An analysis of anti-money laundering measures in the South African real estate sector

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"*Do not be anxious about anything, but in every situation, by prayer and petition, with thanksgiving, present your requests to God. And the peace of God, which transcends all understanding, will guard your hearts and your minds in Christ Jesus*".

Philippians 4:6-7

ABSTRACT

The Centre for the Study of Economic Crime (CenSEC) of the then Rand Afrikaans University undertook a study to identify major money laundering trends in South Africa. The results of the study were published in 2002 in which five major trends were identified (De Koker, 2002:31). One of these trends, being the purchase of goods and properties, was selected as the focus of this study with specific focus on the abuse of the real estate sector for purposes of money laundering.

Although multiple sources of information are available on money laundering and the prevention thereof, there are, however, limited sources of information available in respect of the application of these measures to the real estate sector, which includes the responsibilities of real estate agents and the effectiveness of these measures in combating money laundering through this sector. In addition, the introduction of the risk-based approach (RBA) into the South African legislative framework in 2017 lead to some challenges for real estate agents on the application of this new approach to combat money laundering. The question then arose as to what extent is money laundering controlled in the South African real estate sector?

The main objective of this study was to critically analyse the extent of anti-money laundering (AML) measures in the South African real estate sector. This was achieved through the information obtained as part of the secondary objectives, being:

1. To select a working definition and give a thorough description of money laundering;

2. To determine how the real estate sector in South Africa functions and explore how it can be abused for money laundering purposes;

3. To analyse the Financial Action Task Force's (FATF) recommendations for combating money laundering in the real estate sector; and

4. To discuss the different legislative measures available in South Africa that can be applied to the prevention of money laundering in the real estate sector and the effectiveness thereof.

South African AML legislation evolved through past years. The Financial Intelligence Centre Act (38 of 2001) (FICA) and the Prevention of Organised Crime Act (121 of 1998) (POCA) currently forms the core Acts as it relates to the prevention of money laundering in South Africa. The Estate Agency Affairs Act (112 of 1976) (EAAA) also regulates the Estate Agency Affairs Board (EAAB), the supervisory body of real estate agents in South Africa. Through the 2017 amendments to FICA, in which the RBA was introduced into the South African legislative framework, South Africa was placed in line with the FATF Recommendations. South Africa now possess a comprehensive

AML framework which contains measures which, if implemented by real estate agents (as accountable institutions), can help to effectively combat money laundering in the real estate sector.

It would, however, appear that real estate agents did not receive adequate assistance from the EAAB to assist them to implement the amendments in a timely manner. This is problematic as the implementation of the 2017 amendments to FICA are crucial to strengthen the South African system against money laundering.

South Africa's compliance with the FATF Recommendations were last evaluated in 2009, when it was found that South Africa had made good progress, since its previous evaluation in 2003, pertaining to the development of AML and counter-terrorist financing systems and that the development of the AML systems represents work in progress. South Africa's compliance with the FATF Recommendations will be evaluated through the upcoming mutual evaluation of South Africa, which is set to take place in 2019 under the 2013 Methodology. The implementation of the 2017 amendments to FICA is crucial, as it addresses findings from the 2009 FATF evaluation.

The study found that, although real estate agents are vulnerable to money laundering, they are also very important in the combating thereof. Real estate agents are actively involved in real estate transactions which place them in a position to detect red flags.

Keywords: Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), Estate Agency Affairs Act (112 of 1976) (EAAA), Estate Agency Affairs Board (EAAB), Financial Action Task Force (FATF), Financial Intelligence Centre Act (38 of 2001) (FICA), illicit funds/profits, money laundering, Prevention of Organised Crime Act (121 of 1998) (POCA), real estate sector.

LIST OF ABBREVIATIONS

AFI	Alliance for Financial Inclusion
AFU	Asset Forfeiture Unit
AML	Anti-money laundering
APG	Asia/Pacific Group on Money Laundering
AUSTRAC	Australian Transaction Reports and Analysis Centre
BSA	Bank Secrecy Act of 1970, formerly referred to as the Financial Reporting and Currency and Foreign Transaction Reporting Act (1970)
CD	Compact disc
CDD	Customer Due Diligence
CenSEC	Centre for the Study of Economic Crime
CFATF	Caribbean Financial Action Task Force
CFT	Counter-terrorist financing
CIP	Customer Identification Programme
CIV	Client Identification and Verification
COMESA	Common Market for Eastern and Southern Africa
COSUNs	Co-operating and Supporting Nations
CPA	Criminal Procedure Act (51 of 1977)
CTR	Cash Threshold Report
CTRA	Cash Threshold Report Aggregation
DNFBP	Designated Non-Financial Business and Profession
DPPS	Dutch Public Prosecution Service
DTA	Drugs and Drug Trafficking Act (140 of 1992)
DVD	Digital Versatile Disc
EAAA	Estate Agency Affairs Act (112 of 1976)
EAAB	Estate Agency Affairs Board
EAG	Eurasian Group
EDD	Enhanced Due Diligence

Egmont Group	Egmont Group of Financial Intelligence Units
E-mail	Electronic mail
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
EU	European Union
EUR	Euro
FATF TREIN	FATF Training and Research Institute
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FFC	Fidelity Fund Certificate
FIC	Financial Intelligence Centre
FICA	Financial Intelligence Centre Act (38 of 2001), as amended by the Financial Intelligence Centre Amendment Act (11 of 2008) and the Financial Intelligence Centre Amendment Act (1 of 2017)
FinCEN	Financial Crimes Enforcement Network
FIOD	Fiscal Intelligence and Investigation Service
FIU	Financial Intelligence Unit
FIU-the Netherlands	Financial Intelligence Unit-the Netherlands
FSB	Financial Services Board
FSRB	FATF-Style Regional Body
GABAC	Task Force on Money Laundering in Central Africa
GAFILAT	Financial Action Task Force of Latin America, formerly known as Financial Action Task Force of South America
GIABA	Inter-Governmental Action Group against Money Laundering in West Africa
ICLG	International Comparative Legal Guides
IMF	International Monetary Fund
JSE	Johannesburg Stock Exchange
KYC	Know your Customer
MENAFATF	Middle East and North Africa Financial Action Task Force
MER	Mutual Evaluation Report

MLAC	Money Laundering Advisory Council
MLARS	Money Laundering and Asset Recovery Section
MLCA	Money Laundering Control Act of 1986
MLTFC Regulations	Money Laundering and Terrorist Financing Control Regulations
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism of the Council of Europe
MoU	Memorandum of understanding
NAR	National Association of Realtors
Netherlands	Kingdom of the Netherlands
NPA	National Prosecuting Authority
NPO	Non-profit organisation
NT	National Treasury
OCDD	Ongoing Customer Due Diligence
OECD	Organisation for Economic Co-operation and Development
PACS	PATRIOT Act Communications System
PCC	Public Compliance Communication
PEP	Politically Exposed Person
POCA	Prevention of Organised Crime Act (121 of 1998), as amended by the Prevention of Organised Crime Amendment Act (24 of 1999) and the Prevention of Organised Crime Second Amendment Act (38 of 1999)
RBA	Risk-based approach
Rebosa	Real Estate Business Owners of South Africa
RECSA	Regional Centre on Small Arms
RMCP	Risk Management and Compliance Programme
SADC	Southern African Development Community
SAPS	South African Police Service
SAR	Suspicious Activity Report
SARB	South African Reserve Bank
SARS	South African Revenue Service

SRB	Self-regulatory body
SRO	Self-regulatory organisation
STR	Suspicious Transaction Report
TFAR	Terrorist Financing Activity Report
TFS	Targeted Financial Sanctions
TFTR	Terrorist Financing Transaction Report
The Commission	The South African Law Commission (nowadays the South African Law Reform Commission)
UK	United Kingdom
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UNSCR	United Nations Security Council Resolutions
US	United States
USA PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001
USA	United States of America
USD	United States Dollar
WetMOT	Disclosure of Unusual Transactions (Financial Services) Act
Wid	Provision of Services (Identification) Act
Wwft	Wet ter voorkoming van witwassen en financieren van terrorisme also known as the Anti-Money Laundering and Terrorist Financing Act

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CHAPTER 1: PURPOSE, SCOPE AND PROGRESS OF STUDY

1.1 Introduction and background

The term “money laundering”, or “money laundering activity”, is defined in section 1 of the Financial Intelligence Centre Act (38 of 2001) (FICA) as an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in terms of section 64 of FICA or section 4, 5 or 6 of the Prevention of Organised Crime Act (121 of 1998) (POCA).

Various special characteristics apply to money laundering. He (2010:31) identifies money laundering as a secretive crime, which is committed in a professional manner. Important characteristics in respect of money laundering have also been identified by Hussain Shah *et al.* (2006:1121) and include the following:

1. It is a group activity;
2. It is a criminal activity which, once begun, normally has no end to it;
3. It is an activity which recognises no boundaries and which occurs across international boundaries;
4. It is undertaken on a large scale and involves a chain of transactions rather than one short transaction; and
5. It is a complex process carried out in a sophisticated way.

Money laundering should be combatted as it actively contributes to the existence of organised criminal groups and their continuous criminal activity (Smit, 2001:14). There are enormous implications on a variety of fronts as a consequence of money laundering. Tuba (2012:106) for instance maintains that money laundering not only poses social and economic threats, but political threats are also present. When money is successfully laundered and crime rewarded, the integrity of the whole of society is harmed and the law and democracy are challenged (FATF, 2014d).

The Centre for the Study of Economic Crime (CenSEC) of the then Rand Afrikaans University undertook a study to identify major money laundering trends in South Africa. The results of the study were published in 2002 in which five major trends were identified, being the purchasing of goods and properties, the abuse of businesses and business entities, the use of cash and

currency, abusing financial institutions and abusing the informal sector of the economy (De Koker, 2002:31).

One of the above-mentioned trends which will be the focus of this study is the purchasing of goods and property and, more specifically, the abuse of the real estate sector for the purposes of money laundering. Mthembu-Salter (2006:21) identifies that the purchase of real estate is one of the key money laundering typologies in South Africa.

The opportunity to invest in the real estate sector offers many advantages to law-abiding citizens but is also open to abuse by criminals (FATF, 2007b:5). In a typologies and case studies report by the Financial Intelligence Centre (FIC) (2019c:8), it is noted that the property sector "…has many attributes that makes it an attractive destination for illicit funds". Transactions in this sector provide potential opportunities for criminals to hide or obscure the true source of illicit funds and the identities of the owners of the real estate (FATF, 2007b:5).

Moshi (2012:4) maintains that real estate transactions (property acquisition and property development) in cash-based economies are a lucrative business. A cash-based economy is defined as an economy where more than half of every sector's transactions are made in cash and the majority of the population are "un-bankable" (Moshi, 2012:2). Money laundering, specifically through the property sector, is well-known in cash-based economies. This is so for a number of reasons which includes *inter alia* the lack of an audit trail and the necessary controls associated with cash transactions, as well as the fact that property investment is profitable as an investment in the long term due to increasing prices and that suspicion is not generally raised when property is purchased on behalf of someone else (Moshi, 2012:4; Nantege, 2013).

The combating of money laundering has become an important focus on an international level (Quirk, 1996:10) and is a priority for the international community with the international standards of anti-money laundering (AML) being established by the Financial Action Task Force (FATF). The FATF closely works together with key international organisations which include their FATF-Style Regional Bodies (FSRBs), the International Monetary Fund (IMF), the World Bank as well as the United Nations (UN) (IMF, 2015).

The FATF is an independent inter-governmental body which was formed during the 1989 G-7 Summit in Paris and has the purpose of developing and promoting policies in order to protect financial systems globally against crimes such as money laundering, the financing of terrorist activities and also against the financing of proliferation of weapons of mass destruction (FATF, 2019f). In order to address these crimes, the FATF Forty Recommendations were formulated by the FATF in 1990 and accepted in July 1990 by the G-7 Summit held in Houston. Various

extensions for limited periods have subsequently and repeatedly extended the life-span of the FATF. South Africa joined and became one of the 39 members of the FATF since June 2003 (De Koker, 2013: ANCIL-4; De Koker, 2013: Com 1-13; FATF, 2019b).

In order to advance effective world-wide implementation of the FATF Recommendations, FATF is reliant on co-operating with various FSRBs (FATF, 2013a:32). The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), of which South Africa is a member, has been an Associate Member of the FATF since June 2010 and as a main purpose aims to implement the FATF Recommendations in order to combat money laundering and, to assess their progress in this regard, the ESAAMLG members take part in a self-assessment process (FATF, 2015a).

Regarding the primary objective of enforcement as a method to counter money laundering activities, Goredema (2007:75) stresses that criminals must be punished if they attempt or succeed in going through with criminal activities which are prevented through specific infrastructures. This important pillar of enforcement comprises the following:

1. Criminalising the underlying activities involved;

2. Creating an investigative infrastructure which supports vulnerable institutions;

3. Provision of reliable forensic analysis by Financial Intelligence Units (FIUs);

4. The tracing of assets and the seizure and confiscation of illicit proceeds through civil law action; and

5. Prosecution and punishment.

A number of challenges exist to prevent and detect money laundering in general, but also in particular in the real estate sector. South Africa has made progress from 2003, since its first FATF mutual evaluation report (MER), by addressing a lot of the recommendations which were made (ESAAMLG & FATF, 2009:6). South Africa was again evaluated by the FATF and ESAAMLG (an on-site visit took place between 4 and 15 August 2008) and was adopted in the FATF plenary as a second mutual evaluation on 26 February 2009 (ESAAMLG & FATF, 2009:2, 6). In the 2009 MER, it was found that “[the] development of AML/CFT systems in South Africa represents work in progress. South Africa has demonstrated a strong commitment to implementing AML/CFT systems which has involved close cooperation and coordination between a variety of government departments and agencies”. The MER also contains recommendations to strengthen the system against money laundering (ESAAMLG & FATF, 2009:6). The FATF is currently busy with its fourth round of mutual evaluations (FATF, 2019d:3). South Africa is on the list of countries to be

assessed under the 2013 methodology, and a possible date for an on-site visit is published on the FATF's Global Assessment calendar as October/November 2019 (FATF, 2019a).

South Africa has enacted various laws and established a number of regulatory bodies to provide a framework for the detection and prevention of money laundering schemes and activities. POCA and FICA currently form the two most important Acts relating to money laundering in South Africa (Bourne, 2002:488). De Koker (2004:716, 717) similarly confirms that these two Acts form the "core structure of South Africa's statutory framework" for the combating of money laundering. POCA sets out general money laundering offences and FICA established the FIC (De Koker, 2004:716, 717). The establishment of the FIC on 31 January 2002 following section 2 of FICA coming into effect, was a major step in terms of the creation of regulatory bodies to push the AML process ahead (De Koker, 2013: Com 5-3).

The FIC worked closely with the National Treasury (NT) during the 2016/2017 year in respect of amendments to FICA. The President signed the Financial Intelligence Centre Amendment Act (1 of 2017) into law on 26 April 2017 (FIC & NT, 2017) which contained the approved amendments, including the following four key areas (FIC, 2017b:12):

1. Changing to a risk-based approach (RBA) for "know your customer" (KYC) requirements;

2. Identifying the real owner/beneficiary of companies;

3. Better management of relationships with prominent influential persons; and

4. Introducing the UN Security Council financial sanctions.

As indicated in the FIC 2016/2017 Annual Report (FIC, 2017b:12, 13), the 2017 amendments to FICA are crucial to strengthen the South African financial system and to align South Africa's legislation to global standards.

With specific reference to the real estate sector, the Estate Agency Affairs Act (112 of 1976) (EAAA) was enacted to provide for the establishment of an Estate Agency Affairs Board (EAAB) to manage and control an Estate Agents Fidelity Fund and for the control of certain activities of estate agents in the public interest. In 1976, the EAAB was formed as a result of this Act in order to control the activities of estate agents in the interest of the public (EAAB, 2014:7).

1.2 Problem statement and motivation

The ESAAMLG carried out a typologies study on money laundering through the real estate sector in the ESAAMLG region and produced a report in 2013 relating to money laundering in the real

estate sector in order to identify vulnerabilities and also to determine which methods and channels criminals use to launder money in this sector. Some of the most important findings in the report are *inter alia* that the majority of real estate transactions are cash based, that the police can only investigate money laundering in the real estate sector under their normal frames of reference due to the lack of enough regulatory bodies and legal frameworks with regard thereto and that only the predicate offences are investigated and not the money laundering part thereof. Another significant factor identified in this study, is the lack of the necessary attention given in the real estate sector in order to find ways to minimize the occurrence and quantum of money laundering. (ESAAMLG, 2013:4, 5; ESAAMLG, 2014:24, 25).

Due to the fact that money laundering is widely seen to be able to cause significant harm, it is valuable and important to try and understand the quantity of money being laundered (Reuter, 2013:224). Apart from the underlying criminal activity, Reuter (2013:224) identifies four ways by which society is affected by money laundering. The first mechanism refers to the fact that the financial system's integrity is put at risk. Secondly fiscal instability can be created as the launderers are more likely to shift money through the financial system when no valid underlying economic basis is present for such transactions. Apart from this, such criminals who do not have an investment goal of maximising the funds they generate will choose ways to invest or route the money which is not the most favourable to the larger economy. Lastly, when AML systems have been established and function properly at a bank or a country, their success in identifying money laundering could potentially create a problem for the applicable bank or country involved precisely due to its own efficient response.

The quantum of money being laundered in both the national and global economies is unknown, although the FATF initiated an effort in the late 1990s to quantify the amount of such funds being laundered (De Koker, 2013: Com 1-4). This lack of available estimates applies to both the amount of money being laundered as well as the spread thereof across different territories and fields of operation (Reuter & Truman, 2004:4). There are various reasons for this scarcity of information, but the main challenge is set out by De Koker (2013: Com 1-4) as being a result of the secret nature of money laundering transactions, which leads to a lack of proper, reliable statistics in respect thereof. Factors such as inadequate techniques employed as well as different classifications or interpretations of what money laundering entails, also play a part therein (Reuter & Truman, 2004:4).

South Africa is no exception to the above, and due to the unavailability of enough comprehensive statistics it is difficult to determine exactly how effective South Africa's AML measures are (ESAAMLG & FATF, 2009:7).

The result of the inability to quantify money laundering is that the assessment of how effective counter-measures, as implemented on a world-wide scale, cannot be measured by using estimated variances in such money laundering data (Reuter & Truman, 2004:4). Money laundering is, however, of such a serious nature that strong, corrective action is required (De Koker, 2013: Com 1-4).

Although the 2009 FATF MER indicates that there has been an improvement in the AML systems as South Africa is committed to implement these systems involving the cooperation between state organs (ESAAMLG & FATF, 2009:6), the 2017 amendments to FICA (which should further strengthen the South African measures to combat money laundering) introduced some challenges as the newly introduced RBA is unfamiliar to accountable institutions, including real estate agents, and limited information and research exist on the implementation of the RBA on the real estate sector to combat money laundering.

From the research done on the subject, it is clear that money laundering in the real estate sector constitutes a significant risk and must be prevented. Although there are a lot of research done on money laundering and the prevention thereof, there are limited sources available on the application of the legislative measures to the real estate sector, the responsibilities on real estate agents and the effectiveness of these measures.

In light of the above the following question arises: To what extent is money laundering combatted in the South African real estate sector?

1.3 Objectives

The main objective of this study will be to critically analyse the extent of AML measures in the South African real estate sector. The following are the secondary objectives which will be used in order to reach this main objective:

1. To select a working definition and give a thorough description of money laundering;

2. To determine how the real estate sector in South Africa functions and explore how it can be abused for money laundering purposes;

3. To analyse the FATF recommendations for combating money laundering in the real estate sector; and

4. To discuss the different legislative measures available in South Africa that can be applied to the prevention of money laundering in the real estate sector and the effectiveness thereof.

1.4 Research design/method

In order to find answers to the research question posed under section 1.2 above and to reach the objectives of this research proposal under section 1.3, a literature study will be conducted.

1.4.1 Literature review

The objective of this study will be to examine existing resources relating to this subject in order to form an opinion and reach a conclusion with regard to the research question.

The Reader's Digest Word Power Dictionary (2002:564) defines literature as "...books and writings on a particular subject (2)" or "leaflets and other material used to give information or advice (3)". This study will make use of books, electronic articles, newspaper articles, journal articles, acts, law reports and personal correspondence.

1.4.2 Empirical research

The study is a desktop study and thus only make use of existing resources and knowledge hence, no empirical study will be required.

1.4.3 Paradigmatic assumptions and perspectives

This study's ontological dimensions will be those of a relativist view of the world within which this research is conducted, meaning that reality cannot be observed as an external reality or truth, but rather that it depends on a number of circumstances and factors. As this relativist view has a direct influence on the meaning of knowledge, the epistemological perspective is that knowledge is seen as multi-layered and complex.

When considering the abovementioned ontological and epistemological assumptions, the philosophical paradigm of this study will be interpretivist as the research done will provide a better understanding of the research question. It is not likely that a single truth will be established but a qualitative analysis will provide a wider and subjective understanding of the research topic.

The methodological considerations will be post-structuralist/doctrinal as it is not descriptive research where specific characteristics of a population or situation are observed or a school of thought that stresses the reflective assessment and critique of society and culture. Data is furthermore not gathered and categorised into one specific theory.

This study will comprise an analysis regarding specific rules and legal systems that are relevant in order to provide a better understanding of the research problem posed under section 1.2 above. The research will be purely theoretical and no quantitative research will apply. The scope of the

research conducted will fall within the South African law, but international legal principles will also be consulted for a better understanding of the South African position.

1.5 Overview

Chapter 1: Purpose, scope and progress of study

The first chapter of the dissertation includes an introduction and background to the research topic as a motivation of the topic actuality. It clearly sets out the problem statement, research objectives and methodology as well as an overview of each chapter.

Chapter 2: Defining money laundering

In this chapter, a brief description of the origin of money laundering is given where after relevant definitions pertaining to money laundering are provided, which include *inter alia* “unlawful activities” and “proceeds of unlawful activities”. The different stages of money laundering, being placement, layering and integration, are furthermore discussed. Lastly, a brief discussion of the dimensions of money laundering is provided.

Chapter 3: Money laundering in the real estate sector

This chapter contains a background on the working of the South African real estate sector in order to gather a better understanding of this sector, as this dissertation specifically focus on money laundering through the real estate sector. A distinction is drawn between commercial and residential real estate aspects, and the vulnerabilities of this sector to money laundering are investigated.

This chapter incorporates the knowledge obtained in the previous chapter and specifically includes methods and practical examples of how money can be laundered through the real estate sector. This chapter also contains red flags as an indication that money is laundered through the real estate sector.

Chapter 4: The FATF and its role in combating money laundering in the real estate sector

As part of the combating of money laundering, the FATF’s role and workings are very important. As such, this chapter includes background to the FATF and the FATF Recommendations. The Recommendations which specifically relate to how money laundering can be combatted in the South African real estate sector, are discussed in detail.

Chapter 5: Legislative measures in South Africa to prevent money laundering in the real estate sector

This chapter includes the development of South African AML legislation, with specific reference to the combating thereof in the real estate sector. Applicable legislation include the Drugs and Drug Trafficking Act (140 of 1992) (DTA), Proceeds of Crime Act (76 of 1996) (PCA), POCA, FICA and the EAAA. South Africa's compliance with the FATF Recommendations is furthermore considered.

In order to assess the effectiveness of the preventative measures as posed in the research question above, the South African legislation is briefly compared to some international AML legislation/measures, which include the United States of America (USA) and the Kingdom of the Netherlands (Netherlands).

Chapter 6: Conclusion

The last chapter of the dissertation reviews the research question posed under section 1.2 and a summary of the information obtained in respect of each of the research objectives under section 1.3. An overall conclusion is reached together with recommendations for future research.

CHAPTER 2: DEFINING MONEY LAUNDERING

2.1 Introduction

Criminals or groups of criminals who produce large profits through their criminal activities have to control these profits in order to protect themselves and hide their underlying criminal activity. This is done through the movement of the funds to a destination which will draw less attention and in the process disguises the real origin of the funds, or through the alteration of the form of such profits (FATF, 2014d). From the above and the discussion in chapter 1 it is clear that it is difficult for criminals, with particular reference to organised crime syndicates, who engage in unlawful activities to disguise, protect and legitimise the funds which are obtained by means of these activities (Bourne, 2002:475).

According to De Koker (2013: Com 1-3), this disguising of the true nature of gains from their criminal activities has been occurring for many years, with the principal aims being the prevention of the forfeiture of their proceeds and preventing being incriminated. The criminals can then use these proceeds without risking the exposure thereof (FATF, 2014d). In modern times, criminals have developed new ways to disguise the origin of illegal proceeds from organised crime, due to the free movement of financial capital between countries (Unger, 2013b:21).

The goal of this chapter is to provide an in-depth description of money laundering in order to understand the working thereof, with specific reference to the real estate sector when one reads this chapter in conjunction with the succeeding chapters. In order to achieve this goal, a brief description of the origin of money laundering is given. Thereafter relevant definitions pertaining to money laundering are considered and lastly, the different stages and dimensions of money laundering are discussed.

2.2 The origin and source of money laundering

Before the 1980s, transactions with regard to illicit proceeds derived from criminal activities were not criminalised – the focus was rather placed on the predicate offence from which the proceeds were generated. It was only from the 1980s that money laundering was criminalised and the resultant proceeds confiscated (De Koker, 2013: Com 1-8).

The most common method through which criminals could move illicit funds and products between countries during earlier times was by means of false international trading (Unger, 2013a:3; Zdanowicz, 2009:855). Al Capone, a well-known gangster from Chicago, supposedly gave rise to the modern version of laundering illicit funds. During the 1920s, he is said to have set up a scam where he used launderettes, which were cash intensive businesses, to pass through the illicit

profits arising from his illegal alcohol sales (Lea, 2005; Unger, 2013b:19). In 1931, Al Capone was eventually found guilty on charges of the evasion of taxes and not for the illegal trade in alcohol or for money laundering (Unger, 2013a:3).

In the latter part of the 20th century, money laundering developed as experienced professionals in *inter alia* the legal, accounting, banking or financing fields assisted launderers to disguise the proceeds of crime (De Koker, 2013: Com 1-7). Since then, entities tasked with enforcing the law continued to develop ways to detect money laundering and organised criminals continued to invent new ways to launder money as part of a process of increasing competition between the two sides (Lea, 2005).

2.3 Money laundering definitions

Several definitions of money laundering exist in national and international instruments. These definitions are continuously adjusted due to the fact that money laundering trends continue to develop (Tuba, 2012:105). Ritzen (2011:241) confirms that no unanimity exists when trying to define money laundering and states that criminologists, economists, legal practitioners as well as law enforcement agencies have tried to establish such a definition over a period of time. There are, however, common themes through the several definitions which are summarised by Ritzen (2011:241) as “the concealment of value (not restricted to monetary funds or cash), in order to hide its illicit origin (e.g. organised crime) or destination (e.g. financing of criminal activities or terrorism) from the legal authorities”.

In order to thoroughly describe money laundering, various definitions obtained from reliable sources must be considered. According to the Oxford English Dictionary (2014), money laundering is “the process of concealing the origins of money obtained illegally by passing it through a complex sequence of banking transfers or commercial transactions”. Furthermore, Unger and Ferwerda (2011:21) define money laundering as “a series of activities meant to disguise the origin of illicit funds”. Madinger (2012:5) provides a simplified description of money laundering as the process whereby criminals try to convert so-called “dirty money” into apparent “clean money”. The underlying criminal act, as well as the fact that the illicit funds exist and the place where it is being allocated to are thus disguised (De Koker, 2013: Com 1-4).

A more complex definition of money laundering is found in the Financial Intelligence Centre Act (38 of 2001) (FICA), which defines money laundering or money laundering activities in section 1 as an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in

terms of section 64 of FICA or section 4, 5 or 6 of the Prevention of Organised Crime Act (121 of 1998) (POCA).

For purposes of this study, the above definition in FICA will be used as the working definition of money laundering, as it is the definition given to this concept in South African legislation.

“Unlawful activities” and the “proceeds of unlawful activities” are important aspects of money laundering arising from the above definition, which must be defined and/or described in order to distinguish money laundering from other crimes. Section 1 of POCA contains a set of specific terms and phrases, some of which are also used in FICA (De Koker, 2013: Com 3-5).

The first important aspect arising from the above definitions of money laundering is the definition of “unlawful activities”. Before the Prevention of Organised Crime Second Amendment Act 38 of 1999, “unlawful activities” were not defined in POCA. “Proceeds of unlawful activity” were, however, defined which led to some confusion. The Prevention of Organised Crime Second Amendment Act 38 of 1999 cleared up this previous uncertainty pertaining to the meaning of “unlawful activities”, as it introduced a definition thereof into POCA (De Koker, 2013: Com 3-6).

Section 1 of POCA describes “unlawful activity” as any conduct which constitutes a crime or which contravenes any law, whether such conduct occurred before or after the commencement of POCA and whether such conduct occurred in the Republic or elsewhere.

“Proceeds of unlawful activities” are also described in section 1 of POCA and consists of any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of POCA, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.

When one specifically looks at “proceeds of unlawful activity” in a money laundering context, it is important to note that the predicate offence must have been concluded and as a consequence of this offence, proceeds must have been “derived, received or retained”. The criminal must be in a position to manage these proceeds in order to launder the money, or to have it laundered for him by someone else (De Koker, 2013: Com 3-8).

As the definition of “proceeds of unlawful activity” as set out in section 1 of POCA includes “property”, it is also broadly defined in section 1 as money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof (De Koker, 2013: Com 3-5).

It is important to note the extraterritorial working of POCA with regards to “unlawful activity” and “proceeds of unlawful activity”. According to Kruger (2008:145), South African courts have jurisdiction over unlawful activities committed in terms of POCA irrespective of whether it occurred “in the Republic or elsewhere”.

South Africa takes an “all crimes approach” and therefore, the money laundering offence include proceeds derived from any offence criminalised in South Africa. In addition, the section 4, 5 and 6 money laundering offences also include proceeds or property derived through predicate offences committed outside the borders of South Africa (ESAAMLG & FATF, 2009:34).

2.4 Characteristics of money laundering

Money can be laundered virtually anywhere across the globe, due to the fact that it could follow nearly any crime which produces proceeds. Money launderers mostly prefer countries with weak anti-money laundering (AML) measures, where the risk of being caught is low and also where reliable financial systems exist, in order to get the illegally laundered funds back into circulation and thus achieve the goal of money laundering (FATF, 2014d).

Many criminals cannot rely on just a single money laundering transaction. Criminals and criminal groups who generate high volumes of cash need intricate or complicated schemes to launder their money, of which the objective is to make the money appear “clean” by the end of this cycle in order to be able to use it. Criminals thus have to plan the scheme with precision in order to reach the objective of money laundering (De Koker, 2013: Com 1-5, Com 1-7; Madinger, 2012:5). De Koker *et al.* (2017:5) indicate that such complex schemes can include the use of shell companies or a complicated series of international transactions which can include crypto currencies.

According to De Koker (2013: Com 1-7) the following could form part of the structure of a money laundering scheme:

1. In order to steer clear of suspicion being raised, it must seem to have a commercial purpose which is sensible;

2. Be efficient from a tax perspective to prevent any payment of the funds to the South African Revenue Service (SARS);

3. Be supported by documentation which appears to be both relevant and authentic; and

4. Be complex and difficult to detect or prevent.

From this section it is clear that in order for criminals to achieve the goal of making their illicit funds “clean”, they need to create a complicated scheme to minimise the risk of detection. In order to do so, criminals will use the different stages of money laundering which is discussed in the next section.

2.5 Stages of money laundering

There are three stages in which money laundering can be achieved (FinCEN, 2008b:6). These stages are thoroughly described by De Koker (2013: Com 1-6) when he draws a distinction between the three stages, being the placement stage, the layering stage and the integration stage. These stages can however apply simultaneously or independently from each other, depending on the money laundering method. All the stages are also not appropriate in all money laundering schemes (Tuba, 2012:105). It can sometimes be useful to break apart and distinguish between these stages, especially in a complex money laundering scheme (Reuter & Truman, 2004:25). It is important to note that in a cash-based economy, money laundering is much more hassle-free than in a non-cash-based economy, due to the fact that mostly only the last phase applies in a cash-based economy (Moshi, 2012:3).

2.5.1 The placement stage

Smit (2001:7) describes the placement stage as one where the money or property which is obtained illegally is moved into the financial system away from the location where it was originally acquired. During this stage, a criminal could try to divide large cash amounts which may be involved and deposit these smaller cash amounts into bank accounts to prevent suspicion being raised by means of the reporting processes under which financial institutions and other role players operate, when the cash is deposited (De Koker, 2013: Com 1-6). By depositing the illegally acquired money in this manner of re-structuring the payments, it is mixed with the legal money from a business which has intensive cash requirements and it thus becomes unclear what part of the money has been legally obtained – this system of structuring and integration of smaller payments can be termed “smurfing” (Ryder, 2012:1; Smit, 2001:7).

De Koker *et al.* (2017:5) explain that the purpose of the placement stage is to place the illicit funds at one or more than one financial institution in order to manipulate the illicit funds through the use of the financial institutions’ services.

The money launderer can also buy a sequence of monetary instruments. These instruments can then be deposited in a different environment from the original funds (FATF, 2014d).

Schneider (2010:16) maintains that this phase of the laundering process poses a high risk of exposure for the criminal. Furthermore, it is also during this stage that *inter alia* financial institutions, real estate agents, accountants as well as lawyers are vulnerable to money laundering (Ryder, 2012:1). It is important to emphasize that real estate agents can be vulnerable to be misused by criminals for the purpose of laundering their illicit proceeds by entering it into the financial system. Methods of how the real estate and real estate agents can be used during this stage of laundering are discussed in more detail in chapter 3.

2.5.2 The layering stage

The second stage is also especially important for criminals who wish to launder their money through the real estate sector. During the previous stage the money has been moved into the financial system, and according to Lea (2005) it must now be distributed. This placement stage is thus now followed by the layering stage which comprises a blurring of the money trail by means of a series of complex transactions in order to draw a separation between the illicit proceeds of the crime and their criminal source (De Koker, 2013: Com 1-6). Smit (2001:9) stresses that these complex transactions are not done solely so that the criminal can make a profit, but rather that the money or property which is obtained illegally can be seen as legitimate. These transactions may, in many cases, include the moving of the illicit proceeds across different jurisdictions and can include electronic wire transfers, shell corporations, false invoicing as well as fictitious import and export transactions (De Koker *et al.*, 2017:5; Smit, 2001:8).

Ryder (2012:1) states that during this stage, the launderer makes it harder to detect the proceeds of crime and attempts to place a distance between the funds and its origin. Launderers make use of a wide spread of accounts, particularly in countries where money laundering is not investigated (FATF, 2014d). Furthermore, according to Schneider (2010:17, 18), the layering phase can also be made easier when countries do not assist each other in getting the criminals prosecuted.

2.5.3 The integration stage

This last stage of the process involves the collection of the original amount, less the costs of the laundering process (such as bank costs, taxes etc.) and managing these by the criminal to appear as if they were legitimate business funds (De Koker, 2013: Com 1-6). In order to move the funds which formed part of the layering stage into a business which appears legitimate, shell corporations investments, the buying of stocks, real estate or art, or the use of other investments are used. It is very difficult during the integration stage to find a relationship between the funds and the original source of such proceeds stemming from the original criminal activity (Smit, 2001:9). This is supported by Ryder (2012:1) who confirms that such funds now form part of the economy again. Smit (2001:10) describes that this stage of laundering is the “culmination of a

successful money-laundering scheme" as the criminal can gain possession of the proceeds without being afraid of being detected.

With specific reference to investment in real estate, criminals can thus now use this last stage of the laundering process to complete the cycle. Examples of how criminals can use the placement, layering and integration stages is discussed in more detail in chapter 3.

As mentioned earlier in this chapter, all three stages of money laundering may not necessarily be present in all money laundering schemes, with either a lesser or larger number of stages being possible. De Koker (2013: Com 1-6) specifically refers to South Africa and states that only the placement stage is present in many such local money laundering schemes. Neither layering, nor integration is thus present as the criminal places the money into the same financial system and thereafter simply withdraws it again. Analysis by means of the three-stage process should in such instances be done with circumspection.

2.6 The occurrence of money laundering

After drawing the above distinction between the three stages of the money laundering process, the next discussion will briefly focus on where these money laundering activities typically take place – both during the three stages of the laundering process as well as in each of the different dimensions of money laundering.

It is important to study where money laundering takes place during the abovementioned three stages of laundering. In terms of locality, the geographical area where acts of money laundering occur or are centred could depend on the relative stage thereof. During placement, the criminal could generally deposit the money relatively near to where the criminal activity, which produced the illicit funds, occurred. The criminal will use a place where sufficient infrastructure during the layering phase exists – this can include, *inter alia*, an offshore financial centre or a world banking centre. During the last phase of the laundering process, further localities are used by the launderer, particularly when the funds were originally generated in economies which are unstable or where the launderer had few suitable opportunities for investment (FATF, 2014d).

Goredema (2003:3) indicates that the patterns of money laundering within the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) can consist of three dimensions. The first of these, internal money laundering, occurs where proceeds of crime which were committed within a country are laundered within the same country. Drug traffickers, for example, prefer to launder their proceeds of crime locally. They can, for example, invest it in motor vehicles, firms which operate legally, front companies, or in the residential real estate market (Goredema, 2003:3, 4). Another type of predicate offence of which proceeds are laundered by criminals,

relates to commercial crime. This includes all forms of commercial crime where criminals can generate proceeds – the more such criminal instances occur, the greater the possibility becomes that these will result in proceeds being laundered by the criminal (Goredema, 2003:7).

Incoming money laundering, being the second dimension, occurs when the proceeds of crime which were committed outside the country are brought into the country. The reasons why criminals could prefer to transfer their illicit proceeds across territories can be due to law enforcement in the country where the money is brought into not being strong, as well as to better invest their money in this country, or to make it more difficult for investigations by authorities by moving these funds (Goredema, 2003:3, 10).

The last (third) dimension is outgoing money laundering. This dimension, the opposite of incoming money laundering, occurs when the proceeds of crime committed inside the country, are exported to other countries to be laundered. Criminals will move their proceeds of crime out of the country in which it was derived into another country in order to cover their tracks in the laundering process and not necessarily to invest their money in the other country (Goredema, 2003:3, 12).

With reference to the stages of laundering, all three stages of money laundering (placement, layering and integration) can occur in any of the dimensions indicated above. Placement, layering and integration will take place in the same country in which it was obtained through the predicate offence, in the case of internal money laundering. When incoming money laundering is present, placement will take place when the money which was derived somewhere else, enters the country and lastly, during outgoing laundering, the proceeds are concealed by moving them into another country (Goredema, 2003:3).

2.7 Offences relating to money laundering

Money laundering is defined in section 2.3 above. It is furthermore important to study the offences relating to money laundering as criminalised by means of POCA. Sections 4, 5 and 6 of POCA contain the different offences relating to the proceeds of unlawful activities (FIC, 2018b:187, 188).

Section 4 of POCA criminalises money laundering and determines that any person will be guilty of an offence if he/she knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and either enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not, or if he/she performs any other act in connection with such property, whether it is performed independently or in concert with any other person and has or is likely to have the following effect:

1. To conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

2. To enable or assist any person who has committed or commits an offence, whether in the Republic or elsewhere in order to avoid prosecution; or to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence.

According to De Koker (2013: Com 3-11), section 4 of POCA increases the risks for criminals by determining that the criminal commits another offence if he/she hides or spends the proceeds of the crime committed or executes any other acts set out in section 4. Consequently, not only the offence which generates the proceeds of crime will apply, but also specified subsequent acts following the original crime.

It is clear from the above that section 4 of POCA has to do with acts relating to illicit proceeds arising from the offence, which includes the acts of the criminal who obtained the proceeds. Sections 5 and 6, relate to and criminalises acts involving third parties who help to launder proceeds derived from another person's unlawful activities (De Koker, 2013: Com 3-11).

Section 5 of POCA specifically criminalises an offence for assisting someone else to benefit from the proceeds of unlawful activities (Kruger, 2008:40). Any person shall be guilty of this offence if he knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby:

1. The retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or

2. If the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way.

This section is summarised by De Koker (2013: Com 3-11) as being any agreement, arrangement or transaction effected by a person in order to assist someone else to use and enjoy the proceeds which were derived from the predicate offence. He furthermore describes that this agreement, arrangement or transaction can be made with the person who originally raised the proceeds from their illegal activities, or family members, organised crime members or with another person, which leads to reach thereof being wide-ranging (De Koker, 2013: Com 3-12).

In addition to the offences criminalised under section 4 and 5 of POCA, section 6 criminalises the acquisition, possession or use of proceeds of unlawful activities (Kruger, 2008:41). According to

this section, a person shall be guilty of an offence if he/she acquires, uses or has possession of property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person. It is clear that this section, in contrast to the above, does not relate to a person who in the first instance committed the offence from which the proceeds were derived, but rather focus on acts where another person acquires, uses or possesses the proceeds of the original unlawful activities of someone else (De Koker, 2013: Com 3-12).

It is important to note that a person does not have to be convicted of the underlying predicate offence which gave rise to the illicit funds before the person can be convicted of the money laundering offences in sections 4, 5 and 6 of POCA (ESAAMLG & FATF, 2009:33).

An important concept arising from sections 4, 5 and 6 relates to the phrase “knows or ought reasonably to have known”. According to De Koker (2013: Com 3-24) the offence of money laundering cannot be committed by a person if he or she does not know or ought reasonably to have known that “the property concerned is or forms part of the proceeds of unlawful activities”.

POCA and FICA sections 1 (2) both describe that this concept of knowledge relates to the fact that a person will have knowledge if he or she has actual knowledge of a fact, or in cases where the court is satisfied that the person believed that there is a reasonable possibility of the existence of that fact but fails to obtain information to confirm the existence of that fact.

According to De Koker *et al.* (2017:54), the first element of the above statutory definition of knowledge involves actual knowledge, whereby the second element are commonly known as “wilful blindness”.

Section 1 (3) of both POCA and FICA contains the test of when a person ought reasonably to have known or suspected a fact as being if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both:

1. The general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

2. The general knowledge, skill, training and experience that he or she in fact has.

In Savoi and others v National Director of Public Prosecutions and another (2014), Judge Madlanga expressed the following view on the phrase “ought reasonably to have known”:

> Paragraph (b) of this section does bring in an element of subjectivity. In my view this is more consonant with the interests of justice than the purely objective test for negligence. In its traditional formulation the objective test ignores the individual attributes of people: their level

> of education; background; personal beliefs – religious and otherwise; idiosyncrasies; fears; and so on. It has been argued that there is a potential for injustice when a completely objective criterion of negligence is applied.

Guidance Note 4B of the Financial Intelligence Centre (FIC) indicates that a suspicious state of mind is subjective as a court has to reach a conclusion on the basis of evidence and reasoning concerning an individual's state of mind relating to a specific set of circumstances. However, an element of objectivity is added by the phrase "ought reasonably to have known or suspected", as contained in section 29 (1) of FICA (FIC, 2019a:14).

From the above, it is clear that this test contains both an objective and a subjective factor. De Koker *et al.* (2017:56) recognise the importance of this test and indicate that the Courts are bound to examine this matter further. POCA and FICA are discussed in more detail in chapter 6.

2.8 Conclusion

Money laundering, when compared to other forms of crime, is known to be very diverse in terms of its composition, who participates and where it occurs (Reuter & Truman, 2004:25, 26). In South Africa, money laundering often works the same as in other countries, but due to particular elements of its economy, the scope of its legal system as well as the ways in which organised criminals operate in South Africa, new procedures or schemes, which contain different and even unique characteristics from those abroad, are present (De Koker, 2013: Com 3-29).

De Koker *et al.* (2017:6) indicate that money laundering does not always take place in a complex, drawn-out and international process in order to make it difficult to follow the money. Nowadays, criminals can use technology to complicate their schemes and make it difficult to detect.

From this chapter it is clear that criminals with illicit funds derived from their criminal activities have to disguise these proceeds in order to prevent detection and to be able to use it again. The discussion in this chapter provides a better understanding of what money laundering is and the stages which launderers could potentially use to successfully launder their illicit proceeds. In the next chapter, more detail is provided with regard to methods which criminals use in the real estate sector for money laundering purposes, as this constitutes the focus of this study.

