a number of factors be set out to consider before reaching a decision on a particular penalty. Such a provision will ensure that there is uniformity in the sanctions imposed by the Centre and supervisory bodies. The proposed factors are the following:

- the nature, duration, seriousness and extent of the contravention,
- the extent to which the contravention was deliberate or due to recklessness,
- any loss or damage suffered as a result of the contravention,
- the impact of the contravention on the accountable institution or person involved and the parties with whom the accountable institution or person does business,
- whether the accountable institution has previously contravened a law or breached a condition of a licence to carry on business;
- any remedial steps taken by the accountable institution or person to prevent a recurrence of the contravention,
- any steps taken against the accountable institution by a supervisory body or voluntary association of which the accountable institution is a member,
- any written representations made by the accountable institution or person,
- whether the contravention revealed serious or systemic weaknesses of the management systems or internal controls relating to the accountable institution’s or person’s business,
- the amount of profit accrued or loss avoided as a result of the contravention,
- the impact of the contravention on the orderliness of financial markets and public confidence in those markets,
the degree of co-operation the accountable institution or person showed during the proceedings, and
any other factor, including mitigating factors, that the panel of adjudicators may consider relevant.
(See clause 18 of the proposed Bill.)

Commentators are requested to provide their views on the proposed power of the Centre and supervisory bodies to impose administrative penalties in relation to failures to comply with the FIC Act.

Commentators are requested to provide their views on the proposed range of administrative penalties.

Commentators are requested to provide their views on the proposed guidance concerning factors to be taken into account when deciding on an appropriate penalty.

**REVIEW**

6.1 An administrative enforcement framework should contain a process for the review of actions taken by the Centre and supervisory bodies. The Centre therefore proposes that a review body be established and a procedure be developed for the functioning of such a body.

6.2 The Centre proposes the establishment of a board of review to review the actions taken by the Centre and supervisory bodies. The board of review may consist of three persons, appointed by the Minister of Finance, with the chairperson being a judge or retired judge. The board of review can obtain the assistance of assessors with expert knowledge in particular matters. However, an assessor would not have a part in the final decision of the board of review. (See clause 24 of the proposed Bill.)
6.3 The chairperson of the board of review will determine the procedure to carry out a review. When carrying out a review, the board of review may receive further evidence either orally or by deposition. (See clause 25 of the proposed Bill.)

6.4 The board of review would, after carrying out a review be able to reach any of the following conclusions:

• confirm, amend or set aside the decision in question, or
• refer a matter back to the Centre or supervisory body to be reconsidered.

(See clause 26 of the proposed Bill.)

Commentators are requested to provide their views on the concept of a board of review to review decisions of the Centre and supervisory bodies.

Commentators are requested to provide their views on the proposed composition of a board of review.

Commentators are requested to provide their views on the proposed procedure for reviews of decisions of the Centre and supervisory bodies.

CONCLUSION

7.1 The Centre believes that a comprehensive administrative framework to address instances of non-compliance with FIC Act will establish an effective and co-operative process to remedy failures to comply with the Act and enhance efforts to raise the standards of compliance in the country. The Centre also believes that such a framework will address current weaknesses and uncertainties concerning the roles, responsibilities, powers and procedures concerning the supervision of compliance with the FIC Act.

7.2 The Centre would therefore appreciate receiving all suggestions for improvements to the current proposals, in order to develop a sound solution to
the issue of administrative enforcement of the obligations which apply to accountable institutions in terms of the FIC Act.
WORKING DOCUMENT

PROPOSED AMENDMENT BILL

REPUBLIC OF SOUTH AFRICA

FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL

(DRAFT)

(MINISTER OF FINANCE)

[B — 2006]

REPUBLIEK VAN SUID-AFRIKA

WYSIGINGSWETSONTWERP OP DIE FINANSIËLE INTELLIGENSIESENTRUM

(KONSEP)

(MINISTER VAN FINANSIES)

[W — 2006]
To amend the Financial Intelligence Centre Act, 2001, in order to insert new definitions; to provide for the application of this Act to prevail if any conflict arises between this Act and any other law; to extend the objectives of the Financial Intelligence Centre Act by making information collected by the Centre available to supervisory bodies, to extend the mandate of the Centre to counter the financing of terrorist and related activities, for the Centre to promote compliance with the provisions of the Act and for the Centre to facilitate the supervision of accountable institutions by supervisory bodies; to extend the functions of the Centre to supervise, in conjunction with supervisory bodies, compliance by accountable institutions with the provisions of the Act; to effect a change of name to the Money Laundering Advisory Council; to provide for the Centre to issue directives; to provide for the powers of inspection by the Centre and to provide for the procedure for the carrying out of an inspection; to further extend the powers of supervisory bodies to take certain action against an accountable institution in instances of non-compliance; to provide for the Centre or a supervisory body to impose administrative sanctions; to provide for the establishment of a board of review to consider applications for review and to provide for the procedure for the functioning of the board of review; to make further provision for offences for failure to comply with certain provisions; to effect consequential amendments to the principal Act; and to provide for matters connected therewith.
BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Substitution of long title of Act 38 of 2001

