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An Examination of the Financial Intelligence Act of Botswana

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Abstract

This article provides an analysis of the Financial Intelligence Act of Botswana in respect of the implementation of international anti-money laundering (AML) standards in Botswana. It examines the extent to which Botswana has incorporated, within its legislative framework, the recommendations of the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) contained in the first Mutual Evaluation Report. Following concerns raised by the ESAAMLG on the effectiveness of the country's AML regulatory framework in 2007, Botswana promulgated the Financial Intelligence Act which is intended to address money laundering risks and compliance issues. This article generally discusses the institutional framework established by the Act and the obligations imposed on the specified parties under the Act. It narrowly focuses on the statutory obligations, to identify customers and keep records by specified parties. It examines the extent to which the provisions of the Financial Intelligence Act comply with Financial Actions Task Force (FATF) recommendations pertaining to customer identification and record-keeping. It is observed that the Act did not until recently provide for enhanced due diligence relating to Politically Exposed Persons. It is further observed that the independence of the Director General of the Financial Intelligence Agency may be threatened under certain circumstances. However, it is generally observed that the Act has made considerable efforts in complying with FATF standards. Finally, the article makes necessary policy recommendations.

Résumé

Cet article fournit une analyse de la loi sur les renseignements financiers du Botswana en ce qui concerne l'application des normes internationales de lutte contre le blanchiment d'argent au Botswana. Il examine comment le Botswana a intégré dans son cadre législatif, les recommandations du Groupe anti-blanchiment en Afrique orientale et australe (GABAOA) contenues

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dans le premier rapport d'évaluation mutuelle. À la suite des préoccupations exprimées par le GABAOA concernant l'efficacité du cadre réglementaire du pays en matière de lutte contre le blanchiment de capitaux en 2007, le Botswana a promulgué la Loi sur le renseignement financier qui doit réduire les risques de blanchiment d'argent et les problèmes de conformité. Cet article traite généralement du cadre institutionnel établi par la loi et des obligations imposées aux parties spécifiées en vertu de la loi. Il porte en outre sur les obligations statutaires d'identification des clients et de conservation des enregistrements par des parties déterminées. Il examine dans quelle mesure les dispositions de la Loi sur le renseignement financier sont conformes aux recommandations du Groupe de travail sur les actions financières (GAFI) relatives à l'identification des clients et à la conservation des données. Il est à noter que la loi ne prévoit pas de diligence raisonnable renforcée à l'égard des personnes politiquement exposées. Il est également observé que l'indépendance du directeur général de la *Financial Intelligence Agency* peut être menacée dans certaines circonstances. Cependant, il est généralement observé que la loi a déployé des efforts considérables pour se conformer aux normes du GAFI. Enfin, l'article donne les recommandations politiques nécessaires.

Introduction

Botswana's financial system can be broadly divided into two main sectors the banking and the non-banking financial sectors.[1] In a similar vein, the country follows the silos (institutional) model of financial sector regulation with each sector having its own sector specific[2] regulator.[3] The silos or institutional model is the traditional approach that appropriates financial regulation according to main functional lines – banking, insurance and securities industry. In other words, it follows the boundaries of the financial system in different sectors, and where every sector is supervised by a different agency.[4]

Another main type of financial services regulatory model is the functional regulatory model. This is mainly identified through the setting up of departments in a supervisory agency which is not sector-specific but focused on various functions such as licensing, legal, accounting, enforcement and information technology, irrespective of the type of business activity being regulated.[5] It is worthwhile noting that there are various other financial services industry regulatory models, which are not necessary for discussion in this article.

As stated above, the anti-money laundering (AML) regime in Botswana is scattered in various pieces of statutes and regulations. That is to say there is no single legislation specifically dealing with combating money laundering. These statutes and regulations include those dealing with anti-corruption and economic crimes, various aspects of serious and organised crime and

the financial services industry, among others. States' efforts in devising domestic regimes in the countering of money laundering, in compliance with internationally adopted standards, are critical in a globalised world economy. Notwithstanding the reference above that Botswana follows regulation by silos for its financial sector, it is imperative to note that the AML regime is generally not sector-specific but cuts across various business entities within and outside the financial services industry.