CHAPTER 3: MONEY LAUNDERING IN THE REAL ESTATE SECTOR

3.1 Introduction

As discussed in the above chapters, the focus of this study is on one of the major money laundering trends in South Africa, namely the purchasing of goods and properties and, more specifically, the abuse of the real estate sector for the purpose of money laundering (De Koker, 2002:31).

The Financial Action Task Force (FATF) and International Monetary Fund (IMF) have both made reference to the fact that this sector is often used by individual criminals as well as organisations when they want to hide their illegally obtained funds (ESAAMLG, 2013:5). This is furthermore confirmed by the Estate Agency Affairs Board (EAAB) (EAAB, 2012), which states that there is empirical evidence which shows the misuse of real estate transactions by criminals.

In an Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) typologies report on money laundering through the real estate sector in the ESAAMLG region, the real estate sector is identified as one which is vulnerable to money laundering and terrorist financing activities due to its rapid growth (ESAAMLG, 2013:4).

The real estate sector as a whole can be misused by criminals. Shelley (2013:131) identifies that commercial, as well as residential real estate transactions, present the opportunity for money laundering activities due to the potential to mix both legitimate and illegitimate funds. When specifically looked at in the South African context, Matheza (2009) recognizes that there are many opportunities for fraud and money laundering in the local real estate industry, due to the amounts of money involved in both residential and commercial real estate transactions.

Internationally, these risks are also present as Soudijn and van Duyne (2009:184) confirm that in the Kingdom of the Netherlands (Netherlands), money derived from criminal activities poses an economic and financial threat to the society at large and in particular to the real estate sector.

The preceding chapter explains the money laundering process and clearly sets out that money laundering is a consequence of one or more predicate offences. The real estate sector is no exception and is vulnerable to the same predicate offences as the other sectors. Some of these predicate offences identified consist of *inter alia* fraud, tax evasion, embezzlement, the manipulation of records, forgery as well as the breach of statutes relating to this sector (ESAAMLG, 2013:7). The ESAAMLG typologies report on money laundering related to illicit dealings in and smuggling of motor vehicles in the ESAAMLG region identified, as one of the issues in the report, that the real estate sector is the most vulnerable area that can be used to

enable money laundering activities of illicit funds derived from dealing in and smuggling of motor vehicles (ESAAMLG, 2012:5).

It is clear that money laundering in the real estate sector constitutes a significant risk with serious consequences. Shelley (2013:135) indicates that money laundering in the real estate sector can lead to an increase in prices, which makes it impossible for local individuals when they want to buy real estate. The President of the Financial Action Task Force (FATF) suspected in 2005 that the sharp increase in property prices in South Africa had money laundering as one of its main underlying reasons (Shelley, 2013:135). Furthermore, a serious threat to the legal economy due to money laundering has been identified by the Organisation for Economic Co-operation and Development (OECD) (OECD, 2009:11).

In order to determine how the real estate sector in South Africa functions and to explore how it can be abused for money laundering purposes, this chapter is divided into four parts. Firstly, the working of the South African real estate market is discussed, which includes relevant definitions relating to real estate and the different forms thereof. Secondly, reasons why the real estate is such a vulnerable sector to money laundering are identified. The third part relates specifically to how money could be laundered through the real estate sector. There are also red flags which would indicate when the real estate market is being used for money laundering, which is discussed in the last part of the chapter.

3.2 The real estate market

3.2.1 Real estate definitions

It is, firstly, important to understand what real estate is. Pirounakis (2013:1) describes real estate as a concept which comprises of land and buildings as well as the legal rights relating to immovable property, which can be given a value to be potentially sold in a market, regardless of it being a real or possible market. The ESAAMLG (2013:7) defines real estate as “ownership and rights to land, purchasing and selling of immovable property (residential, commercial, and agricultural), leasing and management and valuation of immovable property”. Unger and Ferwerda (2011:7) not only describes real estate as the value of physical objects for construction or trading purposes which comprise the means of providing shelter, but also as the total wealth represented by these physical objects, and as the “investment opportunities and financial assets related to these physical objects”.

Pirounakis (2013:9) set out *inter alia* the following characteristics of real estate:

1. The form of use is defined by specific legal rights and property rights;
2. The market is competitive within a monopolistic framework;
3. Various sub-sectors exist which interact with each other;
4. It has many facets and interacts with financial markets and the economy as a whole;
5. It applies to specific permanent locations;
6. Prices depend on demand and supply of property or land;
7. The physical duration of the asset is long – it can be a durable object;
8. The costs of development and construction are relatively high, as are the costs of the transactions involved and moving costs; and
9. It can constitute an element of wealth and can be a durable, expensive and scarce asset.

Apart from defining the real estate sector, one should also look at the definition of an estate agent. An estate agent is defined in section 1 of the Estate Agency Affairs Act (112 of 1976) (EAAA) as any person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, directly or indirectly advertises that he, on the instructions of or on behalf of any other person:

1. Sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or purchaser therefor;
2. Lets or hires or publicly exhibits for hire immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor;
3. Collects or receives any moneys payable on account of a lease of immovable property or any business undertaking; or
4. Renders any such other service as the Minister on the recommendation of the board may specify from time to time by notice in the Gazette.

An estate agent can thus be seen as “any natural person or partnership or company or close corporation or trust that performs any acts as an estate agent as defined in section 1(vi) of the Act and/or regulation 2 of the Specification of Services notice published under Government Notice R1485 of 17 July 1981” (EAAB, 2015:1).

3.2.2 Commercial and residential real estate

Real estate can be divided into commercial and residential real estate and Pirounakis (2013:125) draws a clear distinction between these two concepts. Property which can either produce income by means of rental or which can be disposed of in order to generate a profit, even if this happens in the future, relates to commercial real estate. In contrast thereto, residential real estate consists of properties which are occupied by the buyers thereof, but will fall under commercial real estate in the case where such properties are developed with the goal of the developer selling or renting such properties to general members of public. Knight Frank (2015b) categorises residential real estate into sectors, being city living, exclusive property, farms and holiday lets. Commercial real estate are categorised into offices, industrial, retail, call centres, farms and warehouses (Knight Frank, 2015a). Other examples of commercial real estate consist of hotels, hospitals, petrol stations and cinemas (Pirounakis, 2013:125).

3.2.3 The workings of the South African real estate sector

Conveyancing refers to the transfer of immovable property ownership. In short, the transaction starts with a deed of sale and entails aspects such as registering and transferring ownership and registering applicable mortgages on the property at the relevant Deeds Office, through to the final payment made by the purchaser (Chas Everitt International Property Group, 2019).

An estate agent and conveyancer are two important role players in the conveyancing process. Most home owners who are interested in selling make use of a real estate agent. They use these agents to help find a buyer for the property (Samuel, 2014). According to Bray (2015), in some real estate markets in the world, there are two sets of estate agents involved, namely one to represent the buyer as well as one to represent the seller. He states that in South Africa there is a “one agent mentality” – the same agent who is the link and communicates with the seller, will also show the buyers the property which is for sale.

Bray (2015) furthermore describes that a real estate agent makes the process of selling and buying, which can sometimes be a difficult process, easier. The agent can determine the value of the property and, is responsible for open days and for showing people the property. He/she also takes responsibility for the marketing of the property and can also enter into negotiations with potential buyers.

A conveyancer is of utmost importance during the process of conveyancing as it is the only person, according to law, who can arrange for the registration in the deeds offices of the transaction to transfer the property's ownership from the seller to the buyer (Chas Everitt International Property Group, 2019). The South African Land Registration System is part of the best in the world and must thus be protected by this set structure (Chas Everitt International Property Group, 2019; Connecta Realty, s.a).

A conveyancer is an attorney, who also possesses specific qualifications at a post-graduate level and can also be called a transferring attorney. The seller, in most cases, chooses the conveyancer (Chas Everitt International Property Group, 2019; Samuel, 2014). The conveyancer must make sure that each step in the conveyancing process complies with the relevant law (Van Hoogstraten, 2015).

3.2.3.1 Important steps in the conveyancing process

Samuel (2014) states that the first important step in the conveyancing process is when the seller and the buyer both sign a Deed of Sale, in order for the sale of the property to be legally recognised in accordance with the Alienation of Land Act (68 of 1981). This agreement, which clearly sets out information relating to the immovable property and the corresponding price thereof, must be in writing and signed by both the parties, as a non-written contract will not be enforceable in terms of section 2 of this Act (Chas Everitt International Property Group, 2019; van Hoogstraten, 2015).

A process which frequently applies, and which then ends up as the relevant Deed of Sale, is the use of an offer to purchase, in the form of a standard contract used by a real estate agent. This initial offer to purchase functions as the equivalent of a complete Deed of Sale, with the main difference relating to the fact that it is at first only signed by the buyer. After acceptance of the offer to purchase by the seller and signature thereof by him/her, it will accord to legislation and, will constitute a Deed of Sale (Samuel, 2014).

The conveyancer will investigate various important aspects relating to the property, including *inter alia* details of current owners, property description, registered limitations of property rights such as attachments or judgements, etc. This commences by establishing and inspecting the correctness of all aspects related to the property as are contained in the deeds registry. The conveyancer will furthermore inspect records of a company in the case where one or more of the parties is either a company or close corporation (Samuel, 2014).

Samuel (2014) further describes that the conveyancer, after collecting all the necessary information, will now set up the documents necessary for the transfer of the property, which must

be signed by both the buyer and the seller. After both parties have signed and the conveyancer has collated and compiled further documentation in relation to the property, he will now lodge the documentation at the Deeds Office. The transfer documents, cancellation and re-registration documents for the mortgage bond must be lodged at the same time in order to be inspected, and thereafter registered (Samuel, 2014; van Hoogstraten, 2015). Before the property can be successfully registered, examination of approximately one week's duration will be executed by the Deeds Office. If no problem exists to cause the documents to be lodged again, registration will take place (Samuel, 2014).

The above is just a brief description of the South African real estate market in order to understand how this sector works and how it could possibly be abused by criminals for the purpose of money laundering. The latter is discussed in more detail in the rest of this chapter.

3.3 Vulnerabilities of the real estate sector and related parties to money laundering

As stated previously, the real estate sector has been identified as one which is vulnerable to money laundering. The succeeding section therefore focus on some of these vulnerabilities in order to better understand this phenomenon and the prevention thereof.

FATF plays a crucial role in the fight against money laundering and terrorist financing. In order to be informed of how a criminal or criminal groups can use a sector for money laundering purposes, FATF actively takes part in research and applies case studies as one of its methods in this regard. Apart from the identification of these vulnerabilities, FATF also identifies red flags of when a transaction can possibly be part of a money laundering scheme (FATF, 2014c:14). These red flag indicators are discussed in section 3.5 below.

The following discussion not only looks at vulnerabilities of the real estate sector itself, but also those relating to related parties, i.e. legal professionals and real estate agencies.

3.3.1 Vulnerabilities of the real estate sector

Nelen (2008:755, 756) states that the real estate sector is vulnerable to be misused by launderers and provides characteristics of this sector which makes it vulnerable. These characteristics are summarised as follow by Unger and Ferwerda (2011:19):

1. The real estate environment is safe and renowned;

2. It can be difficult to quantify values objectively;

3. A lot of speculation can take place in this sector;

4. The person who pays for the property or receives the money, is not automatically the same entity as the buyer or seller, as this sector allows for a differentiation between ownership in a legal and in an economic sense; and

5. Criminal activities can take place in this sector by means of the use of specific real estate properties.

Another reason why the real estate sector is vulnerable to money laundering may be due to its ability to make quick sales (ESAAMLG, 2013:10). In a report on tax fraud and money laundering vulnerabilities involving the real estate sector, the three vulnerabilities identified by the OECD (2007:7) as being reported the most are:

1. The ease of under- or over declaration of the correct real estate value;

2. The potential of attracting criminal money; and

3. The opportunity to hide true ownership.

Other vulnerabilities identified by the OECD (2007:8) include the following:

1. The prices of residential and business properties escalating at a rapid pace;

2. Problems in identifying the real/beneficial owners of off-shore structures;

3. Fronting through the use of nominees;

4. Acquisitions across international borders;

5. High turnover rates in real estate and quick succession of transactions;

6. Problems relating to the means of payment, including administrative restrictions on accessing banking information and the potential use of large cash amounts;

7. Abuse of notaries;

8. The role of intermediaries (real estate agents and others) as potential key enablers of money laundering and tax fraud;

9. Opportunities for corruption and/or other related crimes;

10. Difficulties in acquiring reliable information timeously with regard to transactions and the transfer of money in the real estate sector;

11. Potential evasion or leakage of taxes; and

12. Potential unacceptable tax planning practices.

When one specifically looks at the ESAAMLG region and South Africa, the ESAAMLG (2013:5) typology report on money laundering through the real estate sector in the ESAAMLG region, found that the real estate market in this region is often unstable. This sector also frequently has escalating prices and is a perfect environment for criminals to hide their illicit funds. This is an ideal environment whether the criminal will make a profit from the investment in the real estate or not (ESAAMLG, 2013:5).

Mthembu-Salter (2006:25) provides reasons why South African real estate is an excellent and popular way for criminals to invest their criminal or legitimate funds. This not only includes the significant increase in prices of South African property over the past few years, but also that the banking system in South Africa is seen as sophisticated. This makes the movement of funds reasonably easy, notwithstanding the existence of exchange controls. A comprehensive legal framework also exists, which ensures the execution of real estate transactions in an environment where property rights are effectively protected. The impression also exists amongst some international criminals that South Africa may potentially be a suitable hiding place, due to its remoteness from the balance of the world and thus from its enforcement agencies. This is confirmed by Ashton (2012) as he explains that “South Africa has increasingly become a haven for international criminals and gangsters and corrupt leaderships, as well as providing an important transit point for international crime”.

3.3.2 Vulnerabilities of legal professionals

Another vulnerability of money being laundered into the real estate sector is the enormous amounts which legal practitioners such as conveyancers handle on behalf of their clients when immovable property is purchased, compared to the low numbers of Suspicious Transaction Reports (STRs) reported to the Financial Intelligence Units (FIUs) in this sector (ESAAMLG, 2013:12).

As indicated in the FATF (2013d:44) report on money laundering and terrorist financing vulnerabilities of legal professionals, the involvement by a legal professional can either be a legal requirement relating to the transfer of property, or this may be based on custom and generally accepted practice. The legal professional will be familiar with the financial details relating to the purchase or sale of real estate and have the opportunity to ask further questions, even if money isn’t directly handled by them.

ESAAMLG (2013:12, 13) provides a brief summary of the vulnerabilities for legal professionals as set out in the above-mentioned FATF's report on money laundering and terrorist financing vulnerabilities of legal professionals. These vulnerabilities include *inter alia* the following:

1. When legal practitioners are involved in the purchase of property and large cash amounts are used without an STR being reported by the legal practitioner. This could indicate complacency towards money laundering or that they could or should have raised more questions;

2. When information relating to ownership is twisted through the use of intermediaries or fronts, as well as supplying false information as part of the processes involved in the execution of the property transactions;

3. The rapid creation by legal practitioners of money laundering havens by means of property transactions which are aborted and which then involves the repayment of the initial deposit amount or the transfer thereof to other legitimate accounts of the client or the legal professional's own trust account;

4. In cases where the legal practitioners facilitated the creation of complex structures for the purposes of purchasing real estate; and

5. The legal practitioner is used as a front for the purchase of property by means of the use of a company or trust, in order to avoid exposure of the real or beneficial owner.

3.3.3 Vulnerabilities of real estate agencies

In the ESAAMLG (2013:11) typology study, the project team found that some real estate agencies do not fulfil their role in the real estate sector and fail to implement necessary and compulsory anti-money laundering (AML) legislation.

The value of a property is not controlled by the estate agents and the real estate sector, but is set by the property market. One of the vulnerabilities relating to real estate agencies are due to the fact that they are not obligated to ensure that a person is the beneficial owner when they enter into a transaction with them. The ESAAMLG's typology report further found that not all real estate agents who are required to register obey this obligation (ESAAMLG, 2013:9).

Although there are vulnerabilities relating to real estate agents, they can also be very important and helpful in the fight against money laundering, as they form a crucial part of real estate transactions by being involved with both the buyer and the seller of the property. Real estate agents can play a very important role in detecting money laundering, due to the fact that they are

involved in a majority of real estate transactions. Real estate agents can thus take part in the detection of some red flag indicators, as described later in this chapter (FATF, 2007b:29).

3.3.4 Strengths and vulnerabilities of the ESAAMLG region

The real estate sector also possesses various strengths. Some strengths and vulnerabilities as they relate to the real estate sector of the ESAAMLG region, are emphasized in the ESAAMLG (2013:28) report on money laundering through the real estate sector in the ESAAMLG region. The strengths of the real estate sector in this region includes *inter alia* that real estate is mostly defined in the same way, the fact that most of the jurisdictions have operational FIUs, there is enough time for law enforcement agencies to intervene with a transaction due to the time involved to complete the transaction, the deterrent nature of penalties applicable to real estate offences, sufficient structures to co-operate across international and national boundaries, the existence of a sufficient legal framework for property registrations as well as the fact that records can be accessed easily.

In contrast to the above strengths, the vulnerabilities in the ESAAMLG's real estate sector are *inter alia* as follows (ESAAMLG, 2013:28, 29):

1. The fact that cash can be used for real estate transactions;
2. Mortgage bonds are used to launder the illicit proceeds;
3. Corporations are used to obtain property;
4. Some records continue to be kept manually;
5. The ineffective implementation of laws with regard to the real estate sector;
6. There is sometimes a lack of integrity by some lawyers and bank officials;
7. There are unregistered parties in the industry;
8. The role of conveyancers; and
9. Large growth of the real estate sector due to criminal proceeds.

3.4 Money laundering activities in the real estate sector

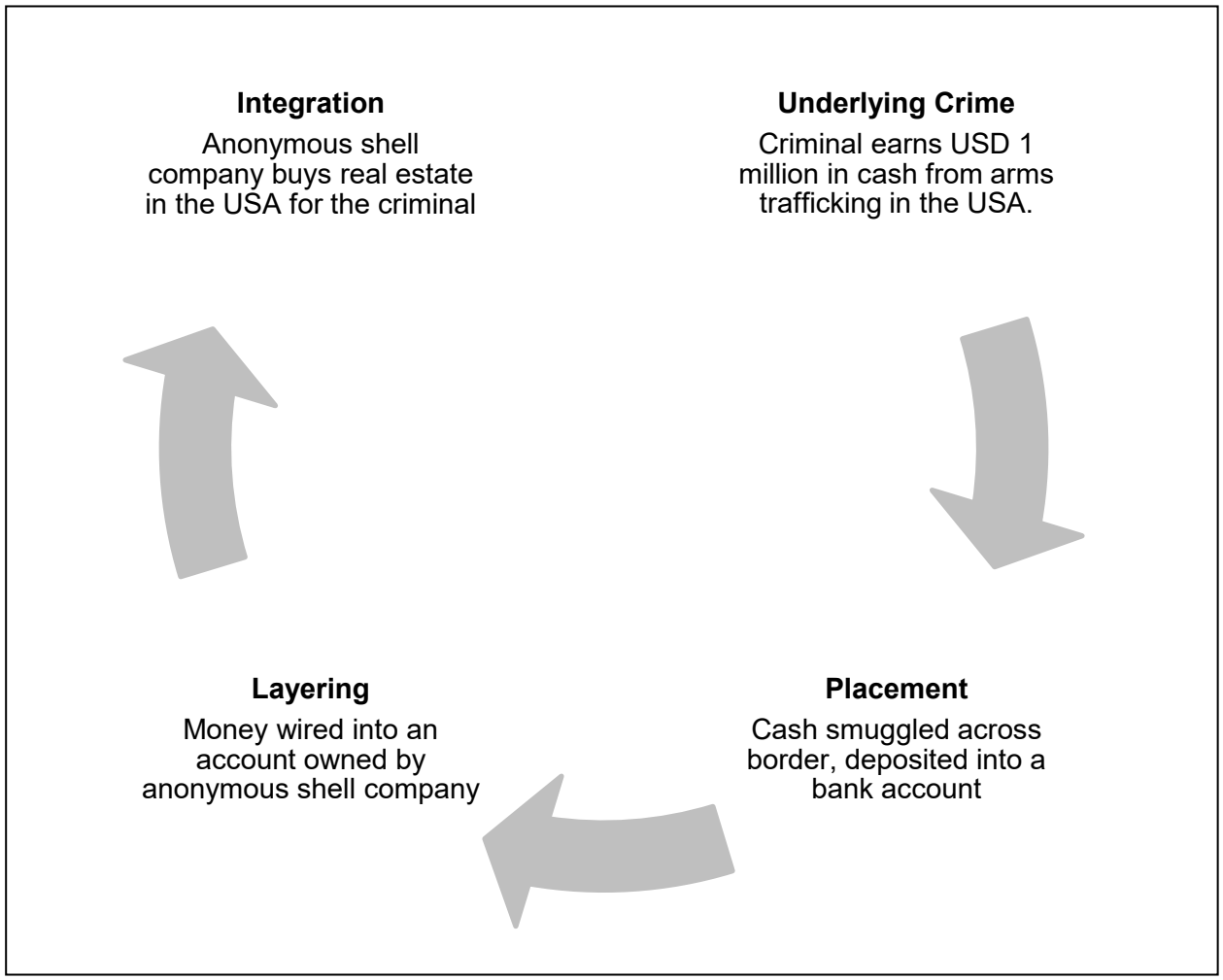
From the above discussion, read in conjunction with chapters 1 and 2, it is clear what money laundering is and how the real estate sector works. The next section therefore focus on how the real estate sector can be abused for money laundering purposes.

It is firstly important to note that money can be laundered through commercial as well as residential real estate. De Koker (2013: Com 3-30) indicates that the type of property purchased by criminals often relates to residential properties, but in some reported cases, commercial and farming properties were also involved. Shelley (2013:131) provides a reason for commercial as well as residential real estate being favourable to money laundering – it is due to the fact that both legitimate and illegitimate funds can easily be mixed. According to the Financial Crimes Enforcement Network (FinCEN) (2006:30), a meaningful increase in suspicious incidences relating to potential money laundering was identified, with certain company sub-types under the commercial real estate sub-sector appearing to be involved more frequently than others. These include companies involved in the management of property, or investment companies, and development companies operating in the real estate sphere. With regard to residential real estate money laundering, criminals will attempt to pay money with long time-lapses in between the payments. They try to make these payment transactions look normal whilst buying property to disguise the proceeds of their crimes (FinCEN, 2008a).

Secondly, apart from the fact that money laundering can occur in both residential and commercial real estate, Shelley (2013:132) maintains that every stage of the laundering process can be applied to real estate transactions. Unger and Ferwerda (2011:21) provide examples of how real estate can be used in the three stages of money laundering. During the placement stage, the criminal could give the illicit money to a real estate agent to buy a house in order to place the illegal money into the construction of real estate. In the second (layering) phase, the criminal could try to transfer the illegal money around the world through a loan given by a foreign bank (in effect the actual hidden money) to the person buying the property. Lastly, during the integration stage, the money is placed into the real estate sector when the person obtains the property. The actual intent of the criminal is, however, not to trade in real estate but to invest the illegal proceeds.

Another example of how real estate can be used in all three stages of the money laundering process is illustrated in Figure 3-1:

Figure 3-1: Example of money laundering through real estate



Source: GFI (2015).

The last phase of money laundering, namely integration, is especially important for money laundering purposes from a real estate perspective. It is during this stage that the criminal or criminal group finds a parking place for the investment of the proceeds stemming from their criminal activities (Unger & den Hertog, 2012:300). Unger and den Hertog (2012:300) further describe that when these criminals use this stage in order to invest in real estate, it can either be for generating legal income (e.g. rental income) or for the use of conducting further criminal activities.

3.4.1 Methods to launder money through the real estate sector

One of the characteristics of money laundering is that a wide variety of methods are possible, which criminals could potentially use to launder their illicit funds (Reuter & Truman, 2004:27). When one specifically looks at real estate transactions, it is evident that investment in property

can disguise illicit funds. These properties can be sold back and forth through the use of shell companies, front companies or even false identities (Reuter & Truman, 2004:31).

Common methods through which money can be laundered in the real estate sector include *inter alia* the purchasing of real estate by using large cash amounts, using third parties, gate keepers or fronts to purchase or lease properties; arranging mortgage bonds and settling these through large cash payments, the use of locals to acquire real estate on behalf of foreign nationals and the use of unregistered real estate agents, who do not follow the accountability rules of the regulators (ESAAMLG, 2013:7, 8).

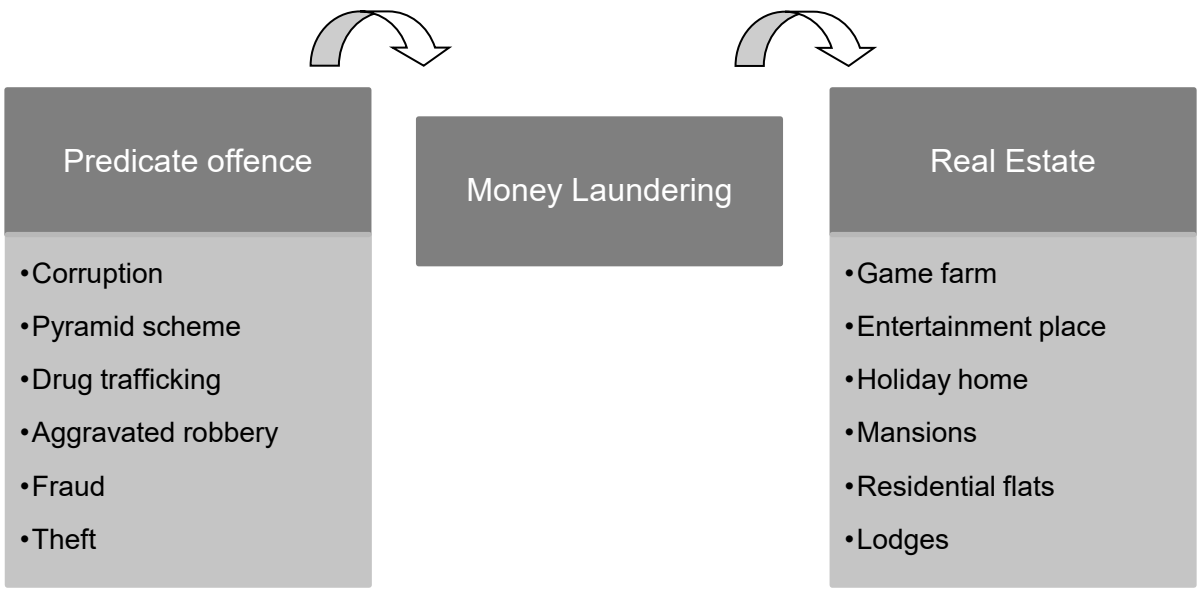
The OECD (2007:2) identified the three most common methods and schemes to launder money. This is reported as the manipulation of prices, applying undeclared income/transactions and nominees and/or false identities, and the establishment of corporations or trusts to hide the true identity of the beneficial owners. Further methods to launder money which were also identified include fictitious transactions, false invoicing and the layering of transactions.

De Koker (2013: Com 3-30) also indicates some methods applicable to money laundering through the real estate sector, frequently including registering real estate in the name of a family trust or business trust which is under control of the criminal. This is done because of the risks of confiscation and forfeiture of the criminal's assets. In other cases, criminals use a trust account of an attorney or estate agent to launder the proceeds of their crime. This is done when criminals are assisted by an attorney or an estate agent to acquire property. The criminal then pays the proceeds of crime into the attorney's or estate agent's trust account, but cancels the instructions a few days later. The money is then repaid to the criminal (usually by means of a cheque drawn) by the attorney or estate agent. According to the ESAAMLG (2014:25), these Designated Non-Financial Businesses and Professionals (DNFBPs) can also place money in their trust accounts with the goal to use these funds to acquire real estate on behalf of the launderers, which are their clients. DNFBPs are discussed in more detail in chapter 4.

Ritzen (2011:241) identifies that real estate can be abused by means of exploitation, speculation and financing. With regard to exploitation, "virtual renters" can be used where the property is not occupied, but the criminal pretends to rent out his property and receives rent income. This rental income in reality relates to illicit funds generated from criminal activities. According to FinCEN (2008a) some other techniques which are used include *inter alia* "straw buyers" to hide the identity of the person who buys the real estate, false documentation as well as the breaking up of larger transactions into various transactions each comprising smaller amounts. Such activities have also been seen to be supplementary to the evasion of tax, theft of identity and other fraudulent activities.

In the ESAAMLG region, multiple case studies relating to the laundering of illicit proceeds through the real estate sector have been documented, which could be an indication of the extent to which this sector is being targeted by criminals (ESAAMLG, 2013:30). The ESAAMLG provided ten case studies where the real estate sector was used to launder money (ESAAMLG, 2013:14-26). These case studies show how the illicit proceeds arising from the predicate offences are laundered into the real estate which includes, but are not limited to, game farms, entertainment buildings, holiday homes, lodges, residential flats etc. These could be summarised as follows in Figure 3-2 below.

Figure 3-2: Summary of ten ESAAMLG case studies on money laundering in the real estate sector



Source: Own interpretation of ESAAMLG (2013:14-26).

According to Rosen (2012) a difference between commercial and residential real estate money laundering relates to the predicate offence involved. Money derived from drug trafficking will in most cases be invested in residential real estate, whereas criminals will use commercial real estate to hide money from fraud, Ponzi schemes and the like.

The preceding section provided some practical applications and methods which criminals use to launder funds derived from predicate offences through the use of the real estate sector. The next, and last section of this chapter contain red flags as indication of money being laundered through the real estate sector.

3.5 Red flags as indication of money being laundered through the real estate sector

As mentioned earlier, there are also red flags which would indicate when the real estate market is being used for money laundering. Some possible red flags are identified in the ESAAMLG (2013:26-28) typologies study. These include large deposits or transfers without explanation, unfamiliar bank transactions, repetitive transfers or deposits without logical explanations, using shell companies to buy property, locals being used by foreign nationals to invest heavily and directly into real estate, when the parties are hesitant to complete essential documents or provide required proof and when the values of transaction relating to property are much higher or lower than the real value or market value of the property. The red flags also include transactions where third parties are unnecessarily used, the use of unusual payment methods, the presence of unregistered estate agents as well as the use of cash, irrespective of the amount involved.

Rosen (2012) identifies three types of risks which could potentially show when the real estate sector is being misused by criminals, namely geographical, transactional and customer risks. The first of these, geographic risks, relates to where one of the parties to the transaction (mostly the purchaser) is located as well as where the customer's money is generated (Freedman, 2012; Rosen, 2012). This risk can be present as the origin of the buyer or the source of funds can be in a country which does not have strong AML measures in place. It can also be present in some countries which are part of terrorist activities or where the countries have a high degree of political corruption (NAR, 2012:2).

According to Rosen (2012) transactional risk relates to aspects of the real estate transaction itself which can be suspicious. This can relate to *inter alia* the origin of the funds, the amount involved to buy the property, subsequent speedy re-sale directly after acquisition of the property and in cases where a buyer pays no attention to the property's characteristics or has no interest in viewing the property (Freedman, 2012; NAR, 2012:3).

The third risk revolves around the customer itself. According to Rosen (2012), it relates to Politically Exposed Persons (PEPs) and customers coming from countries with high-risk profiles. This risk applies in particular to the commercial real estate sector and is evident in relation to companies whose motives in relation to the property transaction is not clear or the underlying company business appears to be suspicious (Freedman, 2012). Examples where these risks could be present could include where the buyer and the property are divided by a substantial distance between them with no reasonable explanation being present, the presence of third parties to the transaction or where PEPs or their families are involved (NAR, 2012:2).

In a study on money laundering and terrorist financing through the real estate sector conducted by the FATF (2007b:34), they provided some features (individually or in combination) which can possibly indicate that the real estate sector is potentially abused. The FATF also published a report on money laundering and terrorist financing vulnerabilities of legal professionals, which include methods where criminals use the services of legal professionals to launder money (FATF, 2013d:4). One of these methods are identified as the purchase of real estate and the report contains red flags which can indicate that money is being laundered (FATF, 2013d:4, 77). The FATF stresses the importance of red flag indicators always being considered in context, as clients with legitimate means and purposes may use the same methods and techniques as criminals. If a red flag indicator is present, it does not necessarily mean that money laundering is taking place. A legitimate explanation for the transaction can sometimes be provided by the client (FATF, 2013d:77). The paragraphs to follow contain some of the red flags identified by the FATF.

3.5.1 Red flags relating to specific persons/groups

Examples of possible red flags are pointed out below. These red flags are categorised into red flags about the client, the parties involved, legal persons and the nature of the retainer.

3.5.1.1 The client

Red flags which can possibly indicate that money is being laundered include when the client (FATF, 2013d:77, 78):

1. Is overly secretive or evasive about his or her identity, the identity of the beneficial owner, the sources of the money and reasons why the transaction must take place in this particular way;

2. Uses an agent or an intermediary (mediator) without the existence of good reasons to do so;

3. Intentionally avoids personal contact without a good reason therefore;

4. Is reluctant or refuses to provide information and related documents or if the client provides false documentation;

5. Is a business entity for which details cannot be readily found on the internet and/or an electronic mail (e-mail) address with an unusual domain is used – particularly in instances where the client is also secretive or avoids direct contact; and

6. Has known criminal connections or has previously been convicted for crimes relating to acquisitions.

3.5.1.2 The parties

Money laundering red flags relating to the parties could include the following instances (FATF, 2007b:35, 36; FATF, 2013d:78, 79):

1. The same parties appear multiple times in transactions during a short period of time;

2. Unusual age characteristics exist in respect of the executing parties to the transaction, e.g. the person is under the legal age, or has been declared incompetent without a logical explanation for their involvement;

3. There is an attempt to disguise the identity of the real owner or parties;

4. When transactions begin in an individual's name and are completed in another's without a logical explanation given for this change;

5. The parties are not as interested in the characteristics of the property as they are supposed to be, based on the stated objective of the transaction;

6. Where related property transactions apply, there appears to be a lack of interest with respect to a better price;

7. Where the parties want to complete the transaction as quickly as possible without having a good reason to do so; and

8. When they are interested only in specific buildings situated in specific areas without regard to the price of the property.

3.5.2 Nature of the transaction

Applicable red flags in respect of the nature of the transaction could include (FATF, 2007b:36, 37; FATF, 2013d:79, 80):

1. Unusual source of funds – funds are received or sent to a foreign country, without there being a clear relationship between the country and client or when funds are received or sent to high-risk countries;

2. When multiple bank accounts are used without good reason;

3. The application of an unusually short repayment period, without the existence of a logical explanation;

4. Frequent or repeated repayment of mortgage bonds prior to the agreed maturity dates, without a logical explanation;

5. Cash purchasing of the asset, with a quick subsequent use as collateral for a loan or mortgage bond;

6. The previously agreed upon payment procedures are requested to be changed and instruments to settle the payment are inappropriate for the transaction;

7. The collateral for the transaction is situated in a high-risk country;

8. The party requests that the payment must be divided into smaller amounts with short intervals between payments; and

9. The extensive use of payment methods such as cash, bank notes, bearer cheques, other anonymous instruments or by endorsing a third-party's cheque to pay for transactions.

3.5.3 Choice of lawyer and legal persons

Under this sub-category, red flags could also include (FATF, 2007b:35; FATF, 2013d:80, 81):

1. The retention of a legal professional who doesn't possess experience in respect of a particular specialty or in connection with complicated or particularly large transactions;

2. The service required applies to a service which has already been turned away by another professional or where a previous service was terminated;

3. Transactions involving a legal person, where their principal contact address is unknown or for correspondence purposes only, or where the details are probably false;

4. Creation of legal persons (entities) in which properties are held and whose sole purpose is to position another entity as a front between the property and the true owner; and

5. Transactions involving extraordinary or particularly complex legal structures, without these being logical from an economic perspective.

3.5.4 Nature of the retainer

In these instances, money laundering red flags could be (FATF, 2013d:81, 82):

1. When the transaction in which the client is involved does not match his normal activities;

2. When there is insufficient evidence to reconcile the client's actions, previous transactions executed, or his normal company activities;

3. Transactions taking place during a short time-frame and having several elements in common, without a logical explanation;

4. The quick succession of property transactions in a back-to-back (or ABC) fashion, accompanied by rapid increases in the amounts or purchase price involved; and

5. Last-minute unexplained changes in instructions.

The above red flag indicators are only some examples of warning signs indicating that an individual could be misusing the real estate sector to launder his/her illicit funds. As noted earlier, the presence of one or more factors does not always mean that money is being laundered. The real estate agents should use their knowledge in this regard to know or identify whether there is a problem with a particular transaction which will raise a red flag(s) (NAR, 2012:3).

3.5.5 The role of the real estate agent in detecting red flags

Although real estate agencies are vulnerable to money laundering, they can also contribute to the combating thereof. This can be done when real estate agents use their knowledge of the real estate sector, combined with the knowledge of how this sector can possibly be abused by criminals, in order to identify when a transaction poses a money laundering risk. Their knowledge of signs relating to the sector being used for money laundering purposes will enable them to furthermore put procedures in place to reduce this risk and approach the authorities to help in this regard when such a scheme is present (NAR, 2012:1).

FATF (2007b:29) also emphasised that estate agents play a key role detecting money laundering due to their involvement in the vast majority of real estate transactions. Estate agents are well placed to identify red flags due to the fact that they are directly in contact with buyers and sellers, which place them in a position to have better knowledge about their clients than the other parties in the transactions.

3.6 Conclusion

This chapter describes the purchasing of goods and properties which is identified as one of the major money laundering trends in South Africa in chapter 1 of this study. This discussion specifically explores the abuse of the real estate sector by criminals for the purpose of money laundering. According to the ESAAMLG (2013:29), this region's real estate sector is vulnerable to money laundering in the same way as which the rest of the world is vulnerable thereto.

In order to understand how money can be laundered through this sector, the first part of this chapter contains a description of the parties involved in the real estate sector and how this sector functions in South Africa. Thereafter, and with particular reference to the vulnerabilities relating to this sector, these as well as vulnerabilities relating to legal professionals and real estate agencies are identified. The third part of this chapter gives practical examples of how money arising from a predicate offence(s) can be laundered through the use of this vulnerable sector.

The last part discusses red flags which could indicate when the real estate market is being abused for money laundering purposes. These include red flags regarding the client, the parties, the nature of the transaction, the choice of lawyer or legal persons and the nature of the retainer. Knowledge of the real estate sector, vulnerabilities and possible red flags relating to money laundering in the real estate sector can ensure that money laundering is combatted more efficiently.

The information in this chapter serves as an important foundation for this study, as the understanding of the sector and how it can be misused by criminals can now be applied to identify effective ways to combat this phenomenon. The next chapter therefore focus on the FATF and its Recommendations, where the Recommendations which are applicable to the prevention of money laundering in the real estate sector, are discussed.

CHAPTER 4: THE FINANCIAL ACTION TASK FORCE AND ITS ROLE IN COMBATING MONEY LAUNDERING IN THE REAL ESTATE SECTOR

4.1 Introduction

Over the past few years, the Financial Action Task Force (FATF) and the International Monetary Fund (IMF) have produced reports which classify the real estate sector as possibly being one of the vehicles through which the illicitly obtained proceeds from individuals and criminal organisations are laundered (ESAAMLG, 2013:5).

When considering this statement, as well as the discussions in the preceding chapters, it is evident that money laundering, particularly in the real estate sector, is a major problem and must be combatted and prevented. According to Hatchard (2006:154), the FATF "plays a major role in the worldwide effort to tackle money laundering". South Africa forms part of both the FATF and the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) in the fight against money laundering (FATF, 2013a:37).

In this chapter, specific focus is placed on the FATF and its role in the fight against money laundering. Not only are the FATF and its Recommendations described, but an overview of the nine FATF-Style Regional Bodies (FSRBs) are also given, with specific focus on the ESAAMLG. A detailed description of the Recommendations which are applicable to the real estate sector is then provided.

4.2 The FATF

4.2.1 Background of the FATF

During the latter part of 1980, the international community faced a problem with regard to drug trading as the drugs as well as the money derived from the drugs were moved across borders. Due to the absence of effective legislation and the necessary enforcement in countries regarding this phenomenon, the ministers of the G-7 created the FATF to provide a multinational approach to the drug-related problems which countries faced and to furthermore ensure that banks as well as other financial institutions are not being misused by criminals to launder the proceeds from their drug activities (FATF, 2014a:2). The FATF was formed in July 1989, during the G-7 Summit in Paris with the task of creating international measures to locate the proceeds derived from both drug and other criminal activities and to seize these proceeds. The G-7 countries, European

Commission as well as eight other countries constituted the founding members of the FATF (De Koker, 2013: Com 1-13; FATF, 2014a:2).

In order for countries to create anti-money laundering (AML) regulations to address the abovementioned problem, the FATF took on its first task and had to create Recommendations with guidelines for these countries to follow. These FATF Forty Recommendations were formulated by the FATF in 1990 and accepted in July 1990 by the G-7 Summit in Houston (De Koker, 2013: Com 1-13; FATF, 2014d). The FATF Recommendations are discussed in more detail later in this chapter.

Today, the FATF is an independent inter-governmental body which has the purpose of developing and promoting policies in order to protect financial systems globally against crimes such as money laundering, the financing of terrorist activities and also against the financing of proliferation to weapons of mass destruction (De Koker, 2013: ANCIL-4). These crimes are serious threats to global security as well as to the integrity of global financial systems (FATF, 2013a:10).

The FATF consists of 39 members which are made up of 37 member jurisdictions and two regional organisations (FATF, 2019b). These members are strategically chosen based on the following (FATF, 2017a:49):

1. Geographic location;

2. The size of their banking sector; and

3. The role they play globally in the financial system.

South Africa joined and became a member of the FATF in June 2003 (De Koker, 2013: Com 1-13).

As part of the FATF's work, it produces integral documentation relating to AML and counter-terrorist financing (CFT). Some of the most important documentation relates to the FATF Standards (Recommendations including Interpretive Notes and definitions in the Glossary), its 2013 assessment methodology as well as some guidance and best practice reports. It is important for the members of the FATF to apply these Recommendations and therefore, the compliance of these members are evaluated through mutual evaluations carried out by the FATF (APG, 2015b; FATF, 2012-2019:7). Except for the Recommendations, the FATF has at its disposal guidance and best practices reports in order to assist countries when they implement the FATF Recommendations (FATF, 2013a:10). Last mentioned are not compulsory for countries but will help them to implement the FATF Recommendations as effectively as possible (FATF, 2012-2019:7).

The FATF Recommendations are not legally binding on the international community and each country has the flexibility to implement these Recommendations into their own legal frameworks. However, international bodies support the FATF Recommendations and major countries, through a political commitment, must combat and prevent money laundering and must therefore adhere to these Recommendations (Cox, 2011:17).

As mentioned, part of the FATF's work includes producing integral documentation relating to AML and CFT. The FATF therefore identifies, as part of one of its main functions, methods and trends criminals use to launder money. This is important for the FATF as criminals continuously find new ways to bypass the laws and regulations countries have implemented as a result of the FATF Recommendations. By knowing the ways criminals disguise their proceeds, FATF can ensure that their Recommendations stay effective in the fight against money laundering. The FATF not only identifies the money laundering threats posed to countries, but also the vulnerabilities the countries and their specific sectors pose to criminals to launder their illicit proceeds. These findings are documented in typology reports (FATF, 2017a:19).

The FATF Plenary, the body responsible for the FATF's decisions is a very important part of the FATF's structure. During a year, this Plenary will meet three times (FATF, 2014a:7). The FATF Plenary is responsible for appointing the President and the Vice-President of the FATF, both for a one-year period stretching from July until June. The President call together and leads the FATF Plenary's meetings and he/she is supported by the Vice-President. The President furthermore supervises the FATF Secretariat (FATF, 2015b). The FATF Secretariat's main responsibilities include *inter alia* to support the FATF's activities and working groups, to ensure that members and other parties communicate adequately and to ensure that FATF members, associate members and the observers work closely together. The Secretariat is also mainly responsible for the FATF's communication, the management of their records and administrative duties with regard to websites (both internal and external) (FATF, 2015c).

4.2.2 Mutual evaluations

Since the creation of the FATF, the FATF together with its FSRBs have been able to expand its reach to more than 200 countries and jurisdictions. Each of these countries and jurisdictions have committed to implement the FATF Recommendations (FATF, 2018a:51). As a result of the FATF Recommendations, most countries have legal, regulatory and operational frameworks in place to assist them in the fight against money laundering. It is important that these laws and regulations are implemented and used effectively, therefore the FATF accurately and thoroughly assess the implementation of these measures by countries (FATF, 2017a:31).