1. The following long title is hereby substituted for the long title to the Financial Intelligence Centre Act, 2001 (hereinafter referred to as the principal Act):

“To establish a Financial Intelligence Centre and an Anti-Money Laundering Advisory Council in order to combat money laundering activities and the financing of terrorist and related activities; to impose certain duties on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities; to provide for a supervisory body to take certain action against an accountable institution in instances of non-compliance; to provide for the Centre to conduct inspections; to provide for the Centre or a supervisory body to impose administrative sanctions; to establish a board of review to consider an application for review against a decision made in terms of this Act; to amend the Prevention of Organised Crime Act, 1998, and the Promotion of Access to Information Act, 2000; and to provide for matters connected therewith.”.

Amendment of section 1 of Act 38 of 2001

2. Section 1 of the principal Act is hereby amended –

(a) by the insertion in subsection (1) after the definition of “authorised officer” of the following definitions:

"bearer negotiable instrument", for the purposes of this Act, includes any instrument that may be converted to coin or paper money of the Republic or of another country that is designated as legal tender and that circulates as, and is customarily used and accepted as, a medium of exchange in the country of issue and is payable to the bearer of the instrument;

"board of review" means the board of review established by section 45M;"
(b) by the substitution in subsection (1) for the definition of “cash” of the following definition:

“"cash" [means] includes—

(a) coin and paper money of the Republic or of another country that is designated as legal tender and that circulates as, and is customarily used and accepted as, a medium of exchange in the country of issue;

(b) travellers’ cheques; and

(c) a bearer negotiable instrument, as defined in this Act;”

(c) by the substitution in subsection (1) for the definition of “Council” of the following definition:

“"Council” means the [Money] Anti-Money Laundering Advisory Council established by section 17;”;

(d) by the insertion in subsection (1) after the definition of “intelligence service” of the following definition:

“"inspector” means a person appointed as an inspector by the Director to act under section 45(B)(1);”;

(e) by the insertion after the definition of “supervisory body” of the following definition:

“"terrorist and related activities” means ‘terrorist and related activities’ as defined in section 1 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004);” and

(f) by the substitution in subsection (1) for the definition of “this Act” of the following definition:

“"this Act" includes an exemption made in terms of section 74 and a regulation made in terms of section 77;”.

Insertion of section 1A in Act 38 of 2001

3. The following section is hereby inserted in the principal Act after section 1:

“Application of Act
1A. (1) This Act does not exclude or limit the concurrent application of any other law in so far as the provisions of such other law are not inconsistent with this Act.

(2) If any conflict relating to a matter dealt with in this Act arises between this Act and any other law, other than the Constitution or an Act of Parliament expressly amending this Act, this Act prevails.”.

Amendment of section 3 of Act 38 of 2001

4. Section 3 of the principal Act is hereby amended—

(a) by the substitution for paragraph (a) of subsection (2) of the following paragraph:

“(a) to make information collected by it available to investigating authorities, supervisory bodies, intelligence services and the South African Revenue Services to facilitate the administration and enforcement of the laws of the Republic;”;

(b) by the substitution for paragraph (b) of subsection (2) of the following paragraph:

"(b) to exchange information with [similar] bodies with similar objectives in other countries regarding money laundering activities, the financing of terrorist and related activities, and similar offences[,] “, and

(c) by the addition of the following paragraphs:

“(c) to promote compliance with the obligations pursuant to the provisions of this Act among the accountable institutions and other persons to whom those provisions apply; and

(d) to facilitate the supervision by supervisory bodies of compliance with the obligations pursuant to the provisions of this Act by accountable institutions and other persons to whom those provisions apply.”.

Amendment of section 4 of Act 38 of 2001

5. Section 4 of the principal Act is hereby amended—

(a) by the substitution for paragraph (c) of the following paragraph:
“(c) [monitor and] give guidance to accountable institutions, supervisory bodies and other persons regarding the performance by them of their duties and their compliance with their obligations pursuant to the provisions of [the] this Act.”; and

(b) by the addition of the following paragraph:

“(e) supervise, in conjunction with supervisory bodies, compliance by accountable institutions and other persons to whom the provisions of this Act apply, with their obligations pursuant to those provisions.”.

