

LEGAL ALERT

THE GREYLISTING OF SOUTH AFRICA



The Financial Action Task Force (**FATF**), which a 39-member body based in Paris, identifies jurisdictions with weak measures to combat money laundering and terrorist financing (**AML/CFT**).

At the FATF plenary meeting which took place on 24 February 2023, FATF has placed South Africa, Africa's most advanced economy, on a list of countries under increased monitoring, commonly known as the grey list.

Our legal alert highlights the position of South Africa and our commentary on the possible implications of being on the grey list together.

The grey list

South Africa became a member of FATF in 2003 and is the only member from the African continent. Other African jurisdictions do participate through FATF regional bodies such as the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG).

In 2019, FATF carried out an evaluation of South Africa's legal framework on AML/CFT. Following the publication of the mutual evaluation report (**MER**) in October 2021, South Africa was subsequently put under a one-year observation period with a view to allow the county to address the 67 recommended actions identified in the MER.

To address some of the technical deficiencies identified in the MER, South Africa passed two major amendments acts in 2022 namely (i) the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act and (ii) the Protection of Constitutional Democracy Against Terrorism and Related Activities Amendment Act.

In January 2023, FATF carried out an assessment of South Africa's progress including a face-to-face meeting held in Morocco on 13 January 2023. Although FATF has recognised that South Africa had made significant and positive progress since 2019 in as much as the 67 recommended actions were reduced to 8 strategic deficiencies, South Africa was nonetheless placed on the grey list up until the 8 strategic deficiencies relating to AML/CFT are addressed.

According to the FATF's statement, "*the grey list identifies countries that are actively working with the FATF to address strategic deficiencies in their regimes to counter money laundering, terrorist financing, and proliferation financing. When the FATF places a jurisdiction under increased monitoring, it means the country has committed to resolve swiftly the identified strategic deficiencies within agreed timeframes and is subject to increased monitoring.*"

South Africa must address the 8 strategic deficiencies by January 2025, at latest.

Implications of the grey list

Appearing on the grey list is a reputational setback for South Africa and may well impact its financial services, banking sectors and the cost of doing business in South Africa. As we had witnessed when Mauritius was grey listed, the perception created was one of a country having a high money laundering and terrorism risk profile. In addition, doing business with companies in the EU became challenging. Multilateral development institutions may be discouraged from providing funding to residents and/or companies incorporated in South Africa.

The Financial Sector Conduct Authority (**FSCA**), as the market conduct regulator of all financial institutions in South Africa and the authority responsible for the AML/CFT supervision of financial services providers,

asset managers and collective investment schemes, has reaffirmed the position of FATF in its press release that an enhanced due diligence need not be applied. According to the FSCA, all bodies which are regulated by the FSCA are expected to review their risk management and compliance programmes and enhance their understanding of AML/CFT risks and implement effective controls to mitigate such risks. The institutions regulated by FSCA are expected to increase their reporting of suspicious and/or unusual transactions to the Financial Intelligence Centre and to fully comply with all other obligations set out in the Financial Intelligence Centre Act, 2001.

The impact for Mauritius

South-Africa having been identified by FATF as a jurisdiction having significant or strategic deficiencies in its AML/CFT measures, the Minister of Financial Services and Good Governance (**Minister**) may, based on the recommendations of the national committee for combatting AML/CFT in Mauritius and after giving due consideration to such factors as may be prescribed, identify whether to categorise South Africa as a high-risk country. This is provided by section 17H of the Financial Intelligence and Anti-Money Laundering Act 2002 (**FIAMLA**).

In the event that South Africa is identified as a high-risk country by Mauritius, then a reporting person defined as "*a bank, financial institution, cash dealer or member of a relevant profession or occupation*" in FIAMLA must, with respect to business relationships or transactions involving a high-risk country apply such enhanced customer due diligence as may be prescribed.

A reporting person must also apply one or more of the following additional mitigating measures to persons and legal entities carrying out transactions involving a high-risk country –

(a) the application of additional elements of enhanced due diligence;

(b) the introduction of enhanced relevant reporting mechanisms or systematic reporting of financial transactions;

(c) the limitation of business relationships or transactions with natural persons or legal entities from the countries identified as high-risk countries.

Pursuant to section 17H (4) of FIAMLA, the Minister if having identified South Africa as a high-risk country must, on the recommendation by FATF or the national committee and having regard to the level of the risk, specify that some countermeasures and any other measures that have a similar effect in mitigating risks must apply to South Africa.

Mauritius has previously, pursuant to the General Notice No.586 of 2020, identified the Democratic People's Republic of Korea (DPRK) and Iran as high-risk countries.

Concluding remarks

Nonetheless, in practice, when dealing with South African counterparties, regulated institutions, or domestic persons as may be the case, could face an enhanced scrutiny. In relation to cross border transactions, foreign countries and/or institutions may, as a matter of policy, apply additional controls to the South African institutions and to the natural persons. This may result in high administrative costs and may act as a deterrent for new business with South Africa.

South Africa has however tried to address the shortcomings identified by the FATF since 2019 and it is expected that South Africa will continue to implement the required actions to address the concerns identified by FATF with the aim of exiting the grey list in the shortest timespan possible.

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