The FATF use two methods when assessing the above as technical compliance as well as effectiveness are considered. When assessing technical compliance, FATF assess whether the Recommendations are implemented by the specific country and provide a rating as to which extent the country comply with the requirements of the Recommendations. Complying with the Recommendations is important as these are the "building blocks" for an effective framework. Effectiveness refers to the practical working of the measures the country implemented in order for these measures to protect the country, its financial systems and economy, taking into account the risks posed to that specific country. To assess whether these measures (legal, regulatory and operational) are working effectively, FATF conducts what is known as mutual evaluations (FATF, 2016a:11; FATF, 2017a:31). The mutual evaluation procedures were introduced by the FATF in 1991 (FATF, 2014a:15).

These mutual evaluations are performed by different countries assessing one another, i.e. peer reviews. The FATF then produces a mutual evaluation report (MER) providing a comprehensive analysis in respect of the evaluated country's system in terms of the FATF Recommendations. The FATF also makes recommendations to the assessed country to improve the strength of the country's system. It takes 18 months to complete all the stages of a mutual evaluation. FATF started with its 4th round of mutual evaluations during the 2014/2015 year. To perform these evaluations, the 2013 Methodology was used (FATF, 2016a:11; FATF, 2017a:31; FATF, 2018d).

During the 2016/2017 year, the FATF refined its standards and methodology used as money laundering and terrorist financing threats change on a continuous basis (FATF, 2018a:9). The FATF procedures for the FATF fourth round of AML/CFT mutual evaluations (FATF, 2019d) together with the 2013 Methodology for assessing technical compliance with the FATF Recommendations and the effectiveness of AML/CFT systems (FATF, 2013-2019:1) were updated in October 2019.

These assessments are beneficial to countries as the FATF provides them with information on any weaknesses in their AML framework. They receive feedback on both their strengths and weaknesses as well as recommendations on how to improve their measures to be effective. Furthermore, the FATF follow up on these countries and they must provide the FATF with their progress on addressing these identified weaknesses (FATF, 2017a:33).

In the case where countries fail to address these weaknesses, or if the weaknesses are so significant that it leads to serious shortcomings in the country's AML framework, FATF may inform the public community of these shortcomings (FATF, 2017a:33).

4.2.2.1 The FATF Methodology

The 2013 Methodology for assessing technical compliance with the FATF Recommendations and the effectiveness of AML/CFT systems, as updated in October 2019, is based on experience gained by the FATF itself, FSRBs, IMF and the World Bank through previous compliance assessments conducted by these bodies on earlier versions of the FATF Recommendations (FATF, 2013-2019:5, 6).

The goal of the FATF Methodology is to help assessors when assessing the global AML compliance of a specific country (FATF, 2013-2019:5). As a starting point, the assessors should obtain an understanding of the money laundering risks the country faces. The elements to take into account include the following (FATF, 2013-2019:6):

1. The nature and extent of these risks;
2. The specific circumstances of the country (e.g. the economy and financial sector);
3. The structural elements forming the basis of the AML system; and
4. Other circumstances and factors which could have an influence on the implementation and effectives of the country's AML measures.

As mentioned earlier, both technical compliance and effectiveness are considered during the mutual evaluation process. As such, a brief overview of both elements is given below.

4.2.2.1.1 Technical compliance

As indicated in the Methodology for assessing technical compliance with the FATF Recommendations and the effectiveness of AML/CFT systems, technical compliance relates to the "implementation of the specific requirements of the FATF Recommendations, including the framework of laws and enforceable means; and the existence, powers and procedures of competent authorities" (FATF, 2013-2019:13).

The requirements of each Recommendation are set out in a list. These criteria should be met by countries in order to be fully compliant with the FATF Recommendations (FATF, 2013-2019:13). The assessors will assess each of the criteria and provide a rating reflecting the country's level of compliance. The compliance ratings are as follows (FATF, 2013-2019:13, 14):

1. Compliant (C): "There are no shortcomings";
2. Largely compliant (LC): "There are only minor shortcomings";

3. Partially compliant (PC): “There are moderate shortcomings”;

4. Non-compliant (NC): “There are major shortcomings”; and/or

5. Not applicable (NA): “A requirement does not apply, due to the structural, legal or institutional features of a country”.

It is the assessed country’s responsibility to demonstrate their compliance with the FATF Recommendations in their AML system. The assessors should therefore assess compliance of the laws and regulations with the FATF Recommendations, and also whether the country has an institutional framework in place (FATF, 2013-2019:14).

4.2.2.1.2 Effectiveness

The second and equally important element that needs to be assessed relates to the effectiveness of a country’s AML measures. Effectiveness is indicated in the Methodology for assessing technical compliance with the FATF Recommendations and the effectiveness of AML/CFT systems as “the extent to which the defined outcomes are achieved” (FATF, 2013-2019:17). Furthermore, the objective of assessing effectiveness is threefold. Firstly, it increases the FATF’s focus on outcomes. Secondly, it assists in identifying compliance with the FATF Recommendations and the identification of weaknesses in AML frameworks. Lastly, it help countries to prioritise the implementation of certain controls to strengthen their AML system (FATF, 2013-2019:17).

In short, the assessment of effectiveness focus on how well a specific country’s AML measures work to combat and prevent money laundering (FATF, 2013-2019:17). Throughout the process of assessing effectiveness, reliance is placed on the judgement of assessors. These assessors work in consultation with the country which they assess (FATF, 2013-2019:17). The approach adopted by the FATF to conduct such an assessment of effectiveness focus on a hierarchy of defined outcomes. The objective at the highest level is to determine if “financial systems and the broader economy are protected from the threats of money laundering and the financing of terrorism and proliferation, thereby strengthening financial sector integrity and contributing to safety and security”. In order to achieve this, 11 “Immediate Outcomes” are used. Each of these outcomes contains an objective which should be present in an effective AML system. These “Immediate Outcomes” subsequently feed into three “Intermediate Outcomes”, each illustrating the major goals of AML measures (FATF, 2013-2019:17). An extract of the 11 “Immediate Outcomes” and the three “Intermediate Outcomes” can be seen in the following table:

Table 4-1: Immediate and Intermediate outcomes

Intermediate Outcomes	Immediate Outcomes	
Policy, coordination and cooperation mitigate the money laundering and financing of terrorism risks.	1	Money laundering and terrorist financing risks are understood and, where appropriate, actions coordinated domestically to combat money launderig and the financing of terrorism and proliferation.
	2	International cooperation delivers appropriate information, financial intelligence, and evidence, and facilitates action against criminals and their assets.
Proceeds of crime and funds in support of terrorism are prevented from entering the financial and other sectors or are detected and reported by these sectors.	3	Supervisors appropriately supervise, monitor and regulate financial institutions and Designated Non-Financial Businesses and Professionals (DNFBPs) for compliance with AML/CFT requirements commensurate with their risks.
	4	Financial institutions and DNFBPs adequately apply AML/CFT preventive measures commensurate with their risks, and report suspicious transactions.
	5	Legal persons and arrangements are prevented from misuse for money laundering or terrorist financing, and information on their beneficial ownership is available to competent authorities without impediments.
Money laundering threats are detected and disrupted, and criminals are sanctioned and deprived of illicit proceeds. Terrorist financiang threats are detected and disrupted, terrorists are deprived of resources, and those who finance terrorism are sanctioned, thereby	6	Financial intelligence and all other relevant information are appropriately used by competent authorities for money laundeirng and terrorist financing investigations.
	7	Money laundering offences and activities are investigated and offenders are presecuted and subject to effective, proportionate and dissuasive sanctions.
	8	Proceeds and instrumentalities of crime are confiscated.

Intermediate Outcomes	Immediate Outcomes	
contributing to the prevention of terrorist acts.	9	Terrorist financing offences and activities are investigated and persons who finance terrorism are prosecuted and subject to effective, proportionate and dissuasive sanctions.
	10	Terrorists, terrorist organisations and terrorist financiers are prevented from raising, moving and using funds, and from abusing the non-profit organisation (NPO) sector.
	11	Persons and entities involved in the proliferation of weapons of mass destruction are prevented from raising, moving and using funds, consistent with the relevant United Nations Security Council Resolutions (UNSCR).

Source: FATF (2013-2019:18).

Assessors need to assess all 11 of the above “Immediate Outcomes”, which should each be assessed individually (FATF, 2013-2019:19). Assessors should consider two important questions for each of these 11 “Immediate Outcomes”. The first relates to the extent to which the country achieve the outcomes. Secondly, it should be considered what the country can put in place to improve effectiveness (FATF, 2013-2019:19, 20).

For each of the 11 “Immediate Outcomes”, the assessors should reach a conclusion about the extent of the effectiveness of the country (FATF, 2013-2019:22). The assessors should provide their conclusion on the effectiveness of each outcome in the form of a rating. The ratings on the levels of effectiveness that can be given are as follow (FATF, 2013-2019:23):

1. High level of effectiveness: “The Immediate Outcome is achieved to a very large extent. Minor improvements needed”;

2. Substantial level of effectiveness: “The Immediate Outcome is achieved to a large extent. Moderate improvements needed”;

3. Moderate level of effectiveness: “The Immediate Outcome is achieved to some extent. Major improvements needed”; and/or

4. Low level of effectiveness: “The Immediate Outcome is not achieved or achieved to a negligible extent. Fundamental improvements needed”.

In many cases, low effectiveness will mainly be as a result of severe deficiencies in the implementation of the technical components of the FATF Recommendations (FATF, 2013-2019:19).

Should the assessment indicate that the effectiveness is low, the assessors should provide recommendations on how the country can achieve the specific outcomes (FATF, 2013-2019:20). These recommendations are a crucial part of the mutual evaluation process and should include both the level of technical compliance and the level of effectiveness (FATF, 2013-2019:23).

The specific risks that the country are exposed to should be taken into account by the assessors. Therefore, their recommendations should focus on the most effective way to mitigate these risks (FATF, 2013-2019:23). Even in cases where the effectiveness of the country is high, assessors can still make recommendations to assist the country in keeping up with evolving risks (FATF, 2013-2019:24).

The mutual evaluation follow-up process will focus on ensuring that the country implement the necessary measures to strengthen their AML framework by addressing the weaknesses identified through the mutual evaluation process (FATF, 2014a:17).

4.2.3 The FATF Recommendations

4.2.3.1 Overview

The *International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation* is also known as the FATF Recommendations (FATF, 2013a:10). As described above, these Recommendations contain measures which countries should have as part of their legal systems to enable them to counter the threats of money laundering and the financing of terrorism and the proliferation of weapons of mass destruction (FATF, 2013a:10). A worldwide network consisting of the FATF and the nine FSRBs constitute over 205 countries already using these Recommendations in order to protect the integrity of the international financial system (FATF, 2014a:4; FATF, 2018b:59).

The FATF Recommendations enjoy global recognition as the appropriate standards in respect of AML and CFT actions (De Koker, 2013: ANCIL-4). Before these recommendations, the majority of countries did not have sufficient measures in place to help them combat and prevent the crime of money laundering and to subsequently prosecute and sentence these launderers. The FATF Recommendations now provides countries with the necessary guidelines to combat money

laundering on an international level as they will be in a position to know the risks posed to them and can draw up the necessary systems to prevent the misuse of the financial and other relevant systems (FATF, 2014a:2; FATF, 2012-2019:6).

According to Tuba (2012:103), countries need to comply with these standards. They need to criminalise money laundering and apply proactive measures to prevent money laundering into the financial systems. They should also punish people who have been advantaged through such laundering.

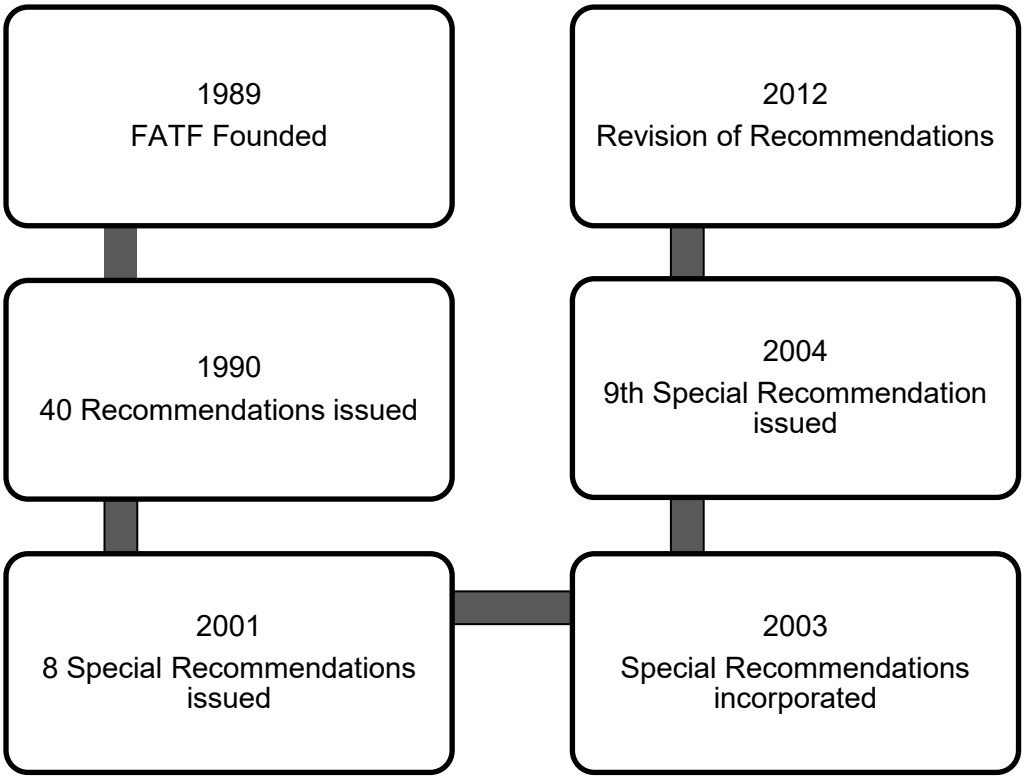
4.2.3.2 Revision of the Recommendations

After being formulated by the FATF in 1990 and accepted in July 1990 by the G-7 Summit in Houston, the Recommendations underwent various revisions as the techniques and trends which criminals use to launder their proceeds changes over time (Egmont Group, 2015). The first revision took place in 1996 (De Koker, 2013: Com 1-13). In October 2001, the Eight Special Recommendations on Terrorist Financing were adopted in order to create a structure for detecting and preventing terrorist financing when using these Special Recommendations together with the 40 Recommendations (FinCEN, 2015a).

A second revision of the FATF Recommendations followed in June 2003 where the FATF combined the Eight Special Recommendations and the 40 Recommendations where necessary (De Koker, 2013: Com 1-13; FinCEN, 2015a). In June 2004, the Special Recommendations were expanded to nine. The ninth special recommendation on the financing of terrorism specifically focussed on cash couriers (FinCEN, 2015a).

The most recent revision of the FATF Recommendations took place in February 2012 (FinCEN, 2015a). This revision has resulted in the Recommendations differing significantly from the previous sets of Recommendations. Not only were they re-numbered to reflect the Special Recommendations, but various new important aspects were incorporated (De Koker, 2013: Com 1-16). These 2012 Recommendations are a consolidation of the 40 Recommendations and the Nine Special Recommendations, resulting in a comprehensive set of Forty Recommendations (De Koker, 2013: Com 1-13). The FATF Recommendations, as revised in 2012, are discussed in more detail in the next few paragraphs. A summary of the FATF Recommendations and the revisions thereof are reflected in Figure 4-1 below:

Figure 4-1: The FATF Recommendations and revisions



Source: Own interpretation of FinCEN (2015a).

4.2.4 The 2012 FATF Recommendations

Since the revision of the FATF Recommendations on 16 February 2012, the Recommendations differ significantly from the previous set. The revised Recommendations was a result of the FATF's third round of mutual evaluations. The FATF together with valuable input from the FSRBs, the IMF, the World Bank as well as the United Nations (UN) revised these standards to keep up with trends criminals use to launder their money (FATF, 2012-2019:7). This revision was also done to take into account lessons that were learnt from evaluating the earlier set of Recommendations (FATF, 2013a:10).

According to De Koker (2013: Com 1-16) some of the new aspects include mandatory risk assessments being introduced, together with a mandatory risk-based approach (RBA) regarding regulatory aspects and risk mitigation, a specific focus on proliferation financing and providing support for sanctions as targeted by the United Nations (UN) Security Council. A more pragmatic and clearer approach to beneficial ownership and client due diligence was also introduced, together with the designation of tax crimes as predicate offences in respect of money laundering and increased prominence given to cooperation between government agencies on policy

formulation and implementation. Both domestic and international organisations' Politically Exposed Persons (PEPs) are included in the PEPs definition (FinCEN, 2015b).

Since this revision of the Recommendations the FATF also had to update its guidance and best practices reports to align the information reflected in these documents with the revised Recommendations (FATF, 2013a:10).

In short, the following comprises some of the most important aspects as set out in the FATF Recommendations. Countries are required to criminalise the following offences as part of their legislation:

1. Money laundering;

2. The financing of terrorism; and

3. The financing of proliferation.

As mentioned earlier, crimes directly or indirectly associated with tax offences must since the 2012 revision of the Recommendations also form part of a money laundering's predicate offence. The assets of terrorists must be frozen and seized. Financial Intelligence Units (FIUs) must take appropriate action with regard to Suspicious Transaction Reports (STRs) received by them. Countries should furthermore oversee financial and reporting entities as these entities should perform, amongst other things, Customer Due Diligence (CDD) measures. As it is extremely important for countries to be aware of the risks posed to them by money laundering and the financing of terrorism, they should perform a national risk assessment to identify these risks. With regard to both domestic and international PEPs and the financing of proliferation, relevant measures should be present in this regard. Lastly, companies must co-operate on an international level to combat the global phenomenon of money laundering and the financing of terrorism and proliferation (APG, 2015a).

The FATF will continue to update its Recommendations to take into account new risks and methods identified through the issue of additional guidance and/or best practices. In some cases, it will, however, be necessary to update a specific Recommendation or its Interpretive Note (FATF, 2017a:23). The FATF issued new guidance papers in the 2015/2016 year, of which two issued relates to the RBA and the implementation thereof (FATF, 2017a:29). The RBA and the importance thereof are discussed in more detail later in this chapter.

4.2.5 The FATF TREIN

The FATF Training and Research Institute (FATF TREIN) became operational on 20 September 2016 in Busan, Korea (FATF, 2017b). This centre was established as a result of the FATF President's proposal at the June 2015 Plenary meeting after identifying challenges during the mutual evaluation process where FSRBs do not have sufficient experience and resources to combat money laundering effectively. This training and research centre will enable FSRBs and FATF members to obtain knowledge and support AML and CFT capacity building through *inter alia* workshops, seminars and various training and research programmes. Training given will include the FATF Recommendations, the mutual evaluation process and the effective implementation of measures to combat and prevent money laundering. They will further help and support countries in the FATF Global Network, where they do not have developed a comprehensive framework, to strengthen their AML/CFT network (FATF, 2017a:7, 21; FATF, 2017b).

In addition to the above, another crucial role of the FATF TREIN relates to the training of assessors, reviewers and officials on the mutual evaluation process. Through this training they will gain more insight into the process and how an effective AML system is evaluated (FATF, 2017b).

The first pilot FATF Standards training course were held during 15-19 May 2017. This training course took place following two workshops in order to identify the fundamental challenges in the implementation of effective AML and terrorist financing measures. The subsequent FATF Standards training course will be the flagship course of the FATF TREIN. They will work towards refining the course to better the understanding and the implementation of the FATF Recommendations globally (FATF, 2018a:54).

During their first year of existence, the FATF TREIN concentrated on the establishment of a Secretariat. The Secretariat consists of experts to provide support to the FATF TREIN (FATF, 2018a:54).

4.3 FSRBs

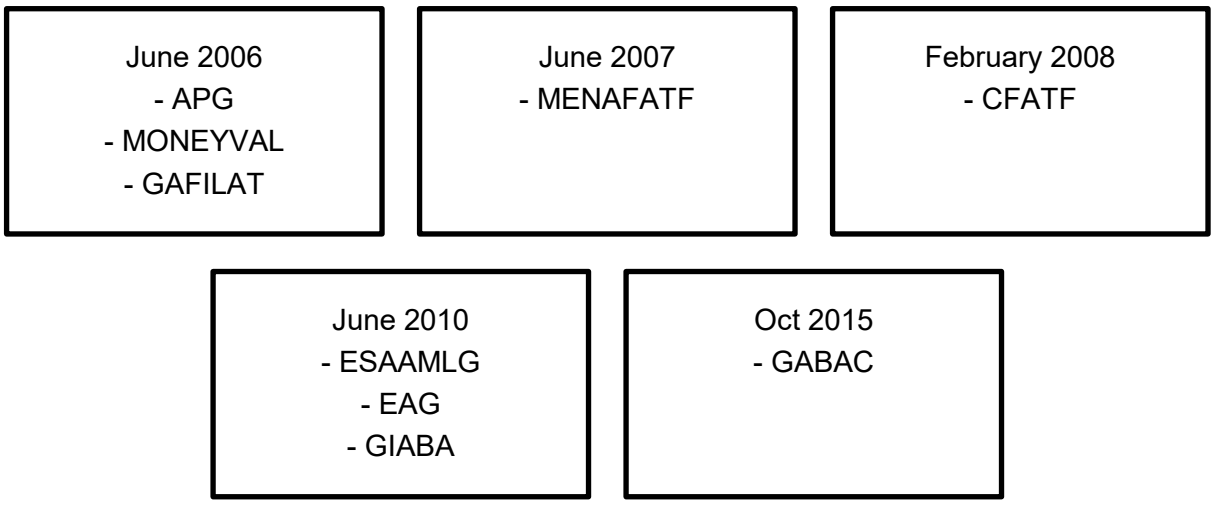
In order to advance effective world-wide implementation of the FATF Recommendations as described above, FATF is reliant on co-operating with various FSRBs (FATF, 2013a:32). Up until 2015, eight FSRBs were established and included the Asia/Pacific Group on Money Laundering (APG), Caribbean Financial Action Task Force (CFATF), Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism of the Council of Europe (MONEYVAL), Eurasian Group (EAG), ESAAMLG, Financial Action Task Force of Latin America,

formerly known as Financial Action Task Force of South America (GAFILAT), Inter Governmental Action Group against Money Laundering in West Africa (GIABA) and the Middle East and North Africa Financial Action Task Force (MENAFATF) (EAG, 2010; FATF, 2013a:40). During October 2015, the FATF expanded its reach as the Task Force on Money Laundering in Central Africa (GABAC) became their ninth FSRB (FATF, 2015d).

Each FSRB is mainly responsible to draw up systems applicable to their respective regions to combat money laundering and terrorist financing. They also conduct evaluations and make recommendations for improvements to their regions' specific AML/CFT systems (EAG, 2010). In order for them to meet their responsibilities, the FSRBs work together towards a goal to identify threats posed to the financial system (FATF, 2017a:51). The FSRBs perform similar tasks for their members as the FATF does for its own (De Koker, 2013: Com 1-17). The relationship between the FATF and the FSRBs are of a unique nature as they work together to combat money laundering and the financing of terrorism by joining their experience in this field together with their own needs (FATF, 2012:1). This relationship between the FATF and the FSRBs, together with their members, forms the FATF Global Network (FATF, 2017a:51). It is critical that this close relationship between the FATF and their FSRBs remain, as this strengthen the global network and ensure that the mutual evaluations which they conduct remain of a high quality and consistency (FATF, 2018b:59).

To ensure that the FSRBs and the FATF can have equal access to the FATFs discussions and meetings as well as their documentation, Associate Membership was created by the FATF. Figure 4-2 indicates the FSRBs and when they became associate members of the FATF:

Figure 4-2: Summary of when the FSRBs obtained Associate Membership to the FATF



Source: Own interpretation.

The following discussion provides a brief description of the ESAAMLG as this is the FRSB of which South Africa forms part of and which plays a fundamental role in the prevention and combating of money laundering through the South African real estate sector.

4.3.1 ESAAMLG

On 26-27 August 1999, at a meeting of Ministers and high-level representatives in Arusha, Tanzania, the ESAAMLG was created. Members of ESAAMLG are Commonwealth countries such as Botswana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Seychelles, Tanzania, Uganda, Zambia and Zimbabwe. All members have committed to the FATF Recommendations (FATF, 2015a).

ESAAMLG has been an Associate Member of the FATF since June 2010 and as a main purpose aims to implement the FATF Recommendations in order to combat money laundering and, to assess their progress in this regard, the ESAAMLG members take part in a self-assessment process (FATF, 2015a). South Africa is the only member of the ESAAMLG who is a member of the FATF. However, this position makes it possible for the rest of the ESAAMLG countries, even though they are not members of the FATF, to be present at FATF meetings and can therefore play an active role in the global effort to combat and prevent money laundering and terrorist financing (ESAAMLG, 2016:14).

FSRBs are formed on the basis that they share a geographic region with a language in common in which they can communicate. They should also have the same risks and challenges in the combating of money laundering. One of the countries under the ESAAMLG membership, withdrew from the ESAAMLG due to a language issue in August 2015, which prevented them from benefiting in their membership with this FSRB. They became an observer of another FSRB, GIABA, and will continue to work with them until they can obtain full membership (FATF, 2017a:52).

At the end of the 2016/2017 reporting period, 18 countries formed part of the ESAAMLG. The ESAAMLG membership also includes both regional and international observers which includes the Alliance for Financial Inclusion (AFI), Australian Transaction Reports and Analysis Centre (AUSTRAC), Common Market for Eastern and Southern Africa (COMESA), East African Community, the Egmont Group of Financial Intelligence Units (Egmont Group), FATF, IMF, Interpol, Portugal, Regional Centre on Small Arms (RECSA), Southern African Development Community (SADC), United Kingdom (UK), United States of America (USA), UN Bodies and Committees, World Bank and World Customs Organisation (ESAAMLG, 2017:11). South Africa served as the ESAAMLG chair during the 2015/2016 reporting period. This position is rotated annually (FIC, 2016:11).

The co-ordination with other international organisations places focus on combating money laundering, the studying of developing regional typologies, the development of resource capacities to assist efforts to deal with the issues, as well as co-ordinating assistance on a technical level where required. When AML measures are implemented, ESAAMLG enables the consideration and incorporation of regional factors (FATF, 2015a).

Based on the above, the ESAAMLG and FATF work closely together. The ESAAMLG also work together with other FSRBs. Some of the areas in which the ESAAMLG works together with the FATF and FSRBs include training, performing typology studies and developing the FATF Recommendations. The FATF and ESAAMLG evaluate the ESAAMLG members jointly (ESAAMLG, 2016:14, 15).

For these joint evaluations, the “Programme for the Second Round of Evaluations and Schedule of Mutual Evaluations” were adopted which is applicable for 2015 to 2019 (ESAAMLG, 2015:6).

The ESAAMLG developed its procedures and are now aligned to the 2012 FATF Recommendations, the 2013 Assessment Methodology as well as the FATF Mutual Evaluation Procedures (ESAAMLG, 2015:6, 7; ESAAMLG, 2016:7).

By expanding the FSRBs to nine and adding Central Africa into the FATF Global Network, a total of 205 countries have committed to the FATF Standards and the implementation thereof in their respective regions. This comprehensive network will contribute in the fight against money laundering (FATF, 2017a:51; FATF, 2018b:59).

4.4 The FATF Recommendations and the real estate sector

An overview of the FATF Recommendations is described earlier in this chapter. As the focus of this study relates to the real estate sector, the specific Recommendations which are applicable to the prevention of money laundering in the real estate sector are identified and discussed in this section. According to FATF (2007b:29) some of these Recommendations which are important to the real estate sector includes CDD, record keeping and reporting requirements.

In FATF Recommendation 22, it is stated that requirements relating to CDD and record keeping (recommendations 10, 11, 12, 15 and 17) apply to certain DNFBPs in particular situations. Real estate agents buying and selling real estate for their clients are listed as a DNFBP in Recommendation 22 to which these requirements apply (De Koker, 2013: ANCIL-22). In the Interpretive Note to Recommendations 22 and 23 (DNFBPS), it is mentioned that, where applicable, Interpretive Notes which apply to financial institutions, will also be relevant to DNFBPs (De Koker, 2013: ANCIL44 (43)).

In the FATF RBA Guidance for real estate agents, it is indicated that risk is addressed for DNFBPs, with specific reference to real estate agents, in three specific areas (FATF, 2008c:7). These areas include CDD (Recommendations 10, 12, 15 and 17), internal control systems of businesses (Recommendation 18) as well as the monitoring of DNFBPs (Recommendation 28).

In light of the above, Recommendations 1, 10, 11, 12, 15, 17, 18, 20, 21 and 28, as relevant to the real estate sector, are discussed below.

4.4.1 Recommendation 1 (Assessing risks and applying a RBA)

4.4.1.1 Defining risk

In order to fully understand the RBA and the below discussion, one need to understand the concept of risk. De Koker *et al.* (2017:197) explain that there is no clear definition of risk in the 2012 FATF Recommendations, although the revised Recommendations made an RBA compulsory.

The FATF Guidance on National Money Laundering and Terrorist Financing Risk Assessment, explains that risk is a combination of three factors, namely threat, vulnerability and consequence and that perfect risk assessments involve making judgements about all these factors (FATF, 2013b:7).

Threats are defined (FATF, 2013b:7) as “a person or group of people, object or activity with the potential to cause harm to, for example the state, society, the economy etc.”. The second factor, vulnerabilities, is defined as being “those things that can be exploited by the threat or that may support or facilitate its activities”. FATF (2013b:7) also defines consequences as “the impact or harm that money laundering or terrorist financing may cause and includes the effect of the underlying criminal and terrorist activity on financial systems and institutions, as well as the economy and society more generally”.

When specifically looked at in the money laundering or terrorist financing context, a threat will be criminals, terrorist groups and their facilitators, their funds as well as past, present and future money laundering or terrorist financing activities. The vulnerability can be factors that represent weaknesses in AML systems or controls or certain features of a country. The consequences of money laundering or terrorist financing may be short or long term (FATF, 2013b:7).

Another definition of risk can be found in Guidance Note 7 of the Financial Intelligence Centre (FIC). Guidance Note 7 was published in 2017 following the Financial Intelligence Centre Amendment Act (1 of 2017) (the amendments are discussed in section 5.3.2.2.2 below). According to De Koker *et al.* (2017:198), Guidance Note 7 contains guidance on risk, risk

principles, risk assessments, risk mitigation and CDD. Risk is defined as "…the likelihood and impact of money laundering or terrorist financing activities that could materialise as a result of a combination of threats and vulnerabilities manifesting in an accountable institution".

The above definitions of risk by the FATF, as well as the FIC, are closely aligned but not completely consistent (De Koker *et al.*, 2017:199). De Koker *et al.* (2017:199) further explain that the FATF and FIC risk concepts are applicable to a national security money laundering environment and that guidance may be necessary in order for the risk concepts to be incorporated into institutions' risk management frameworks.

4.4.1.2 Recommendation and Interpretive Note

According to De Koker *et al.* (2017:192), Recommendation 1 and the Interpretive Note to Recommendation 1 assists countries as it put in place the context for countries to know how to respond to money laundering risks, and what action they should take when combating money laundering.

According to Recommendation 1, a country must identify, assess and understand their risk of money laundering and terrorist financing and take appropriate action to reduce these risks. Based on the assessment done by each country, they should apply an applicable RBA. This RBA should be used to confirm that their resources and measures which are in place to mitigate money laundering, correspond to the risk areas identified. The RBA therefore serves as an essential foundation for the efficient allocation of countries' resources (De Koker, 2013: ANCIL-13; FATF, 2013a:19).

Furthermore, according to Recommendation 1, countries should ensure that their AML systems address high risks sufficiently, if high risks where identified. Should lower risks be identified, countries may apply simplified measures in respect of some FATF Recommendations. These simplified measures are however subject to certain conditions, which are covered under paragraph 6 of the Interpretive Note to Recommendation 1 (De Koker, 2013: ANCIL-13, ANCIL-34).

It is suggested in Recommendation 1 that financial institutions and DNFBPs should also be required by countries to identify and assess their money laundering and terrorist financing risks and to take sufficient action to mitigate the risks identified (De Koker, 2013: ANCIL-13).

The Interpretive Note to Recommendation 1 indicates that, for countries to know how the RBA must be implemented, the experience of the sector in dealing with AML and CFT must be taken

into account. This is also applicable to financial institutions and DNFBPs (De Koker, 2013: ANCIL-33).

However, financial institutions, DNFBPs and competent authorities should still apply enhanced measures in cases where higher risks are identified. They must make sure that they have adequate measures in place which can regulate the risks identified, and which will enable them to efficiently allocate their resources to the identified risks (De Koker, 2013: ANCIL-33).

As such, financial institutions and DNFBPs should be required by countries, depending on the risks identified, to take either enhanced or simplified measures. Countries should, however, not allow financial institutions or DNFBPs to take simplified measures in the case where the occurrence of money laundering or terrorist financing is suspected. Should it be proven that a low risk is present for money laundering or terrorist financing to take place in a country, financial institution or DNFBP, it may be decided not to apply certain Recommendations, but only in very limited circumstances (De Koker, 2013: ANCIL-33).

In addition to the above, the following are furthermore applicable to financial institutions and DNFBPs as set out in the Interpretive Note to Recommendation 1 (De Koker, 2013: ANCIL-35, ANCIL-36):

- The risk assessments performed by financial institutions/DNFBPs must be documented and up to date;
- Financial institutions/DNFBPs must be able to provide information regarding the assessments done to competent authorities and self-regulatory bodies (SRBs);
- Adequate policies and procedures, approved by senior management, must be in place. These should mitigate all risks identified i.e. by countries or respective financial institution/DNFBPs; and
- The controls (as stipulated in the policies and procedures) and the implementation thereof should be monitored. Effective controls are necessary in order for the DNFBPs to manage and reduce these risks appropriately in line with national requirements, competent authorities and SRBs.

An SRB is defined by the FATF (2013-2019:172) as “a body that represents a profession (e.g. lawyers, notaries, other independent legal professionals or accountants), and which is made up of members from the profession, has a role in regulating the persons that are qualified to enter and who practise in the profession, and also performs certain supervisory or monitoring type

functions. Such bodies should enforce rules to ensure that high ethical and moral standards are maintained by those practising the profession".

It is clear from the Interpretive Note to Recommendation 1 that it is important for financial institutions and DNFBPs to take into account all risk factors which is relevant when they assess the risks. By doing this, they will be able to determine the overall risk level which can then be used to determine the appropriate level of mitigation to be used (De Koker, 2013: ANCIL-36).

In the FATF Guidance on the RBA for real estate agents, it is clear that real estate agents must take three elements into account when conducting risk assessments. Firstly, they should consider the size of the business, for example, the value of the financial transactions. Secondly, the nature of their business should be determined. Lastly, they should consider the way in which instructions are received (through advertising or referrals) (FATF, 2008c:23).

4.4.1.3 National risk assessments

As mentioned in section 4.2.4 above, countries should perform a national risk assessment to identify the money laundering and terrorist financing risks posed to them (APG, 2015a).

The FATF RBA Guidance for real estate agents indicates the following important aspects with regard to a national risk assessment (FATF, 2008c:16):

1. The assessment of risks at a national level, together with measures to mitigate such risks will assist countries to apply and assign resources effectively to public bodies and self-regulatory organisations (SROs);

2. A national risk assessment will assist competent authorities and SROs in allocating funds to combat money laundering; and

3. It can furthermore advise decision makers most appropriate strategies to implement a regulatory regime to address the identified risks.

A report by the FATF on Money Laundering and Terrorist Financing Risk Assessment Strategies sets out that a national risk assessment is a process providing information on the money laundering and predicate offences, as well as weaknesses in the country's AML controls which can expose the country to abuse by criminals (FATF, 2008b:2). More specifically, the objective of a national money laundering risk assessment is to identify money laundering methods and trends, the frequency of use of these methods by criminals, the effectiveness of the criminals to hide their illicit funds and to identify any weaknesses in the country's AML systems (FATF, 2008b:2, 3).

As FATF acknowledges the importance of a national risk assessment, it issued a Guidance Report (National Money Laundering and Terrorist Financing Risk Assessment) in 2013. This guidance report covers *inter alia* the following (De Koker *et al.*, 2017:213):

1. Important FATF obligations for a money laundering risk assessment;
2. General principles to be followed by countries when conducting such an assessment;
3. Guidelines on how to organise the process, the frequency in which it is performed as well as which information the country can use during the assessment;
4. An overview of the identification, analysis and evaluation stages, which forms the three main stages of the assessment process; and
5. The results of the national risk assessment and the dissemination thereof.

De Koker *et al.* (2017:213) explain that the effectiveness of a national risk assessment is reliant on a high-level commitment by key government organisations to take part in the process. Furthermore, the form, scope and nature of the assessment should meet the needs of *inter alia* the following users (De Koker *et al.*, 2017:213):

1. Policy makers;
2. Regulators;
3. Supervisors;
4. SRBs;
5. Law enforcement;
6. Other investigative authorities;
7. FIUs;
8. Financial institutions;
9. DNFBPs;
10. NPOs; and
11. International stakeholders.

As evident from the above, countries should undertake a risk assessment in accordance with Recommendation 1 of the FATF. According to De Koker *et al.* (2017:192) several countries performed such risk assessments or are busy with such assessments. With specific reference to South Africa, De Koker *et al.* (2017:192) state that the Government is committed to applying a similar process. South Africa's compliance with the FATF Recommendations is discussed in section 5.4 below.

4.4.1.4 Development from the rule-based approach to the RBA

As discussed earlier in this chapter, the FATF Recommendations were accepted in 1990. These recommendations contained a rule-based approach where the regulator of each institution set the rules which should be complied with by these institutions (De Koker *et al.*, 2017:193).

The rule-based approach had both advantages and disadvantages, some of which are demonstrated in Figure 4-3 below:

Figure 4-3: Advantages and disadvantages of the rule-based approach

Advantages	Disadvantages
Regulatory clarity	Generalisation
Less resource-intensive	Limited flexibility

Source: De Koker *et al.* (2017:193, 194).

According to De Koker *et al.* (2017:193), the benefits included clear rules and regulations. It was also an advantage for institutions as, depending on the rules, it was less resource-intensive for them. However, the disadvantages overruled as the rule-based approach had standardised processes and therefore limited the flexibility of institutions. This could lead to situations where too little/too much attention is given to high/low risk customers as the rules, determined by the regulator, had to be followed (De Koker *et al.*, 2017:194).

The FATF realised these disadvantages and when the FATF Recommendations were revised in 2003, both compulsory and non-compulsory elements of an RBA were included (De Koker *et al.*, 2017:194).

In June 2007, the FATF published a guidance document to assist countries and institutions in implementing an RBA i.e. guidance on the RBA to combating money laundering and terrorist financing – high level principles and procedures. The audience of the guidance document are

public authorities and financial institutions, and it is indicated that various high level principles obtained in the guidance document, will likewise be applicable to DNFBPs (FATF, 2007a:1). This guidance document had the following objectives (De Koker *et al.*, 2017:194; FATF, 2007a:1):

1. To contribute to the development of the understanding by countries and institutions of what an RBA entails;

2. To provide a framework of high-level principles to countries and institutions when they apply an RBA; and

3. To show good practice for the public and private sector when they design and implement an RBA.

According to this guidance document, an RBA will be successful if the following are in place (FATF, 2007a:10):

1. Information (that are reliable and actionable) relating to the threats identified, should be available to the regulators and financial institutions;

2. Emphasis should be placed on the importance of cooperation between policy makers, law enforcement, regulators and the private sector;

3. It should be made public by authorities that the RBA will not eliminate all risk elements;

4. It is the responsibility of authorities to ensure that financial institutions are not scared of sanctions in cases where the institutions have sufficient internal systems and controls in place;

5. Supervisory staff of regulators should be adequately informed on the RBA; and

6. All similar industries should be treated the same in respect of supervisory oversight and requirements.

Subsequent to the guidance document as described above, FATF published several other guidance documents, with specific focus on the different industries/products (De Koker *et al.*, 2017:194). A guidance document focussing on the real estate sector was published by the FATF in June 2008 (FATF Guidance on the RBA for real estate agents). The FATF consulted various real estate representatives while putting together this guidance document. This document had the same objectives as the 2007 guidance document, as described above (FATF, 2008a).

When the FATF Recommendations were revised in 2012, a more comprehensive and compulsory RBA was included (De Koker *et al.*, 2017:195). As such, the 2007 guidance documents had to be updated and the FATF is still busy with this process. De Koker *et al.* (2017,195) furthermore explain that a lot of sectors are still using the previous guidance documents as they have not received updated guidance from the FATF.

The FATF guidance documents should be used together with the MERs by FATF on the respective countries evaluated (De Koker *et al.*, 2017:196). The mutual evaluation process is discussed in section 4.2.2 above.

4.4.1.5 Benefits, challenges and limitations of an RBA

The development of the RBA was discussed in the preceding section. It is evident that this approach offers several benefits, but also have disadvantages and limitations. Please refer to Figure 4.4 below:

Figure 4-4: Advantages and disadvantages of the RBA

Advantages	Disadvantages
Flexibility	Requires experienced individuals and resources
Efficient and effective use of resources	Lack of sound judgement applied can lead to waste of resources/creation of vulnerabilities
Better risk management	Diversity of institutions and different risks identified by them
Increased difficulty for criminals to launder illicit funds	Transitional costs could be present which must be addressed
Countries/institutions can easily adapt to new risks identified	Staff and/or management overly cautious with making judgements based on risk

Source: De Koker *et al.* (2017:194), FATF (2007a:3-5) and FATF (2008c:5, 6).

4.4.1.5.1 Benefits of an RBA

De Koker *et al.* (2017:194) explain that the RBA is flexible and each country/region and sector can adapt accordingly. Another benefit is that this approach uses resources more efficiently and effectively if it is applied correctly. With specific focus on real estate agents, the flexibility of the RBA allows them to use their specialised skills, knowledge, judgement and expertise to review their customers and activities and to find an appropriate AML approach for their specific business

activities. The real estate agents should, however, be careful not to over- or underestimate risks as this will lead to resources being wasted or vulnerabilities created in the system. It is therefore of utmost importance that the real estate agents do have sufficient expertise in order to make such judgements (FATF, 2008c:5, 6).

The RBA were formulated in a way to make it more difficult for criminals to hide their illegal activities, as this approach increase the focus on higher risks identified by countries and financial institutions. Finally, the RBA allows financial institutions to adapt to new risks identified by these institutions (FATF, 2007a:3).

4.4.1.5.2 Challenges of an RBA

Although there are several advantages to the RBA, there are also some challenges (applicable to both the public and private sector) associated with this approach. Firstly, an RBA requires experienced individuals and resources in order to obtain accurate information on the applicable risks posed to the country or institution. The individuals and resources are also needed to develop systems and procedures, and to train relevant individuals to be able to apply these systems and procedures effectively. These individuals and resources are required at both a national and institutional level (FATF, 2007a:4).

Another challenge is that financial institutions must understand the risks identified and should be able to apply their judgement. If this is not done, risk could be overestimated/underestimated leading to a waste of resources/creating vulnerabilities in the institution (FATF, 2007a:4).

As each institution is different, and different risks may be identified by each institution, regulators will have to work hard to compile guidelines on sound practice. This could lead to challenges to supervisory staff who must monitor the compliance of the institutions (FATF, 2007a:4).

With specific reference to the real estate sector, real estate agents face a challenge due to the fact that their staff members, and in some instances management, are sometimes extremely careful and not comfortable with making judgements based on risk. If management fails to determine the appropriate levels of risk, it can lead to compliance issues as resources are insufficiently allocated (FATF, 2008c:6).

It is important for SROs and designated competent authorities to ensure that an adequate decision-making process is in place for real estate agents in respect to risk management (FATF, 2008c:6).

4.4.1.5.3 Limitations to the RBA

In the guidance document published by the FATF for real estate agents, it is stated that there are certain situations where an RBA will be limited, where it could not be applied at all or where it will only be applied to subsequent stages to a process and not the initial stages. This will mostly be in circumstances where the law requires the institution to take certain actions (FATF, 2008c:9). An example regarding the above relates to CDD measures. CDD is discussed in detail in section 4.4.2 below.

De Koker *et al.* (2017:197) explain the importance of authorities understanding the above-mentioned limitations. An environment should be created by the authorities where regulated institutions can have reasonable and suitable measures in place to effectively fight against their money laundering risks.