Substitution of heading to Chapter 2 of Act 38 of 2001

6. The following heading is hereby substituted for the heading to Chapter 2:

“[MONEY] ANTI-MONEY LAUNDERING ADVISORY COUNCIL”.

Amendment of section 17 of Act 38 of 2001

7. The following section is hereby substituted for section 17 of the principal Act:

“Establishment

17. [A Money] An Anti-Money Laundering Advisory Council is hereby established.”.

Amendment of section 34 of Act 38 of 2001

8. Section 34 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) Subsection (1) does not apply to the carrying out of a transaction to which the rules of an exchange licensed in terms of the [Stock Exchanges Control Act, 1985, or the Financial Markets Control Act, 1989] Securities Services Act, 2004 (Act No. 36 of 2004), apply.”.
9. The following section is hereby inserted into the principal Act after section 42:

“Directives by the Centre

42A. (1) The Centre may, by notice in writing, direct an accountable institution or any category of accountable institutions or any other person to whom the provisions of this Act apply—

(a) to furnish the Centre—

(i) at the time or times or at the intervals or in respect of the period or periods specified in the notice, with the information, reports or statistical returns specified in the notice;

(ii) within the period specified in the notice with any documents in the possession or custody or under the control of an accountable institution,

as the Centre may reasonably require to perform its function of supervision of compliance with the obligations under this Act;

(b) to take any steps, or to refrain from doing or continuing any act, in order to terminate or remedy a possible contravention of, or failure to comply with a provision of this Act; or

(c) to make any arrangements to the satisfaction of the Centre for the discharge of all or any part of the obligations pursuant to the provisions of this Act which apply to that accountable institution, category of accountable institutions or person.

(2) The Centre may examine a document submitted to it in terms of subsection (1)(a)(i) or make an extract from it or a copy thereof.

(3) The costs of furnishing the information, reports, returns or documents in terms of subsection (1)(a) are borne by the accountable institution concerned.”.

Amendment of section 45 of Act 38 of 2001

10. Section 45 of the principal Act is hereby amended—
(a) by the substitution for subsection (1) of the following subsection:

“(1) [Each] Notwithstanding the provisions of any other law, each supervisory body—

(a) is responsible for supervising compliance with the provisions of this [Chapter] Act by each accountable institution regulated or supervised by it; and

(b) is deemed to have the carrying out of the responsibility to supervise compliance with this Act by the accountable institutions referred to in this subsection included in its statutorily or otherwise determined functions and objectives; “; and

(b) by the insertion after subsection (1) of the following subsections:

“(1A) Notwithstanding the provisions of any other law, each supervisory body may, subject to section 72(b), take such steps as may be necessary or expedient for the discharge of its responsibility under subsection 1(a), including steps with regard to co-operation with and mutual assistance and advice to the Centre, other supervisory bodies, including bodies discharging similar functions outside the Republic, and investigating authorities.

(1B) Notwithstanding the provisions of any other law, each supervisory body must, in addition to any existing power it may have under any law, and in consultation with the Centre, mandate any of its members or employees—

(a) to perform, carry out or exercise on behalf of the supervisory body, where required or appropriate, any of the functions, duties and rights of the supervisory body referred to in sections 36(1) and (2), 42(4)(b), 44(b) and 45;

(b) to require, any accountable institution supervised or regulated by the supervisory body, or any compliance functionary of any such accountable institution referred to in section 43(b), by written notice to report to such member or person within a period and in a form and manner set out in the notice, on matters relating to the compliance with obligations imposed under this Act;

(c) where that supervisory body has statutory control over any inspector or similar functionary performing inspection functions under any law, to...
cause inspections to be undertaken in terms of, and in accordance with, the provisions of that law by such inspector or functionary of the affairs of—

(i) any accountable institution regulated or supervised by that supervisory body;

(ii) any accountable institution regulated or supervised by another supervisory body in respect of which the first mentioned supervisory body exercises other statutory regulatory or supervisory powers, which inspections may be undertaken at the initiative of the first mentioned supervisory body or at the request of the other supervisory body, and

(iii) any other person regulated or supervised by that supervisory body,

relating to compliance by any such institution or person with the provisions of this Act;