4.4.2 Recommendation 10 (CDD)

According to Cox (2011:132), a crucial aspect of all regulatory requirements across the globe relates to sufficient and applicable CDD measures. De Koker *et al.* (2017:240) explain that in the past, before the 2003 revised FATF Recommendations, CDD was commonly known as “know your customer” (KYC). This term can create confusion as it is sometimes unclear if it is used to refer to all four of the obligations of CDD, or if it only refers to the customer identification and verification (CIV) obligation. Nowadays, the technically correct term is CDD and this term is used consistently by the FATF (De Koker *et al.*, 2017:240).

Recommendation 10 therefore sets out situations when financial institutions should have to undertake CDD measures, as well as the measures to be taken (De Koker, 2013: ANCIL-16). Recommendation 10 must be read in conjunction with the Interpretive Note to Recommendation 10 (De Koker, 2013: ANCIL-44 (20)).

According to Recommendation 10, the four obligations of CDD to be taken are (De Koker, 2013: ANCIL-16):

1. The customer should be identified and the customer’s identity should be verified through the use of reliable and independent source documents, data or information;

2. The beneficial owner should be identified and verified through reasonable measures taken in order to satisfy the financial institution of the identity of the beneficial owner;

3. The purpose and intended nature of the business relationship should be understood and, if necessary, information should be obtained on these aspects; and

4. Ongoing due diligence should be performed on the business relationship and transactions performed.

Recommendation 10 clearly states that “financial institutions should be prohibited from keeping anonymous accounts or accounts in obviously fictitious names”. It should therefore be a requirement for financial institutions to perform the CDD measures at the start or during the course of the establishment of a business relationship, when occasional transactions are performed, in the case where they suspect that money is being laundered or when the accuracy/reliability of customer identification data previously obtained is in doubt. For occasional transactions, Recommendation 10 indicates that CDD should be performed for transactions above the designated threshold (being United States Dollar (USD)/Euro (EUR) 15 000) or wire transfers in circumstances as set out by the Interpretive Note to Recommendation 16 (De Koker, 2013: ANCIL-16).

Recommendation 10 makes it a requirement that the principle of CDD measures should be included in laws and regulations. Each country may decide how they will execute the required CDD obligations (De Koker, 2013: ANCIL-16). The RBA in accordance with the Interpretive Notes to this Recommendation and to Recommendation 1, should be used to determine the extent of these measures (De Koker, 2013: ANCIL-17).

In the case where the financial institution is not able to adhere to the CDD obligations, they should not be required to start with the business relationship and/or perform the transaction. It should also be considered if an STR must be filed as required by Recommendation 20 (De Koker, 2013: ANCIL-17, ANCIL-44 (20)). STRs are discussed in section 4.4.8 below.

The Interpretive Note to Recommendation 10 emphasizes the fact that institutions do not have to perform verification on the identity of a customer each time that the customer request a transaction to be performed. If the institution is, however, uncertain about the accuracy and reliability of the identification and verification already done, they are not allowed to rely on CIV previously performed e.g. where there is a substantial change in the customer’s account operations or where a suspicion of money laundering is present (De Koker, 2013: ANCIL-44 (23-24)).

With respect to existing customers, financial institutions should take into account materiality and risk in determining the CDD measures to be taken and when these should be performed. They should consider if and when CDD was performed and if the data, obtained while performing these measures, was sufficient (De Koker, 2013: ANCIL-44 (24)).

4.4.2.1 CDD and the RBA (higher/lower risks)

As mentioned earlier in this chapter, the RBA in accordance with the Interpretive Note to Recommendations 1 and 10 should be used to determine the extent of CDD measures to be performed (De Koker, 2013: ANCIL-17).

Recommendation 1 and the Interpretive Note to Recommendation 1 are described in section 4.4.1 above. The discussion which follows relates to Interpretive Note to Recommendation 10, focussing on CDD measures and the RBA.

In certain circumstances, a higher risk of money laundering may be present which, as stipulated in the Interpretive Note to Recommendation 10, will require enhanced CDD measures to be performed. On the other hand, some circumstances may present a lower risk of money being laundered, and as such simplified CDD measures may be taken (De Koker, 2013: ANCIL-44 (25-26); De Koker *et al.*, 2017:205,209). It is, however, important in such circumstances that a thorough analysis of the applicable risk was performed by a country/financial institution (De Koker, 2013: ANCIL-44 (25-26)). Enhanced and simplified CDD are described in more detail in sections 4.4.2.2 and 4.4.2.3 below.

The Interpretive Note to Recommendation 10 provides examples to be used as indicators for potential higher and lower money laundering risk situations. These are only guidelines and may not apply to all circumstances (De Koker, 2013: ANCIL-44 (24)). According to De Koker *et al.* (2017:205), every institution will draw up its own list of risk factors subsequent to a risk assessment performed, but they can reference to the examples provided by the FATF. The risks are categorised in three categories i.e. customer risk, country/geographic risk and particular products, services, transactions or delivery channels risk (De Koker, 2013: ANCIL44 (25)).

When institutions assess their money laundering risks in terms of these three categories, they should take what is known as risk variables into account. The Interpretive Note to Recommendation 10 provides examples of such risk variables which on its own, or combined, could have an effect on the risk posed, i.e. the risk can increase or decrease depending on the risk variables which will have an influence on the CDD measures to be performed (De Koker, 2013: ANCIL-44 (27)).

4.4.2.1.1 Customer risk factors

According to Esoimeme (2015:15, 16), financial institutions/DNFBPs should, when performing CDD, identify the money laundering risks posed by certain customers and/or entities due to the nature of their specific business or occupation, as well as the transaction which they want to

perform. These risks should also be assessed during the Enhanced Due Diligence (EDD) process and these institutions/DNFBPs should put strategies in place to mitigate the risks at the Ongoing Customer Due Diligence (OCDD) stage. The institution/DNFBP should apply their judgement and should not treat all customers as if they pose the same level of risk (Esoimeme, 2015:27).

The RBA Guidance for real estate agents indicates that CDD, including CIV, is crucial for the mitigation of customer risk factors (FATF, 2008c:21). As mentioned earlier, institutions can refer to the above examples in the FATF Recommendations, but every institution will draw up its own list of risk factors subsequent to a risk assessment performed (De Koker *et al.*, 2017:205). The following are examples of higher customer risk categories as set out in the RBA Guidance for real estate agents and the National Association of Realtors (NAR) (FATF, 2008c:21; NAR, 2012:2):

1. PEPs;
2. Large unexplained differences between the location of the buyer and the prospective property;
3. Complex business structures where the agent cannot easily determine the identity of the owner;
4. Cash-intensive businesses;
5. NPOs and intermediaries not subject to monitoring and supervisory requirements; and/or
6. Uncommon third-party involvement in the transaction.

4.4.2.1.2 Country/geographic risk factors

FATF (2008c:20) explain that risks relating to countries/geographic sections will, together with other identified risk categories, assist with the identification of possible money laundering situations. As per the RBA Guidance for real estate agents (FATF, 2008c:20), no common definition exists by competent authorities, financial institutions or DNFBPs to indicate whether a specific country or geographic area will pose a higher risk.

According to Esoimeme (2015:98, 99), the identification of geographic sectors which may present higher money laundering risks is a fundamental part of an institutions AML compliance programme. However, these geographic risks do not on its own determine a higher or lower risk for the customer or transaction. All risk factors need to be considered in determining the overall level of risk of a specific client or transaction.

The FATF (2008c:20, 21) and the NAR (2012:2) list some countries/jurisdictions where the risk for money laundering may be higher. The following types of countries/jurisdictions are listed:

1. Countries subject to restrictions or sections issued by bodies such as the UN;

2. Countries with inadequate or weak AML laws and regulations, as identified by credible sources;

3. Countries which fund and/or support criminal activities, which have a considerable amount of corruption, or other identified criminal activities; and/or

4. Countries with no obligation to register real property.

The guidance report furthermore indicates that the location of the person buying and the person selling the property as well as the location of the property itself in relation to the buyer of the property can be two elements contributing to a money laundering risk (FATF, 2008c:20).

4.4.2.1.3 Particular products, services, transactions or delivery channels risk factors

The following are *inter alia* higher risk factors as indicated in the RBA Guidance for real estate agents and the NAR (FATF, 2008c:21, 22; NAR, 2012:3):

1. Properties that are valued for a higher or lower amount than the actual value of the property;

2. The buyer of the property uses a considerable amount of cash to buy the property;

3. The purchase price of the property is significantly higher than the amount which the buyer of the property can afford, in relation to the person's profession and salary;

4. The property is sold immediately after it has been bought with the price of the subsequent sale being considerably higher or lower than the initial purchase price, without a logical reason;

5. Situations where the buyer do not want to see the property and do not show interest in the features of the property;

6. More than one transaction within a short period of time for similar property types without a reasonable explanation; and

7. No profit is made on the sale of the property.

It is important for real estate agents to use their knowledge of the real estate sector to identify any other suspicious circumstances which could increase the risk of money being laundered (NAR, 2012:3). It is in some countries a requirement for institutions and professions who also conduct CDD measures, to be involved with the sale of real estate e.g. lawyers, financial institutions and/or notaries. By having more professions involved, the money laundering risk may be lowered (FATF, 2008c:22).

4.4.2.2 EDD measures

The Interpretive Note to Recommendation 1 requires financial institutions to conduct EDD procedures in cases where higher risks are present, as discussed above. By doing so, financial institutions perform a higher degree of monitoring on the business relationship in order to establish if the identified transaction is indeed suspicious. This Interpretive Note furthermore provides examples of EDD procedures to be performed by the institution, namely (De Koker, 2013: ANCIL-44 (27-28)):

1. Additional information should be gathered and updated on a more frequent basis on the customer/beneficial owner. Such information should include the occupation of the customer/beneficial owner, the volume of assets, the nature of and reasons for the proposed business relationship, the source of funds and any other publicly available data on the customer/beneficial owner;

2. Permission should be obtained from senior management to be able to start with the relationship, or to continue with an existing relationship;

3. The amount of controls performed on the customer as well as the timing of such controls should be enhanced. Transaction patterns should be observed, and suspicious transactions should be selected for further investigation; and

4. The customer should be requested to make the first payment by using an account in his/her name through a bank which will also perform CDD measures on the customer.

As not all high-risk situations are exactly the same, the EDD procedures cannot be the same for all customers. Real estate agents should therefore be able to apply applicable EDD procedures based on each individual client/transaction, as identified through the RBA (FATF, 2008c:17, 23). Specific controls and procedures that can be implemented and performed by real estate agents include (FATF, 2008c:23):

1. Real estate agents should continuously be aware of situations and customers which could pose a higher money laundering risk;

2. The acceptance of high-risk customers or transactions should be escalated to management;

3. Enhanced controls should be in place for the monitoring of transactions; and

4. The relationships with the customers should be reviewed on a regular basis.

Esoimeme (2015:46) explains that EDD procedures, in contrast to standard CDD procedures, will provide financial institutions/DNFBPs with a better knowledge of the customer and the risks relating to the specific customer and/or transaction. Financial institutions/DNFBPs should apply such EDD measures based on their respective RBA (Esoimeme, 2015:47).

In the case where there is a reasonable belief that a specific customer or transaction is part of a money laundering scheme, the financial institution/DNFBP should file an STR with their respective FIU. An RBA is therefore not relevant in such circumstances (Esoimeme, 2015:50). STRs are discussed in more detail in section 4.4.8 below.

4.4.2.3 Simplified CDD measures

As mentioned earlier, financial institutions/DNFBPs may perform simplified CDD measures in certain lower risk situations. According to the Interpretive Note to Recommendation 10 such simplified measures should bear in mind the nature of the lower risk, for example, simplified measures may only be applicable to the CIV stage, or the ongoing monitoring stage. Some examples of simplified CDD measures include (De Koker, 2013: ANCIL-44 (28)):

1. The identity of the customer/beneficial owner may be established subsequent to the on-set of the business relationship;

2. The frequency of customer identification updates may be decreased;

3. The extent of OCDD measures and the analysis of transactions may be reduced; and

4. Additional information to indicate the objective and intended nature of the business relationship do not have to be gathered as reliance could be placed on conclusions made from available information regarding the type of transaction or intended business relationship.

The Interpretive Note to Recommendation 10 clearly indicates that simplified CDD measures are not allowed in the event where there is a suspicion that money is being laundered, or in the case where specific higher-risk scenarios are applicable (De Koker, 2013: ANCIL-44 (28)).

According to Esoimeme (2015:57), simplified CDD measures may be applied to *inter alia* the following types of individuals/companies/products:

1. Financial institutions which are subject to AML requirements as obligated per the relevant country's laws and regulations;

2. Publicly listed companies liable to regulatory disclosure requirements; and

3. Individuals whose income is mostly derived from a salary, pension fund money or social benefits. The prospective transaction should correspond to the income of the individual.

Although basic CDD measures are not performed, the financial institution/DNFBP should still perform OCDD procedures (Esoimeme, 2015:58).

4.4.2.4 OCDD measures

In accordance with the Interpretive Note to Recommendation 10, it should be compulsory for financial institutions to make sure that all CDD information, documents and data are continuously updated and relevant. This should be done through reviewing current records, especially for higher-risk customers or transactions (De Koker, 2013: ANCIL-44 (29)).

Through the ongoing monitoring process, uncommon/suspicious transactions should be highlighted for further investigation (Esoimeme, 2015:51). This process is helpful as it reviews the complete profile of the customer/transaction and stretch wider than the initial CIV process, making it easier to pick up unusual trends relating to potential money laundering activities (Esoimeme, 2015:53).

Cox (2011:218) explains that criminals will anticipate CDD procedures at the start of the business relationship or transaction and will try their best to make the business relationship/transaction seem legitimate. By performing OCDD procedures, institutions/DNFBPs therefore have a better chance of identifying suspicious activity.

Cox (2011:219, 220) furthermore explains that there is not a set way to conduct OCDD. It could generally entail a close review of transactions conducted during the course of the business relationship. It will be beneficial to the institution/DNFBP to monitor transactions in real time, i.e. as they take place or just before they take place. Another OCDD procedure will be, as mentioned earlier, to continuously update information on the customer (including documents and data) to ensure accurate and up to date information.

4.4.2.5 General issues/limitations with CDD procedures

As mentioned earlier, there are certain circumstances where the RBA will be limited. An example where such a limitation can apply, is with CDD measures. Where a lower risk is identified for a customer in respect of CIV, it does not mean that all other CDD procedures will necessarily be simplified due to the low identification risk, as stipulated in the Interpretive Note to Recommendation 10. OCDD procedures still have to be performed irrespective of the risk status of the customer (De Koker, 2013: ANCIL-44 (27); FATF, 2008c:9).

Except for the above limitation, Cox (2011:134-138) identified some common issues experienced with CDD procedures. Most of these, when individually reviewed, do not necessarily mean that the customer is busy with a money laundering scheme. All circumstances must be taken into account when determining the risk associated with the specific customer/transaction. Below is a summary of issues that can be experienced during the application of CDD measures:

1. The customer is hesitant to provide personal information;

2. Inconsistent/contradictory information is received;

3. Incomplete information is received e.g. addresses or contact numbers not provided by the customer;

4. Fraudulent documents and information are provided by the customer, e.g. fraudulent identification documents;

5. Passports from diplomats from small countries. Such passports may seem legitimate, however they can be forged and not picked up due to the lack of knowledge from officials on the specifications of such passports; and

6. Customers who are attempting to rush the process.

To conclude on Recommendation 10, one should remember that the existence of one, or more than one risk factor, do not automatically indicate that the customer is laundering funds. Real estate agents should be able to recognise risk factors and be able to apply their minds, based on their experience in the industry, to determine if a customer is busy with a suspicious activity (NAR, 2012:3).

4.4.3 Recommendation 11 (Record keeping)

Recommendation 11 expects financial institutions to maintain all necessary records regarding both local and international transactions for a minimum of five years. This will enable them to

comply with requests for information by competent authorities within a short period of time. The records kept should be adequate (i.e. information on the types and amounts of transactions and the currency used), in order for it to be used to reconstruct individual transactions when used for criminal prosecution (De Koker, 2013: ANCIL-17).

A similar five year period also applies following the ending of a business relationship or after the date of occasional transactions and affects all records which were obtained as part of the CDD process. The records relating to CDD measures to be kept include *inter alia* the following (De Koker, 2013: ANCIL-17):

1. Copies/records of official identification documents (passports, identity cards, driving licenses etc.);

2. Account files and business correspondence; and

3. Results of any analysis performed on the customer, for example, information on the background and purpose of complex and large transactions.

According to Esoimeme (2015:178), the records can be held in several forms, which can include original documents, copies of original documents or documents kept electronically or on microfilm. Esoimeme (2015:178) furthermore indicates that it is not necessary for financial institutions/DNFBPs to have separate record keeping systems for every individual AML requirement, as long as it is possible for them to access applicable records within a short period of time when it is requested. In exceptional circumstances, it may be required that a financial institution/DNFBP keep certain records for a period exceeding five years.

Recommendation 11 further stipulates that financial institutions should be required by law to maintain the above-mentioned records on transactions and information gathered through their CDD measures (FATF, 2012-2019:13).

4.4.4 Recommendation 12 (PEPs)

According to Recommendation 12, financial institutions should be able to determine through proper risk management if their customer (or beneficial owner) is a domestic, or foreign PEP. Since such persons pose a higher risk, some additional measures on top of the normal CDD measures as described above, should be required. These measures should also be applied to their family and close associates, and include the following (De Koker, 2013: ANCIL-18):

1. Special approval by a person in a senior management position should be given for any new business relationship, or the continuation of a business relationship for existing customers;

2. The institution should be able to find out the source of the funds that will be used; and

3. The business relationship should be monitored by using enhanced OCDD measures.

The FATF issued a guidance document on PEPs (Recommendations 12 and 22) in June 2013. As reflected in this guidance, countries should in terms of Recommendations 12 and 22 make sure that financial institutions and DNFBPs put controls in place in order to address the higher risks posed by certain PEPs. Recommendation 12 pertains to financial institutions and in terms of Recommendation 22, countries should ensure that DNFBPs also comply with these requirements (FATF, 2013c:3, 4).

The above requirements on financial institutions/DNFBPs are preventative and PEPs should not be treated as if they are involved in criminal activities. Business relationships should therefore not be denied solely on the fact that a customer or beneficial owner is a PEP (FATF, 2013c:3). The FATF compiled a list of red flags that can be used by financial institutions/DNFBPs to detect possible abuse of the financial systems by PEPs (FATF, 2013c:27).

In the abovementioned guidance on PEPs, FATF defines a PEP as "an individual who is or has been entrusted with a prominent public function". PEPs can pose money laundering risks as they can misuse the positions entrusted to them (FATF, 2013c:3). The guidance document furthermore provides applicable definitions of concepts used in Recommendation 12 (FATF, 2013c:4, 5):

1. Domestic PEP and foreign PEP: A person who are currently or have previously been entrusted with prominent public functions locally (in the case of a domestic PEP) or by a foreign country (in the case of a foreign PEP). Examples of such PEPs can include *inter alia*:

    - Heads of State/government;
    - Senior politicians;
    - Senior government;
    - Military officials;
    - Senior executives of state owned corporations; and
    - Important political party officials.

2. International organisation PEP: This refer to "persons who are or have been entrusted with a prominent function by an international organisation, refers to members of senior management or individuals who have been entrusted with equivalent functions". Examples of international organisation PEPs include *inter alia*:

- Directors;
- Deputy directors; and
- Members of the board.

3. Family members of PEPs: These are persons related to a PEP in one of the following ways:

- Directly by blood (consanguinity);
- By being married; or
- Through civil partnership.

4. Close associates of PEPs: Individuals who are socially, or in a professional capacity closely connected to a PEP.

Recommendation 1 (Assessing risks and applying a RBA) and Recommendation 10 (CDD) were discussed in sections 4.4.1 and 4.4.2 above. The below discussion focus on the link between Recommendation 12 and the above-mentioned Recommendations.

According to the FATF Guidance on PEPs, Recommendations 10 and 12 forms a critical part of CDD requirements as they can only establish if a customer/beneficial owner is a PEP when there is effective CDD measures (both CIV as well as OCDD measures) in place. Such effective CDD measures is fully reliable on an effective RBA, as explained in Recommendation 1, and CDD measures should be applicable to all types of customers (FATF, 2013c:5). Financial institutions/DNFBPs should determine the extent of the risks associated with a specific PEP and the controls that they have in place to address such risks before a decision is made to accept or reject a business relationship, or to continue an existing relationship (FATF, 2013c:7).

Subsequent to such a risk assessment, if the financial institution/DNFBP determined that a higher risk is not posed by a PEP, the customer/beneficial owner must be treated like any other customer and normal CDD and OCDD measures must be performed. However, financial institutions/DNFBPs should keep in mind that the PEPs circumstances might change which could influence the risk level of the PEP. Such a change could lead to the implementation of EDD measures as set out in Recommendation 12. In the case where the financial institution/DNFBP do not have adequate procedures in place to address higher risks in respect of the PEP, they should cancel the business relationship (FATF, 2013c:23).

For PEPs no longer entrusted with a prominent public function, financial institutions/DNFBPs should also determine the risks associated with such person, as per the RBA. They should take

adequate measures to mitigate any risks that may exist. Risk factors may include but are not limited to (FATF, 2013c:12):

1. The influence that the person can still exercise;

2. The rank that the person had; and

3. If the present position of the person links to the previous function when he/she was a PEP.

As per Recommendation 20, financial institutions/DNFBPs should file an STR with their respective FIU if a suspicion and/or reasonable grounds exists that the funds used by a PEP are the proceeds of criminal activities (FATF, 2013c:7). Recommendation 20 is discussed in detail in section 4.4.8 below.

According to the FATF guidance document on PEPs, some challenges are posed to financial institutions and DNFBPs worldwide to effectively implement the requirements relating to PEPs (FATF, 2013c:4). The first relates to the fact that it is sometimes difficult to determine whether a customer/beneficial owner is a PEP, or to determine their family members or close associates. This can be the case when foreign PEPs are involved and the financial institution/DNFBP do not have access to current information regarding such customers/beneficial owners. The second challenge relates to customers/beneficial owners who become PEPs subsequent to the establishment of a business relationship. It is often difficult for financial institutions/DNFBPs to identify such instances, and therefore financial institutions/DNFBPs should keep up to date with changes in PEP status and should not only rely on the status of the customer at the onset of the business relationship (FATF, 2013c:13). Such OCDD measures should be done in agreement with Recommendation 10 and therefore, it should be based on risk (FATF, 2013c:14).

4.4.5 Recommendation 15 (New technologies)

As mentioned at the start of section 4.4, Recommendation 15 also applies to DNFBPs as required by Recommendation 22. According to FATF Recommendation 15, countries and financial institutions should identify and assess the money laundering risks that may arise when new products and/or new business practices are developed, as well as instances where they use new technologies (or technology still in development) for new and existing products. They should take adequate steps to mitigate the identified risks (De Koker, 2013: ANCIL-19).

Financial institutions should perform a risk assessment in order to identify such risks, before they launch the new products, business practice or new technologies (Shinfield & Bellofiore, 2012).

4.4.6 Recommendation 17 (Reliance on third parties)

The four CDD obligations are set out in Recommendation 10, as explained in section 4.4.2 above. According to Recommendation 17, financial institutions may, if certain criteria are met, be allowed by countries to rely on certain third parties to perform the first three CDD obligations of Recommendation 10 or to introduce business (De Koker, 2013: ANCIL-20; FATF, 2012-2019:16). As per Recommendation 22, this will also apply to DNFBPs which includes real estate agents.

The criteria to be met as set out in Recommendation 17 include the following (De Koker, 2013: ANCIL-20):

1. The financial institution/DNFBP who place their reliance on a third party should, without delay, gather the necessary information as per the first three CDD elements of Recommendation 10;

2. Such financial institutions/DNFBPs must ensure that copies of the information and documentation relating to the CDD obligations will be easily and rapidly accessible when it is requested from the third party;

3. The financial institution/DNFBP should be convinced that the third party is regulated, supervised, monitored and that they have controls in place to ensure compliance with Recommendations 10 and 11; and

4. To determine the country where the third party which meets the conditions can be based, country risk factors should be taken into account.

Even though all of the above are met, and the financial institution/DNFBP rely on a third party to perform such CDD measures, the financial institution/DNFBP is still ultimately responsible for the CDD measures (De Koker, 2013: ANCIL-20).

The Interpretive Note to Recommendation 17 provide the following important information (De Koker, 2013: ANCIL-44 (39):

1. Third parties can be defined as “financial institutions or DNFBPs that are supervised or monitored and that meet the requirements under Recommendation 17”;

2. Recommendation 17 is not applicable to outsourcing or agency relationships;

3. The third parties which are relied upon must comply with Recommendations 10 (CDD) and 11 (Record keeping) and such compliance must be monitored; and

4. The third party will normally already have a business relationship with the customer. This relationship should be independent from the proposed new relationship between the customer and the financial institution/DNFBP who place their reliance on the third party.

4.4.7 Recommendation 18 (Internal controls and foreign branches and subsidiaries)

Recommendation 18 makes it a requirement for financial institutions, their foreign branches as well as their majority owned subsidiaries to implement AML programmes. It is the responsibility of financial institutions to ensure that their foreign branches and their majority owned subsidiaries implement the same AML measures as those of their home country (De Koker, 2013: ANCIL-21).

According to the Interpretive Note to Recommendation 18, such programmes should include the following (De Koker, 2013: ANCIL-44 (40)):

1. Internal policies, procedures and controls should be established (this should include suitable compliance management arrangements as well as sufficient screening procedures when hiring employees). The Interpretive Note indicates that a compliance officer at a management level should be appointed as part of compliance management arrangements;

2. A continuous employee training programme should be in place; and

3. There should be an independent audit function in place to test the system.

The nature and degree of such measures should be determined based on the degree of money laundering risks identified, taking into account the size of the business (De Koker, 2013: ANCIL-44 (40)). The FATF RBA Guidance for real estate agents indicates that the resources of small businesses and professions to combat money laundering can be limited due to the limited number of staff employed by various DNFBPs (including real estate agents), in contrast to most financial institutions. This limitation should be considered when a risk-based framework for internal control systems are created (FATF, 2008c:26).

According to Esoimeme (2015:151) financial institutions and DNFBPs should in terms of this Recommendation provide their employees with suitable AML training. Such training should include both information on the relevant laws and regulations applicable in their country, as well as the institutions' own internal policies and procedures.

The FATF Guidance on PEPs indicates that the employee training programmes need to include adequate ways in which the employees can identify clients which are PEPs. It should also include training on the potential risks associated with such clients (FATF, 2013c:14).

Taking all the above into account, real estate agents should imbed their RBA in the internal controls of the firm in order to ensure an effective RBA. Internal control systems play a crucial part in the success of an institution's internal policies and procedures (FATF, 2008c:26).

4.4.8 Recommendation 20 (Reporting of suspicious transactions)

According to Recommendation 20, a financial institution must be required by law to immediately report to their FIU any suspicion or reasonable grounds to suspect that funds are the proceeds of criminal activity or related to terrorist financing (De Koker, 2013: ANCIL-21). This Recommendation must be read in conjunction with the Interpretive Note to Recommendation 20.

The Interpretive Note indicates that "criminal activity" includes "all criminal acts that would constitute a predicate offence for money laundering or, at a minimum, to those offences that would constitute a predicate offence, as required by Recommendation 3" (De Koker, 2013: ANCIL-44 (42)).

The reporting responsibility is a direct mandatory responsibility to report all suspicious transactions (which includes attempted transactions) irrespective of the value of the transaction/attempted transaction (De Koker, 2013: ANCIL-44 (42)).

The FATF RBA Guidance for real estate agents explain that suspicious transaction reporting is crucial for countries as they need to use the financial information to combat money laundering. The law of each country contains certain thresholds where institutions will need to report a transaction if such a transaction falls above the designated thresholds (FATF, 2008c:25).

4.4.9 Recommendation 21 (Tipping-off and confidentiality)

According to Cox (2011:228), an important part in the prevention of money laundering relates to the discretion of investigators and individuals who report suspicious transactions. If money launderers were alerted of suspicions, they would move or hide the funds in another jurisdiction, which will undermine the prevention and detection of such activities.

As such, Recommendation 21 exists which relates to both tipping-off and confidentiality. In terms of Recommendation 21, financial institutions and their directors, officers and employees must be protected by legislation from criminal and civil liability for breach of contracts or legislative, regulatory or administrative provision in the case where they report a suspicion to the FIU in good faith. They do not have to know the exact underlying criminal activity and it is not necessary that such illegal activity already took place (De Koker, 2013: ANCIL-21).

The second part of Recommendation 21 indicates that it should be illegal for financial institutions and their directors, officers and employees to reveal that an STR or related information was filed with an FIU (so-called “tipping-off”) (De Koker, 2013: ANCIL-21).

Cox (2011:228) explain that a person will commit an offence of “tipping-off” if “he knows or suspects that a disclosure has been made, and he makes the disclosure which is likely to prejudice any investigation which might be conducted following the disclosure referred to above”.

Cox (2011:229, 230) further explains that staff need to be familiar with their obligations under tipping-off laws and regulations. They need to know what they are allowed to tell customers to ensure that they do not tip them off in the case where there is a suspicion of money laundering. When an STR is filled, they are not allowed to tell the customer the real reason why the transaction is taking longer than usual, as this will constitute “tipping-off”.

Recommendation 10 (CDD) is described earlier in this chapter. In the Interpretive Note to Recommendation 10, reference is made to the risk that financial institutions could accidentally tip off customers when the institution is performing their CDD responsibilities. It is therefore important that in the case where there is a suspicion of money laundering, financial institutions should consider the potential risk that the CDD procedures may tip off the customer. In the case where they reasonably believe that such CDD measures will tip off the customer, an STR should rather be filed and the CDD measures should not be performed (De Koker, 2013: ANCIL44 (20)).

4.4.10 Recommendation 28 (Regulation and supervision of DNFBPs)

In terms of Recommendation 28, countries should make sure that DNFBPs (excluding casinos) are subject to effective systems to monitor and ensure compliance with AML requirements. Such monitoring can be done by a supervisor or an SRB and must be carried out on a risk-sensitive basis (De Koker, 2013: ANCIL-26).

The supervisor or SRB must furthermore have the necessary measures to prevent that criminals (or their associates) are professionally accredited or holding or being the beneficial owner of a significant/controlling interest or a management function. The supervisor or SRB should also have “effective, proportionate, and dissuasive sanctions in line with Recommendation 35” (FATF, 2012-2019:22). Recommendation 35 is discussed in more detail later in this chapter.

The Interpretive Note to Recommendation 28 provides clarity on an RBA to the supervision of DNFBPs. Such an RBA refers to the general process where a supervisor or SRB assign resources to supervise the DNFBP’s compliance to AML requirements, based on the supervisor or SRB’s knowledge of risks. Furthermore, it refers to a specific process where the supervisor or SRB

monitor DNFBPs which use an RBA to combat money laundering (De Koker, 2013: ANCIL-44 (56).

Based on the supervisor or SRBs knowledge of the money laundering risks, together with the characteristics of the specific DNFBP, the supervisor or SRB must decide how often they will need to monitor the DNFBP and how intense such monitoring will have to be. Their knowledge of the money laundering risks should include those in the applicable country together with those relating to the DNFBP, its customers, products and services (De Koker, 2013: ANCIL-44 (56)).

It is important for the supervisors or SRBs to possess over sufficient powers to carry out their specific functions. They should furthermore have adequate financial, human and technical resources in place. Countries should monitor these supervisors and SRBs to ensure that their staff keep up high professional standards and that they possess over the necessary skills to perform their functions (De Koker, 2013: ANCIL-44 (56)).

The FATF Guidance to PEPs place focus on the role that supervisors play in giving guidance to DNFBPs on PEPs and how DNFBPs apply the requirements relating to PEPs (FATF, 2013c:24). Further to the above, supervisors should monitor the internal controls of DNFBPs applicable to PEPs and their supervisory methodology should be in line with the internal control requirements of Recommendation 18 (FATF, 2013c:25).

4.5 The FATF Recommendations applicable to countries

Section 4.4 provides a breakdown of the specific Recommendations which are applicable to the prevention of money laundering in the real estate sector. In addition to the Recommendations discussed in section 4.4 above, this next section provides a brief discussion of the following Recommendations which focus on the AML requirements of countries:

1. Recommendation 2 (National co-operation and co-ordination);
2. Recommendation 3 (Money laundering offence);
3. Recommendation 4 (Confiscation and provisional measures);
4. Recommendation 29 (Financial intelligence units);
5. Recommendation 30 (Responsibilities of law enforcement and investigative authorities);
6. Recommendation 33 (Statistics);
7. Recommendation 34 (Guidance and feedback); and

8. Recommendation 35 (Sanctions).

These Recommendations need to be briefly examined in order to establish the South African compliance with the FATF Recommendations in the fight against money laundering in South Africa, with specific reference to the real estate sector. South Africa's compliance with these Recommendations as well as the Recommendations discussed in section 4.4 above are discussed in chapter 5 of this study.

4.5.1 Recommendation 2 (National co-operation and co-ordination)

In terms of this Recommendation, countries must have national AML policies in place, based on identified risks, and should have a designated authority responsible for such policies (De Koker, 2013: ANCIL-13).

4.5.2 Recommendation 3 (Money laundering offence)

Money laundering should be criminalised based on (De Koker, 2013: ANCIL-37):

1. The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention); and

2. The UN Convention against Transnational Organized Crime, 2000 (the Palermo Convention).

The crime of money laundering must be applied to all serious offences and should include an extensive range of predicate offences (De Koker, 2013: ANCIL-14). It should furthermore include all types of properties (irrespective of the value of the property) which represents the proceeds of crime, either directly or indirectly. When it is proved that property constitutes the proceeds of a crime, it should not be necessary to convict a person of a predicate offence. A predicate offence for money laundering should include criminal acts that occurred in other countries, which would have constituted a crime in that specific country and which would have been a predicate offence if it had happened locally (De Koker, 2013: ANCIL-37).

If a person is found guilty of the money laundering offence as criminalised in a country's legislation, there should be efficient, proportionate and dissuasive sanctions in place (De Koker, 2013: ANCIL-37).

Furthermore, suitable offences should be criminalised for individuals who participate in, or facilitates money laundering offences (De Koker, 2013: ANCIL-38).

4.5.3 Recommendation 4 (Confiscation and provisional measures)

In terms of Recommendation 4, the following are relevant (De Koker, 2013: ANCIL-14):

1. The measures as set out in the Vienna, Palermo and Terrorist Financing Conventions should be adopted by countries and should be included in their legislative measures to enable their competent authorities to freeze and/or seize properties involved in money laundering schemes without prejudicing the rights of bona fide third parties.

2. These measures should incorporate the authority to:

    - Find and trace properties to be confiscated;

    - Execute provisional measures (freeze and/or seize property) to keep criminals from dealing with or disposing of such property;

    - Take steps which will counter actions that influence a country's ability to freeze, seize or recover property that must be confiscated; and

    - Take suitable investigative measures.

3. It should be considered by countries to adopt measures which will enable the confiscation of such proceeds without convicting a person, or which require a person to show the lawful origin of the property to be seized.

4.5.4 Recommendation 29 (FIUs)

Recommendation 29 makes it a requirement for countries to establish an FIU. The FIU should receive and analyse STRs and other information relating to money laundering and the predicate offences associated therewith. The FIU should also spread the results of analysis performed widely and should be able to gather additional information from reporting entities. It is important that the FIU have timely access to financial, administrative and law enforcement information necessary to execute its responsibilities accordingly (De Koker, 2013: ANCIL-26). The Interpretive Note to Recommendation 29 provides detailed information on the role and functions of an FIU and should be read in conjunction with Recommendation 29 (De Koker, 2013: ANCIL-44 (57)).

The Interpretive Note to Recommendation 29 specifically stipulates that countries should ensure that their FIU has regard to the Egmont Group's "Statement of Purpose" and its "Principles for Information Exchange Between Financial Intelligence Units". These documents contains important guidance in respect of an FIU's roles and functions and mechanisms to exchange

information between FIUs (FATF, 2012-2019:99). The Interpretive Note also stipulates that FIUs should apply for membership to the Egmont Group (FATF, 2012-2019:99).

The Egmont Group was founded in 1995 as a result of a meeting between a group of FIUs at the Egmont-Arenberg Palace in Brussels, Belgium (Egmont Group, 2018:11; FinCEN, 2015a). Today, the Egmont Group consists of 164 FIUs and provides a platform to securely exchange expertise and financial intelligence to combat money laundering and terrorist financing (Egmont Group, 2019a). The Egmont Group's membership is divided in eight regional groups which are aligned to the FSRBs (Egmont Group, 2019c).

4.5.5 Recommendation 30 (Responsibilities of law enforcement and investigative authorities)

As stipulated in Recommendation 30 and the Interpretive Note to Recommendation 30, countries must make sure that their designated law enforcement authorities are responsible to investigate money laundering, as well as predicate offences, through a financial investigation in line with their AML legislation. The Interpretive Note to Recommendation 30 defines a financial investigation as "an enquiry into the financial affairs related to a criminal activity, with a view to identifying the extent of criminal networks and/or the scale of criminality; identifying and tracing the proceeds of crime, terrorist funds or any other assets that are, or may become, subject to confiscation; and developing evidence which can be used in criminal proceedings" (De Koker, 2013: ANCIL-26, ANCIL-44 (61)).

In addition to the above, countries must have designated competent authorities which will deal with identifying, tracing, freezing and seizing of properties (De Koker, 2013: ANCIL-44 (61)).

Recommendation 30 not only applies to law enforcement authorities, but also to competent authorities with the responsibility of conducting financial investigations of predicate offences, in line with the functions under Recommendation 30 (De Koker, 2013: ANCIL-44 (61)).

It is important for law enforcement and prosecutorial authorities to have competent financial, human and technical resources. Countries should therefore, in terms of Recommendation 30, have processes in place which will ensure that the staff of the authorities possess high professional standards (including confidentiality) and that they have the necessary skills and integrity to perform their functions (De Koker, 2013: ANCIL-44 (62)).

4.5.6 Recommendation 33 (Statistics)

In terms of Recommendation 33, countries should keep comprehensive statistics of the following as relevant to the effectiveness of their AML systems (De Koker, 2013: ANCIL-28):

1. The number of STRs received;

2. Money laundering investigations;

3. Prosecutions and convictions;

4. Confiscated, frozen or seized properties; and

5. Mutual legal assistance and other global requests for cooperation.

4.5.7 Recommendation 34 (Guidance and feedback)

Competent authorities, supervisors and SRBs should have in place guidelines (including feedback) which will enable financial institutions/DNFBPs to apply national AML measures, which include the identification and reporting of suspicious transactions (De Koker, 2013: ANCIL-28).

4.5.8 Recommendation 35 (Sanctions)

Countries should establish effective, proportionate and dissuasive sanctions for offenders (natural and legal persons) which can include criminal, civil or administrative sanctions. It is important that these sanctions include the directors and senior management of financial institutions and DNFBPs (De Koker, 2013: ANCIL-28).

4.6 Conclusion

As mentioned at the start of this chapter, the FATF “plays a major role in the worldwide effort to tackle money laundering” (Hatchard, 2006:154). The above discussion provides a comprehensive background on the FATF and its role, together with the FSRBs in the fight against money laundering. In addition to this, a background of the FATF Recommendations and the Recommendations specifically relating to the real estate sector, are discussed. The FATF’s mutual evaluation process are discussed to provide a background to the discussion which follows in the next chapter around the 2009 mutual evaluation on South Africa’s compliance with the FATF Recommendations.

As the FATF is an independent inter-governmental body that develops and promotes policies to protect the global financial system against *inter alia* money laundering, this chapter provides an understanding of the FATF and its Recommendations in order to compare South African legislation against the standards set by the FATF. The next chapter focus on the South African legislation and reference is made on numerous occasions to the information in chapter 4.

CHAPTER 5: LEGISLATIVE MEASURES IN SOUTH AFRICA TO PREVENT MONEY LAUNDERING IN THE REAL ESTATE SECTOR

5.1 Introduction

According to De Koker *et al.* (2017:18), the current South African anti-money laundering (AML) framework started to develop in the early 1990s. Before the Drugs and Drug Trafficking Act (140 of 1992) (DTA) came into effect, South Africa had no legislation in place with the direct focus to combat money laundering. The Criminal Procedure Act (51 of 1977) (CPA) only provided limited assistance as section 35 included that instruments which were used in the execution of an offence could be forfeited to the state and not the actual gains as a result of the offence (Bourne, 2002:487). However, section 300 of the CPA provided that a court may award compensation where the offence causes damage to or loss of property. In addition, section 301 provided for compensation to an innocent purchaser who unknowingly purchased property which was unlawfully obtained.

The South African Law Commission (nowadays the South African Law Reform Commission) (the Commission) suggested a dual approach to counter money laundering. The first part of this approach is to enforce duties to ensure proper record keeping and the reporting of suspicious conduct on entities which can potentially be used for money laundering. Secondly, they suggested that money laundering offences must be created (Kruger, 2008:37).

According to Kruger (2008:36), both preventative and reactive measures can be used to effectively combat money laundering. Preventative measures aim to prevent the offence while reactive measures include sanctions after a crime was committed. Kruger (2008:36) further explains that the Financial Intelligence Centre Act (38 of 2001) (FICA) involves both of these types of measures.

As described in chapter 4, South Africa is a member of the Financial Action Task Force (FATF). According to Tuba (2012:109), South Africa ratified both the Vienna and Palermo Conventions. Due to its responsibility towards these international commitments, several legislative measures were developed in order to combat money laundering and other related matters in order to comply.

On 16 February 2012, the South African Minister of Finance welcomed the FATF's announcement on the revision of the FATF Recommendations (FIC, 2012). The Minister commented as follows (FIC, 2012):

> We will be working closely with supervisory bodies, law enforcement agencies and other key partners in industry and government to ensure that the new Standards are understood, and that the measures taken to meet these Standards are appropriate for South African circumstances.

When international legislation is considered, Ryder (2012:4) explains that the United States of America (USA) "has adopted an aggressive stance towards money laundering and is the instigator of the 'war on drugs', which was the catalyst for the introduction of the Vienna Convention in 1988". He further explains that the USA is "at the forefront of the global fight against money laundering; which is not surprising given the amount of laundered money that is transferred through its banking system" (Ryder, 2012:4). The USA is furthermore one of the founding members of the FATF (KnowYourCountry, 2019b).

The Kingdom of the Netherlands (Netherlands) is identified as "a major trade and financial centre" which makes it attractive for the laundering of illicit funds (KnowYourCountry, 2019a). In the Mutual Evaluation Report (MER) of the Netherlands, FATF (2011:8) indicates that the Netherlands have criminalised money laundering "fully in line with the requirements under the Vienna and Palermo Conventions".

The Netherlands has a well-established Financial Intelligence Unit (FIU), which was one of the founding members of the Egmont Group of Financial Intelligence Units (Egmont Group) which are highly trusted for its professionalism, both local and abroad (FATF, 2011:8).

In light of the above, this chapter includes an analysis of the development of the South African legislative measures to combat money laundering, as well as the legislation currently applicable towards the prevention of money laundering in the real estate sector, and the effectiveness thereof. Throughout the discussion on the legislation currently in place to combat money laundering in the South African real estate sector, reference is made to the FATF Recommendations as discussed in chapter 4 of this study.

As the USA and the Netherlands both dispose of strong AML legislation, and are among the founding members of the FATF and Egmont Group respectively, their AML regimes are briefly discussed and compared to the AML legislative measures currently in place in South Africa.

5.2 The development of South African legislation

5.2.1 The DTA

The DTA was the first Act to contain provisions that dealt explicitly with money laundering and money laundering offences, but these were limited to the proceeds of drug related offences (De Koker *et al.*, 2017:18). According to De Koker *et al.* (2017:18), the DTA criminalised the laundering

of proceeds arising from specific drug-related offences and required that suspicious transactions, involving such proceeds, need to be reported.

According to Bourne (2002:487) and Kruger (2008:44), section 7 read with subsection 1(1) and 14 of the DTA, created an offence when drug-related proceeds were laundered by a person when he/she knew or suspected that these proceeds resulted from a drug-related offence.

According to section 7 of the DTA (Conversion of proceeds of defined crime), no person shall convert any property, while he knows or has reasonable grounds to suspect that any such property is the proceeds of a defined crime.

Section 14 of the DTA (Offences relating to proceeds of defined crime) sets out that any person who contravenes a provision of section 6, or contravenes a provision of section 7, shall be guilty of an offence.

A “defined crime” and “convert” were defined in section 1 (1) of the DTA but subsequently deleted by the Prevention of Organised Crime Act (121 of 1998) (POCA). According to De Koker (1997:22), a “defined crime” constitutes a drug offence or “the conversion of property or any part thereof which was derived directly or indirectly as a result of the commission, whether in the Republic or elsewhere, of a drug offence”.

Smit (2001:19) provides the definition of “convert” as:

> Convert, in relation to property, includes –
>
> (a) any agreement or understanding in connection with the property, whether any such agreement or understanding is legally enforceable or not; or
> (b) any other act in connection with the property, whether any such act is performed independently or in concert with other persons,
>
> which has or is likely to have the effect –
>
> (i) of concealing or disguising the nature, source, location, disposition or movement of the property or its ownership or any interest with respect thereto; or
> (ii) of enabling or assisting any person who has committed or commits, whether in the Republic or elsewhere, a drug offence or an economic offence –
> (aa) to avoid prosecution; or
> (bb) to remove or to diminish any property, or any part thereof, realized directly or indirectly by him as a result of the commission of the said offence, or to use it in order to obtain funds, investments or other property.

According to Smit (2001:19), this definition of “convert”, as set out in the DTA, provided a foundation for future South African legislation in order to describe money laundering. The DTA furthermore made provision that the proceeds of drug-related offences can be confiscated by the State (Bourne, 2002:487; De Koker, 1997:23).

De Koker *et al.* (2017:18, 19) explains that although the DTA’s money laundering provisions appeared to be impressive, the effectiveness of these provisions was limited in practice. This was partly as a result of the scope being limited to only include proceeds of drug offences. De Koker *et al.* (2017:18, 19) further explains that “the confiscation procedure was rarely used and reporting in terms of the Act was also less than satisfactory”.

In addition to the above, the DTA created an obligation to report suspicious activities in section 10 (2) (De Koker, 1997:22; Smit, 2001:20). Smit (2001:20) explained that directors, managers or executive officers of banks, insurers, unit trust management companies and stockbrokers have the duty to report to a designated officer in cases where they have a suspicion that a transaction included the proceeds of a drug offence.

According to De Koker *et al.* (2017:145), minimal reports were filed in respect of section 10 (2) of the DTA. The wording of the DTA required senior officials to file a report when they formed a suspicion that a transaction may include the proceeds of a drug offence. In practice, these senior officials were not involved in the day-to-day processing of transactions and as such, they could not form such a suspicion.

Seeing that the DTA limited the scope of laundering of proceeds only to drug offences, other money laundering activities that did not relate to drug related offences weren’t included as an offence (Smit, 2001:20). As such, the South African legislation continued to develop, as described in the paragraphs to follow.

5.2.2 The Proceeds of Crime Act (76 of 1996)

The Minister of Justice requested the Commission in 1994 to investigate a comprehensive range of the South African legislation dealing with international cooperation in criminal prosecutions. The Commission subsequently recommended in their report that amendments should be made to existing extradition laws, that procedures in relation to international cooperation in prosecutions must be improved on, and that a Proceeds of Crime Act should be enacted to create general money laundering offences (De Koker *et al.*, 2017:19).

Following the recommendations of the Commission, the Proceeds of Crime Act (76 of 1996) (PCA) was promulgated in 1996 (Bourne, 2002:487). According to De Koker *et al.* (2017:19), the

PCA not only greatly extended money laundering offences to the proceeds of any type of crime, but also created a reporting obligation on businesses to report any suspicious property coming into their possession. It furthermore provided that the proceeds of crime can be confiscated when the criminal was convicted (De Koker *et al.*, 2017:19).

Bourne (2002:487) confirms that the PCA extended money laundering offences and described that it created three money laundering offences. According to Kruger (2008:44), these offences are as follows, which will be discussed in the paragraphs to follow:

1. when the proceeds of any crime are disguised (section 28);

2. when one assists another to derive benefits from the proceeds of crime (section 29); and

3. when property is acquired, used or possessed while the person knows that it is the proceeds of crime (section 30).

The "proceeds of crime" defined in section 1 (1) of chapter 1 of the PCA refers to any payment or other reward received or held by the defendant or over which the defendant has effective control at any time, whether before or after the commencement of the Act, in connection with any criminal activity carried on by him or her or any other person.

5.2.2.1 Section 28 (Money Laundering)

Section 28 criminalised the following money laundering offence:

> Any person who, knowing or having reasonable grounds to believe that property is or forms part of the proceeds of crime –
>
> (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or
> (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect –
> (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or its ownership or any interest which anyone may have in respect thereof; or
> (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere –
> (aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly or indirectly as a result of the commission of an offence, shall be guilty of an offence.

Smit (2001:22) describes this offence as the execution of any act with the outcome that the nature of the proceeds of crime is concealed in order for a person to avoid prosecution, or when it results in the decrease of the proceeds thereof.

It is furthermore explained by Smit (2001:22) that this offence could relate to two types of criminals. Firstly, to a criminal who committed a crime from which he received proceeds, which then led to such proceeds being laundered by him. Secondly, it could relate to a person who was not involved in the initial crime and the receipt of the proceeds, but who was subsequently part of the laundering of such proceeds as obtained by the criminal.

5.2.2.2 Section 29 (Assisting another to benefit from proceeds of crime)

Section 29 criminalised the following offence:

> Any person who knowing, or having reasonable grounds to believe, that another person has obtained the proceeds of crime, enters into any agreement with anyone or engages in any arrangement whereby –
>
> (a) the retention or the control by or on behalf of the said other person of the proceeds of crime is facilitated; or
> (b) the said proceeds of crime are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way,
>
> shall be guilty of an offence.

5.2.2.3 Section 30 (Acquisition, possession or use of proceeds of crime)

Section 30 criminalised the following offence:

> Any person who acquires or uses or has possession of property knowing, or having reasonable grounds to believe, that it is or forms part of the proceeds of crime of another person, shall be guilty of an offence, unless such a person reports his or her suspicion or knowledge as contemplated in section 31.

According to Smit (2001:22), the offences set out in section 29 and 30 were framed to make provision for when a person is involved in a later stage of money laundering, or who formed part of an isolated element of a money laundering scheme.

5.2.2.4 Section 31 (Failure to report suspicion regarding proceeds of crime)

The new reporting duty, as set out in the DTA, was broadened by the PCA (Smit, 2001:22) in section 31 towards businesses receiving property which they suspected to be the proceeds of crime (Bourne, 2002:487; Kruger, 2008:45). Section 31 read as follows:

> (1) Any person who carries on a business or is in charge of a business undertaking who has reason to suspect that any property which comes into his or her possession or the possession of the said business undertaking forms the proceeds of crime, shall be obliged to report his or her suspicion and the grounds on which it rests, within a reasonable time to a person designated by the Minister and shall take all reasonable steps to discharge such obligation: Provided that nothing in this section shall be construed so as to infringe upon the common law right to professional privilege between an attorney and his or her client in respect of information communicated to the attorney so as to enable him or her to provide advice, to defend or to render other legal assistance to the client in connection with an offence under any law, of which he or she is charged, in respect of which he or she has been arrested or summoned to appear in court or in respect of which an investigation with a view to instituting criminal proceedings is being conducted against him or her.
>
> (2) Any person who fails to comply with an obligation contemplated in subsection (1) shall be guilty of an offence.
>
> (3) (a) No obligation as to secrecy and no other restriction on the disclosure of information, whether imposed by any law, the common law or any agreement, shall affect any obligation imposed by subsection (1).
>
> (b) No liability based on a breach of an obligation as to secrecy or any restriction on the disclosure of information, whether imposed by any law, the common law or any agreement, shall arise from a disclosure of any information in compliance with any obligation imposed by subsection (1).

According to De Koker *et al.* (2017:146), this expansion of the new reporting obligation was still too limited to be effective. It was also commercially disruptive as some prosecuting authorities disputed that business could not proceed with transactions if a report was filled. As such, when POCA was drafted, this reporting duty was amended. POCA is discussed later in this chapter.

Chapter 2 of the PCA allowed for a confiscation order through which the proceeds of crime are confiscated after the criminal was convicted. The court could make such an order towards the defendant to pay a certain amount of money that is equivalent to the amount of the benefit

received by the defendant through his crime (Bourne, 2002:487). Smit (2001:23) describes this as a similar procedure to the procedure in the DTA.

According to Smit (2001:22), no cases have been reported relating to the three offences under the PCA. There are also no records of prosecutions relating to these offences.

5.2.2.5 Penalties

As can be seen from the above, the PCA extended the scope of offences relating to money laundering significantly when compared to the DTA's conversion offence. A principle was now formed to punish any underlying type of activity relating to laundering of the proceeds of crime (Smit, 2001:22). Bourne (2002:487) explained that the penalties enforced for contraventions of section 28, 29 and 30 were severe. These penalties are set out in section 33 (1) of the PCA as a fine or imprisonment for a period not exceeding 30 years.

De Koker *et al.* (2017:19) explains that, although the PCA was repealed by POCA, offences committed under the PCA may still be prosecuted in terms of the transitional arrangements. He further explains that come core aspects of the PCA can still be of relevance for certain prosecutions.

5.3 Current legislative measures in respect of money laundering

Bourne (2002:488) states that POCA and FICA currently form the two most important Acts relating to money laundering in South Africa. De Koker (2004:716, 717) similarly confirms that these two acts form the "core structure of South Africa's statutory framework" for the combating of money laundering.

5.3.1 POCA

5.3.1.1 The Prevention of Organised Crime Bill

Following a decision by the South African government in 1998, important measures to combat organised crime were considered, which led to the drafting of a Prevention of Organised Crime Bill. This Bill introduced specific offences applicable to organised crime and "civil forfeiture" measures, similar to those experienced in the USA. This Bill also initially provided for amendments to the PCA in respect of its money laundering and confiscation provisions, but the final provisions adopted by Parliament involved the PCA being repealed to rather incorporate such amended provisions as part of the new Act (De Koker *et al.*, 2017:20).

5.3.1.2 POCA and amendments

POCA was introduced with effect from 21 January 1999 as a result of the above and combined the money laundering provisions into one Act by repealing the PCA together with the money laundering provisions in the DTA (De Koker *et al.*, 2017:20).

Bourne (2002:488) explains that POCA was drafted due to the fact that money laundering, criminal gangs as well as organised crime continued to develop in South Africa and abroad and that the current legislation was not on an international standard and ineffective in the fight against these offences.

This is also confirmed in Mohunram and Another v National Director of Public Prosecutions and Another (2007), which stated the following in paragraph 144:

> The adoption of POCA was a legislative response to the conjunction of two phenomena. In the first place, the rapid growth of organised crime, money laundering, criminal gang activities and racketeering had become a serious international problem and security threat from which South Africa had not been immune. It was often impossible to bring the leaders of organised crime to book, because they were able to ensure that they were far removed from the overt criminal activity involved. Secondly, both South Africa's common and statute law had failed to keep pace with international measures aimed at dealing effectively with these problems.

According to De Koker *et al.* (2017:20, 21), POCA introduced *inter alia* the following essential changes to the AML regime:

- It introduced the concept of negligence as it included that a money laundering offence could be committed if an individual negligently fails to identify the true nature of illicit property. It was not clear in the PCA if money laundering could be committed negligently;
- The "proceeds of unlawful activities" definition is more comprehensive than what similar definitions in the DTA and PCA included; and
- Individuals who reported suspicious transactions could, in terms of POCA, continue with the specific transactions on condition that they had reasonable steps in place to comply with their reporting obligations.

POCA criminalised two core money laundering offences, namely general money laundering offences for proceeds of all types of crimes and offences which involve proceeds derived through a pattern of racketeering (De Koker *et al.*, 2017:32). In addition to these offences, POCA also includes mechanisms for both criminal confiscation of the proceeds of crime as well as civil forfeiture of proceeds and instrumentalities of offences (De Koker *et al.*, 2017:20). Some of the specific provisions of POCA are described later in this chapter.

5.3.1.2.1 Prevention of Organised Crime Amendment Act (24 of 1999)

As POCA was drafted under severe pressure, it contained several flaws (De Koker *et al.*, 2017:21). The Prevention of Organised Crime Amendment Act (24 of 1999) addressed these flaws and introduced *inter alia* the following amendments to the money laundering provisions (De Koker *et al.*, 2017:21):

- The suspicious transaction reporting duty was expanded to include both managers and employees of business undertakings; and

- Section 7A was added to allow individuals who reported a suspicious transaction in terms of POCA to use the fact that they've reported a suspicion as a defence if they were charged with committing a money laundering offence as a result of negligence. This section has since been amended by FICA. FICA is described in more detail later in this chapter.

5.3.1.2.2 Prevention of Organised Crime Second Amendment Act (38 of 1999)

POCA was amended for a second time by the Prevention of Organised Crime Second Amendment Act (38 of 1999). De Koker *et al.* (2017:21) explains that this second revision of POCA was to provide for its retroactive application, i.e. to include offences committed before 21 January 1999 (the effective date of POCA) in order for authorities to apply the confiscation and forfeiture provisions to offences committed before this date. In addition to the above, the second amendment of POCA also included a definition of the term "unlawful activity".

5.3.1.3 Specific provisions of POCA

Section 1 of POCA sets out detailed terms and phrases. These definitions are not only applicable on the sections in POCA, but FICA also relies on some of these terms and phrases, as well as their respective meanings included in POCA (De Koker, 2013: Com 3-5; De Koker *et al.*, 2017:32).

Chapter 3 of POCA provides for certain acts relating to "proceeds of unlawful activities" to be part of criminal activities (De Koker, 2013: Com 3-5). In order to understand sections 4, 5 and 6 of chapter 3, real estate agents should familiarise themselves with the following core definitions as set out in section 1 of POCA:

1. "Proceeds of unlawful activities" – According to De Koker (2013: Com 3-5), "proceeds of unlawful activities" is a fundamental phrase in POCA. As indicated under section 1 of POCA, this term relates to any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of POCA, in connection with or as a result of any

unlawful activity carried on by a person, and includes any property representing property so derived;

2. "Property" includes money or any other movable, immovable corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest in and all proceeds thereof; and

3. "Unlawful activity" – The Prevention of Organised Crime Second Amendment Act (38 of 1999) defined "unlawful activity" in order to provide clarity given that it was not originally defined in POCA, despite "proceeds of unlawful activities" having been defined (De Koker, 2013: Com 3-6; De Koker *et al.*, 2017:33). Unlawful activity is now defined as any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement POCA and whether such conduct occurred in the Republic or elsewhere.

The above definitions should be used by estate agents to identify any possible proceeds of unlawful activities when they are dealing with their clients. It can, however, be difficult for estate agents to identify whether proceeds resulted from unlawful activities. Real estate agents should therefore familiarise themselves with the applicable definitions and guidance issued by the Financial Intelligence Centre (FIC), Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) and FATF which can assist them to identify if a client is trying to use the real estate sector to launder illicit funds. These indicators (red flags) are discussed in chapter 3 of this study.

Importance is drawn to the fact that money and/or property can only constitute "proceeds of unlawful activities" when the unlawful activity that gave rise to the proceeds (the so-called "predicate offence") was completed and the money and/or property was "derived, received or retained" as a result of the unlawful activity (De Koker *et al.*, 2017:35). The predicate offence and the money laundering offence are therefore two separate offences. It can only constitute a money laundering offence if the predicate offence is completed and money and/or property is "derived, received or retained" by the criminal as a result of the predicate offence and the criminal now has sufficient control over these proceeds to launder these to hide the true origin thereof (De Koker *et al.*, 2017:35).

As a result of the revisions to POCA as described above, sections 28, 29 and 30 of the PCA were restructured in sections 4, 5 and 6 of POCA (Kruger, 2008:45). Although a comprehensive description of these provisions are provided in chapter 2 of this study, a brief description are contained below for purposes of this chapter.

5.3.1.3.1 Section 4 (Money Laundering)

The money laundering offence is set out in section 4 of POCA and relates to situations where the criminal participates in not only the initial criminal activity, but also in the laundering of the proceeds obtained from such activity (Tuba, 2012:109).

Section 4 of POCA reads as follows:

> Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and-
>
> (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or
>
> (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person,
>
> which has or is likely to have the effect-
>
> (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
>
> (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere-
>
> (aa) to avoid prosecution; or
>
> (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,
>
> shall be guilty of an offence.

Tuba (2012:109) explains that a person would be guilty of money laundering if any arrangement or transaction is made with another person in order to hide the true nature, source, location or movement of the proceeds which resulted from the initial criminal activity. Where the criminal himself executes both the underlying criminal activity and the disposal of the proceeds, this is referred to as self-laundering.

In order to prove the elements of the offence, the person must thus act in such a way as to conceal or disguise the source, nature or ownership of the proceeds of crime. However, it is only necessary that the action had, or is likely to have, money laundering as a consequence (Tuba, 2012:109, 110).

5.3.1.3.2 Section 5 (Assisting another to benefit from proceeds of unlawful activities) and section 6 (Acquisition, possession or use of proceeds of unlawful activities)

De Koker *et al.* (2017:38) explains that sections 5 and 6 of POCA criminalise acts of third parties involved in the laundering of proceeds of someone else.

Section 5 reads as follows:

> Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby-
>
> (a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or
> (b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way,
>
> shall be guilty of an offence.

According to Tuba (2012:110), section 5 provides another offence relating to laundering. In this type of laundering, which is known as "third-party laundering", a third party (not being the offender) enters into an agreement, arrangement or a transaction specifically to manage the unlawfully obtained proceeds on the offender's behalf. The third party doesn't have to know that the property is gained from a criminal activity, as the measure would be whether this fact should reasonably have been known by him. As such, real estate agents can be the third party entering into a transaction with the client (offender) who are then used to launder the money on behalf of the client.

Section 6 of POCA contains the third money laundering offence and reads as follows:

> Any person who-
>
> (a) acquires;
> (b) uses; or
> (c) has possession of,
>
> property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence.

De Koker *et al.* (2017:40) explains that in terms of section 6, the act which is committed must relate to the proceeds which arose from the unlawful activities of another person, and does not include the acquisition, use or possession of such proceeds by the person who committed the

predicate offence which gave rise to the proceeds. When applied to estate agents, this can include commission received from the sale of a property, which in fact is part of the illicit funds which the client is laundering through the real estate sector.

It is important for estate agents to familiarise themselves with the section 4, 5 and 6 offences, as they may be guilty of an offence based on the concept of negligence, if they negligently fail to identify that property constitutes the proceeds of illicit funds.

5.3.1.3.3 Confiscation orders

According to De Koker *et al.* (2017:57), the State may seize property involved in certain offences. Criminal confiscation as well as civil forfeiture of proceeds and instrumentalities are contained in POCA (De Koker *et al.*, 2017:57; ESAAMLG, 2009:3).

Bourne (2002:489) indicates that POCA provides, under section 18, for property which represents the benefit flowing from the offence for which conviction is obtained or offences relating thereto, to be confiscated after such conviction.

5.3.1.3.4 Reporting

The reporting obligations in respect of suspicious transactions under the DTA and PCA was repealed by section 7 of POCA. Section 7 allowed individuals who reported suspicious transactions to continue with the specific transactions on condition that they had reasonable steps in place to comply with their reporting obligations. The duty to report suspicious transactions was expanded to include both managers and employees of business undertakings and individuals who reported a suspicious transaction in terms of POCA, was allowed to use the fact that they've reported a suspicion as a defence if they were charged with committing a money laundering offence as a result of negligence (De Koker *et al.*, 2017:146).

FICA brought various changes to POCA, which included the amendment of section 7. The duty relating to the reporting of both suspicious, as well as unusual transactions, are contained in section 29 of FICA since 3 February 2003 (De Koker, 2013: Com 7-10), and are discussed later in this chapter.

5.3.1.3.5 Penalties

POCA contains severe penalties if a person is convicted of an offence under section 4, 5 or 6 of this Act. These penalties are set out in section 8 of POCA and comprise a fine of not exceeding R100 million or imprisonment of up to 30 years (Bourne, 2002:489). Kruger (2008:52) explains that section 76 (1) of POCA grants a regional court the jurisdiction to impose the above penalties.

Apart from these penalties, the state may also confiscate both the proceeds of the unlawful activity and the "instrumentalities" of the crime in terms of the powers provided to them in this Act (De Koker, 2013: Com 3-12).

5.3.2 FICA

5.3.2.1 The Money Laundering Control Bill

In August 1996, the Commission issued a report titled "Money Laundering and Related Matters" which contained a proposed Money Laundering Control Bill (De Koker *et al.*, 2017:22).

The President signed this legislation on 28 November 2001 after a lengthy process, which included extensive debating, comments from the public and the introduction of various amendments (De Koker *et al.*, 2017:22). The provisions came into effect by means of various subsequent proclamations, the first which was published in January 2002. The following provisions came into effect (De Koker *et al.*, 2017:22):

1. On 1 February 2002, the provisions which established the FIC and the Money Laundering Advisory Council (MLAC), together with the provisions that enabled the writing of the Regulations as required under the Act came into effect;

2. The duty to report suspicious/unusual transactions was effected on 3 February 2003;

3. On 30 June 2003, the main compliance obligations of accountable institutions took effect; and

4. The reporting of transactions which involve amounts of cash and bearer negotiable instruments in excess of R24 999 was phased in for accountable institutions from 4 October 2010.

5.3.2.2 FICA and amendments

5.3.2.2.1 The Financial Intelligence Centre Amendment Act (11 of 2008)

According to De Koker *et al.* (2017:23), the Financial Intelligence Centre Amendment Act (11 of 2008) amended FICA extensively, through *inter alia* the following:

- It determined more regulatory, supervisory and enforcement powers to the FIC and supervisory bodies;

- An "administrative penalty framework and registration regime" for both accountable- and reporting institutions were introduced; and

- The list of supervisory bodies and accountable institutions contained in schedules 1 and 2 of FICA was modified.

The amendments came into effect on 1 December 2010 as published in the Government Notice 1106 of 2010 of the Government Gazette 33781 dated 26 November 2010 (De Koker *et al.*, 2017:24).

5.3.2.2.2 The Financial Intelligence Centre Amendment Act (1 of 2017)

The FIC and NT drafted amendments to FICA and published a draft Financial Intelligence Centre Amendment Bill for comment in April 2015 (De Koker *et al.*, 2017:23; FIC, 2016:17). This was as a result of the need to make sure that South Africa keep up with the global AML standards and best practise (De Koker *et al.*, 2017:201; FIC, 2016:17). The most important amendment to FICA was the introduction of a risk-based approach (RBA) into the legislative framework, in contrast to the rule-based approach previously in place. The RBA was put at the centre of South Africa's AML regime as it was now recognised that money laundering risks vary within and between sectors (FIC, 2017a:1).

On 26 April 2017, the Financial Intelligence Centre Amendment Act (1 of 2017) was signed into law by the President and gazetted on 2 May 2017. The Minister of Finance had to determine the commencement date of the provisions of FICA. On 13 June 2017, the Minister of Finance signed and gazetted the coming into operation of various provisions of FICA. These provisions were implemented on different dates, i.e. 13 June 2017 and 2 October 2017. The remaining provisions will be implemented in 2018/2019 (FIC & NT, 2017; FIC, 2018a:16).

South Africa was evaluated by the FATF in 2009 and will be evaluated again in 2019. The amendments to FICA are extremely important as it is highlighted in the FIC 2015/2016 Annual Report that if countries fail to effectively implement the agreed upon international standards, they may be exposed to increased monitoring by FATF and International Monetary Fund (IMF) (FIC, 2016:8). This may result in doubt being raised in respect of the stability of the countries' financial systems. To mitigate these risks as well as to strengthen South Africa's ability to mitigate financial crime, the amendments to FICA were intended to achieve the following (FIC, 2016:8):

- Address regulatory gaps to enable compliance with best practice;
- To strengthen Customer Due Diligence (CDD) measures;
- To introduce an RBA to identify and verify customers; and
- To improve the sharing of information between designated entities.

In addition to the above key areas, De Koker *et al.* (2017:23) indicates that the Financial Intelligence Centre Amendment Act (1 of 2017) improves the FIC's supervisory powers and extends the FIC's functions relating to suspicious transactions. The 2017 amendments to FICA also repealed the provisions in respect of the establishment and functioning of the MLAC (FIC, 2017a:7, 8).

As indicated in the FIC 2016/2017 Annual Report (FIC, 2017b:12, 13), the 2017 amendments to FICA are crucial to strengthen the South African financial system and to align South Africa's legislation to global standards. South Africa has a long-standing commitment to use the FATF standards as the basis in combating money laundering and terrorist financing.

The amendments to FICA are in line with the FATF Recommendations together with relevant United Nations (UN) Conventions and special resolutions (FIC, 2016:8).

5.3.2.3 The FIC

As discussed in chapter 4 of this study, each country is required in terms of FATF Recommendation 29 to establish an independent FIU, which should apply for membership to the Egmont Group.

The FIC is the FIU of South Africa, which is an "administrative" FIU under the Minister of Finance (ESAAMLG, 2009:4, 5). The FIC was established in 2003 following the promulgation of FICA as the national centre to gather, analyse and disseminate financial data (FIC, 2017b:10; FIC, 2017d:2; FIC, 2018a:10). The FIC report to the Minister of Finance and to Parliament, with the primary role to "contribute to safeguarding the integrity of South Africa's financial system and its institutions, and to make them intolerant to abuse" (FIC, 2017b:10). In July 2003, the FIC was admitted as a member of the Egmont Group (De Koker *et al.*, 2017:103).

According to De Koker *et al.* (2017:95), the FIC did not have supervisory and enforcement powers prior to 2010, as these powers were the responsibility of supervisory bodies. This was changed through the Financial Intelligence Centre Amendment Act (11 of 2008) which gave the FIC supervisory powers in respect of persons who have to comply with FICA, but who are not supervised by a statutory supervisory body, as well as in respect of persons who are supervised, but whose supervisory body fails to enforce compliance.

The primary activities of the FIC (as contained in its founding legislation) are as follows (FIC, 2018a:15):

- To process, analyse, interpret and retain information disclosed to and/or obtained by the FIC;

- To inform, advise, co-operate with and make its financial intelligence products available to:
    - Investigating authorities;
    - Supervisory bodies;
    - Intelligence services; and
    - The South African Revenue Service (SARS) to promote South Africa's tax administration and enforcement of laws.
- The exchange of information with similar bodies in other countries;
- Monitor and guide accountable- and reporting institutions, supervisory bodies and individuals with regards to their compliance with FICA;
- In respect of supervision and enforcement, the FIC must supervise and enforce compliance with FICA by persons not supervised by a supervisory body, or where the supervisory body fail to act;
- The implementation of a registration system for all applicable institutions and individuals; and
- To conduct an annual review on the implementation of FICA and report the findings to the Minister of Finance.

According to Bourne (2002:489), the functions of the FIC includes the receiving and analysis of reports received as it relates to money laundering activities. De Koker *et al.* (2017:93) explains that the amendments to FICA added the following bodies to section 3 of FICA which may receive information collected by the FIC:

- An investigating authority;
- The National Prosecuting Authority (NPA);
- An intelligence service;
- SARS;
- The Independent Police Investigative Directorate;
- The Intelligence Division of the National Defence Force;
- A Special Investigating Unit;

- The office of the Public Protector;
- An investigative division in an organ of state; and
- A supervisory body.

De Koker *et al.* (2017:94) further explains that the above list overlaps to a large extent with the list of bodies stipulated in section 40 of FICA (the main provision in respect of access to information held by the FIC). However, the list in section 40 extends to persons who are entitled to receive such information in terms of a court order or other national legislation (De Koker *et al.*, 2017:94).

It is important to note that the FIC does not conduct its own investigations or prosecutions (FIC, 2018a:9). During the 2017/2018 reporting period, the FIC referred 1 470 matters for further investigation to both domestic and foreign authorities. It also assisted with 2 243 requests for information, as opposed to 2 145 during the 2016/2017 reporting period (FIC, 2018a:9).

The FIC develops and issues guidance products with practical information on complying with FICA (FIC, 2018a:31). The recent amendments to FICA added a statutory consultation process to the FIC in section 42B, as the FIC must firstly publish a draft version of the guidance and invite submissions, and, secondly, they must consider any submissions received, before they can issue the final guidance to accountable institutions, supervisory bodies and other persons (De Koker *et al.*, 2017:95). During the 2017/2018 financial year, the FIC issued eight guidance products, with the primary focus on the amendments to FICA. Existing guidance products were also updated to include these amendments (FIC, 2018a:31).

If it is reasonably suspected that funds are associated with the proceeds of crime, the FIC will block these funds and share the relevant information with the Asset Forfeiture Unit (AFU). The AFU is then able to seize the proceeds. The FIC blocked close to R13 billion as suspected proceeds of crime over the past 15 years, which includes more than R55 million during the 2017/2018 reporting period (FIC, 2018a:10, 38).

In order to strengthen global efforts to combat money laundering, the FIC works closely with FIU's and other global stakeholders. Memoranda of understanding (MoUs) between the FIC and other jurisdictions allow the FIC to exchange information with global FIU's (which strengthen South Africa's ability to assist international partners) and in turn, request information from them in respect of financial crimes. At time of the 2017/2018 reporting period, the FIC signed MoUs with 89 jurisdictions (FIC, 2018a:41).

A key focus of the FIC during the 2017/2018 reporting period was the implementation of the amendments to FICA. As such, it issued guidance notes, hosted stakeholder consultations, and conducted awareness-raising initiatives (FIC, 2018a:11).

It conducted six roadshows, which attracted a total of approximately 1 600 participants. These roadshows focussed specifically on compliance with, amendments to and enforcement of FICA (FIC, 2018a:30). It furthermore conducted 28 compliance awareness sessions and published 14 media articles, which focussed on raising awareness among attorneys, real estate agents, motor vehicle dealers and financial service providers on the reporting of suspicious and/or unusual transitions (FIC, 2018a:30).

The FATF rated the FIC positively in the 2009 mutual evaluation as largely meeting the requirements of a functional FIU and was described as a "well-structured, funded, and staffed FIU that is functioning effectively" (De Koker *et al.*, 2017:104).

In conclusion, the FIC's relationship with law enforcement agencies, prosecutorial authorities, investigative agencies, supervisory bodies and other local agencies and authorities are of utmost importance to be able to reach its mandate (FIC, 2018a:8).

5.3.2.4 Specific provisions and application of FICA to real estate agents

"Money laundering" or "money laundering activity", is defined in section 1 of FICA and means an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in terms of section 64 of FICA or section 4, 5 or 6 of POCA. The definitions of the proceeds of unlawful activities, property as well as unlawful activity, are the same as in section 1 of POCA, as discussed above.

Bourne (2002:489) sets out one of FICA's goals as to accompany POCA through the introduction of measures to deter and prevent activities relating to money laundering. In order to achieve the goal, institutions prone to be vulnerable to money laundering are presented with certain duties by FICA.

These institutions are set out in FICA as accountable institutions, supervisory bodies and reporting institutions:

- "Accountable institutions" are listed in schedule 1 to FICA and includes real estate agents;

- Schedule 2 of FICA contains a list of “supervisory bodies” which includes the Estate Agency Affairs Board (EAAB) in terms of the Estate Agency Affairs Act (112 of 1976) (EAAA). The EAAA is discussed later in this chapter; and

- Schedule 3 to FICA lists two “reporting institutions”, being a person who carries on the business of dealing in motor vehicles and in Kruger Rands.

The EAAB issued a Notice to the estate agents in respect of the amendments to FICA in which it was suggested that estate agencies (as accountable institutions) must thoroughly consider the amendments at the highest level of authority, i.e. the board of directors and senior management (EAAB, 2018b).

The EAAB notice also made mention of Guidance Note 7 which were published by the FIC in collaboration with NT, South African Reserve Bank (SARB) and the Financial Services Board (FSB). Guidance Note 7 were published to support accountable institutions and supervisory bodies to implement the amendments to FICA more effectively and provides guidance to *inter alia* the following aspects (EAAB, 2018b):

- How to adopt an RBA to CDD measures;

- CDD measures which include the establishment of a client’s identity, requirements in respect of beneficial ownership and Ongoing Customer Due Diligence (OCDD) measures;

- Record keeping;

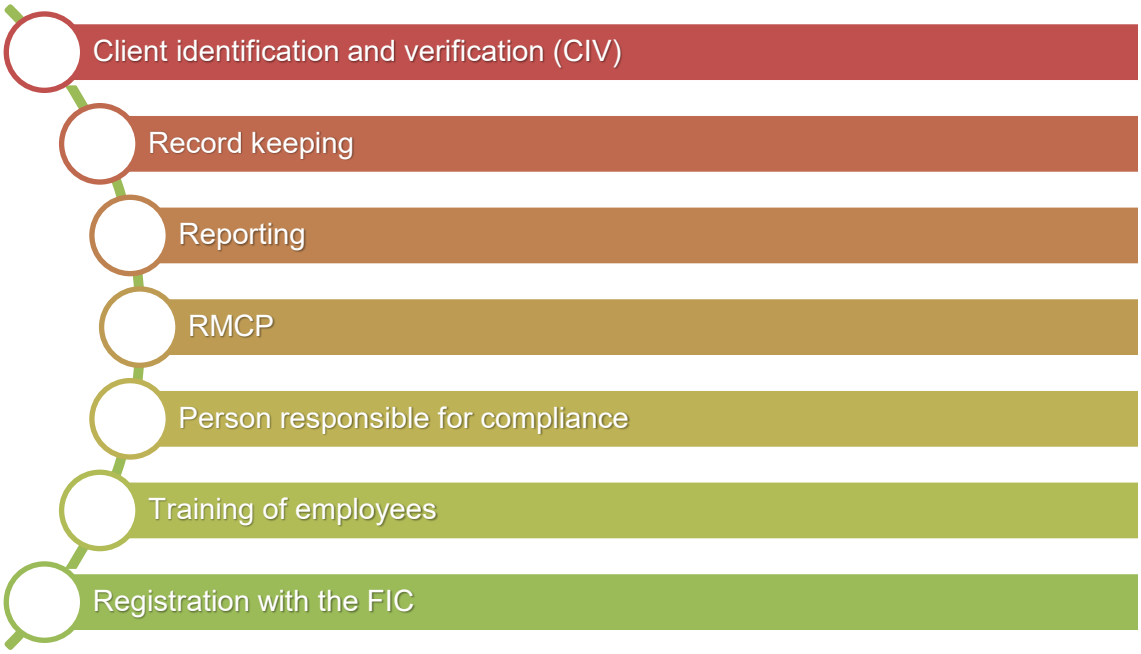
- How to develop and implement a Risk Management and Compliance Programme (RMCP); and

- How to implement the UN Security Council Resolutions on the freezing of assets.

The EAAB encouraged estate agencies to fully acquaint themselves with the amendments and to actively take steps to implement these amendments (EAAB, 2018b).

The FIC periodically presents road shows throughout South Africa where they engage with stakeholders in respect of the compliance obligations of all accountable- and reporting institutions (FIC, 2017g). A presentation by the FIC during a road show in 2017, indicated that FICA (as amended) includes the following seven pillars of compliance (FIC, 2017c:13):

Figure 5-1: The seven pillars of compliance in terms of FICA



Source: FIC (2017c:13).

In light of the above, the below paragraphs contain details of each of the above obligations applicable to real estate agents as accountable institutions, as contained in chapter 3 of FICA.

5.3.2.4.1 CDD (FICA chapter 3, part 1)

The amendments to FICA resulted in the formal introduction of the CDD concept in South African legislation (De Koker *et al.*, 2017:241). A mandatory RBA was also introduced and the rule-based approach was removed from FICA (De Koker *et al.*, 2017:241).

De Koker *et al.* (2017:241) explains that before the above amendments, CIV was mandated through section 21 with detailed prescriptions in regulations 3 to 19. As the amendments now introduced an RBA for CDD measures, it had a big impact on CIV measures. As different institutions will have different money laundering risks, the CIV measures will differ among these institutions.

Before the amendments to FICA, estate agents had to establish and verify their clients' identities according to the Money Laundering and Terrorist Financing Control Regulations (MLTFC Regulations). The amendments to FICA, with specific reference to the inclusion of an RBA, now allows them to use their discretion in determining the necessary compliance steps to be taken in certain instances, allowing them the flexibility to determine the types of information needed and measures to be used to determine their clients' identities. The rigid steps contained in the repealed MLTFC Regulations no longer have to be followed (FIC, 2017d:28).

As indicated in the FIC's Guidance Note 7 on the implementation of various aspects of FICA, CDD refers to an accountable institution's knowledge and understanding about its clients and the business which the client is conducting with the accountable institution (FIC, 2017d:28). Through these CDD measures, estate agents can manage their client relationships better and be in a better position to identify attempts by their clients to misuse the products and/or services of the institution for illicit purposes (FIC, 2017d:28).

In terms of section 20A of FICA, estate agents may not establish a business relationship or conclude a single transaction with an anonymous client or a client with an apparent false or fictitious name. A business relationship is defined in section 1 of FICA as an arrangement between a client and an accountable institution for the purpose of concluding transactions on a regular basis. A single transaction is furthermore defined in section 1 as a transaction – (a) other than a transaction concluded in the course of a business relationship; and (b) where the value of the transaction is not less than the amount prescribed, except in the case of section 20A. The prescribed amount is identified in Regulation 1A of the MLTFC Regulations as an amount not less than R5 000 (FIC, 2018b:121).

Section 21 of FICA requires estate agents to perform the following before they enter into a single transaction or establish a business relationship, in accordance with their RMCP:

- Establish and verify the client's identity;
- If the client is acting on behalf of another person, the identity of the other person and the client's authority to establish the business relationship or to conclude the single transaction of behalf of the other person, must be established and verified; and
- If another person is acting on behalf of the client, the identity of the other person and the other person's authority to act on behalf of the client, must be established and verified.

In cases where estate agents established a business relationship before FICA became effective, they may not conclude a transaction in the course of the specific business relationship unless the above steps were taken and all accounts at the estate agency that were involved in transactions concluded in the course of the business relationship were traced.

In terms of section 21A, estate agents which engages with a prospective client to establish a business relationship as contemplated in section 21, must in addition to the above steps under section 21 and in accordance with its RMCP, obtain information to reasonably enable them to determine whether future transactions that will be performed in the course of the business

relationship concerned are consistent with their knowledge of that prospective client, including information describing the following:

- The nature of the concerned business relationship;
- The intended purpose of the concerned business relationship; and
- The source of funds which the prospective client expects to use in concluding transactions in the course of the concerned business relationship.

Section 21B contains additional CDD measures to be taken in respect of legal persons, trusts and partnerships.

Section 21C contains measures for OCDD. Estate agents should, in terms of their RMCP, conduct the following OCDD measures in respect of a business relationship:

- Monitoring of transactions undertaken through the course of the business relationship including the source of funds (to ensure that the transactions are consistent with the institution's knowledge of the client and the client's business and risk profile) and the background and purpose of all complex, unusual large transactions and all unusual patterns of transactions which have no apparent business or lawful purpose; and
- Keeping up-to-date information obtained for the purpose of establishing and verifying the clients' identities in terms of section 21, 21A and 21B of FICA.

Should an estate agent, after entering into a single transaction or establishing a business relationship doubts the accuracy or adequacy of the previously obtained information in terms of sections 21 and 21B, the estate agent must repeat the steps set out in sections 21 and 21B in accordance with their RMCP to the extent that it is necessary to confirm the information which is doubted. This requirement is contained in section 21D of FICA.

Section 21E stipulates that in cases where estate agents are unable to establish and verify the identity of a client or other relevant person in accordance with sections 21 or 21B, or to obtain the information contemplated in section 21A, or to conduct OCDD measures as per section 21C, they:

- May not establish a business relationship or conclude a single transaction with a client;
- May not conclude a transaction in the course of a business relationship or perform any act to give effect to a single transaction; and

- Must terminate, in accordance with the accountable institution's RMCP, an existing business relationship with a client.

As contained in Guidance Note 7, estate agents must consider whether the circumstances which prevent them from conducting the CDD measures are suspicious or unusual in terms of section 29 of FICA (FIC, 2017d:47). Section 29 is discussed in more detail later in this chapter.

If the prospective client with whom the estate agent engages to establish a business relationship, or the beneficial owner of the prospective client, is a foreign prominent public official, a domestic prominent influential person or immediate family or known close associates of these officials, the estate agent must, in terms of section 21F, 21G and 21H:

- Obtain senior management approval for the establishment of the business relationship;
- Take reasonable steps to establish the source of wealth and source of funds of the client; and
- Conduct enhanced ongoing monitoring of the business relationship.

FICA's schedule 3A contains a list of domestic prominent influential persons and schedule 3B contains a list of foreign prominent public officials.

Guidance Note 7 explains that estate agents should determine the nature and extent of their CIV measures by taking the assessed money laundering risks (from their risk assessment) in respect of the applicable business relationship or single transaction into consideration (FIC, 2017d:29, 32).

Guidance Note 7 further includes the following in respect of the timing of verification of the client's identity (or the identity of beneficial owners and other persons associated with a client) (FIC, 2017d:44):

> …an accountable institution may initiate the processes related to the conclusion of a single transaction or entering into a business relationship while it is verifying the relevant persons' identities, but the institution must complete the verification before the institution concluded a transaction in the course of the resultant business relationship or performs any act to give effect to the resultant single transaction.

The RBA

An RBA is defined in Guidance Note 7 as "an approach whereby accountable institutions identify, assess and understand the ML/TF risks to which institutions are exposed and take AML/CFT measures that are proportionate to those risks" (FIC, 2017d:70).

According to De Koker *et al.* (2017:202), if accountable institutions understand and manage their money laundering risks, they are able to protect, maintain and contribute to the integrity of their businesses as well as the integrity of the South African financial system.

Estate agents must conduct money laundering risk assessments in order to obtain an understanding of their specific money laundering risks. The money laundering risk assessment process must suit each estate agency taking into account the nature, size and complexity of the respective institution (De Koker *et al.*, 2017:202). Guidance Note 7 provides extensive guidance to accountable institutions in respect of these money laundering risk assessments.

For estate agents, money laundering risks are threats and vulnerabilities which put the institution at risk to be abused by money launderers, e.g. clients who use the accountable institution's products and services to exploit the institution to launder funds. In addition to the misuse of an estate agency's products and services, the nature of the money laundering risks can also relate to *inter alia* the geographic location and delivery channels of the accountable institution (FIC, 2017d:9, 10).

Guidance Note 7 explains that money laundering risk management includes the following three important aspects (FIC, 2017d:10):

1. The identification of money laundering risks;

2. The assessment of the identified risks; and

3. The development of methods to manage and/or mitigate these risks.

Estate agents should ensure that there are adequate controls in place to mitigate their money laundering risks. These controls may include existing controls in the organisation (FIC, 2017d:10). Estate agents should be satisfied that their money laundering risk management systems continue to be effective in view of changing circumstances relating to their money laundering risks (FIC, 2017d:12). As such, estate agents must reassess their money laundering risks regularly, together with the applicable controls in place to mitigate the money laundering risks, to ensure that their residual risks (the risk rating taking into account the mitigating controls) remain at an acceptable standard to the organisation. They should furthermore ensure that their employees adhere to the money laundering risk management systems and controls (FIC, 2017d:12).

Guidance Note 7 provides detailed guidance in respect of a money laundering risk assessment, as summarised below:

- A money laundering risk assessment should include the likelihood of the money laundering risk to occur, as well as the impact should the risk occur. As such, estate agents should have sufficient processes in place (proportionate to the size and complexity of the agency) to identify and assess money laundering risks (FIC, 2017d:14);

- Guidance Note 7 contains examples of product or service, delivery channels and geographic area factors which may be indicative of money laundering risks (FIC, 2017d:15);

- The methodology used and procedures performed by an estate agency to determine the money laundering risk rating, together with the conclusions reached on the risk ratings, must be documented in their RMCP (FIC, 2017d:23);

- Estate agents must use their knowledge and understanding of the identified money laundering risks to develop applicable controls to mitigate the identified risks (FIC, 2017d:23, 24); and

- Through the money laundering risk assessment process, estate agents will be able to determine the nature and extent of resources required to mitigate the identified risks (FIC, 2017d:24).

In line with the FATF Recommendations, the RBA allows estate agents to enhance their CDD measures where higher money laundering risks are present. However, where the assessed money laundering risk are lower, simplified CDD measures may be applied (FIC, 2017d:24).

Estate agents should note that FICA does not prohibit them from conducting high-risk activities or having high-risk business relationships. Refusing services or terminating a business relationship in order to avoid risk, should be used only as a last resort where the estate agency has come to the conclusion that the money laundering risks relating to a specific client cannot be adequately and/or effectively mitigated (FIC, 2017d:27).