(d) to issue, from time to time and in consultation with the Centre, directives to an accountable institution referred to in subsection (c) on compliance directly or by necessary implication imposed on any such accountable institution by a provision of this Act, which directives may not be inconsistent with any provision of this Act, or any guidance provided by the Centre in terms of this Act;

(e) where that supervisory body exercises control in terms of any law over the granting of any licence, registration, approval or authorisation of any person to carry on business as an accountable institution regulated or supervised by it, to impose as a condition—

(i) to qualify for such a license, registration, approval or authorisation, an obligation on an applicant to comply with the obligations pursuant to the provisions of this Act, and

(ii) of the granting of such a licence, registration, approval or authorisation, an obligation to maintain, during the currency thereof, the required human, financial and technological resources to ensure compliance with the obligations pursuant to the provisions of this Act;
(f) where it is a requirement of any law that a determination must be made as to whether a person who is to hold office in an accountable institution is fit and proper, to take into account whether that person has been directly or indirectly involved in—

(i) any contravention or failure to comply with a provision of this Act;
(ii) any money laundering activity, or
(iii) any terrorist or related activity,
whether before or after the commencement of this Act; or

(g) to direct an accountable institution, after consultation with the Centre, to institute proceedings to terminate—

(i) the employment of an officer or employee of such accountable institution;
(ii) if such accountable institution consists of a partnership, the membership of a partner in that partnership, or
(iii) if such accountable institution has a board of directors, the membership of a member of that board.

(1C) The Centre, or any supervisory body, other than the supervisory body referred to in item 1 of Schedule 2, after consultation with the Centre, may institute proceedings in the High Court having jurisdiction against any accountable institution regulated or supervised by that supervisory body in order to—

(a) discharge any duty or responsibility imposed on the supervisory body in terms of this Act;
(b) compel such accountable institution to comply with any provision of this Act or to cease contravening a provision of this Act;
(c) compel such accountable institution to comply with a directive issued by the Centre under this Act; or
(d) obtain a declaratory order against such accountable institution on any point of law relating to any provision of this Act.

(1D) If a supervisory body has reason to believe that an accountable institution regulated or supervised by that supervisory body is contravening or failing to comply with, or has contravened or failed to comply with any provision of this Act, it may, after consultation with the Centre—
(a) by written notice direct that accountable institution to-

(i) furnish the supervisory body within a specified period with any
    specified information or documents in the possession or under
    the control of that accountable institution and which relate to the
    matter of such contravention or failure;

(ii) appear before the supervisory body at a specified time and
    place for questioning by the supervisory body in connection with
    such matter; or

(iii) make arrangements to the satisfaction of the supervisory body
    for the discharge of all or any part of that accountable
    institution’s obligations pursuant to the provisions of this Act; or

(b) if it appears that prejudice has occurred or might occur as a result of
    such contravention or failure to comply, apply to a court having
    jurisdiction for an order restraining such accountable institution from
    continuing business pending an application to court by the supervisory
    body as contemplated in subsection (1C), or pending the exercising of
    such other legal remedy as may be available to the supervisory body.

(1E) (a) If a supervisory body has reason to believe that an
accountable institution has contravened a provision in this Act, or has failed to
comply with a directive issued by the Centre or the supervisory body
concerned, the supervisory body may, after consultation with the Centre,
publish a statement to that effect in such manner as the supervisory body
considers appropriate.

(b) Before publishing a statement, the supervisory
body must give the accountable institution concerned a notice warning it of
the proposed publication of such statement, the reason therefore and the
proposed date of publication.

(c) The accountable institution concerned may before
the proposed date of publication of the statement make representations to the
supervisory body concerning the proposed action.

(d) If the supervisory body thereafter decides to
publish the statement, the supervisory body must, without delay, give the
accountable institution concerned a notice which sets out the terms of the
statement to be published.
(1F) All expenses necessarily incurred by the supervisory body in carrying out its mandate in terms of this section will be at the expense of the accountable institution and the supervisory body concerned may recover such expenses from the accountable institution concerned.”.

Amendment of Chapter 4 of Act 38 of 2001

11. Chapter 4 of the principal Act is hereby amended by—

(a) the substitution for the heading to Chapter 4 of the following heading:

"[OFFENCES AND PENALTIES] ENFORCEMENT"; and

(b) the insertion of the following headings after the heading to Chapter 4:

“PART 1
Inspections”

Insertion of section 45A in Act 38 of 2001

12. The following section is hereby inserted into the principal Act after section 45:

“Powers of Centre to conduct inspection

45A. (1) The Centre may —

(a) from time to time, on its own initiative;

(b) at the request of any supervisory body; or

(c) pursuant to and for the purposes of the implementation of any agreement contemplated in section 40(4), in respect of a person identified by the requesting authority acting in terms of such agreement with the Centre,

conduct an inspection of the affairs, or any part thereof, of an accountable institution or any person to whom the provisions of this Act apply, in order to determine the extent to which that accountable institution or person complies with any provision of this Act or any directives issued by the Centre or a supervisory body.”.
13. The following section is hereby inserted into the principal Act after section 45A:

“Appointment of inspectors

45B. (1) The Director may appoint any person in the service of the Centre, or any other suitable person on behalf of the Centre, as an inspector, under this Act.

(2) The Director may determine the remuneration paid to a person who is appointed in terms of subsection (1), but who is not in the full-time service of the Centre.

(3) An inspector must be provided with a certificate of appointment signed by the Director stating that the person has been appointed as an inspector under this Act.

(4) When an inspector performs any function in terms of this Act, the inspector must—

(a) be in possession of a certificate of appointment issued to that inspector in terms of subsection (3); and

(b) show that certificate to any person who—

(i) is affected by the exercise of the functions of the inspector; and

(ii) requests to see the certificate.

(5) An inspector may, with the consent of the Director, appoint any person to assist him or her in carrying out an inspection.”.

Insertion of section 45C in Act 38 of 2001

14. The following section is hereby inserted into the principal Act after section 45B:

“Powers of inspector

45C. In order to carry out an inspection contemplated in section 45A, an inspector may—
direct a person, in writing, to appear for questioning before the inspector;

during business hours, without prior notice, enter and inspect any premises at which such accountable institution or person conducts business;

order any person who has or had any documents in his or her possession or under his or her control relating to the affairs of the accountable institution or person—

(i) to produce any such document; or

(ii) to furnish the inspector at such place and in such manner as he or she may specify, with such information in respect of such document, as the inspector may request;

open any strong room, safe or other container, or order any person to open any strong room, safe or other container, in which he or she suspects any document relevant to the inspection is kept;

use any computer system or equipment on the premises or require reasonable assistance from any person on the premises to use that computer system to—

(i) access any data contained in or available to that computer system; and

(ii) reproduce any document from that data;

examine or make extracts from or copies of any document in the possession of such accountable institution or person or, against the issue of a receipt, remove the document temporarily for that purpose; and

against the issue of a receipt seize any document obtained in terms of paragraphs (b) to (f) above, which in the inspector’s opinion may afford evidence of non-compliance with a provision of this Act.”.

Insertion of section 45D in Act 38 of 2001

15. The following section is hereby inserted into the principal Act after section 45C:

“Proceedings of inspection”
45D. (1) A person questioned in terms of section 45C must answer each question truthfully and to the best of that person’s ability, and is obliged to answer questions that may incriminate that person.

(2) If a person is questioned in terms of section 45C and is obliged to answer questions which may incriminate such person or, if such person is to be tried on a criminal charge, may prejudice such person at such a trial, no evidence regarding any such questions and answers is admissible in any criminal proceedings, except in criminal proceedings for perjury.

(3) Immediately before entering and inspecting in terms of section 45C, the inspector conducting the search must provide identification to the person in control of the premises and explain to that person the authority by which the search is being conducted.

(4) A person may, during normal working hours, examine and make extracts from any document removed under section 45C(f) under the supervision of an inspector.

(5) An inspector may determine the time and place of any questioning in terms of section 45C(a) and may determine who may be present at such questioning.

(6) Despite the provision of subsection (5), a person questioned in terms of section 45C(a) may have his or her legal representative present.

(7) A person carrying out an inspection under this Act must preserve, or aid in preserving, secrecy with regard to all matters that may come to his or her knowledge in the performance of his or her duties and may not communicate any such matter to any person except the Centre, or unless a court of law orders such communication, or insofar as such communication is necessary to properly carry out the inspection.

(8) If the Centre has reason to believe that any—

(a) department or organ of State;
(b) regulatory authority;
(c) self-regulating association or organisation; or
(d) statutory board charged with supervisory or regulatory duties,
is affected by, or has an interest in any information obtained during an inspection under this Act, the Centre may convey such information to the body concerned.”.

Insertion of section 45E in Act 38 of 2001

16. The following section is hereby inserted into the principal Act after section 45D:

"Recovery of costs of inspection

45E. The Centre may recover from an accountable institution or person being inspected all expenses necessarily incurred as a result of the inspection, including the remuneration of any inspector who is not in the service of the Centre, appointed under section 45B(1).”.