The findings from the money laundering risk assessment should be used by the estate agency to determine the appropriate level and type of CDD measures applicable to a client, business relationship or single transaction. Their RMCP should describe the CDD measures which they apply together with how these measures are attenuated or intensified based on any identified money laundering risks (FIC, 2017d:29).

In conclusion to the above, Guidance Note 7 indicates that estate agents must use the CDD process as a measure to mitigate the money laundering risks associated with a proposed business relationship or a single transaction, as it provides them with *inter alia* the following information (FIC, 2017d:26):

- Who they are conducting business with;
- Who benefits from the business that they conduct with their clients;
- To understand the nature of the business they conduct with their clients; and
- To determine when the business with clients should be considered suspicious or unusual.

As the money laundering risks differ between different industries and sectors, the FIC will in future and as the need arises, consider to provide specific guidance to address industry and/or sector specific challenges as it relates to the implementation of the RBA (FIC, 2017d:13).

Compliance and enforcement

FICA stipulates the following as it relates to the compliance and enforcement of CDD measures:

> **Section 46 – Failure to identify persons**
>
> (1) An accountable institution that performs any act to give effect to a business relationship or single transaction in contravention of section 21(1) or (1A) is noncompliant and is subject to an administrative sanction.
>
> (2) An accountable institution that concludes any transaction in contravention of section 21(2) is noncompliant and is subject to an administrative sanction.
>
> **Section 46A – Failure to comply with duty in regard to customer due diligence**
>
> An accountable institution that fails to comply with the duty to perform additional due diligence measures in accordance with section 21A, 21B, 21C, 21D, 21E, 21F, 21G or 21H is noncompliant and is subject to an administrative sanction.

Administrative sanctions are discussed in section 5.3.2.5.4 below.

5.3.2.4.2 The duty to keep records (FICA chapter 3, part 2)

Before the 2017 amendments to FICA, sections 22 to 26 governed the record keeping requirements. The amendments to FICA resulted in section 22A being added together with significant amendments to the related provisions (De Koker *et al.*, 2017:256).

Guidance Note 7 indicates that record keeping is an essential component of a successful system for the combating of money laundering. In some cases, the records of clients' identities and their transaction activities can be the only evidence to assist law enforcement to detect, investigate, prosecute and/or confiscate illicit funds. As such, recordkeeping together with CDD measures results in greater transparency to the financial system (FIC, 2017d:57).

The duties of estate agents as set out in part 2 of FICA are twofold, i.e. the duty to keep CDD records and the duty to keep transaction records.

Duty to keep CDD records

In terms of section 22 of FICA, if an estate agency is required to obtain information pertaining to a client or prospective client in terms of sections 21 to 21H, the estate agency is required to keep record of such information.

Section 22 of FICA stipulates that the records kept by estate agents must include copies of, or references to information obtained by them which were used to verify a person's identity. For business relationships, the records kept must reflect the information obtained by the estate agent under section 21A in respect of the following:

- The nature of the business relationship;
- The intended purpose of the business relationship; and
- The source of the funds which the prospective client is expected to use in concluding transactions in the course of the business relationship.

Duty to keep transaction records

Section 22A of FICA requires estate agents to keep record of every transaction (irrespective of it being a single transaction or a transaction concluded in the course of a business relationship) which they have with the client and are reasonably necessary to enable the transaction to be readily reconstructed. These records should include the following:

- The amount involved and the currency in which it was denominated;
- The date on which the transaction was concluded;
- The parties involved in the transaction;
- The nature of the transaction;

- Business correspondence; and

- If an accountable institution provides account facilities to its clients, the identifying particulars of all accounts and the account files at the accountable institution that are related to the transaction.

Other requirements in respect of the duty to keep records

As indicated in Guidance Note 7, estate agents should include all elements of their record management processes (as required in FICA) in their RMCP (FIC, 2017d:57). Section 23 provide the following as it relates to the period for which records must be kept:

1. Records pertaining to the establishment of a business relationship referred to in section 22 must be kept by estate agents for at least five years from the date on which the business relationship is terminated;

2. For a transaction concluded in terms of section 22A, estate agents must keep the records for at least five years from the date on which that transaction is concluded; and

3. In cases where a transaction or activity gives rise to a report contemplated in section 29, records must be kept for at least five years from the date on which the report was submitted to the FIC.

Section 24 of FICA stipulates the following in respect of records kept by third parties:

1. Third parties may keep the records as required in terms of sections 22 and 22A of FICA on behalf of estate agents, on condition that estate agents have free and easy access to the records and the records are readily available to the FIC and the relevant supervisory body for the purposes of performing its functions in terms of FICA;

2. Should the third party fail to comply with the requirements of sections 22 and 22A on behalf of the estate agents, the estate agents will be liable for such failure; and

3. In the case where estate agents appoint a third party to perform the duties imposed on them by sections 22 and 22A, the estate agents must immediately provide the FIC and the supervisory body concerned with the prescribed particulars regarding the third party.

Section 24 also allows estate agents to keep the records as required by section 22 and 22A in electronic form. Estate agents must be capable to reproduce such records in a legible format.

As explained in Guidance Note 7, FICA is not prescriptive in terms of the manner in which records must be kept. As such, estate agents may store the required records in accordance with their own standard procedures in respect of the capturing of information and the retention of records. They may therefore keep records by storing the originals, photocopies of the originals, scanned versions of the originals or in computerised or electronic form (FIC, 2017d:58). Guidance Note 7 contains the following examples of mechanisms which can be used to store the records which allow estate agents to reduce the volume and density of records. These mechanisms can include (FIC, 2017d:59):

- Hard drives;
- Compact discs (CDs);
- Digital versatile discs (DVDs);
- Memory sticks;
- Cloud storage;
- Electronic document repositories; and
- Fintech capabilities.

Guidance Note 7 advise that the records must include details which will assist in the identification of the records, for example, reference numbers on documents or letters, relevant dates (issue or expiry dates) and/or details of the issuer or writer (FIC, 2017d:59).

In addition to the above, estate agents should ensure that the records are tamper proof and that there are safeguards in place to prevent unauthorised access to information which are stored electronically (FIC, 2017d:59).

Records kept in terms of sections 22, 22A or 24, or a certified extract of such records or a certified printout of any extract of an electronic record, is on its mere production in a matter before a court admissible as evidence of any fact contained in it of which direct oral evidence would be admissible, as stipulated in section 25 of FICA.

Compliance and enforcement

FICA stipulates the following as it relates to the duty to keep records:

Section 47 – Failure to keep records

> An accountable institution that fails to –
> (a) keep a record of information in terms of section 22(1), 22A(1) or (2); or
> (b) keep such records in accordance with section 23 or 24(1); or
> (c) comply with the provisions of section 24(3), is noncompliant and is subject to an administrative sanction.

Section 48 – Destroying or tampering with records

> Any person who wilfully tampers with a record kept in terms of section 22 or section 24(1), or wilfully destroys such a record, otherwise than in accordance with section 23, is guilty of an offence.

Administrative and criminal sanctions are discussed in section 5.3.2.5.4 below.

5.3.2.4.3 Reporting duties (FICA chapter 3, part 3)

The FIC obtains financial intelligence and other data through reports which are filed in accordance with various sections of the FIC Act, being (FIC, 2017f):

- Section 28 - Cash threshold reporting
- Section 28A - Terrorist property reporting
- Section 29 - Suspicious and unusual transaction reporting
- Section 30 - Cash conveyance reporting - not in operation
- Section 31 - Cross-border electronic transfer reporting - not in operation.

The FIC analyses the data received from businesses, accountable- and reporting institutions to create financial intelligence reports. Should it be necessary or requested, the information received will be shared with local and/or international law enforcement agencies and/or SARS (FIC, 2017f).

For purposes of this study, only reports filed in terms of sections 28 (cash threshold reporting) and 29 (suspicious and unusual transactions) are discussed.

<u>Section 28 (Cash transactions above prescribed limit)</u>

According to Guidance Note 5B on cash threshold reporting to the FIC in terms of section 28 of FICA, FICA contains an obligation on estate agents to report all cash transactions exceeding a prescribed threshold to the FIC in the prescribed form (FIC, 2017e:7). This cash threshold

reporting obligation is set out in section 28 of FICA and it provides FICA "with a mechanism to proactively monitor and report on cash transactions which may be linked to money laundering or terrorist financing activities so that potential proceeds of crime are timeously identified and investigated" (FIC, 2017e:7).

The cash threshold reporting obligation extends to both cash paid and cash received by the accountable or reporting institution in excess of the prescribed amount being paid or received (FIC, 2017e:9). Section 28 of FICA reads as follows:

> An accountable institution and a reporting institution must, within the prescribed period, report to the Centre the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of the prescribed amount –
>
> (a) is paid by the accountable institution or reporting institution to the client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or
> (b) is received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting.

Cash is defined in section 1 of FICA as:

> (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.

Guidance Note 5B indicates that cash excludes the following (FIC, 2017e:9):

- Bearer negotiable instruments (as defined in FICA); and
- A transfer of funds through bank cheques, bank drafts, electronic funds transfers, wire transfer or any other written order not involving a physical transfer of cash.

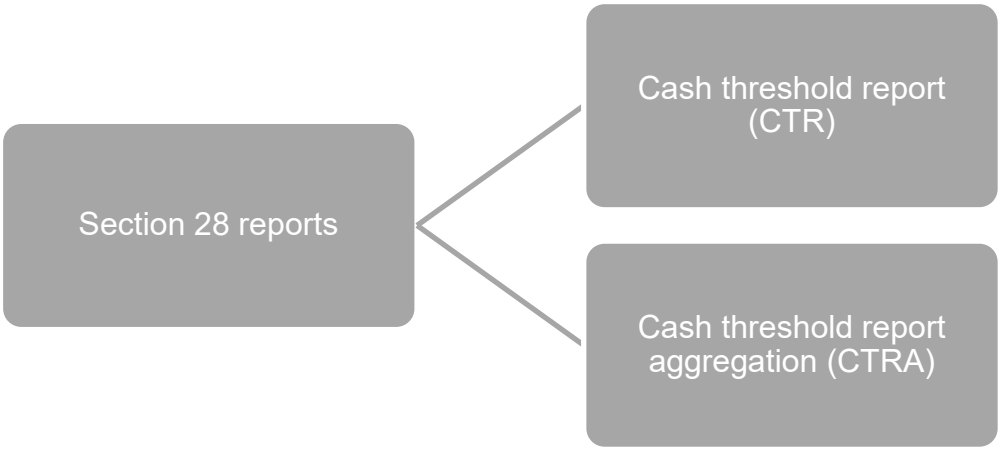
The prescribed amount is indicated in regulation 22B of the MLTFC Regulations as R24,999.99 (FIC, 2018b:129). It is important for estate agents to note that they must report aggregates of smaller amounts which exceed the prescribed threshold when added up. The aggregation is also applicable in instances where a series of small amounts and a large amount (which on its own exceed the prescribed threshold) appear to be linked to one another (FIC, 2017e:12). Some factors which may indicate that a series of small amounts are combined to form an aggregated transaction which exceeds the prescribed threshold, are provided in Guidance Note 5B (FIC, 2017e:13) as follows:

- The timeframe in which the series of smaller transactions occur;
- If the series of transactions constitute a repetitive pattern of the same type of transaction (for example cash payments or cash deposits); and
- the series of small transactions involve the same client business relationship.

Types of reports

Guidance Note 5B indicates that there are two different types of reports available on the FIC's reporting portal in relation to cash threshold reporting, as indicated in Figure 5-2 below (FIC, 2017e:6, 20).

Figure 5-2: Types of section 28 reports



Source: FIC (2017e:6, 20).

Guidance Note 5B defines these concepts as follows (FIC, 2017e:6):

1. CTR – "a cash threshold report submitted in terms of section 28 of the FIC Act"; and
2. CTRA – "a cash threshold report submitted in terms of section 28 of the FIC Act, whereby the transaction values have been aggregated (added up) to total the threshold value".

All aggregated cash transactions must be listed individually on the CTRA by estate agents (FIC, 2017e:13).

Although certain cash transactions may not be reportable by estate agents in terms of section 28 of FICA, estate agents should still monitor all cash transactions. Should these transactions seem suspicious, estate agents should submit a suspicious or unusual transaction report to FICA in terms of section 29, which is discussed in the chapters to follow (FIC, 2017e:14).

Section 29 (Suspicious and unusual transactions)

FICA provides for the reporting of suspicious and unusual activities/transactions in the prescribed form. Section 7 of POCA was repealed by FICA and since 3 February 2003, this reporting duty was included in section 29 of FICA (FIC, 2019a:8).

According to De Koker *et al.* (2017:147), section 29 must be read in conjunction with the guidance issued by the FIC. The FIC released the first guidance note on suspicious transaction reporting (Guidance Note 4) in March 2008. This was however replaced by Guidance Note 4A on the reporting of suspicious and unusual transactions in 2017. In 2019, the FIC updated its guidance on suspicious and unusual transaction reporting and published Guidance Note 4B, which replaced Guidance Note 4A (FIC, 2019b).

Guidance Note 4B was prepared by the FIC to provide guidance to accountable- and reporting institutions and any other person as required in section 29 to meet their reporting obligations in terms of FICA. The guidance provided include general guidance on the obligations under section 29, the reporting timelines, how reports have to be sent to the FIC, the information to include in the reports as well as how the electronic reporting mechanism must be used (FIC, 2019a:5).

Guidance Note 4B highlights that all businesses (including accountable- and reporting institutions as per section 29 of FICA) have a role in the combating of money laundering in South Africa. The reporting of suspicious and unusual transactions and/or activities is an essential component of the AML regime in every country (FIC, 2019a:8). These reporting requirements are also required in the FATF Recommendations, as described earlier in this study.

Section 29 (1) of FICA reads as follows:

> A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or ought reasonably to have known or suspected that -

(a) the business has received or is about to receive the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;

(b) a transaction or series of transactions to which the business is a party -

(i) facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;

(ii) has no apparent business or lawful purpose;

(iii) is conducted for the purpose of avoiding giving rise to a reporting duty under this Act;

(iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service;

(v) relates to an offence relating to the financing of terrorist and related activities; or

(vi) relates to the contravention of a prohibition under section 26B; or

(c) the business has been used or is about to be used in any way for money laundering purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities,

must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

Section 29 (2) of FICA reads as follows:

> A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that a transaction or a series of transactions about which enquiries are made, may, if that transaction or those transactions had been concluded, have caused any of the consequences referred to in subsection (1)(a), (b) or (c), must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

As noted from section 29 (1) above read in conjunction with Guidance Note 4B, the obligation to report suspicious transactions and activities applies to a broad range of persons and institutions as the obligation is imposed on any person who (FIC, 2019a:10):

- Carries on a business;
- Is in charge of a business;
- Manages a business; or

- Is employed by a business

Guidance Note 4B notes that “business” is not defined in FICA and defines it as follows: “The ordinary meaning of the term, within the context of the FIC Act, is that of a commercial activity or institution, as opposed to a charitable undertaking or public sector institution” (FIC, 2019a:10). FIC (2019a:10) further explains that “any person associated with a commercial undertaking as an owner, manager or employee of that undertaking, is subject to the obligation to report suspicious or unusual transactions and activities to the Centre”. Guidance Note 4B includes that this obligation also includes accountable- and reporting institutions as listed in schedule 1 and 3 of FICA (FIC, 2019a:10), and are therefore applicable to estate agents.

The concepts of “unlawful activity” and “proceeds of unlawful activity” are defined by FICA through reference to the definitions of these concepts in POCA (FIC, 2019a:11). These concepts are described earlier in this chapter.

Guidance Note 4B highlights that section 29 of FICA is only applicable to reports in connection with suspicions in respect of proceeds of unlawful activities and money laundering, terror financing and financial sanctions offences, and not criminal activity in general. As such, FICA does not require reports on suspected crimes or unlawful conduct by someone, except if it relates to money laundering, terror financing or financial sanction activities (FIC, 2019a:12).

Actual knowledge versus a suspicion

Section 29 of FICA not only applies to circumstances where a person has actual knowledge, but also to circumstances where a mere suspicion may exist (FIC, 2019a:14). FICA, however, does not provide a definition for what constitutes a suspicion. Guidance Note 4B explains that “the ordinary meaning of this term includes a state of mind of someone who has an impression of the existence or presence of something or who believes something without adequate proof, or the notion of a feeling that something is possible or probable” and that “this implies an absence of proof that a fact exists” (FIC, 2019a:14).

The starting point to consider if certain circumstances give rise to a suspicion will be to consider if the circumstances raise questions or gives rise to discomfort, apprehension or mistrust (FIC, 2019a:14).

As a suspicious state of mind is subjective, a court would have to draw inferences in respect of a person’s state of mind as it relates to certain circumstances from the evidence at the court’s disposal in relation to those circumstances. Guidance Note 4B further indicates that FICA adds an element of objectivity in section 29 (1) through the phrase “ought reasonably to have known

or suspected" (FIC, 2019a:14). The application of this is explained in section 1 (3) of POCA, which is explained earlier in this study.

Persons under section 29 of FICA should evaluate matters and transactions in respect of the business in question and compare it to what would be appropriate within the normal course of business. A person's knowledge of the customer's business, financial history, background and behaviour should be applied to determine if the matter/transaction is suspicious (FIC, 2019a:15). Various factors should be considered to determine a suspicious situation, as some factors may seem insignificant when looked at individually, but, when looked at together with other factors, may raise suspicion in respect of the situation. As such, the context of a situation is significant in determining a suspicion (FIC, 2019a:15).

Part 5 and 6 of Guidance Note 4B provides information in respect of factors that may indicate a suspicious or unusual transaction or activity. These can be used as indicators to circumstances which may give rise to suspicions (a suspicious state of mind) or it may be an indicator of the fact that a reasonably diligent and attentive person may have become suspicious of a specific or multiple transaction(s) (FIC, 2019a:15).

Part 5 contains indicators particularly to situations where there can be a suspicion in respect of a transaction between a business and its customer whereas part 6 contains indicators which apply specifically to situations where there can be a suspicion in respect of a specific activity portrayed by the customer when it engages with the business (FIC, 2019a:23, 26). The indicators provided in part 5 and 6 of Guidance Note 4B are given to assist persons in a business to recognise instances where transactions and/or a specific activity must raise questions and give rise to a sense of discomfort, apprehension or mistrust. The indicators are only examples of factors that may be used when transactions and/or client activity are assessed, which should not be viewed in isolation as it should always be considered together with other circumstances in respect of a particular transaction (FIC, 2019a:23, 26).

Threshold of reporting

Guidance Note 4B highlights that there is no monetary threshold applicable to the reporting of a suspicious or unusual transaction. Once it is concluded that a certain situation is present which gives rise to a suspicion that the transaction and/or activity includes the proceeds of unlawful activities, money laundering or terrorist financing, estate agents must report the transaction regardless the amount of the transaction/activity (FIC, 2019a:24). This must be distinguished from a situation where the amount of the transaction or series of transactions forms the basis of a

suspicion or where it is part of the circumstances which gave rise to the suspicion in respect of a transaction or series of transactions (FIC, 2019a:24).

Tipping-off

Sections 29 (3) and 29 (4) read as follows:

> (3) No person who made or must make a report in terms of this section may, subject to subsection 45B(2A), disclose that fact or any information regarding the contents of any such report to any other person, including the person in respect of whom the report is or must be made, otherwise than-
> (a) within the scope of the powers and duties of that person in terms of any legislation;
> (b) for the purpose of carrying out the provisions of this Act;
> (c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or
> (d) in terms of an order of court.
>
> (4) No person who knows or suspects that a report has been or is to be made in terms of this section may disclose that knowledge or suspicion or any information regarding the contents or suspected contents of any such report to any other person, including the person in respect of whom the report is or is to be made, otherwise than-
> (a) within the scope of that person's powers and duties in terms of any legislation;
> (b) for the purpose of carrying out the provisions of this Act;
> (c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or
> (d) in terms of an order of court.

According to De Koker *et al.* (2017:170), this prevents leaking of information to criminals of the fact that a report was filed which will allow them the opportunity to bypass the course of justice or to take revenge against the person who filed the report .

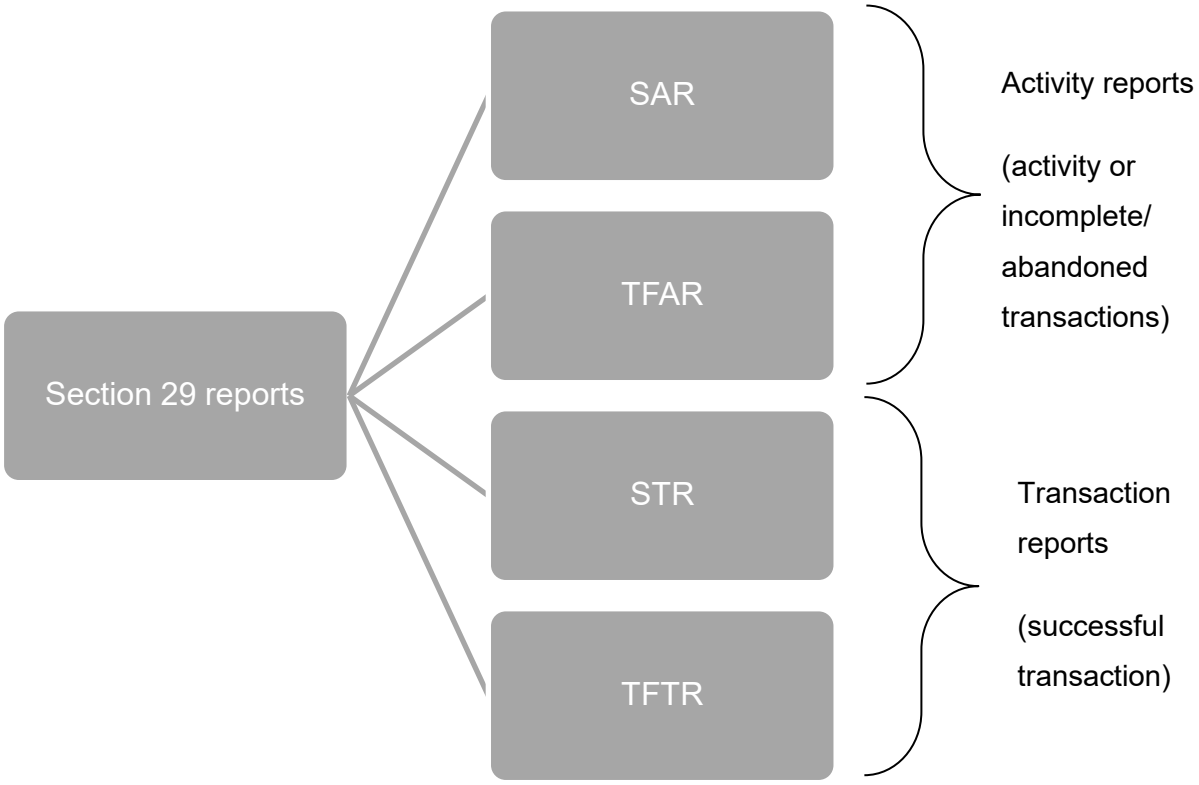
Guidance Note 4B contains that a person who contravenes the above provisions commits an offence in terms of FICA that carry maximum penalties of imprisonment for up to 15 years, or a fine up to R100 million (FIC, 2019a:30).

Types of reports

The nature of the reporting obligation contained in section 29 will either be transaction- or activity specific (FIC, 2019a:16).

Activity reports include suspicious activity reports (SAR) and terrorist financing activity reports (TFAR), where transaction reports include suspicious transaction reports (STR) and terrorist financing transaction reports (TFTR) (FIC, 2019a:16), as can be seen from Figure 5-3 below.

Figure 5-3: Types of section 29 reports



Source: FIC (2019a:16).

For purposes of this study, only the reports applicable to money laundering is applicable, i.e. SAR and STR. Guidance Note 4B defines these concepts as follows (FIC, 2019a:6):

1. SAR – "a suspicious or unusual activity report submitted in terms of section 29 (1)(a), (c) or 29(2) of the FIC Act in respect of the proceeds of unlawful activities or money laundering, or suspicious or unusual activity in terms of section 29 (1)(b)(vi) relating to the contravention of a prohibition under section 26B of the FIC Act, where the report relates to an activity which does not involve a transaction between two or more parties or in respect of a transaction or a series of transactions about which enquiries are made, or in respect of an incomplete, abandoned, aborted, attempted, interrupted or cancelled transaction, but which transactions has not been concluded, respectively"; and

2. STR – "a suspicious or unusual transaction report submitted in terms of section 29 (1)(b)(i) to (iv) of the FIC Act in respect of the proceeds of unlawful activities or money laundering and 29(1)(b)(vi) relating to the contravention of a prohibition under section 26B of the FIC

Act where the report relates to a transaction or a series of transactions between two or more parties".

Other regulations in respect of the reporting duties

In terms of section 33 of FICA, an estate agent who makes a report to the FIC in terms of section 28 or 29 may continue with and carry out the transaction in respect of which the report is required to be made, except if the FIC directs the estate agent not to proceed with the transaction in terms of section 34 of FICA. Section 34 is applicable where the FIC, after consultation with the estate agent, has reasonable grounds to suspect that the transaction (or proposed transaction) may:

1. Involve the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities, or property owned or controlled by or on behalf of, or at the direction of a person or entity identified pursuant to a resolution of the Security Council of the United Nations contemplated in a notice referred to in section 26A (1); or

2. Constitute money laundering or a transaction contemplated in section 29 (1)(b).

Should the FIC have reasonable grounds to suspect any of the above it may, in terms of section 34, direct the estate agent in writing not to proceed with the carrying out of the transaction or proposed transaction or any other transaction in respect of the funds affected by that transaction or proposed transaction for a period not longer than 10 days as determined by the FIC. This will allow the FIC to make the necessary inquiries concerning the transaction and, if the FIC considers it appropriate, to inform and advise an investigating authority or the National Director of Public Prosecutions. Saturdays, Sundays and proclaimed public holidays must not be taken into account when the 10-day period is calculated. Guidance Note 4B indicates that this instruction in terms of section 34 of FICA is an "intervention order" (FIC, 2019a:28).

As indicated in Guidance Note 4B, section 37 (1) of FICA overrides secrecy and confidentiality obligations in South African law (FIC, 2019a:29). Section 37 reads as follows:

> (1) Subject to subsection (2), no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution, supervisory body, reporting institution, the South African Revenue Service or any other person with a provision of this Part, Part 4 and Chapter 4.

(2) Subsection (1) does not apply to the common law right to legal professional privilege as between an attorney and the attorney's client in respect of communications made in confidence between –

(a) the attorney and the attorney's client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or

(b) a third party and an attorney for the purposes of litigation which is pending or contemplated or has commenced.

Section 38 protects a person who submits a report to the FIC, and reads as follows:

(1) No action, whether criminal or civil, lies against an accountable institution, reporting institution, supervisory body, the South African Revenue Service or any other person complying in good faith with a provision of this Part, Part 4 and Chapter 4, including any director, employee or other person acting on behalf of such accountable institution, reporting institution, supervisory body, the South African Revenue Service or such other person.

(2) A person who has made, initiated or contributed to a report in terms of section 28, 29 or 31 or who has furnished additional information concerning such a report or the grounds for such a report in terms of a provision of this Part is competent, but not compellable, to give evidence in criminal proceedings arising from the report.

(3) No evidence concerning the identity of a person who has made, initiated or contributed to a report in terms of section 28, 29 or 31 or who has furnished additional information concerning such a report or the grounds for such a report in terms of a provision of this Part, or the contents or nature of such additional information or grounds, is admissible as evidence in criminal proceedings unless that person testifies at those proceedings.

Filing a report

All estate agents must register with the FIC in terms of section 43B of FICA (FIC, 2019a:32). This should be done via the goAML system on the FIC's website (UNODC, 2017). Registration by estate agents with the FIC is discussed in more detail later in this chapter.

Guidance Notes 4B and 5B explain the following in respect of the method in which a report must be filed:

1. In terms of regulation 22 of the MLTFC Regulations, a report in terms of section 29 of FICA should be filed through the internet-based reporting portal on the FIC's website (FIC, 2019a:32); and

2. A CTR must be filed with the FIC in terms of regulation 22 (1) of the MLTFC Regulations on the same internet-based reporting portal as mentioned above (FIC, 2017e:19).

The internet-based portal is the same system used for the registration of estate agents with the FIC, being the goAML system. This system has the capability to accept both individual and batch reports (UNODC, 2017). According to the United Nations Office on Drugs and Crime (UNODC) (2019), “the goAML application is a fully integrated software solution developed specifically for use by Financial Intelligence Units (FIU's) and is one of UNODC's strategic responses to financial crime, including money-laundering and terrorist financing”.

In terms of timeframes of reporting, the following are applicable:

1. A report in terms of section 28, must be submitted to the FIC as soon as possible but no later than two days after an estate agent has become aware that a cash transaction or series of cash transactions has exceeded the prescribed threshold, as required by regulation 24 (4) of the MLTFC Regulations (FIC, 2017e:21). As set out in Guidance Note 5B, knowledge of such a transaction will usually be obtained when estate agents (FIC, 2017e:22):

    - Physically receive or pay out cash exceeding R24 999.99; or
    - Peruse their bank statement or a bank deposit slip from the client reflecting a transaction that exceeds R24 999.99.

2. A section 29 report must be sent to the FIC as soon as possible after an estate agent has become aware of the facts which give rise to a suspicion, as required in terms of regulation 24 of the MLTFC Regulations. In terms of regulation 24 (3) of the MLTFC Regulations, this period should not exceed 15 days, which excludes Saturdays, Sundays and Public Holidays (FIC, 2019a:34).

During the 2017/2018 reporting period of the FIC, estate agents reported 8 285 CTRs, 16 SARs and six STRs to the FIC (FIC, 2018c:11).

Compliance and enforcement

FICA stipulates the following as it relates to reporting duties:

Section 51 – Failure to report cash transactions

(1) An accountable institution or reporting institution that fails, within the prescribed period, to report to the Centre the prescribed information in respect of a cash transaction in accordance with section 28, is guilty of an offence.

(2) An accountable institution or reporting institution that fails, within the prescribed period, to report to the Centre the prescribed information in respect of a cash transaction in accordance with section 28, is noncompliant and is subject to an administrative sanction.

Section 52 – Failure to report suspicious or unusual transactions

(1) Any person who fails, within the prescribed period, to report to the Centre the prescribed information in respect of a suspicious or unusual transaction or series of transactions or enquiry in accordance with section 29(1) or (2), is guilty of an offence.

(2) Any person referred to in section 29(1) or (2) who reasonably ought to have known or suspected that any of the facts referred to in section 29(1)(a), (b) or (c) or section 29(2) exists, and who negligently fails to report the prescribed information in respect of a suspicious or unusual transaction or series of transactions or enquiry, is guilty of an offence.

Section 53 – Unauthorised disclosure

(1) Any person referred to in section 29(3) who discloses a fact or information contemplated in that section, otherwise than in the circumstances or for the purposes authorised in that section, is guilty of an offence.

(2) Any person referred to in section 29(4) who discloses a knowledge or suspicion or any information contemplated in that section, otherwise than in the circumstances and for the purposes authorised in that section, is guilty of an offence.

Administrative and criminal sanctions are discussed in section 5.3.2.5.4 below.

5.3.2.4.4 RMCP (FICA section 42), person responsible for compliance (FICA section 42A) and training of employees (FICA section 43)

RMCP

Another obligation on estate agents is set out in section 42 of the FICA, namely to develop, document, maintain and implement an RMCP (FIC, 2017d:62). Guidance Note 7 explains that an

estate agency's ability to effectively apply an RBA is to a great extent dependent on the quality of its RMCP. An estate agency's RMCP should therefore be adequate to counter the money laundering risks facing the institution. Furthermore, an RMCP not only contains policy documents, but also procedures, systems and controls that should be implemented within the institution. As such, the RMCP can be described as "the foundation of an accountable institution's efforts to comply with its obligations under the FIC Act on a risk sensitive basis" (FIC, 2017d:62).

Section 42 (1) of FICA stipulates that an estate agency must develop, document, maintain and implement a programme for AML and counter-terrorist financing (CFT) risk management and compliance.

Section 42 (2) contains an extensive list of provisions in respect of the content of the RMCP. The 2018/2019 FIC road show presentation unpacks an RMCP as follows (FIC, 2018c:52):

1. Risk identification;
2. CDD;
3. Transactional monitoring;
4. Recordkeeping;
5. Reporting to the FIC;
6. Extended registration model of entity; and
7. Implementation of RMCP.

Section 42 (2) reads as follows:

> A Risk Management and Compliance Programme must:
> (a) enable the accountable institution to –
> (i) identify;
> (ii) assess;
> (iii) monitor;
> (iv) mitigate; and
> (v) manage
> the risk that the provision by the accountable institution of products or services may involve or facilitate money laundering activities or the financing of terrorist and related activities;
> (b) provide for the manner in which the institution determines if a person is –

(i) a prospective client in the process of establishing a business relationship or entering into a single transaction with the institution; or

(ii) a client who has established a business relationship or entered into a single transaction;

(c) provide for the manner in which the institution complies with section 20A;

(d) provide for the manner in which and the processes by which the establishment and verification of the identity of persons whom the accountable institution must identify in terms of Part 1 of this Chapter is performed in the institution;

(e) provide for the manner in which the institution determines whether future transactions that will be performed in the course of the business relationship are consistent with the institution's knowledge of a prospective client;

(f) provide for the manner in which and the processes by which the institution conducts additional due diligence measures in respect of legal persons, trusts and partnerships;

(g) provide for the manner in which and the processes by which ongoing due diligence and account monitoring in respect of business relationships is conducted by the institution;

(h) provide for the manner in which the examining of –

(i) complex or unusually large transactions; and

(ii) unusual patterns of transactions which have no apparent business or lawful purpose,

and keeping of written findings relating thereto, is done by the institution;

(i) provide for the manner in which and the processes by which the institution will confirm information relating to a client when the institution has doubts about the veracity of previously obtained information;

(j) provide for the manner in which and the processes by which the institution will perform the customer due diligence requirements in accordance with sections 21, 21A, 21B and 21C when, during the course of a business relationship, the institution suspects that a transaction or activity is suspicious or unusual as contemplated in section 29;

(k) provide for the manner in which the accountable institution will terminate an existing business relationship as contemplated in section 21E;

(l) provide for the manner in which and the processes by which the accountable institution determines whether a prospective client is a foreign prominent public official or a domestic prominent influential person;

(m) provide for the manner in which and the processes by which enhanced due diligence is conducted for higher-risk business relationships and when simplified customer due diligence might be permitted in the institution;

(n) provide for the manner in which and place at which the records are kept in terms of Part 2 of this Chapter;

(o) enable the institution to determine when a transaction or activity is reportable to the Centre under Part 3 of this Chapter;

(p) provide for the processes for reporting information to the Centre under Part 3 of this Chapter;

(q) provide for the manner in which –

(i) the Risk Management and Compliance Programme is implemented in branches, subsidiaries or other operations of the institution in foreign countries so as to enable the institution to comply with its obligations under this Act;

(ii) the institution will determine if the host country of a foreign branch or subsidiary permits the implementation of measures required under this Act; and

(iii) the institution will inform the Centre and supervisory body concerned if the host country contemplated in sub-paragraph (ii) does not permit the implementation of measures required under this Act;

(r) provide for the processes for the institution to implement its Risk Management and Compliance Programme; and

(s) provide for any prescribed matter.

In terms of section 42 (2A), should any of the above not be applicable to an estate agency, the estate agency must indicate in its RMCP the paragraph under subsection (2) which is not applicable, together with the reason why it is not applicable to the accountable institution.

The RMCP must be approved by the board of directors, senior management or other person or group of persons exercising the highest level of authority in an accountable institution (according to section 42 (2B)). In accordance with section 42 (2C), the RMCP must be reviewed at regular intervals to ensure that it remains relevant to the operations of the estate agency and the achievement of the requirements as per section 42 (2).

In terms of sections 42 (3) and (4), an estate agency must make documentation describing its RMCP available to each employee who are involve in transactions to which FICA applies. The estate agency should also, if requested, make a copy of this documentation available to the FIC or the EAAB (as the supervisory body of estate agents).

Guidance Note 7 of the FIC contains guidance to estate agents in respect of an RMCP. As stipulated in Guidance Note 7, an RMCP must always be commensurate with an estate agency's size and the complexity of the institution and the nature of business conducted (FIC, 2017d:63). The nature and extent of its internal systems and controls which is part of its RMCP, depends on various factors which can include, *inter alia* (FIC, 2017d:64):

- The nature, scale and complexity of the accountable institution's business;
- The diversity of its operations;

- Its client, product or services profile;
- Its distribution channels;
- The volume and size of its transactions; and
- The degree of risk associated with each area of operations.

The content of the estate agency's RMCP must be communicated widely throughout the institution in order to increase the effectiveness of its implementation (FIC, 2017d:65).

Person responsible for compliance

Section 42A (1) stipulates that the board of directors of an estate agency which is a legal person with a board of directors, or the senior management of an estate agency without a board of directors, must ensure compliance by the estate agency and its employees in terms of the provisions of FICA and its RMCP.

If an estate agency is a legal person, section 42A (2) stipulates that the estate agency must:

> (a) have a compliance function to assist the board of directors or the senior management, as the case may be, of the institution in discharging their obligation under subsection (1); and
>
> (b) assign a person with sufficient competence and seniority to ensure the effectiveness of the compliance function contemplated in paragraph (a).

Sections 42A (3) and (4) reads as follows in respect of an estate agency which is not a legal person:

> (3) The person or persons exercising the highest level of authority in an accountable institution which is not a legal person must ensure compliance by the employees of the institution with the provisions of this Act and its Risk Management and Compliance Programme, in so far as the functions of those employees relate to the obligations of the institution.
>
> (4) An accountable institution which is not a legal person, except for an accountable institution which is a sole practitioner, must appoint a person or persons with sufficient competence to assist the person or persons exercising the highest level of authority in the accountable institution in discharging their obligation under subsection (3).

Training of employees

Section 43 stipulates that an estate agency must provide ongoing training to its employees to enable them to comply with the provisions of FICA and the RMCP which are applicable to them.

De Koker *et al.* (2017:235) explains that an estate agency which fails to provide ongoing training to its employees is non-compliant in terms of section 62 and will be subject to an administrative sanction. Sanctions are discussed in section 5.3.2.5.4 below.

According to Nkhwashu (2018), the obligation on estate agencies to provide training to their employees "has not been implemented with the seriousness it deserves under the previous rules-based or 'tick-box' regulatory framework". He explains that this was mostly due to the fact that most estate agencies offered awareness programmes which required no assessments at the end of the training to determine if the trainees obtained an acceptable knowledge in respect of their duties and obligations. FICA also did not provide adequate guidance in this regard. Nkhwashu (2018) indicates that the amendments to FICA and sections 42A, 43 and 62 are "a step in the right direction", however, Guidance Note 7 should have contained and elaborated on this obligation. As the amendments to FICA resulted in a risk-based regulatory framework where accountable institutions and its employees are required to exercise their discretion in the application of the provisions in FICA, the need for ongoing training is higher than ever.

Compliance and enforcement

FICA stipulates the following as it relates to the RMCP, person responsible for compliance and training of employees:

> **Section 61 – Failure to comply with duty in respect of Risk Management and Compliance Programme**
>
> An accountable institution that fails to –
>
> (a) develop, document, maintain and implement an anti-money laundering and counterterrorist financing risk management and compliance programme in accordance with section 42(1), (2) and (2A);
> (aA) obtain approval for its Risk Management and Compliance Programme in accordance with section 42(2B);
> (aB) review its Risk Management and Compliance Programme at regular intervals in accordance with section 42(2C);
> (b) make the Risk Management and Compliance Programme available to its employees in accordance with section 42(3); or

(c) make a copy of its Risk Management and Compliance Programme available to the Centre or a supervisory body in terms of section 42(4),

is noncompliant and is subject to an administrative sanction.

Section 61B – Failure to comply with duty in regard to governance

(1) The board of directors or senior management, or both, of an accountable institution that fails to ensure compliance in accordance with section 42A(1) is noncompliant and is subject to an administrative sanction.

(2) An accountable institution that fails to appoint a person in accordance with section 42A(2) or (4) is noncompliant and is subject to an administrative sanction.

(3) A person that fails to ensure compliance in accordance with section 42A(3) is noncompliant and is subject to an administrative sanction.

Section 62 – Failure to provide training

An accountable institution that fails to provide training to its employees in accordance with section 43 is noncompliant and is subject to an administrative sanction.

Administrative sanctions are discussed in section 5.3.2.5.4 below.

5.3.2.4.5 Registration of accountable institutions and reporting institutions (FICA section 43B)

The last pillar of compliance relates to the registration of estate agents with the FIC. Section 43B of FICA governs this obligation as it contains in subsection 1 that every accountable institution referred to in schedule 1 and every reporting institution referred to in schedule 3 must, within the prescribed period and in the prescribed manner, register with the FIC.

Sections 43B (2), (3) and (4) contains other particulars in this regard and reads as follows:

(2) The registration of an accountable institution and a reporting institution contemplated in subsection (1) must be accompanied by such particulars as the FIC may require.

(3) The FIC must keep and maintain a register of every accountable institution and reporting institution registered in terms of subsection (1).

(4) A registered accountable institution or reporting institution must notify the FIC, in writing, of any changes to the particulars furnished in terms of this section within 90 days after such a change.

Regulation 27A of the MLTFC Regulations provide the period for and the manner of registration by every accountable institution referred to in schedule 1 of FICA, and every reporting institution

referred to in schedule 3 of FICA (FIC, 2018b:164). Public Compliance Communication (PCC) 05C provides guidance to accountable- and reporting institutions in respect of registration with the FIC in terms of section 43B of FICA (FIC, 2018d; FIC, 2018e). Failure to register with the FIC or to provide information in terms of section 43B of FICA can lead to administrative sanctions in terms of section 61A.

In terms of MLTFC Regulation 27A (4), the registration of estate agents must be in accordance with the format specified by the FIC and must be submitted to the FIC electronically by means of the internet-based reporting portal provided for this purpose (FIC, 2018b:164). As indicated earlier in this chapter, this internet-based reporting portal is the goAML system, which went live on 25 April 2016 (De Koker *et al.*, 2017:137). The goal of this innovative system is to improve the quality of information available to the FIC in order to develop financial intelligence. The benefits of goAML includes that the system is interactive which puts compliance in the hands of reporting institutions, and that reporting is more secure which improves the integrity of the system. South Africa is the first country in the world to implement the full enterprise version of the software (FIC, 2016:46).

The FIC (2016:46) indicates that the goAML system improves its capacity to:

- Register accountable- and reporting institutions;
- Receive large volumes of reporting and data from business;
- Analyse reports and other data; and
- Provide intelligence reports to law enforcement and supervisory bodies.

The section 43B (3) obligation on the FIC to keep and maintain a register of every accountable- and reporting institution registered with the FIC is now simplified through the use of the goAML system (De Koker *et al.*, 2017:138, 139).

De Koker *et al.* (2017:137) indicates that the FIC issued Directive 04/2016 for a limited time to assist accountable- and reporting institutions which were already registered with the FIC with the transition to the new internet-based system.

At the end of the 2017/2018 reporting period, 40 799 accountable- and reporting institutions were registered with the FIC, as opposed to 38 841 during the 2016/2017 reporting period (FIC, 2018a:11). With specific reference to estate agents, 10 242 registrations were recorded at 31 March 2018, as opposed to 9 999 registrations at 31 March 2017 (FIC, 2018a:26). Attorneys and estate agents register based on the amount of businesses/branch offices, and not as

individual practitioners in each office/branch. The amount of estate agent registrations does therefore not reflect the total amount of practitioners subject to FICA (FIC, 2018a:26).