Insertion of section 45F in Act 38 of 2001

17. The following section is hereby inserted into the principal Act after 45E:

“PART 2
Administrative Action

Administrative penalties

45F. (1) If the Centre or any supervisory body has reason to believe that an accountable institution or any person to whom the provisions of this Act apply—

(a) has contravened or failed to comply with any provision of this Act;

(b) has breached a condition of a license or registration imposed by a supervisory body under—

(i) section 45(1B)(e); or

(ii) any other law, if such a condition pertains to the combating or control of money laundering activities or terrorist and related activities; or
(c) has contravened or failed to comply with any directives issued by the Centre or a supervisory body,

the Centre or supervisory body concerned may impose one or more of the administrative penalties referred to in subsection (2) in respect of the contravention, failure or breach, as the case may be.

(2) A penalty imposed by the Centre or the supervisory body concerned may consist of any combination of—

(a) a caution not to repeat the conduct which led to the contravention, or failure to comply with, a provision of this Act, breach of a condition of a license or registration or contravention of, or failure to comply with, a directive issued by the Centre;

(b) a reprimand;

(c) a direction to take any remedial action or to make any arrangements as directed by the Centre or a supervisory body;

(d) a direction to take particular action or to cease a particular action;

(e) a monetary penalty not exceeding the amount prescribed by the Minister;

(f) a direction to terminate—

(i) the employment of an officer or employee of an accountable institution;

(ii) if an accountable institution consists of a partnership, the membership of a partner in that partnership, or

(iii) if an accountable institution has a board of directors, the membership of a member of that board, or

(g) a direction to a supervisory body exercising control in terms of any law over the granting of any licence, registration, approval or authorisation of an accountable institution to carry on business as an accountable institution—

(i) to suspend such a licence, registration, approval or authorisation for a period not exceeding six months;

(ii) to impose the conditions to the continuation of such a licence, registration, approval or authorisation which the Centre or the supervisory body concerned may deem appropriate, or
(iii) to withdraw such a licence, registration, approval or authorisation.

(3) The Centre or the supervisory body concerned may direct that a monetary penalty referred to in subsection (2)(e) must be paid in a personal capacity by the natural person or persons for whose activities the relevant institution is accountable in law, and who the Centre or the supervisory body concerned determines was or were personally involved in the relevant contravention or failure.

(4) The Centre or the supervisory body concerned may suspend any part of an administrative penalty on any condition the Centre or the supervisory body concerned deems appropriate for a period not exceeding five years.”.

Insertion of section 45G in Act 38 of 2001

18. The following section is hereby inserted into the principal Act after section 45F:

"Determination of appropriate penalty

45G. When determining an appropriate administrative penalty, the Centre or the supervisory body concerned must consider the following factors—
(a) the nature, duration, seriousness and extent of the relevant contravention, failure or breach;
(b) the extent to which the contravention, failure or breach was deliberate or due to recklessness;
(c) any loss or damage suffered as a result of the contravention, failure or breach;
(d) the impact of the contravention, failure or breach on the accountable institution or person involved and its probable influence on the economic decisions of persons to whom such accountable institution or person rendered or renders services;
(e) whether the accountable institution or person has previously contravened or failed to comply with any law or breached any condition.
of a licence, registration, approval or authorisation of such accountable institution or person to carry on business as an accountable institution;

(f) any remedial steps taken by the accountable institution or person to prevent a recurrence of the contravention, failure or breach;

(g) any steps taken or to be taken against the accountable institution or person by—
   (i) a supervisory body to which the accountable institution or person is subject, or
   (ii) a voluntary association of which the accountable institution or person is a member;

(h) any written representations made by the accountable institution or person;

(i) whether the contravention, failure or breach revealed serious or systemic weaknesses of the management systems or internal controls relating to all or part of the accountable institution’s or person’s business;

(j) the amount of profit accrued or loss avoided which is consistent with the principle that the accountable institution or person should not benefit from the contravention, failure or breach;

(k) the impact of the contravention, failure or breach on the orderliness of financial markets, including whether public confidence in those markets has been damaged;

(l) the degree of co-operation the accountable institution or person showed during the proceedings; and

(m) any other factor, including mitigating factors, that the Centre or supervisory body concerned considers relevant.”.

Insertion of section 45H in Act 38 of 2001

19. The following section is hereby inserted into the principal Act after section 45G:

"Administrative penalty and criminal proceedings"
45H. (1) A finding that an accountable institution or person has contravened or failed to comply with a provision of this Act or a directive issued by the Centre or a supervisory body, breached a condition of its license or registration does not constitute a previous conviction as contemplated in Chapter 27 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(2) If a court assesses the penalty to be imposed on an accountable institution or person convicted of an offence in terms of this Act, the court must take into account any administrative penalty imposed under section 45F in respect of the same set of facts."