Compliance and enforcement

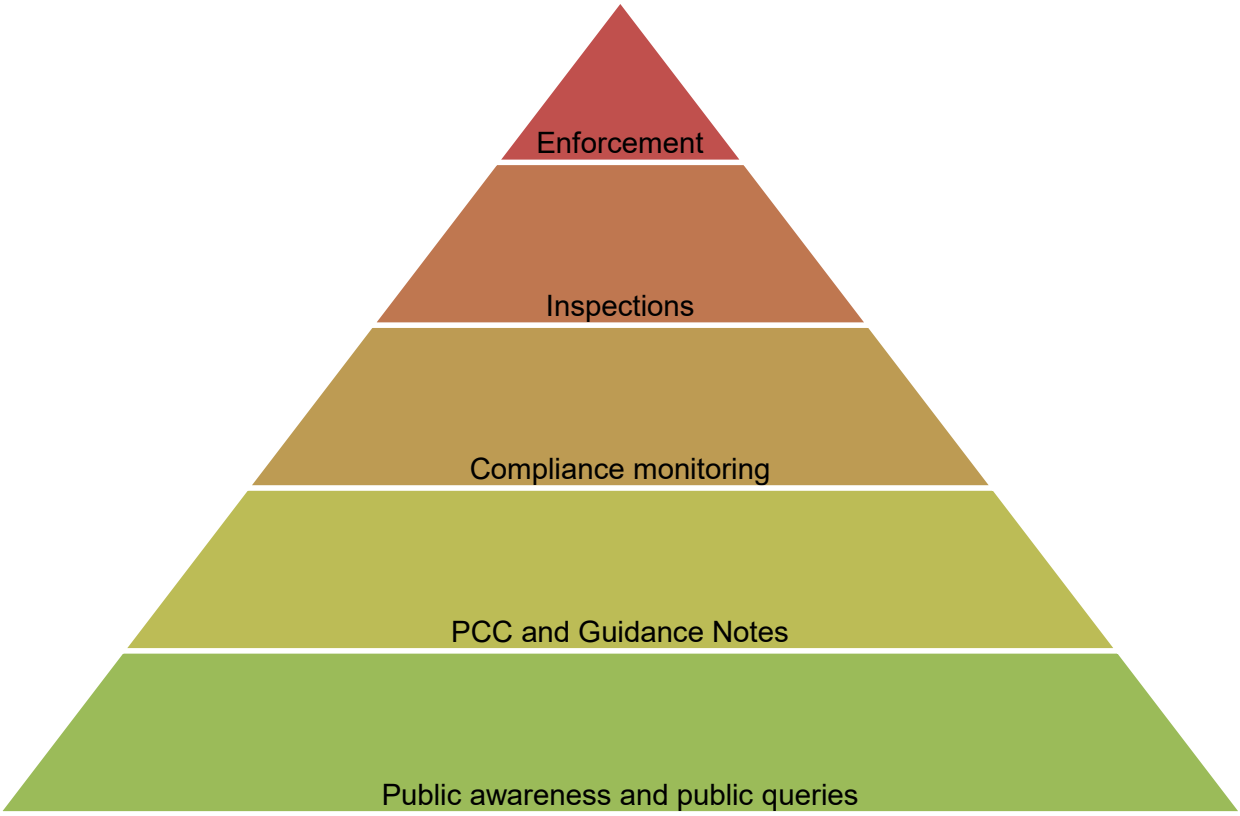
FICA stipulates the following as it relates to the registration of accountable institutions and reporting institutions:

> **Section 61A – Failure to register with Centre**
>
> Any accountable institution or reporting institution that –
>
> (a) fails to register with the Centre in terms of section 43B; or
> (b) fails to provide information in terms of section 43B,
>
> is noncompliant and is subject to an administrative sanction.

Administrative sanctions are discussed in section 5.3.2.4.5 below.

5.3.2.5 Supervision and enforcement

The 2018/2019 FIC roadshow presentation reflects the FIC's supervisory model as follows:



Source: FIC (2018c:119).

5.3.2.5.1 Supervision of accountable institutions

Section 45 (1) places a responsibility on every supervisory body to supervise and enforce compliance with FICA or any order, determination or directive made in terms of FICA by all accountable institutions regulated or supervised by it. This obligation on supervisory bodies forms part of the legislative mandate of any supervisory body and constitutes a core function of that supervisory body. As mentioned earlier in this chapter, the EAAB is the supervisory body of estate agents as set out in schedule 2 of FICA.

The EAAB was established in 1976 in terms of the EAAA (EAAB, 2017:8). The primary mandate of the EAAB is "to regulate and control certain activities of estate agents in the public interest" (EAAB, 2014:7). The secondary mandate of the EAAB is provided for in FICA where the EAAB is designated as the supervisory body for estate agents which requires the supervision and enforcement of compliance by estate agents with the provisions of FICA (EAAB, 2014:7).

The EAAB regulates the estate agency profession and insure that all estate agents are registered with the EAAB. Evidence of such registration and confirmation that an estate agent is legally entitled to carry out the activities of an estate agent, is in the form of a Fidelity Fund Certificate (FFC) which needs to be renewed annually (EAAB, 2014:7).

Industry compliance lies at the core of the EAAB's functions and they are responsible to make sure that qualifying estate agents receive an FFC timeously to enable them to trade legally as estate agents (EAAB, 2014:7).

From 1 July 2016, the process for estate agents to register with the EAAB were automated. Estate agents need to follow a three-step process through the MyEAAB agents portal in order to apply for an FFC (EAAB, 2017:30). FFCs are only issued to principle estate agents and estate agency firms which fully comply with audit compliance requirements (EAAB, 2014:20).

During the 2017/2018 reporting period, the EAAB issued 49 645 FFCs, as opposed to 48 489 during 2016/2017 (EAAB, 2018a:33).

In addition to the above, the EAAB has to conduct disciplinary proceedings where there is evidence of wrongdoing by estate agents (EAAB, 2014:7, 34-35). As such, they investigate complaints received from the public, which can be submitted to the EAAB through any of the following (EAAB, 2014:35):

- Post/Mail;
- Electronic mail (e-mail);

- Fax;
- Walk-in clients;
- Whistle-blowers; and/or
- Inspections.

In terms of section 45 (1C), the EAAB must submit to the FIC, within the prescribed period and in the prescribed manner, a written report on any action taken against any estate agents in terms of FICA or any order, determination or directive made in terms of FICA.

The FIC and EAAB must co-ordinate their approach to exercising their powers and performing their functions in terms of FICA to ensure the consistent application of FICA, as stipulated in section 45 (1D)(a).

In respect of the amendments to FICA, a transitional period was required before full compliance to the amendments to FICA can be achieved (FIC, 2017a:6). Sanctions for non-compliance with the new requirements were delayed to allow sufficient time for accountable institutions, including estate agents, to implement the amendments (FIC, 2017a:7). This is discussed in more detail below.

5.3.2.5.2 Compliance and enforcement of FICA

As discussed earlier in this chapter, various provisions of the amendments to FICA became effective on different dates. During October 2017, the FIC conducted a survey among accountable institutions to determine if they are ready to comply with the new requirements. In this survey, accountable institutions were asked to identify any anticipated obstacles which will prevent them from complying with the amendments, as well as to indicate when they would be ready to fully comply with the amendments (FIC, 2018a:17). 1 223 Responses were received by the FIC, and based on the responses, the FIC and supervisory bodies determined that administrative sanctions on the new provisions would only be imposed from 2 April 2019 (FIC, 2018a:17). From this date, all estate agencies must ensure that they are fully compliant with the provisions of FICA (Rebosa, 2018). Sections of FICA which were not affected by the amendments, would however continue to be subject to administrative enforcement (FIC, 2018a:17).

The estate agents, however, found it difficult to comply with the new provisions by 1 April 2019, as they did not receive guidance and information from the EAAB in a timely manner:

- Following a meeting between the Real estate business owners of South Africa (Rebosa) and the EAAB on 23 January 2019, Rebosa was advised that the EAAB will embark by the beginning of February 2019 on a series of roadshows to educate the industry on compliance with FICA. The EAAB would also finalise a draft RMCP template by the end of January 2019 (Rebosa, 2019);

- The EAAB issued the RMCP template to estate agencies on 1 April 2019 (EAAB, 2019a), which are the date on which estate agencies had to be compliant to all the provisions of FICA, including an RMCP;

- The EAAB compiled a video in respect of the amendments to FICA, which included information on the implementation of an RBA, the seven pillars of compliance, money laundering, money laundering risk assessments, development of an RMCP, the reporting of suspicious or unusual transactions and how to submit the different types of reports to the FIC (EAAB, 2019b). This video was posted on the EAAB's website on 17 April 2019, which was after the date on which accountable institutions had to comply with the amendments; and

- The EAAB invited estate agents and agencies to a webinar session on "The Implementation of the FIC Amendment Act" session. Three dates were indicated for these sessions, being 11 April 2019, 16 May 2019 and 23 May 2019 respectively (EAAB, 2019c), all after the date on which accountable institutions had to comply with the amendments.

Rebosa (2019) states that "it is unfortunately true that industry has to comply with a new Act despite not having received the required training from the EAAB as yet. This is despite the fact that it is the responsibility of the EAAB to have made such training available (Section 7.1 of the Estate Agency Affairs Act and Section 3 of the Property Practitioners Bill)".

5.3.2.5.3 FIC Inspections

One of the pillars of the FIC's supervisory model is Inspections (FIC, 2018c:119). The 2010 amendments to FICA introduced the power to inspect accountable- and reporting institutions and enforce non-compliance with FICA administratively (FIC, 2018a:26). Inspections are regulated through sections 45A and 45B in chapter 4 of FICA. Section 45A contains the particulars on the appointment of inspectors, and section 45B sets out the provisions on how these inspections must be conducted.

The goal of inspections is to determine the level of compliance by accountable institutions with the requirements set out in FICA (FIC, 2018a:26; FIC, 2018c:120). Supervisory bodies are

responsible to oversee compliance to FICA by accountable institutions in their applicable business sector (FIC, 2018a:26). The FIC and supervisory bodies are not allowed to use the inspection powers to investigate any criminal matters. Should they become aware of any criminal conduct during an inspection, they should refer it to law enforcement agencies to investigate (FIC, 2018c:120).

The first inspections in terms of FICA were done in August 2011 and since then, the FIC has conducted a total of 1 054 inspections (as at the end of the 2017/2018 reporting period) on motor vehicle dealers, Kruger rand dealers, trust companies and administrators of trusts, entities that lend money against security of securities, Postbank, the Post Office and Ithala Development Finance Corporation Limited (FIC, 2018a:27).

During the FIC roadshow in 2017, they indicated that enforcement of the amendments to FICA will be delayed as accountable institutions need time to implement the amendments to FICA. Enforcement of the provisions of FICA which were not amended (for example registration and reporting requirements) would continue without any delay (FIC, 2017c:101).

As the EAAB is responsible to supervise and enforce compliance by estate agents with the FICA provisions, their annual target for 2017/2018 to conduct inspections was set at 100 and they conducted a total of 108 inspections during the 2017/2018 reporting period (EAAB, 2018a:52; FIC, 2018a:27).

The findings from these inspections revealed that KwaZulu-Natal has the highest level of contraventions, which included *inter alia* (EAAB, 2018a:53):

- Failure to keep records;
- Failure to comply with duties such as the appointment of a compliance officer;
- Failure to conduct adequate CDD; and
- Incomplete internal rules.

FICA stipulates the following as it relates to offences relating to inspections:

> **Section 62A – Offences relating to inspection**
>
> A person who –
> (a) fails to appear for questioning in terms of section 45B(2)(a);
> (b) fails to comply with an order contemplated in section 45B(2)(b);
> (c) wilfully gives false information to an inspector;

(d) fails to comply with any reasonable request by an inspector in the performance of his or her functions; or
(e) wilfully hinders an inspector in the performance of his or her functions, is guilty of an offence.

Sanctions are discussed in section 5.3.2.5.4 below.

5.3.2.5.4 Sanctions

Administrative sanctions

De Koker *et al.* (2017:122) explains that the 2017 amendments to FICA decriminalised several contraventions to FICA and non-compliance can now be sanctioned through administrative sanctions. The 2017/2018 annual report of the FIC (2018a:10) confirms that the main objective of the amendments was "to provide an enforcement framework within which administrative penalties under the FIC Act could be applied". In terms of section 45C (1) the FIC or a supervisory body may impose an administrative sanction on any accountable institution, reporting institution or any other person under FICA, when they are satisfied based on available facts that the institution or person:

(a) has failed to comply with a provision of this Act or any order, determination or directive made in terms of this Act;
(b) has failed to comply with a condition of a licence, registration, approval or authorisation issued or amended in accordance with section 45(1B)(e);
(c) has failed to comply with a directive issued in terms section 34(1) or 43A(3); or
(d) has failed to comply with a non-financial administrative sanction imposed in terms of this section.

De Koker *et al.* (2017:122) indicates that the above include the failure to:

- Identify persons (section 46);
- Apply CDD measures (section 46A);
- Keep records (section 47);
- Comply with a requirement relating to an RMCP (section 61);
- Register with the FIC (section 61A);
- Comply with a requirement relating to governance of compliance (section 61B);

- Provide training to staff and appoint a compliance officer (section 62); and
- Comply with the FIC's or a supervisory body's directives (section 62E).

The administrative sanctions that can be imposed by the FIC or the EAAB are set out in section 45C (3) and include any one or more of the following:

> (a) A caution not to repeat the conduct which led to the non-compliance referred to in subsection (1);
> (b) a reprimand;
> (c) a directive to take remedial action or to make specific arrangements;
> (d) the restriction or suspension of certain specified business activities; or
> (e) a financial penalty not exceeding R10 million in respect of natural persons and R50 million in respect of any legal person.

In addition to the administrative sanctions set out above, the FIC or EAAB may, in terms of section 45C (4), make recommendations to the relevant institution or person in respect of compliance with FICA or any order, determination or directive made in terms of FICA.

In terms of section 45C (5), the FIC or EAAB must give the institution or person reasonable notice in writing of the following before imposing an administrative sanction:

> (a) the nature of the alleged non-compliance;
> (b) of the intention to impose an administrative sanction;
> (c) of the amount or particulars of the intended administrative sanction; and
> (d) that the institution or person may, in writing, within a period specified in the notice, make representations as to why the administrative sanction should not be imposed.

Financial penalties must be paid into the National Revenue Fund as stipulated in section 45C (7)(a).

In the case where the institution or person has already been charged with a criminal offence in respect of the same set of facts, sections 45C (8) and (9) are applicable:

> (8) An administrative sanction contemplated in this section may not be imposed if the respondent has been charged with a criminal offence in respect of the same set of facts.
>
> (9) If a court assesses the penalty to be imposed on a person convicted of an offence in terms of this Act, the court must take into account any administrative sanction imposed under this section in respect of the same set of facts.

Section 45C (10) stipulates that an administrative sanction imposed in terms of FICA does not constitute a previous conviction as contemplated in chapter 27 of the CPA.

Should an institution or person under FICA wants to appeal the decision of imposing an administrative sanction, the provisions set out in sections 45D, 45E and 45F of FICA are applicable.

Criminal sanctions

Section 68 of FICA sets out the penalties where a person is found guilty of an offence in terms of FICA:

> (1) A person convicted of an offence mentioned in this Chapter, other than an offence mentioned in subsection (2), is liable to imprisonment for a period not exceeding 15 years or to a fine not exceeding R100 million.
>
> (2) A person convicted of an offence mentioned in section 55, 62A, 62B, 62C or 62D, is liable to imprisonment for a period not exceeding five years or to a line not exceeding R10 million.

5.4 Mutual Evaluation - South African compliance with the FATF Recommendations

As noted in chapter 4 of this study, South Africa has joined and became a member of the FATF in June 2003 (De Koker, 2013: Com 1-13). It was also during 2003 that South Africa was evaluated for the first time by the FATF (ESAAMLG & FATF, 2009:29). A second evaluation was conducted by the FATF and ESAAMLG during 4 to 15 August 2008 (an on-site visit) and the evaluation was subsequently adopted in the FATF Plenary on 26 February 2009 as a second mutual evaluation (ESAAMLG & FATF, 2009:2, 5).

The evaluation team was made up of members of the FATF Secretariat as well as FATF experts in criminal law, law enforcement and regulatory issues (ESAAMLG & FATF, 2009:5).

This evaluation of South Africa was based on the FATF 2004 Methodology as updated in February 2008. South Africa's compliance with the 40 Recommendations and the Nine Special Recommendations on Terrorist Financing was evaluated. The evaluation took place based on the laws and regulations, together with other materials which South Africa provided to the evaluation team. The team also used information gathered during their on-site visit. During this on-site visit, they met with various South African government and private sector officials and representatives (ESAAMLG & FATF, 2009:5).

The MER published by the FATF and ESAAMLG describes the measures in place in South Africa at the time, the levels of compliance with the FATF Recommendations and contains recommendations on how specific elements of the system could be strengthened (ESAAMLG & FATF, 2009:6).

5.4.1 Findings of the 2009 FATF Mutual Evaluation

The MER contains the following in respect of South Africa's the development of its AML systems (ESAAMLG & FATF, 2009:6):

> The development of AML/CFT systems in South Africa represents work in progress. South Africa has demonstrated a strong commitment to implementing AML/CFT systems which has involved close cooperation and coordination between a variety of government departments and agencies. The authorities have sought to construct a system which uses as its reference the relevant United Nations Conventions and the international standards as set out by the Financial Action Task Force. Since 2003, South Africa has taken numerous steps to address many of the recommendations that were made in its first FATF mutual evaluation report.

One of the major findings was that South Africa had made good progress since it was last evaluated in 2003 in the development of AML and CFT systems. An overview of other major findings as it relates to AML measures are as follows (FATF, 2018c):

1. The money laundering offence is generally in line with both the Vienna and Palermo Conventions, however, the effectiveness thereof was difficult to assess due to the absence of comprehensive statistics;

2. It was found that the FIC is an "effective financial intelligence unit";

3. The scheme to confiscate assets is "comprehensive and utilises effective civil forfeiture measures"; and

4. FICA enforces CDD, record-keeping, STRs and internal control requirements. However, measures to deal with Politically Exposed Persons (PEPs), correspondent banking and beneficial ownership are not included in FICA.

It was found through the evaluation process that South Africa consists of a broad and well-established DNFBP sector (ESAAMLG & FATF, 2009:21).

Table 1 of the MER contains the ratings of compliance with each of the FATF Recommendations (ESAAMLG & FATF, 2009:215). The ratings were according to the four levels of compliance as per the 2004 Methodology, i.e. C - Compliant, LC - Largely Compliant, PC - Partially Compliant and NC - Non-Complaint (ESAAMLG & FATF, 2009:215). Although FICA was amended after the

2009 mutual evaluation, it is deemed necessary to provide an overview of the findings in the MER in order to provide a background of South Africa's compliance to the FATF Recommendations.

Table 5-1 below, contains an extract of the ratings as indicated in the MER, as relevant to this study. As the evaluation was based on the FATF Recommendations before it was renumbered through the 2012 revision to the FATF Recommendations, the table contains the previous numbering of the Recommendations and the new numbers as per the revised 2012 Recommendations are added for ease of reference.

Table 5-1: Extract of the findings of the 2009 FATF mutual evaluation of South Africa

Previous number	**New number**	**Summary of findings (as relevant to this study)**
Money laundering offence		
1	3	*Largely Compliant* • Comprehensive statistics are not available, making it difficult to assess the effectiveness of the AML regime.
CDD		
5	10	*Partially Compliant* • There is no specific legal obligation for accountable institutions to perform CDD if there is a suspicion of money laundering, or when the accountable institutions doubt the veracity/adequacy of previously obtained CIV data. • There is also no specific legal requirement to specify that requires accountable institutions must identify beneficial owners or verify their identities. As such, no obligation exist to identify the beneficial owner before, or during the course of establishing a business relationship or conducting a transactions for occasional customers.

Previous number	New number	Summary of findings (as relevant to this study)
		• There is no explicit requirement that information on the purpose of a business relationship must be obtained together with no explicit requirement to perform OCDD measures. • Furthermore, no specific requirement exist that accountable institutions should apply enhanced CDD for customers, business relationships or transactions that pose a higher risk. • Once a business relationship has been established, no specific requirement exist for accountable institutions to terminate the business relationship or to consider filing an STR if they doubt the veracity/adequacy of previously obtained CIV data.
PEPs		
6	12	*Non-Compliant* • There is no enforceable obligation for financial institutions to identify PEPs or take the measures included in Recommendation 6 (Recommendation 12 as per the revised 2012 Recommendations).
New technologies		
8	15	*Partially Compliant* • It is not a legal requirement to have policies in place to address the potential abuse of new technologies for money laundering.
Third parties and introducers		
9	17	*Non-Compliant* • Exemption 5 does not require the following:

Previous number	New number	Summary of findings (as relevant to this study)
		- The institution relying on third-party verification is not required to immediately obtain the relevant CDD information; and - An accountable institution does not have to take measures to satisfy itself that copies of identification data (and other relevant documentation relating to CDD requirements) will be made available without delay from the other institution. • Some accountable institutions are applying exemption 5 and fully exempt all customers from FATF membership countries from CIV requirements.
Record keeping		
10	11	*Partially Compliant* • The following requirements are not in place: - Transaction records do not have to include the date of the transaction or the address of the customer; - Outside of the banking sector, no obligation exist to keep sufficient transaction records to permit the reconstruction of account activity; and - Account files or business correspondence does not have to be kept as part of this obligation. • "Effective application of the record keeping obligations is eroded by Exemptions 4, 6, 14, 16 and 17 which exempt accountable institutions from maintaining records of customer identification and verification".
DNFBP		
13-15 and 21	18-21	*Non-Compliant* • The deficiencies identified in the previous Recommendations 5, 6 and 8-11 that apply to the financial sector, also apply to all DNFBPs.

Previous number	New number	Summary of findings (as relevant to this study)
		• Applying the previous Recommendation 9: the characteristics of the real estate market (including that it is often cash-based) is a concern as the full range of preventative measures required by Recommendation 9 does not apply to non-face-to-face transactions in this sector. • Effectiveness: the results of the EAAB inspection show that the implementation of AML measures (which include CDD requirements) are low among estate agents.
Internal controls, compliance and audit		
15	18	*Partially Compliant* • No requirement exist for financial institutions, other than banks, that the compliance officer needs to be at a management level. • Other than for banks, there is also no requirement for accountable institutions to keep an adequately resourced and independent audit function to test compliance with AML procedures, policies and controls. • No general requirement exist for financial institutions to establish screening procedures which will ensure high standards when hiring new employees. • Training does not have to be conducted on an ongoing basis.

Previous number	New number	Summary of findings (as relevant to this study)
DNFBP		
13-15 and 21	18-21	*Partially Compliant* • Applying the previous Recommendation 13 and Special Recommendation IV - Effectiveness: implementation of the reporting obligation is negatively affected as, for estate agents it was until recently not widely recognised that property transactions effected in cash are suspicious. The EAAB has detected activity which is suspected to relate to money laundering in the real estate sector which was supposed to be reported, but was not. • Applying the previous Recommendation 15 and 21: the deficiencies identified in the previous Recommendation 15 that is applicable to the financial sector are also applicable to all DNFBPs.
Sanctions		
17	35	*Partially Compliant* • Sanctions are not sufficiently effective and proportionate - only criminal sanctions apply for breaches to FICA. • The SARB, FSB and the Johannesburg Stock Exchange (JSE) do not have specific authority to apply administrative sanctions for breaches to FICA.
DNFBP – regulation, supervision and monitoring		
24	28	*Partially Compliant* • Designated supervisory authorities for casinos (National Gambling Board), attorneys (Law Society of South Africa) and estate agents (EAAB) do not have

Previous number	New number	Summary of findings (as relevant to this study)
		specific authority to inspect for compliance or to apply sanctions in terms of FICA.
Guidelines and Feedback		
25	34	*Partially Compliant* • The current STR reporting guidelines are not sector specific and the reporting requirements and reporting forms are mainly designed for banks. • The FIC has not provided general feedback on the methods and trends of money laundering, or sanitised money laundering cases. • The guidance does not contain a description of money laundering techniques and methods.
The FIU		
26	29	*Largely Compliant* • No annual reports in respect of AML cases, typologies and trends analysis have been issued.
Law enforcement authorities		
27	30	*Largely Compliant* • The effectiveness of the AML regime cannot be assessed as a result of the lack of more comprehensive statistics. The information provided shows a low number of money laundering investigations.
Statistics		
32	33	*Partially Compliant* • Regular reviews are not performed by South Africa to determine the effectiveness of its AML systems.

Previous number	New number	Summary of findings (as relevant to this study)
		• The assessment team did not receive comprehensive data/statistics reflecting details of money laundering investigations. The authorities do not maintain comprehensive statistics on the criminal sanctions applied to a person convicted of money laundering. • No statistics are maintained in respect of the number of cases and the amounts of property frozen, seized, and confiscated in relation to money laundering. • There are no adequate statistics on cross-border transportations of currency and bearer negotiable instruments over the thresholds. • Comprehensive statistics of mutual legal assistance and extradition matters are not kept.
Legal persons – beneficial owners		
33	24	*Non-Compliant* • Limited measures are available to ensure that adequate, accurate and timely information can be obtained by competent authorities in respect of the beneficial ownership and control of legal persons. • Shareholders can be legal persons and nominees which may conceal information in respect of beneficial ownership. • Information in the company registers are only relevant to some legal ownership and control and does not necessarily contain information concerning beneficial ownership and control. In addition, the information is not verified and necessarily reliable.

Previous number	New number	Summary of findings (as relevant to this study)
		• It is not specified for cooperatives what information on directors must be supplied or updated, and they may also be legal persons.

Source: ESAAMLG & FATF (2009:215-224).

5.4.2 Recommendations to strengthen the AML/CFT system

Following the mutual evaluation in 2009, the FATF made several recommendations which, if applied correctly, will align South Africa's financial system and legal framework to global standards (FIC, 2017b:12).

Table 2 in the MER recommends certain action plans which will strengthen the AML/CFT system (ESAAMLG & FATF, 2009:225). For purposes of this study, an extract of the applicable recommendations to combat money laundering in the real estate sector can be found in Table 5-2 below.

Table 5-2: Recommendations by the FATF following the 2009 FATF mutual evaluation of South Africa

Recommendations
Criminalisation of Money Laundering: • South Africa should amend section 6 of POCA to extend the money laundering offence of acquisition, possession and use to a person who committed the predicate offence. • For avoidance of doubt, South African authorities must consider to amend POCA to regularise and standardise subsections 4-6 with subsections 2-9. • The lack of comprehensive statistics and data must be addressed.
Confiscation, freezing and seizing of proceeds of crime: • Although a high value of proceeds are confiscated, comprehensive statistics and data must be kept as it relates to money laundering.

Recommendations
The FIC and its functions: • The FIC must publish information in respect of AML cases, typologies and trends analysis. • The FIC should also tailor STR forms to meet the needs of the non-bank reporting parties and should issue sector-specific guidance in respect of the reporting obligation.
Law enforcement, prosecution and other competent authorities: • The South African authorities should proactively focus on pursuing specific money laundering offences. • South Africa should consider additional guidance to law enforcement on obtaining production of privileged documents. • The South African Police Service (SAPS) should consider developing its own expertise in forensic analysis (e.g. in accounting and auditing) as such expertise will always be required in analysing money laundering trends. There is also a need to appoint more prosecutors and provide them with a more skills-based training. • The SAPS should consider maintaining statistics on cases where special investigative techniques are used, e.g. controlled deliveries and undercover operations. This would indicate the effectiveness of these techniques.
CDD (including enhanced or reduced CDD measures): • South African authorities must enhance the effectiveness of the existing AML regime through the following measures: - Apply adequate CDD requirements to financial institutions that are not currently accountable institutions under FICA; - Institute a primary obligation to identify beneficial owners; - Review the current Exemptions to address current practices which exempt full CDD requirements (in situations where the application of simplified or reduced CDD measures would be more appropriate); - Establish explicit requirements to conduct enhanced due diligence when there is a suspicion of money laundering or if there are doubts about previously obtained CDD data with respect to high-risk customers and transactions;

Recommendations
- Establish an explicit obligation for accountable institutions to conduct OCDD measures on business relationships and reduce the existing reliance on the obligations under FICA to file an STR and the Regulations to update CIV particulars; - Accountable institutions should be required to identify PEPs and to apply enhanced CDD measures to such relationships; and - Explicit requirements should be introduced for accountable institutions to have policies/procedures in place to prevent the misuse of technological developments by money launderers.
Third parties and introduced business: • South Africa should implement the requirements of Recommendation 9. • The timeframe to forward the information in Exemption 5 (c) should be more definitive to ensure that the accountable institution relying on the third-party verification obtains the relevant CDD documentation immediately. The other accountable institution should be under an obligation to provide the information within the timeframe. • A specific obligation should be placed on accountable institutions relying on CIV undertaken by third parties to indicate that they are ultimately responsible for CIV even though they are satisfied by the services provided by the third parties.
Record keeping: • A specific obligation should be in place for financial institutions outside the banking sector to collect sufficient information to reconstruct financial transactions. There should also be a general obligation to keep account files and business correspondence.
Monitoring of transactions and relationships: • A explicit requirement should be introduced by South Africa on all financial institutions so that these institutions pay special attention to all complex, unusually large or unusual patterns of transactions that have no apparent or visible economic purposes. • Special attention should be given to customers and transactions relating to countries that do not (or insufficiently) apply the FATF Recommendations. • The application of Exemption 5 and section 29 of Guidance Note 3 with respect to countries with equivalent AML systems must be clarified. The provisions of section 29 must be strengthened to ensure that accountable institutions are routinely and

Recommendations
consistently paying special attention to business relationships and transactions with countries that do not (or insufficiently) apply the FATF Recommendations.
STRs and other reporting: • The FIC should consider modifying the reporting forms for non-bank financial institutions and DNFBPs. • The FIC should provide general feedback in respects to the current techniques, methods and trends of money laundering and sanitised examples of actual money laundering cases either in the its annual reports or typology reports separately.
Internal controls, compliance, audit and foreign branches: • FICA should be amended to specify that employee training must be ongoing and that that compliance officers must be at a management level. • Financial institutions must screen all employees and, for non-bank financial institutions, internal audit procedures must be maintained to ensure compliance with AML policies and procedures.
DNFBPs - CDD and recordkeeping: • South African authorities should, most importantly, expand the scope of FICA to more broadly cover the requirements in Recommendations 5, 6 and 8 to 11 for DNFBPs as well as financial institutions. South African authorities should also consider the best ways to deal with the specific risks in the real estate sector relating to non-face-to-face transactions, the use of cash and obligations to identify the buyer of real estate.
DNFBPs - Suspicious transaction reporting: • South African authorities should work with the dealers in precious metals and stones as well as the real estate sectors to determine whether suspicious activity are adequately identified and reported. • Requirements relating to Recommendations 15 and 21 as it relates to all DNFBPs should be strengthened.

Recommendations
Regulation, supervision and monitoring: • Provisions, that will provide adequate authority for the DNFBP supervisors to inspect and apply a range of effective, proportionate and dissuasive sanctions for non-compliance with FICA, should be implemented.
Resources and statistics: • South African should consider the following: - Ways to address the challenges with attracting and appointing qualified applicants to the NPA; - The effectiveness of its systems for combating money laundering should be reviewed on a regular basis; - The system for collecting and maintaining comprehensive data on money laundering investigations, prosecutions and convictions should be improved; and - Statistics in respect of the number of cases and the amounts of property frozen, seized and confiscated in relation to money laundering should be maintained.

Source: FATF and ESAAMLG (2009:225-230).

5.4.3 Developments since the 2009 South African Mutual Evaluation

South Africa was on the FATF regular follow-up process since the Mutual Evaluation in 2009. However, the FATF Plenary decided in June 2014 that South Africa must be placed in the targeted follow-up process. As such, South Africa only had to report on the previous Recommendation 5 and 10 (ESAAMLG, 2018:1).

In October 2017, the FATF Plenary agreed that "South Africa has reached a level of compliance for old Rs.5 and 10 that is substantially equivalent to largely compliant and South Africa should therefore be removed from the targeted follow-up process taking into account that it has already started preparing for its 4th round mutual evaluation which begins imminently" (ESAAMLG, 2018:3).

The FATF's Global Assessment calendar indicates a possible on-site visit during October/November 2019 for South Africa to be evaluated under the 2013 Methodology (FATF, 2019a). The FIC continues to prepare for the 2019 FATF evaluations. As part of their preparation, it is crucial that the FIC Amendment Act is implemented, as it addresses findings from the 2009 FATF evaluation (FIC, 2017b:55).

As a complete mutual evaluation normally takes up to 18 months (FATF, 2018d), an MER will probably be published by FATF in 2020. A possible date for the Plenary discussion is indicated as June 2020 (FATF, 2019a).

5.5 Comparison of South African legislation to international legislative measures

The preceding discussion contains a detailed description of the South African legislative measures as it relates to the combating of money laundering in the real estate sector. The following section provides a brief overview of the AML regime of the USA and the Netherlands, in order to compare the South African AML regime with international legislative measures in this regard.

Table 5-3 contains an overview of some important aspects in respect of the USA and the Netherlands' AML regime respectively.

Table 5-3: Important aspects of the USA and the Netherlands' AML regime

	USA	**The Netherlands**
FATF status	• Member of the FATF since 1990. • Member of the Asia/Pacific Group on Money Laundering (APG). • One of the Co-operating and Supporting Nations (COSUNs) of the Caribbean Financial Action Task Force (CFATF). • Observer to the Eurasian Group (EAG), ESAAMLG, Financial Action Task Force of Latin America (GAFILAT), Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL) and the Middle East and North Africa Financial Action Task Force (MENAFATF). (Source: FATF (2019e)).	• Member of the FATF since 1990. • One of the COSUNs of CFATF. (Source: FATF (2019c)).
FATF Evaluation	• The FATF evaluated the USA in 2016 (FATF, 2016b:3). • The USA is not on the FATF List of Countries that have been identified as having strategic AML deficiencies (KnowYourCountry, 2019b).	• The FATF evaluated the Netherlands in 2014 (ICLG, 2019a). • The Netherlands is not on the FATF List of Countries that have been identified as having strategic AML deficiencies (KnowYourCountry, 2019a).

	USA	The Netherlands
	• The 2016 MER indicated that the USA was deemed Compliant for nine and Largely Compliant for 21 of the FATF Recommendations (KnowYourCountry, 2019b).	• The 2011 MER indicated that the Netherlands was deemed Compliant for six, Largely Compliant for 22, Partially Compliant or Non-Compliant for two of the six Core FATF Recommendations (KnowYourCountry, 2019a). • The Netherlands was placed in a regular follow-up process following the 2011 MER (FATF, 2014b:3).
Main AML legislation	• The Bank Secrecy Act of 1970, formerly referred to as the Financial Reporting and Currency and Foreign Transaction Reporting Act (1970) (BSA) (Ryder, 2012:41). • The BSA is sometimes referred to as the "anti-money laundering" law or jointly as "BSA/AML" (FinCEN, 2019b). • The BSA has been enhanced and amended through several other laws (FinCEN, 2019c).	• The "Wet ter voorkoming van witwassen en financieren van terrorisme", also known as the Anti-Money Laundering and Terrorist Financing Act (Wwft) (FIU-the Netherlands, 2019b). • Effective from 1 August 2008 (FIU-the Netherlands, 2019b).
FIU	• The Financial Crimes Enforcement Network (FinCEN). • FinCEN was established on 25 April 1990. • FinCEN is a member of the Egmont Group since 1 June 1995. (Source: Egmont Group (2019d)).	• The Financial Intelligence Unit-the Netherlands (FIU-the Netherlands). • The FIU-the Netherlands was established on 1 February 1994. • The FIU-the Netherlands is a member of the Egmont Group since 1 February 1995. (Source: Egmont Group (2019b)).
Rule-based approach or RBA	• The USA has adopted the RBA as advocated by the FATF Recommendations (Ryder, 2012:46). • All financial institutions and financial businesses subject to the BSA must maintain risk-based AML programmes, with four minimum requirements (occasionally called the four pillars of a programme) (ICLG, 2019b): (i) policies, procedures and internal controls;	• The Wwft contains a risk-orientated approach. • Institutions assess the risks that certain clients or products poses to the institution which creates the possibility to adjust their efforts to the identified risks. This approach is included in the institutions' own compliance rules. • The Wwft does not prescribe how the Institutions must achieve something, but only what must be achieved.

	USA	The Netherlands
	(ii) designation of a compliance officer; (iii) training; and (iv) periodic independent testing of the programme.	(Source: FIU-the Netherlands (2019d)).
Criminalisation of money laundering	• The USA was the first country to criminalise money laundering through the Money Laundering Control Act of 1986 (MLCA) (Ryder, 2012:55). • The MLCA established four criminal offences (Ryder, 2012:55, 56): (i) transaction money laundering; (ii) transportation money laundering; (iii) sting operations; and (iv) spending of laundered property.	• Since 6 December 2001 money laundering has been criminalised as an offence in its own right. The Wetboek van Strafrecht (Dutch Criminal Code) includes the following forms of money laundering (FIU-the Netherlands, 2019c): (i) Deliberate money laundering (section 420bis); (ii) Simple money laundering (section 420bis.1); (iii) Habitual money laundering (section 420ter); (iv) Culpable money laundering (section 420quater); and (v) Simple money laundering (section 420quater.1).
Government authorities responsible for investigating and prosecuting money laundering	• The following authorities conduct money laundering investigations (ICLG, 2019b): (i) The Federal Bureau of Investigation (FBI); (ii) the Drug Enforcement Administration; (iii) the United States (US) Secret Service; (iv) US Immigration and Customs Enforcement; (v) the Internal Revenue Service Criminal Division; (vi) the Postal Inspection Service; and (vii) An investigation unit of the Environmental Protection Agency (for money laundering investigations in respect of crimes).	• The Dutch Public Prosecution Service (DPPS), assisted by the Dutch police and the Fiscal Intelligence and Investigation Service (FIOD) (ICLG, 2019a). • The DPPS has the authority to forfeit and confiscate objects (ICLG, 2019a).

	USA	The Netherlands
	• The Money Laundering and Asset Recovery Section (MLARS) of the US Department of Justice is responsible for the prosecution of money laundering crimes and related forfeiture activities (ICLG, 2019b).	

Based on the information from the above table and the in-depth discussion earlier in this chapter in respect of the AML legislation in South Africa, South Africa's AML regime corresponds as follows to those in the USA and the Netherlands:

1. South Africa, the USA and the Netherlands are all members of the FATF. South Africa is a member of the ESAAMLG and the USA is a member of the APG. The Netherlands is not a member of a FATF-Style Regional Body (FSRB);

2. All three countries had been evaluated by the FATF, with South African to be evaluated again in 2019. Neither one of these countries are on the FATF's List of Countries that have been identified as having strategic AML deficiencies;

3. After the adoption of an RBA following the 2017 amendments to FICA, South African legislation now corresponds to the USA and the Netherlands, who also follows an RBA in line with the FATF Recommendations; and

4. Money laundering has been criminalised as an offence in the legislation of the USA and the Netherlands. South African legislation also criminalise money laundering as an offence through sections 4, 5 and 6 of POCA.

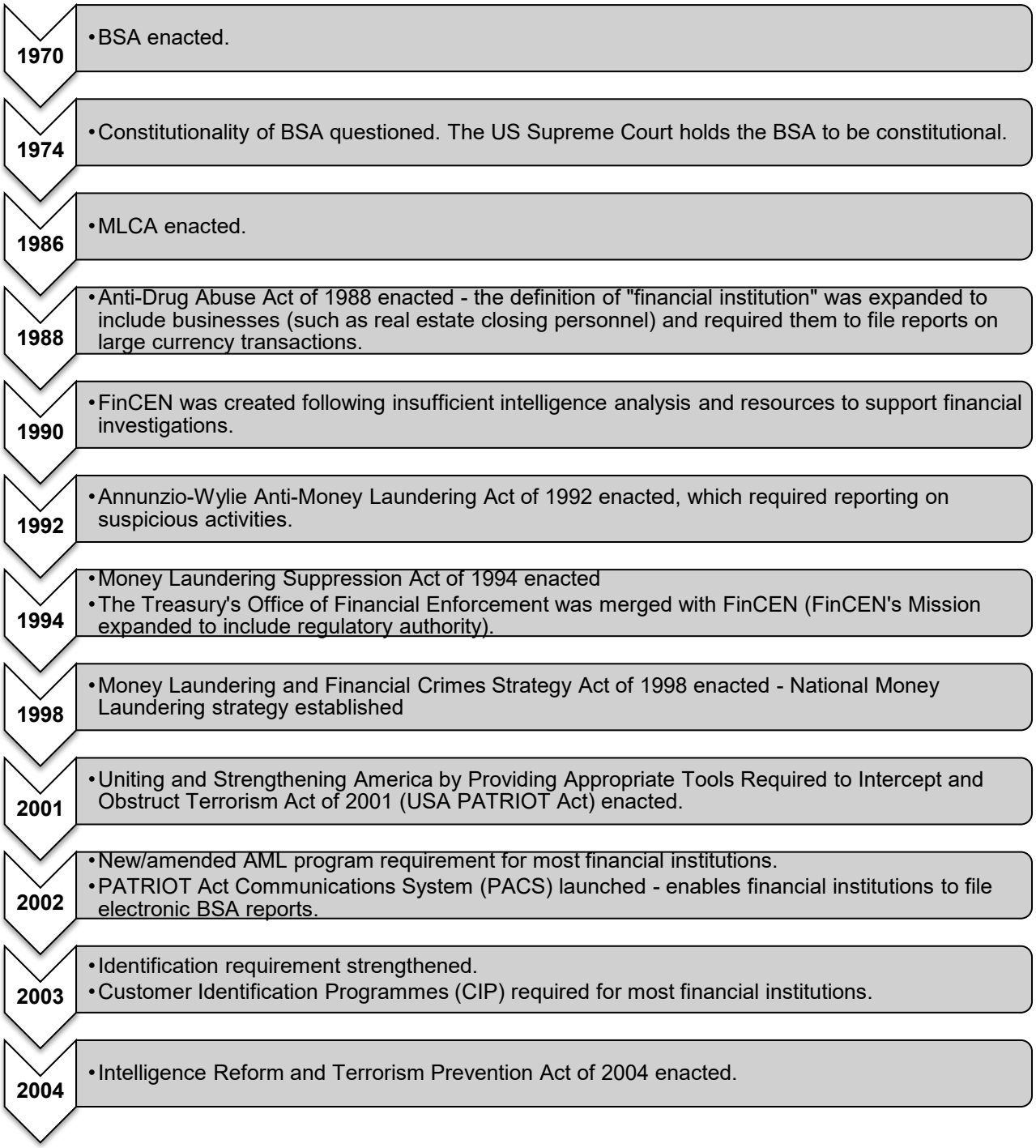
In addition to the above, the below discussion provides information on the USA and the Netherlands' main legislative frameworks and their respective FIUs, in order to compare these aspects of South African legislation to those of the USA and the Netherlands.

5.5.1 The USA

As indicated in the table above, the BSA forms the main AML legislation in the USA and "has become one of the most important tools in the fight against money laundering" (FinCEN, 2019c). The BSA has been enhanced and amended through several other laws, which are discussed in more detail below.

According to Ryder (2012:41), the USA AML legislation pre-dates the international measures introduced by the UN, the European Union (EU) and the FATF. The BSA was enacted in 1970 and has been amended several times by numerous other laws, to provide law enforcement and regulatory agencies with the most effective tools to combat and prevent money laundering (FinCEN, 2019c; ICLG, 2019b). Figure 5-4 contains a brief overview of the AML legislation and main events as it relates to the development of the USA AML regime.

Figure 5-4: Overview of the USA AML legislation



Source: FinCEN (2019a) and FinCEN (2019c).

The BSA provides the authority to the Secretary of the Treasury to implement reporting, recordkeeping, and anti-money laundering programme requirements by regulation for financial institutions and other businesses listed in the statute (ICLG, 2019b).

Ryder (2012:71) indicates that the USA "has fully endorsed the risk-based approach as advocated by the FATF and the measures have been incorporated into the BSA 1970, the Patriot Act 2001 and FinCen's regulations".

The term "financial institution" is defined in the BSA 31 US Code 5312 (a)(2) and includes persons involved in real estate closings and settlements.

The 2016 MER on the fourth mutual evaluation of the USA, indicated that "the regulatory framework has some significant gaps, including minimal coverage of certain institutions and businesses" which includes real estate agents. The FATF found that "minimal measures are imposed on DNFBPs, other than casinos and dealers in precious metals and stones, and consist of the general obligation applying to all trades and businesses to report transactions (or a series of transactions) involving more than USD 10,000 in cash, and targeted financial sanctions (TFS) requirements. Other comprehensive AML/CFT obligations do not apply to these sectors" (FATF, 2016b:3, 4).