Insertion of section 45I in Act 38 of 2001

20. The following section is hereby inserted into the principal Act after section 45H:

“Duty to inform accountable institution or person of decision of Centre or supervisory body concerned and payment of penalty

45I. (1) The Centre or the supervisory body concerned must, by notice in the prescribed manner, inform the accountable institution or person—
(a) of the reasons for its decision;
(e) that the accountable institution or person may within the period specified in the notice—
(i) pay the monetary penalty referred to in section 45F and comply with any direction the Centre or the supervisory body concerned may have directed to the accountable institution or person; or
(ii) apply to the board of review to review the decision taken by the Centre or the supervisory body concerned.

(2) A monetary penalty payable in terms of section 45F(2)(e) must be paid in the prescribed manner into the Criminal Assets Recovery Account under section 64(c) of the Prevention Act.”.
Insertion of section 45J in Act 38 of 2001

21. The following section is hereby inserted into the principal Act after section 45I:

"Publication of decisions

45J. If an accountable institution or person does not apply for a review against a decision of the Centre or supervisory body concerned within the prescribed period referred to in section 45L, the Director or the supervisory body concerned must make public the decision and the nature of any penalty, unless there are exceptional circumstances that justify the preservation of the confidentiality of the decision."

Insertion of section 45K in Act 38 of 2001

22. The following section is hereby inserted into the principal Act after section 45J:

"Status of decision

45K. Any decision of the Centre or supervisory body concerned may be served, executed and enforced as if it were a civil judgment of the High Court in favour of the Centre or supervisory body concerned."

Insertion of section 45L in Act 38 of 2001

23. The following section is hereby inserted into the principal Act after section 45K:

"Review

45L. An accountable institution or person who feels aggrieved by any decision made by the Centre or a supervisory body concerned under a provision of this Act may, within the prescribed period and in the prescribed manner and upon payment of the prescribed fees, apply for a review of that decision by the board of review established by section 45M."
24. The following section is hereby inserted into the principal Act after section 45L:

"Establishment of board of review

45M. (1) The board of review is hereby established.

(2) The board of review must consist of three persons with an alternate for each of them, appointed by the Minister, of whom—

(a) one must be a person who is or has been a judge of a court contemplated in section 166(a) to (c) of the Constitution, who will be the chairperson; and

(b) two must be persons appointed on account of their wide experience and expert knowledge of financial institutions and financial services.

(3) A member of the board of review holds office for a period of three years and may on the expiration of his or her term of office be eligible for re-appointment.

(4) An alternate acts as a member when—

(a) a member is absent, has recused himself or herself or is suspended; or

(b) the filling of a vacancy on the board of review is pending.

(5) Any vacancy that occurs on the board of review must be filled by the appointment of another person by the Minister, subject to the provisions of subsection (2), and any person so appointed must hold office for the unexpired portion of the period of office of his or her predecessor.

(6) When the board of review deems it necessary for the consideration of a particular matter on review that the board of review should be assisted by an assessor having expert knowledge of a particular matter, the board of review may co-opt any such person to participate as an assessor.

(7) An assessor co-opted under subsection (6) may not participate in any decision of the board of review.

(8) If before or during the consideration of any review it transpires that any member of the board of review has any direct or indirect personal interest in the outcome of that review, that member must recuse
himself or herself and for the consideration of the review be replaced by the alternate member.

(9) A member of the board of review who is not in the full-time employment of the State must in respect of his or her services as such a member be paid such remuneration, including re-imbursement for transport, travelling and subsistence expenses incurred by him or her in the performance of his or her functions as a member of the board of review, as may from time to time be determined by the Minister.

(10) The Director must designate a sufficient number of persons from the staff of the Centre to act as the secretariat of the board of review.”.

Insertion of section 45N in Act 38 of 2001

25. The following section is hereby inserted into the principal Act after section 45M:

"Board of review procedure and powers

45N. (1) In any review under section 45L, the board of review is, subject to the provisions of subsection (4), confined to establishing whether or not, in taking the relevant decision, the Centre or the supervisory body concerned exercised its discretion properly and in good faith.

(2) A review must be considered on the date and at the place and time fixed by the board of review, which must in writing notify the parties to the review thereof.

(3) The chairperson of the board of review must determine the procedure to consider a review.

(4) Any party to an review is entitled to be represented at an review by a legal representative.

(5) For the purpose of considering a review, the board of review may receive further evidence, either orally or by deposition".
Insertion of section 45O in Act 38 of 2001

26. The following section is hereby inserted into the principal Act after section 45N:

"Orders of board of review

45O. (1) The board of review may after considering the review—

(a) confirm, set aside or vary the relevant decision of the Centre or the supervisory body concerned.

(b) refer any matter back for consideration or reconsideration by the Centre or the supervisory body concerned in accordance with such directions as the board of review may lay down, and

(c) If the board of review sets aside any decision of the Centre or the supervisory body concerned, the prescribed fee by the applicant in respect of the review in question will be refunded to the applicant, and if the board of review varies any such decision, it may in its discretion direct that the whole or any part of such fees be refunded to the applicant.

(2) The decision of a majority of the members of the board of review is the decision of that board of review.

(3) The decision of the board of review must be in writing, and a copy thereof must be furnished to every party affected by the review.

(4) The decision of the board of review is binding on the parties to the review.

(5) This section must not be construed so as to limit the right of any interested person to have a decision of the board of review reviewed by a court of competent jurisdiction, subject to the obligation on such person first to have exhausted the remedies in terms of this Act."

Insertion of heading to Chapter 4 of Act 38 of 2001

27. The following heading to the Chapter 4 is hereby inserted after section 45R:
Substitution for section 57 of Act 38 of 2001

28. The following section is hereby substituted for section 57 of the principal Act:

“Failure to comply with request

57. An accountable institution, reporting institution or any other person that fails to comply with a request made—
(a) by the Centre or an investigating authority acting under the authority of an authorised officer in terms of section 32(2)[,]; or
(b) in terms of section 45(1B)(b),
is guilty of an offence.”.

Substitution for section 58 of Act 38 of 2001

29. The following section is hereby substituted for section 58 of the principal Act:

“Failure to comply with directives

58. An accountable institution that fails to comply with a [direction by] directive of—
(a) the Centre in terms of section 34(1) or 42A; or
(b) a supervisory body in terms of section 45(1B)(d) or (g) or 45(1D)(a),
is guilty of an offence.”.

Insertion of section 62A in Act 38 of 2001

30. The following section is hereby inserted into the principal Act after section 62:

“Offences relating to inspection
62A. A person who—

(a) having been summoned to appear at any proceedings contemplated in section 45C(a), fails without lawful excuse so to appear;

(b) without lawful excuse refuses or fails to answer a question put by an inspector and relating to the affairs of an accountable institution or person being inspected;

(c) wilfully gives false information to an inspector;

(d) without lawful excuse refuses or fails to comply with any reasonable request by an inspector in the exercise of his or her powers or the performance of his or her duties;

(e) wilfully hinders an inspector in the exercise of his or her powers or the performance of his or her duties; or

(f) contravenes section 45D(7), is guilty of an offence.

Insertion of section 62A in Act 38 of 2001

31. The following section is hereby inserted into the principal Act after section 62A:

“Hindering or obstructing board of review

62B. Any person who wilfully interrupts the proceedings of the board of review or who wilfully hinders or obstructs the board of review in the performance of its functions is guilty of an offence.”.

Insertion of section 62B in Act 38 of 2001

32. The following section is hereby inserted into the principal Act after section 62B:

“Offences by witnesses

62C. (1) Any person summoned to attend and give evidence or to produce any book, document or object before the Centre or a supervisory body or the board of review, who fails to attend at the time and place specified
in the notice, or to remain in attendance until the conclusion of the enquiry or until he or she is excused by the Centre or supervisory body or the board of review from further attendance, or having attended, refuses to be sworn or to make affirmation as a witness after he or she has been required to do so or, having been sworn or having made affirmation, fails to answer fully and satisfactorily any question lawfully put to him or her, or fails to produce any book, document or object in his or her possession or custody or under his or her control, which he or she has been summoned to produce, is guilty of an offence.

(2) Any person who after having been sworn or having made affirmation, gives false evidence before the Centre or supervisory body or the board of review on any matter, knowing such evidence to be false or not knowing or believing it to be true, is guilty of an offence.

Amendment of section 68 of Act 38 of 2001

33. Section 68 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) A person convicted of an offence mentioned in section 55, 61, [or] 62, 62A, 62B or 62C is liable to imprisonment for a period not exceeding five years or to a fine not exceeding R1 000 000.”.

Short title and commencement

34. This Act is called the Financial Intelligence Centre Amendment Act, 2006, and comes into operation on a date to be determined by the President by notice in the Gazette.