In general, the BSA requires financial institutions to (FinCEN, 2019b):

1. Keep records of cash purchases of negotiable instruments;

2. File reports of cash transactions in excess of USD 10,000 (daily aggregate amount); and

3. Report suspicious activity which might indicate, tax evasion, or other criminal activities.

FinCEN (2017:1) issued an advisory to "provide financial institutions and the real estate industry with information on money laundering risks associated with certain real estate transactions". Although real estate brokers, escrow agents, title insurers, and other real estate professionals are not required to, FinCEN encourages them in this advisory to voluntarily report suspicious transactions (through an SAR) which involves real estate purchases and sales (FinCEN, 2017:1, 6). In line with other financial institutions under the BSA, there is a safe harbour from liability set by the BSA in respect of the filing of suspicious activity reports, including voluntary ones, by persons involved in real estate closings and settlements (FinCEN, 2017:1).

When financial institutions file an SAR which involves a real estate transaction, financial institutions must provide complete and accurate information which must include relevant facts as

well as information about the real estate transaction and the circumstances and reasons why the transaction is deemed suspicious (FinCEN, 2017:7).

In addition to the above as it relates to the reporting of suspicious transactions, the BSA requires *inter alia* the following from financial institutions:

1. AML programmes: all financial institutions subject to the BSA are required to establish an AML programme that includes, at a minimum (FinCEN, 2017:5):

    - The development of internal policies, procedures, and controls;
    - The designation of a compliance officer;
    - An ongoing employee training programme; and
    - An independent audit function to test programmes.

2. Recordkeeping: the International Comparative Legal Guides (ICLG) (2019b) explains that the recordkeeping requirements of the BSA contain general recordkeeping requirements applicable to all BSA financial institutions, specific recordkeeping requirements for specific types of BSA financial institutions and requirements to maintain records related to BSA compliance for all financial institutions and financial businesses subject to the BSA. As a general requirement, records should be kept for five years (ICLG, 2019b).

The BSA impose CDD programmes and CIP only on banks, broker-dealers, futures commission merchants, introducing brokers in commodities and mutual funds. These institutions should maintain CDD programmes, as well as CIP programmes as part of their AML Programmes (ICLG, 2019b).

When comparing South African AML legislation to the above provisions of the BSA, it is noted that South African legislation requires the RBA and seven pillars of compliance on all accountable institutions, which includes estate agents. The USA legislation impose minimal measures on DNFBPs (including estate agents). Comprehensive AML measures do not apply to estate agents. Although the filing of SARs, AML Programmes and recordkeeping are required from financial institutions, which includes “persons involved in real estate closings and settlements”, these do not include real estate brokers, escrow agents, title insurers, and other real estate professionals. These professionals are only encouraged by FinCEN to voluntarily report suspicious transactions through the filing of an SAR.

South African legislation is therefore more inclusive of comprehensive AML measures imposed on estate agents as accountable institutions. These comprehensive measures in South Africa includes CDD measures, the reporting of suspicious transactions, RMCP programmes and record keeping requirements, which are mandatory to all estate agents.

As identified in the table above, FinCEN is the FIU of the USA, which was created in 1990 by the Department of Treasury (FinCEN, 2019d; Ryder, 2012:50). The mission of FinCEN is as follows (FinCEN, 2019e):

> The mission of the Financial Crimes Enforcement Network is to safeguard the financial system from illicit use, combat money laundering, and promote national security through the strategic use of financial authorities and the collection, analysis, and dissemination of financial intelligence.

This mission of FinCEN is two-fold. Firstly, FinCEN is one of the Department of Treasury's primary agencies to oversee and implement policies to prevent and detect money laundering, which are accomplished in two ways (Department of the Treasury, 2007):

> First, FinCEN works in partnership with the financial community to deter and detect money laundering. FinCEN uses counter-money laundering laws, such as the Bank Secrecy Act (BSA), to require reporting and recordkeeping by banks and other financial institutions. This recordkeeping preserves a financial trail for investigators to follow as they track criminals and their assets. The Act also requires reporting suspicious currency transactions which could trigger investigations.

The second aspect of FinCEN's mission, is explained by Ryder (2012:50). Financial institutions need to submit intelligence in the form of currency transaction reports and SARs. FinCEN therefore plays a leading role in collecting financial intelligence. Not only does FinCEN collect financial evidence, but is also responsible for "analysing and disseminating information reported under the BSA in addition to interpreting the BSA, promulgating BSA regulatory requirements, and exercising civil (administrative) BSA enforcement authority" (ICLG, 2019b).

As discussed earlier in this chapter, the FIC of South Africa's primary activities include:

- To monitor and guide accountable- and reporting institutions, supervisory bodies and individuals with regards to their compliance with FICA;
- To supervise and enforce compliance with FICA by persons not supervised by a supervisory body, or where the supervisory body fail to act; and
- The processing, analysing and interpreting of STRs filed by accountable- and reporting institutions.

The FIC's primary role is to "contribute to safeguarding the integrity of South Africa's financial system and its institutions, and to make them intolerant to abuse" (FIC, 2017b:10) which contains similarities to the mission of FinCEN. The FIC also has the power to impose administrative penalties under FICA for non-compliance to some of the FICA requirements.

In light of the above, the FIC and FinCEN contains similarities in their role to safeguard the financial system against abuse, and to collect and analyse financial data/intelligence.

5.5.2 The Netherlands

As can be seen from the above table, the Wwft constitutes the main AML legislation in the Netherlands. The purpose of the Wwft is "to maintain the integrity of the financial system" (FIU-the Netherlands, 2019d). The Wwft became effective on 1 August 2008 and has replaced the Provision of Services (Identification) Act (Wid) and the Disclosure of Unusual Transactions (Financial Services) Act (WetMOT) (FIU-the Netherlands, 2019b).

As the 2011 MER of the Netherlands identified some shortcomings (especially in respect of some preventative measures and the FIU), the Wwft was amended and came into force on 1 January 2013. The amendment aimed to deal with the following shortcomings as identified in the 2011 MER (FATF, 2014b:6):

- Various CDD requirements;
- Suspicious transaction reporting requirements;
- The protection of entities filing suspicious transaction reports from criminal and civil liability;
- The exchange of information between supervisors; and
- The legal framework for the FIU.

Article 1a of the Wwft distinguishes between three main categories of institutions (ICLG, 2019a):

1. Banks;
2. Other financial institutions; and
3. Designated natural persons or legal entities acting in the context of their professional activities.

Traders/sellers of real estate, vehicles, ships, art objects, antiques, precious stones, precious metals, or jewellery are included under point three above. Depending on the type of financial

institution (as per in Article 1a in Wwft), the authorised authorities to impose AML requirements are determined. For real estate agents, the authorised authorities are the Dutch Tax Authority and Wwft Supervision Office (ICLG, 2019a).

The Wwft contains the following five core obligations as it relates to its AML requirements (ICLG, 2019a):

1. Institutions should identify and assess its money laundering risks, which should include the recording of the results of the risk assessment. Furthermore, the institutions should have policies and procedures in place to effectively mitigate and manage the identified money laundering risks (articles 1f – 2d of the Wwft);

2. Institutions should conduct an in-depth CDD (standard, simplified or strengthened) before they enter into a business relationship or conducting incidental transactions (articles 3 – 11 of the Wwft);

3. Institutions should report unusual transactions to the FIU, which are based on objective or subjective indicators (articles 12 – 23a of the Wwft);

4. Institutions should provide periodic training to their employees to enable them to recognise unusual transactions and to conduct a proper and comprehensive CDD (article 35 of the Wwft); and

5. Institutions should adequately keep records of their money laundering risk assessment/CDD measures and the reporting of unusual transactions, which should be provided to regulators upon request (articles 33 – 34 of the Wwft).

With reference to South African AML legislation and the above-mentioned five core obligations in the Wwft of the Netherlands, South African legislation (after the 2017 amendments to FICA) also requires a money laundering risk assessment, in depth CDD measures in accordance with an RBA, reporting of suspicious/unusual transactions to the FIC, the obligation to provide training to employees and the duty to keep records.

As identified in the table above, the FIU-the Netherlands is the FIU of the Netherlands and has been designated through the Wwft as the only organisation in the Netherlands to which reporting entities (as identified in the Wwft) must report any unusual transactions (FIU-the Netherlands, 2019a; ICLG, 2019a). The FIU-the Netherlands analyses any unusual transactions reported, which uncovers the flow of money which can be linked to money laundering or underlying crimes (FIU-the Netherlands, 2019a). If the head of the FIU-the Netherlands declared a transaction

suspicious, it is referred to various law enforcement and investigative services (FIU-the Netherlands, 2019a).

As discussed earlier in this chapter, the South African FIC, in accordance with one of its primary activities process, analyse and interpret the STR filed to them by accountable- and reporting institutions. The FIC does not conduct its own investigations or prosecutions and refers matters which requires further investigation to domestic and foreign authorities. As such, the processing of information received and the referral to law enforcement authorities in South Africa and the Netherlands correspond to one another.

In conclusion, the 2017 amendments to FICA, which introduced the RBA to South African legislation, was of utmost importance as it place South Africa in line with the FATF Recommendations and the AML framework of the USA and the Netherlands.

5.6 Conclusion

The establishment of AML legislation was finalised over a long period of time. A core development in the South African AML regime was the 2017 amendments to FICA which introduced an RBA into the legislative framework. The amendments placed South Africa's AML regime in line with the FATF Recommendations. The Minister of Finance commented on the signing of FICA into operation and stated that "it was critical for government to accelerate the implementation of the Act as it demonstrated government's commitment to the fight against corruption, money laundering and illicit flows". The Minister of Finance also indicated that, although the amendments to FICA was a big step forward, more work still had to be done (FIC & NT, 2017).

Since the real estate sector plays a critical role within the South African economy, Rebosa (2018) indicates that estate agents should comply with the RBA and CDD measures as a matter of urgency. Real estate agents found it difficult to comply with the new provisions of FICA by 1 April 2019, as they did not receive sufficient guidance and information from the EAAB in a timely manner. This is problematic as the implementation of the 2017 amendments to FICA are crucial to strengthen the South African system against money laundering.

It is clear from the discussion in this chapter that South Africa's AML legislation developed over the years to create legislation which is comprehensive and relevant to the combating of changing trends in money laundering. POCA and FICA (after the 2017 amendments which inserted the RBA) equip South Africa with a complete legal framework in order to control money laundering and, together with the EAAA, can be used to prevent and limit money laundering in the real estate sector.

As the previous mutual evaluation of South Africa took place in 2009, before the 2017 amendments to FICA, the effectiveness of the current legal framework will only be established once an MER is published by the FATF which will contain the results of the 2019 mutual evaluation under the 2013 FATF Methodology. This will probably only be published in June 2020.

As the USA and the Netherlands both dispose of strong AML legislation, and are among the founding members of the FATF and Egmont Group respectively, their AML regimes are briefly discussed and compared to the AML legislative measures currently in place in South Africa. The 2017 amendments to FICA which introduced the RBA to South African legislation was of utmost importance as it place South Africa in line with the FATF Recommendations and the AML framework of the USA and the Netherlands.

CHAPTER 6: CONCLUSION

6.1 Introduction

In chapter 1 of this study, the major money laundering trends in South Africa were explored. One of these, which was selected as the focus of this study, is the purchasing of goods and properties and, more specifically, the abuse of the real estate sector for the purpose of money laundering.

Although the quantum of money being laundered in both the national and global economies is unknown, previous research on this topic showed that South Africa made good progress during the past few years in their establishment of an anti-money laundering (AML) regime to combat money laundering.

Limited sources of information are, however, available in respect of the application of these measures to the real estate sector, which includes the responsibilities on real estate agents and the effectiveness of these measures in combating money laundering through the real estate sector. In addition, the introduction of the risk-based approach (RBA) into the South African legislative framework in 2017 lead to some challenges for real estate agents on the application of this new approach to combat money laundering in the real estate sector. The question then arose as to what extent is money laundering controlled in the South African real estate sector?

As set out in chapter 1 of this study, the main objective of this study was to critically analyse the extent of AML measures in the South African real estate sector. The secondary objectives which were used in order to reach the main objective were as follows:

1. To select a working definition and give a thorough description of money laundering;

2. To determine how the real estate sector in South Africa functions and explore how it can be abused for money laundering purposes;

3. To analyse the Financial Action Task Force's (FATF) recommendations for combating money laundering in the real estate sector; and

4. To discuss the different legislative measures available in South Africa that can be applied to the prevention of money laundering in the real estate sector and the effectiveness thereof.

The goal of this chapter is to conclude on the research question and the research objective. In order to reach this goal, the discussion which follows are twofold. Firstly, conclusions in respect of the secondary objectives are drawn, where after a conclusion is reached on the main objective.

6.2 Conclusion on the secondary objectives

6.2.1 Understanding money laundering and the working thereof

Chapter 2 focussed on the first secondary objective of this study, which was to select a working definition of money laundering and to thoroughly describe money laundering.

Although several definitions exist for “money laundering”, the definition of money laundering contained in the Financial Intelligence Centre Act (38 of 2001) (FICA) was selected as the working definition for purposes of this study (refer to section 2.3). Section 1 of FICA defines “money laundering” or “money laundering activity” as an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in terms of section 64 of FICA or section 4, 5 or 6 of the Prevention of Organised Crime Act (121 of 1998) (POCA).

The following definitions in section 1 of POCA are also important to understand the concept of money laundering:

6. “Unlawful activity” – Any conduct which constitutes a crime or which contravenes any law, whether such conduct occurred before or after the commencement of POCA and whether such conduct occurred in the Republic or elsewhere;

7. “Proceeds of unlawful activities” – Any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of POCA, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived; and

8. “Property” – Money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof.

The following characteristics were identified (refer to section 2.4):

1. Money laundering can take place virtually anywhere across the globe as it can follow almost any crime which produces profits;

2. Money launderers mostly prefer countries with weak AML measures as these countries poses a lower risk of being caught. They also prefer countries with reliable financial systems

in order to get the illegally laundered funds back and thus achieve the goal of money laundering; and

3. Many money laundering schemes involve more than just a single money laundering transaction. Criminals and criminal groups who generate high volumes of cash need intricate or complicated schemes to launder their money and make it appear “clean” by the end of this cycle in order to be able to use it.

Money laundering can occur in the following three stages (refer to section 2.5):

1. Placement stage – during this stage, the proceeds from the criminal activity is placed into the financial system;

2. Layering stage – this stage contains a series of complex transactions in which the proceeds are now being spread away from the criminal source making it more difficult to detect; and

3. Integration stage – the criminal withdraws the money from the financial system (the original cash amount, less the costs of the laundering process) making it appear like legitimate business funds.

The three stages can apply simultaneously or independently from each other, depending on the money laundering method. All the stages are also not appropriate in all money laundering schemes.

It was found that in South Africa, money laundering often works the same as in other countries, but due to particular elements of its economy, the scope of its legal system as well as the ways in which organised criminals operate in South Africa, new procedures or schemes, which contain different and even unique characteristics from those abroad, are present. Some specific ways in which criminals misuse the real estate sector to launder criminal proceeds through the real estate sector was discussed in chapter 3.

6.2.2 The working of the South African real estate sector and the abuse thereof for money laundering purposes

After describing what money laundering is and how it functions, it is important to move on to the second secondary objective of this study, which was to determine how the South African real estate sector functions and to explore how it can be abused for money laundering purposes.

The following definitions relating to real estate were explored in order to understand how this sector works (refer to section 3.2):

1. “Real estate” can be described as a concept which comprises land and buildings as well as the legal rights relating to immovable property, which can be given a value to be potentially sold in a market, regardless of it being a real or possible market. It is also defined as “ownership and rights to land, purchasing and selling of immovable property (residential, commercial, and agricultural), leasing and management and valuation of immovable property” (ESAAMLG, 2013:7);

2. An “estate agent” is defined in section 1 of the Estate Agency Affairs Act (112 of 1976) (EAAA) as any person who for the acquisition of gain on his own account or in partnership in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person:

    (a) sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or purchaser therefore; or

    (b) lets or hires or publicly exhibits for hire immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor; or

    (c) collects or receives any moneys payable on account of a lease of immovable property or any business undertaking; or

    (d) renders any such other service as the Minister on the recommendation of the board may specify from time to time by notice in the Gazette;

3. “Commercial real estate” – property which can either produce income by means of rental or which can be disposed of in order to generate a profit, even if this happens in the future;

4. “Residential real estate” – properties which are occupied by the buyers thereof, but will fall under commercial real estate in the case where such properties are developed with the goal of the developer selling or renting such properties to general members of the public;

5. “Conveyancing” refers to the transfer of immovable property ownership; and

6. A “conveyancer” is an attorney, who also possesses specific qualifications at a post-graduate level and can also be called a transferring attorney. Such an attorney is of utmost importance during the process of conveyancing as it is the only person, according to law, who can arrange for the registration in the Deeds Offices of the transaction to transfer the property’s ownership from the seller to the buyer.

As part of this secondary objective to determine how the real estate sector can be abused for money laundering purposes, the vulnerabilities of the real estate sector to money laundering were explored, which included vulnerabilities relating to legal professionals and real estate agencies (refer to section 3.3).

It was found that the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) region, which includes South Africa, is vulnerable to money laundering due to an often unstable real estate market in this region, and a significant increase in prices of South African property over the past few years. Other vulnerabilities of this region include *inter alia* the following:

1. The fact that cash can be used for real estate transactions;
2. Mortgage bonds are used to launder the illicit proceeds;
3. Some records continue to be kept manually;
4. The ineffective implementation of laws with regard to the real estate sector;
5. There are unregistered parties in the industry; and
6. There is a large growth of the real estate sector due to criminal proceeds.

Another vulnerability of money being laundered into the real estate sector is the enormous amounts which legal practitioners (such as conveyancers) handle on behalf of their clients when immovable property is purchased. As it relates to real estate agencies, it was found that some agencies in the ESAAMLG region do not fulfil their role in the real estate sector and fail to implement any necessary and compulsory AML legislation.

Although various vulnerabilities exists, the real estate sector in the ESAAMLG region also possesses of some strengths, which includes *inter alia* that real estate is mostly defined in the same way, the fact that most of the jurisdictions have operational Financial Intelligence Units (FIUs), there is enough time for law enforcement agencies to intervene with a transaction due to the time involved to finish the transaction, the deterrent nature of penalties applicable to real estate offences, sufficient structures to co-operate across international and national boundaries, the existence of a sufficient legal frameworks for property registrations as well as the fact that records can be accessed easily.

Taking the working of the real estate sector and its vulnerabilities into account, the following were found on how the real estate sector can be abused for money laundering purposes (refer to section 3.4):

1. It is firstly important to note that money can be laundered through commercial as well as residential real estate. As discussed in chapter 3, the difference between commercial and residential real estate money laundering relates to the predicate offence involved. Money derived from drug trafficking will in most cases be invested in residential real estate, whereas criminals will use commercial real estate to hide money from fraud, Ponzi schemes and the like;

2. All three stages of money laundering can be applied to real estate transactions, although the last phase of money laundering (integration) is especially important for money laundering purposes from a real estate perspective. During this stage, the criminal or criminal group finds a parking place for the investment of the proceeds stemming from their criminal activities. When criminals use this stage in order to invest in real estate, it can either be for generating legal income (e.g. rental income) or for the use of conducting further criminal activities; and

3. Common methods through which money can be laundered in the real estate sector include *inter alia* the purchasing of real estate by using large cash amounts, using third parties, gate keepers or fronts to purchase or lease properties; arranging mortgage bonds and settling these through large cash payments, the use of locals to acquire real estate on behalf of foreign nationals and the use of unregistered real estate agents, who do not follow the accountability rules of the regulators.

In order to detect such abuse of the real estate sector, the FATF identified red flags which can assist in identifying cases when the real estate market is being used for money laundering (refer to section 3.5). Red flag indicators should always be considered in context, as clients with legitimate means and purposes may use the same methods and techniques as criminals. If a red flag indicator is present, it does not necessarily mean that money laundering is taking place. A legitimate explanation for the transaction can sometimes be provided by the client.

6.2.3 The FATF recommendations to combat money laundering in the real estate sector

The third secondary objective of this study was to analyse the FATF recommendations and its role in combating money laundering in the real estate sector. As such, chapter 4 focussed on the FATF, its FATF-Style Regional Bodies (FSRBs) and Recommendations. Specific focus was placed on Recommendations which specifically relates to how money laundering can be

combatted in the South African real estate sector. South Africa's compliance with these Recommendations was also considered.

The FATF was formed in July 1989 during the G-7 Summit in Paris. Today, the FATF is an independent inter-governmental body which has the purpose of developing and promoting policies in order to protect financial systems globally against crimes such as money laundering, the financing of terrorist activities and also against the financing of proliferation to weapons of mass destruction. The FATF consists of 39 members which are made up of 37 member jurisdictions and two regional organisations. South Africa joined and became a member of the FATF in June 2003.

An integral part of the FATF's work relates to the FATF Recommendations, which were formulated by the FATF in 1990 and accepted in July 1990 by the G-7 Summit in Houston. These Recommendations underwent various revisions as the techniques and trends which criminals use to launder their proceeds changes over time (refer to section 4.2.3.2). The most recent revision of the FATF Recommendations took place in February 2012, which resulted a comprehensive set of 40 Recommendations - made up of the previous 40 Recommendations and the Nine Special Recommendations.

Although the Recommendations are not legally binding on the International community, international bodies support the FATF Recommendations and major countries, through a political commitment, must combat and prevent money laundering and must therefore adhere to these Recommendations. As a result of the FATF Recommendations, most countries have legal, regulatory and operational frameworks in place to assist them in the fight against money laundering. Due to the importance of its members to apply these Recommendations, the compliance of these members are evaluated through mutual evaluations carried out by the FATF (refer to section 4.2.2).

These mutual evaluations are performed by different countries assessing one another, i.e. peer reviews. The FATF then produces a mutual evaluation report (MER) providing a comprehensive analysis in respect of the evaluated country's system in terms of the FATF Recommendations. The FATF also makes recommendations to the assessed country to improve the strength of the country's system.

In order to advance effective world-wide implementation of the FATF Recommendations the FATF is reliant on co-operating with nine FSRBs (refer to section 4.3). South Africa forms part of the ESAAMLG which was created in August 1999 and plays a fundamental role in the prevention and combating of money laundering through the South African real estate sector. Other members of

the ESAAMLG are Commonwealth countries such as Botswana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Seychelles, Tanzania, Uganda, Zambia and Zimbabwe and all members have committed to the FATF Recommendations.

6.2.3.1 The FATF Recommendations and the Real Estate Sector

As the focus of this study relates to the real estate sector, the specific Recommendations which are applicable to the prevention of money laundering in the real estate sector were identified and discussed (refer to section 4.4).

As per FATF Recommendation 22, requirements relating to Customer Due Diligence (CDD) and record keeping apply to certain Designated Non-Financial Businesses and Professionals (DNFBPs) in particular situations. Real estate agents buying and selling real estate for their clients are listed as a DNFBP in Recommendation 22 to which these requirements apply. In the Interpretive Note to Recommendations 22 and 23 (DNFBPs), it is mentioned that, where applicable, Interpretive Notes which apply to financial institutions, will also be relevant to DNFBPs.

Recommendations 1, 10, 11, 12, 15, 17, 18, 20, 21 and 28 were therefore identified in this study as being applicable to the prevention of money laundering in the real estate sector, and a comprehensive discussion were provided in this regard, summarised as follows:

1. Recommendation 1 (Assessing risks and applying a risk-based approach) require countries to identify, assess and understand their risk of money laundering and terrorist financing and take appropriate action to reduce these risks. Based on the assessment done by each country, they should apply an RBA to confirm that their resources and measures which are in place to mitigate money laundering, correspond to the risk areas identified. Financial institutions and DNFBPs should also be required by countries to identify and assess their money laundering and terrorist financing risks and to take sufficient action to mitigate the risks identified. The Interpretive Note to Recommendation 1 contains more guidance in respect of Recommendation 1.

2. Recommendation 10 (CDD) stipulates that financial institutions should be prohibited from keeping anonymous accounts or accounts with obviously fictitious names. It should therefore be a requirement for financial institutions to perform the CDD measures at the start or during the course of the establishment of a business relationship, when occasional transactions are performed, in the case where they suspect that money is being laundered or when the accuracy/reliability of customer identification data previously obtained is in doubt. The following CDD measures should be taken:

- The customer and the customer's identity should be identified and verified through the use of reliable and independent source documents, data or information;

- The beneficial owner should be identified and verified through reasonable measures in order for the financial institution to be satisfied that it knows the identity of the beneficial owner;

- The purpose and intended nature of the business relationship should be understood and, if necessary, information should be obtained on these aspects; and

- OCDD measures should be performed on the business relationship and transactions performed.

The RBA in accordance with the Interpretive Notes to this Recommendation and to Recommendation 1 should be used to determine the extent of the above measures. Recommendation 10 makes it a requirement that the principle of CDD measures should be included in laws and regulations.

3. In terms of Recommendation 11 (Record keeping), financial institutions should be required by law to maintain the following records for a period of five years:

    - All necessary records regarding both local and international transactions to enable them to comply with requests for information by competent authorities within a short period of time; and

    - All records which were obtained as part of their CDD process.

4. Recommendation 12 (Politically Exposed Persons (PEPs)) contains the following additional measures which Financial Institutions must apply to PEPs (in addition to normal CDD measures):

    - Proper risk-management systems must be in place to determine if the customer (or beneficial owner) is a PEP;

    - Special approval by a person in a senior management position should be given for any new business relationship, or the continuation of a business relationship for existing customers;

    - The institution should be able to find out the source of the funds that will be used; and

    - The business relationship should be monitored by using enhanced OCDD measures.

The above measures should also be applied to their family and close associates. The Interpretive Note to Recommendation 12 contains more guidance in respect of this Recommendation.

5. Recommendation 15 (New technologies) stipulates that countries and financial institutions should identify, assess and mitigate the money laundering risks that may arise in the following instances:

    - When new products and/or new business practices are developed; and
    - Where they use new technologies (or technology still in development) for new and existing products.

6. In terms of Recommendation 17 (Reliance on third parties), financial institutions may, if certain criteria are met, be allowed by countries to depend on certain third parties to perform the first three CDD obligations of Recommendation 10 or to introduce business. The criteria to be met include the following:

    - The financial institution should, without delay, gather the necessary information as per the first three CDD elements of Recommendation 10;
    - They must ensure that copies of the information and documentation relating to the CDD obligations will be easily and rapidly accessible when it is requested from the third party;
    - They should be convinced that the third party are regulated, supervised, monitored and that they have controls in place to ensure compliance with Recommendations 10 and 11; and
    - To determine the country where the third party which meets the conditions can be based, country risk factors should be taken into account.

Although the above-mentioned reliance on third parties is permitted, the financial institution is still ultimately responsible for the CDD measures. The Interpretive Note to Recommendation 17 contains more guidance in respect of Recommendation 17.

7. It is a requirement in terms of Recommendation 18 (Internal controls and foreign branches and subsidiaries) that financial institutions, their foreign branches as well as their majority owned subsidiaries to implement programmes against money laundering. The Interpretive Note to Recommendation 18 contains that such programmes should include internal

policies, procedures and controls, a compliance officer at a management level, a continuous employee training programme and an independent audit function to test the system.

8. Recommendation 20 (Reporting of suspicious transactions) stipulates that it should be required by law that if a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or related to terrorist financing, they must report their suspicions to their FIU. The Interpretive Note to Recommendation 20 contains more guidance in this regard.

9. Recommendation 21 (Tipping-off and confidentiality) are twofold. Firstly, financial institutions and their directors, officers and employees must be protected by legislation from criminal and civil liability for breach of contracts or legislative, regulatory or administrative provision in the case where they report a suspicion to the FIU in good faith. They do not have to know the exact underlying criminal activity and it is not necessary that such illegal activity already took place. Secondly, financial institutions and their directors, officers and employees should be prohibited by law from "tipping off" that an STR or related information was filled with an FIU.

10. Recommendation 28 (Regulation and supervision of DNFBPs) maintains that countries should make sure that DNFBPs (excluding casinos) are subject to effective systems to monitor and ensure compliance with AML requirements. Such monitoring can be done by a supervisor or a self-regulatory body (SRB) and must be carried out on a risk-sensitive basis. The supervisor or SRB must have the necessary measures to prevent that criminals (or their associates) are professionally accredited or holding or being the beneficial owner of a significant/controlling interest or a management function. The supervisor or SRB should also have "effective, proportionate, and dissuasive sanctions in line with Recommendation 35" (FATF, 2012-2019:22). The Interpretive Note to Recommendation 28 contains more guidance in respect of this Recommendation.

6.2.3.2 The FATF Recommendations and South African compliance

In addition to the above Recommendations which are applicable to the prevention of money laundering in the real estate sector, the following Recommendations were also identified and discussed which focus on the AML requirements of countries (refer to section 4.5):

1. Recommendation 2 (National co-operation and co-ordination);

2. Recommendation 3 (Money laundering offence) together with the Interpretive Note to Recommendation 3;

3. Recommendation 4 (Confiscation and provisional measures) together with the Interpretive Note to Recommendation 4;

4. Recommendation 29 (FIUs) together with the Interpretive Note to Recommendation 29;

5. Recommendation 30 (Responsibilities of law enforcement and investigative authorities) together with the Interpretive Note to Recommendation 30;

6. Recommendation 33 (Statistics);

7. Recommendation 34 (Guidance and feedback); and

8. Recommendation 35 (Sanctions).

The implementation of and compliance with these Recommendations are important for South African to combat money laundering in general and specifically in the real estate sector.

As the FATF is an independent inter-governmental body that develops and promotes policies to protect the global financial system against *inter alia* money laundering, chapter 4 contained important information on the FATF and its Recommendations in order to compare South African legislation against the standards set by the FATF.

6.2.4 South African legislative measures to prevent money laundering in the real estate sector

The fourth secondary objective of this study was to discuss the different legislative measures available in South Africa that can be applied to the prevention of money laundering in the real estate sector and the effectiveness thereof.

In order to achieve this objective, chapter 5 focussed on the development South African legislation to combat money laundering, as well as the legislation currently applicable towards the prevention of money laundering in the real estate sector, and the effectiveness thereof.

As South African legislation should be aligned to the FATF standards in order for South Africa to consist over an effective AML regime, the information in chapter 4 of this study was of utmost importance and referenced to on numerous occasions.

6.2.4.1 South African legislative measures

The Drugs and Drug Trafficking Act (140 of 1992) (DTA) was the first Act to contain provisions that dealt explicitly with money laundering and money laundering offences, but these were limited

to the proceeds of drug related offences. Other money laundering activities that did not relate to drug related offences were therefore not included as an offence (refer to section 5.2.1)

As such, the South African legislation continued to develop. In 1996, the Proceeds of Crime Act (76 of 1996) (PCA) was promulgated in 1996 which extended money laundering offences to the proceeds of any type of crime. The PCA also created a reporting obligation on businesses to report any suspicious property coming into their possession and provided for the confiscation of proceeds of crime when the criminal was convicted (refer to section 5.2.2).

The PCA and money laundering provisions in the DTA was subsequently repealed by POCA, and currently, the two most important Acts relating to money laundering in South Africa are POCA and FICA. Another important Act, applicable for purposes of this study, is the EAAA.

6.2.4.1.1 POCA

POCA was introduced with effect from 21 January 1999 as money laundering, criminal gangs as well as organised crime continued to develop in South Africa and abroad and the current legislation was not on an international standard and ineffective in the fight against these offences. Sections 28, 29 and 30 of the PCA were restructured in sections 4, 5 and 6 of POCA (refer to section 5.3.1).

Money laundering is criminalised in section 4 of POCA and relates to situations where the criminal participates in not only the initial criminal activity, but also in the laundering of the proceeds obtained from such activity. Sections 5 and 6 of POCA criminalise acts of third parties involved in the laundering of proceeds of someone else.

Section 5 provides for an offence known as “third-party laundering” in which a third party (not being the offender) enters into an agreement, arrangement or a transaction specifically to manage the unlawfully obtained proceeds on the offender’s behalf. The third party doesn’t have to know that the property is gained from a criminal activity, as the measure would be whether this fact should reasonably have been known by him.

For the offence in section 6, the act which is committed must relate to the proceeds which arose from the unlawful activities of another person, and does not include the acquisition, use or possession of such proceeds by the person who committed the predicate offence which gave rise to the proceeds.

When applying sections 5 and 6 to real estate agents, they are in danger as a real estate agent can be the third party entering into a transaction with the client (offender) who are then used to launder the money on behalf of the client. Furthermore, commission received from the sale of a

property can in fact be part of the illicit funds which the client is laundering through the real estate sector.

It is important for estate agents to familiarise themselves with the section 4, 5 and 6 offences, as they may be guilty of an offence based on the concept of negligence, if they negligently fail to identify that property constitutes the proceeds of illicit funds.

Should a person be guilty of an offence under section 4, 5 or 6 of POCA, the penalties comprise of a fine of not exceeding R100 million or imprisonment of up to 30 years. Apart from these penalties, the state may also confiscate both the proceeds of the unlawful activity and the "instrumentalities" of the crime in terms of the powers provided to them in POCA.

6.2.4.1.2 FICA

FICA came into effect on 1 February 2002, which resulted in a comprehensive South African legislative framework for the combating of money laundering. FICA was amended through the Financial Intelligence Centre Amendment Act (11 of 2008) and the Financial Intelligence Centre Amendment Act (1 of 2017), which was signed into law by the President on 26 April 2017 and gazetted on 2 May 2017. The most important amendment to FICA in 2017 was the introduction of an RBA into the legislative framework, in contrast to the rule-based approach which was previously in place (refer to section 5.3.2).

FICA accompanies POCA through the introduction of certain duties to institutions prone to be vulnerable to money laundering. These institutions are set out in FICA as accountable institutions, supervisory bodies and reporting institutions. Real estate agents are listed in schedule 1 of FICA as an accountable institution, and the Estate Agency Affairs Board (EAAB) in terms of the EAAA is listed in schedule 2 as their supervisory body.

The Financial Intelligence Centre (FIC) identified the seven pillars of compliance in terms of FICA (as amended):

1. Client identification and verification (CIV);
2. Record keeping;
3. Reporting;
4. Risk Management Compliance Programme (RMCP);
5. Person responsible for compliance;

6. Training of employees; and

7. Registration with the FIC.

Chapter 5 of this study contained an extensive discussion on each of these pillars as applicable to real estate agents as accountable institutions. It is very important for real estate agents to familiarise themselves with these requirements and the EAAB informed real estate agents of Guidance Note 7, which were published by the FIC in collaboration with National Treasury (NT), South African Reserve Bank (SARB) and the Financial Services Board (FSB). Guidance Note 7 was published to support accountable institutions and supervisory bodies to implement the amendments to FICA more effectively.

South Africa's AML regime was briefly compared to similar legislation in the United States of America (USA) and the Kingdom of the Netherlands (Netherlands) (refer to section 5.5). It was found that the 2017 amendments to FICA, in which the RBA was introduced into the South African legislative framework, place South Africa in line with the FATF Recommendations and the AML framework of the USA and the Netherlands.

As the EAAB is the supervisory body of real estate agents, they are subject to section 45 (1) of FICA which places a responsibility on every supervisory body to supervise and enforce compliance with FICA or any order, determination or directive made in terms of FICA by all accountable institutions regulated or supervised by it. This obligation on supervisory bodies forms part of the legislative mandate of any supervisory body and constitutes a core function of that supervisory body (refer to section 5.3.2.5).

The EAAB was established in 1976 in terms of the EAAA with the primary mandate "to regulate and control certain activities of estate agents in the public interest" (EAAB, 2014:7). The secondary mandate of the EAAB is contained in FICA where the EAAB is designated as the supervisory body for estate agents which requires the supervision and enforcement of compliance by estate agents with the provisions of FICA. The EAAB therefore plays an important role in the combating of money laundering in the real estate sector.

6.2.4.2 Effectiveness of South African AML legislation

When South Africa joined and became a member of the FATF in 2003, it was also evaluated for the first time by the FATF. A second evaluation was conducted by the FATF and ESAAMLG in 2008 and the evaluation was subsequently adopted in the FATF Plenary on 26 February 2009 as a second mutual evaluation.

Although FICA was amended after the 2009 mutual evaluation, a brief discussion was included on the findings in the MER in order to provide a background of South Africa's compliance to the FATF Recommendations (refer to section 5.4).

The 2009 MER found that the development of the AML systems represents work in progress. One of the major findings was that South Africa had made good progress since it was last evaluated in 2003 and had taken numerous steps to address the recommendations which were made by the FATF following the mutual evaluation in 2003. It was furthermore found that the money laundering offence is generally in line with both the Vienna and Palermo Conventions, however, the effectiveness thereof was difficult to assess due to the absence of comprehensive statistics. Other major findings as it relates to AML measures included that the FIC is an "effective financial intelligence unit", the scheme to confiscate assets is "comprehensive and utilises effective civil forfeiture measures" and that South Africa consists of a broad and well-established DNFBP sector (FATF, 2018c). The MER also included that FICA enforces CDD, record-keeping, suspicious transaction reports (STRs) and internal control requirements. However, measures to deal with PEPs, correspondent banking and beneficial ownership are not included.

6.3 Conclusion on the main objective and recommendations

The main objective of this study was to critically analyse the extent of AML measures in the South African real estate sector.

South Africa is as vulnerable to money laundering as any other country and criminals use real estate as a popular way to launder their illicit funds. As such, South Africa should possess over a strong AML regime which should be in line with international standards set out to prevent this phenomenon.

As mentioned above, FICA and POCA currently are the core Acts as it relates to the prevention of money laundering in South Africa. The EAAA also regulates the EAAB, the supervisory body of real estate agents in South Africa. Following the mutual evaluation in 2009, the FATF again made several recommendations which, if applied correctly, will align the South Africa's financial system and legal framework to global standards.

A major development in the South African AML framework was the amendments to FICA through the Financial Intelligence Centre Amendment Act (1 of 2017). Through this amendment to FICA, an RBA was introduced into the legislative framework which replaced the rule-based approach previously in place. FICA now allows real estate agents, as accountable institutions, to use their discretion in determining the necessary compliance steps to be taken in certain instances, allowing them the flexibility to determine the types of information needed and measures to be

used to determine their clients' identities. The rigid steps contained in the repealed Money Laundering and Terrorist Financing Control Regulations (MLTFC Regulations) no longer have to be followed.

Although there are several advantages to the RBA, there are also some challenges associated with this approach. Some of these challenges include that an RBA requires experienced individuals and resources in order to obtain accurate information on the applicable risks posed to the country or institution, which must be followed by the development of systems and procedures, and training of relevant individuals to be able to apply these systems and procedures effectively. It furthermore include that financial institutions must understand the risks identified and should be able to apply their judgement. If this is not done, risk could be overestimated/underestimated leading to a waste of resources/creating vulnerabilities in the institution.

With specific reference to the real estate sector, real estate agents face a challenge due to the fact that their staff members, and in some instances management, are sometimes extremely careful and not comfortable with making judgements based on risk. If management fails to determine the appropriate levels of risk, it can lead to compliance issues as resources are insufficiently allocated.

The FIC in collaboration with NT, SARB and the FSB published Guidance Note 7 to support accountable institutions and supervisory bodies to implement the amendments to FICA more effectively.

The EAAB issued a Notice to the estate agents in respect of the amendments to FICA in which it was suggested that estate agencies must thoroughly consider the amendments at the highest level of authority, i.e. the board of directors and senior management. The EAAB encouraged estate agencies to fully acquaint themselves with the amendments and to actively take steps to implement these amendments. The EAAB also made reference to Guidance Note 7 to assist them with implementing the amendments.

This study furthermore found that, although real estate agents are vulnerable to money laundering, they are also very important as they can contribute to the combating of this phenomenon in the real estate sector. Real estate agents form a crucial part of real estate transactions by being involved with both the buyer and the seller of the property which place them in a position to detect red flags. Real estate agents should use their knowledge of the real estate sector, combined with the knowledge of how this sector can possibly be abused by criminals, in order to identify when a transaction poses a money laundering risk.

Real estate agents should furthermore be informed about the provisions in POCA and FICA and should be able to identify any possible proceeds of unlawful activities when they are dealing with their clients. It can, however, be difficult for estate agents to identify if proceeds resulted from unlawful activities and they should therefore familiarise themselves with the applicable definitions and guidance issued by the FIC, ESAAMLG and FATF which can assist them to identify if a client is trying to use the real estate sector to launder illicit funds.

Although South Africa has been on the FATF regular follow-up process since the 2009 mutual evaluation, the FATF Plenary however decided in June 2014 that South Africa must be placed on the targeted follow-up process, which meant that South Africa only had to report on the previous Recommendation 5 and 10. In October 2017 it was agreed by the FATF Plenary that "South Africa has reached a level of compliance for old Rs.5 and 10 that is substantially equivalent to largely compliant and South Africa should therefore be removed from the targeted follow-up process taking into account that it has already started preparing for its 4th round mutual evaluation which begins imminently" (ESAAMLG, 2018:3).

Through the 2017 amendments to FICA, in which the RBA was introduced into the South African legislative framework, South Africa is placed in line with the FATF Recommendations and the AML framework of the USA and the Netherlands. South Africa now possesses a comprehensive AML framework, but the effectiveness thereof will depend on the implementation of these amendments by estate agencies.

During a survey by the FIC in October 2017 among accountable institutions to determine if they are ready to comply with the new requirements, accountable institutions were asked to identify any anticipated obstacles which will prevent them from complying with the amendments, as well as to indicate when they would be ready to fully comply with the amendments. Based on the responses received, the FIC and supervisory bodies determined that administrative sanctions on the new provisions would only be imposed from 2 April 2019. It was therefore from this date which all estate agencies must ensure that they are fully compliant with the provisions of FICA. The sections of FICA which were not affected by the amendments would however continue to be subject to administrative enforcement.

The study found that real estate agents found it difficult to comply with the new provisions by 1 April 2019, as they did not receive guidance and information from the EAAB in a timely manner. The challenges experienced by real estate agents included the following:

1. The EAAB informed the Real estate business owners of South Africa (Rebosa) on 23 January 2019 that the EAAB will embark by the beginning of February on a series of

roadshows to educate the industry on compliance with FICA and that the EAAB would finalise a draft RMCP template by the end of January 2019;

2. The RMCP template was only issued by the EAAB on 1 April 2019, being the date on which estate agencies had to be compliant to all the provisions of FICA, including an RMCP;

3. The EAAB compiled and posted a video in respect of the amendments to FICA on the EAAB's website on 17 April 2019, which was after the date on which accountable institutions had to comply with the amendments. The video included information on the implementation of an RBA, the seven pillars of compliance, money laundering, money laundering risk assessments, development of an RMCP, the reporting of suspicious or unusual transactions and how to submit the different types of reports to the FIC; and

4. The EAAB invited estate agents and agencies to a webinar session on "The Implementation of the FIC Amendment Act" session. Three dates were indicated for these sessions, being 11 April 2019, 16 May 2019 and 23 May 2019 respectively, all after the date on which accountable institutions had to comply with the amendments.

The above indicates that real estate agents did not receive adequate and timely information and training on the implementation of the 2017 amendments to FICA by the EAAB. This is problematic as the implementation of the 2017 amendments to FICA are crucial to strengthen the South African system against money laundering. Rebosa (2019) states that "it is unfortunately true that industry has to comply with a new Act despite not having received the required training from the EAAB as yet. This is despite the fact that it is the responsibility of the EAAB to have made such training available (Section 7.1 of the Estate Agency Affairs Act and Section 3 of the Property Practitioners Bill)".

South Africa's compliance with the FATF Recommendations will be evaluated through the upcoming mutual evaluation of South Africa, which is set to take place in 2019 under the 2013 Methodology. The implementation of the 2017 amendments to FICA is crucial, as it addresses findings from the 2009 FATF evaluation.

In light of the above, it is evident that the South African AML legislation evolved through the past few years and that POCA and FICA (as amended) now contain measures which, if implemented by real estate agents (as accountable institutions) can help to effectively combat money laundering in the real estate sector. It does, however, appear that real estate agents have not received adequate assistance by their supervisory body, the EAAB, to assist them to implement the amendments in a timely matter. It therefore appears that the current AML legislation to combat money laundering in the real estate sector is not yet effectively implemented.

It is recommended that an empirical study (through surveys) be performed at real estate agencies to determine real estate agents' knowledge of money laundering, possible red flags, and most importantly, the legislation applicable to them and the implementation of the 2017 amendments to FICA. The results obtained from the recommended study, together with the 2020 MER by the FATF and ESAAMLG based on the 2019 mutual evaluation of South Africa, will provide more information on the effectiveness of the South African AML legislation to combat money laundering in the real estate sector.

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