This article examines the Financial Intelligence Act[6] which has since become the primary AML legislation of general application in Botswana. The other pieces of legislation which form part of the AML regulatory universe in Botswana, however, are not part of the immediate discussion in this article which only investigates the role of the Financial Intelligence Act and the institution it establishes.

Background to the criminalisation of money laundering in Botswana

The origins of the establishment of AML regime in Botswana can be vaguely traced to the promulgation of the Corruption and Economic Crimes Act in 1994.[7] Section 3 of the said statute establishes a Directorate on Corruption and Economic Crimes (hereinafter DCEC), with a mandate to investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of the country.[8] The mandate to investigate suspected money laundering activities was specifically given to the DCEC in 2000, through the amendment of the Proceeds of Serious Crimes Act (PSCA).[9] Following the amendment of the PSCA, a specialised unit within the DCEC, called the Financial Intelligence Unit (FIU), was established.

Subsequently in 2003, the AML (Banking) Regulations intended to operationalise Section 14 of the PSCA were made under the Banking Act.[10] Recently, the legislature passed the Counter Terrorism Act[11] and Proceeds and Instruments of Crime Act[12] which form part of the AML regime in Botswana. The Proceeds and Instruments of Crime Act repealed and replaced the PSCA.

Most of the legislative enactments were passed, following the first in-country mutual which was conducted in 2007 by the East and Southern African Anti-Money Laundering Group (ESAAMLG). The ESAAMLG is a Financial Actions Task Force (FATF) Styled Regional Body (FSRB), which Botswana is a member. The 2007 Mutual Evaluation Report concluded that Botswana's criminalisation of AML framework was generally in line with international standards and the material elements are consistent with the Vienna,[13] and Palermo Conventions.[14] However, there is no effective implementation and systematic enforcement of the PSCA, and several

predicate offences are not covered under Botswana law. It is further noted that the DCEC and the Bank of Botswana are not currently adequately resourced to perform the full functions of an FIU, especially as no training on the analysis of Suspicious Transaction Reports (STRs) and other reports has been provided to staff which receive the reports made pursuant to AML. There is an unclear legal authority for the DCEC to conduct money laundering investigations beyond corruption and public revenue related cases though they are effectively conducting all money laundering investigations.

The AML regime under the discussion in this article is correct as at end of 2018, the period in which the country experienced the promulgation of some new AML related laws.

Background to the passing of the Financial Intelligence Act

The Financial Intelligence Act, hereinafter 'the Act', was passed by the legislature in 2009.[15] This was following the 2007 Mutual Evaluation Report, which identified some institutional and legislative deficiencies in Botswana's AML regime. Prior to 2009, the DCEC acted as a de facto FIU; however, it shared the responsibility to receive, analyse and disseminate the STRs with the Central Bank, the Bank of Botswana.[16]

Within the DCEC, the STRs were investigated by the Investigations Department to determine if there was any case of money laundering. The Mutual Evaluation Report further observed that there was no specific legal provision for the dissemination of STRs to the Botswana Police Service for further investigation. Of critical importance, it was also observed that the resources and AML skills of the DCEC were insufficient for this agency to fulfil the overall functions of an FIU.[17]

A recommendation was made to designate a single national centre for the receipt, analysis and dissemination of STRs as Botswana's FIU, after consideration of the most appropriate location of the FIU with respect to the legislation, necessary resources, technical capacity, effectiveness, ability to fully cooperate and coordinate with other involved parties, from both the public and private sectors, and to be able to conduct appropriate international cooperation. It was also recommended that a dedicated FIU with administrative, financial and operational independence be established in Botswana.

In essence, the promulgation of the Financial Intelligence Act was giving effect to the recommendations made by the ESAAMLG in its 2007 Mutual Evaluation Report, in an endeavour to make the country comply with international AML standards and practices.

The objective of the Financial Intelligence Act

The general intention of the legislature in passing the Act is captured in the long title. In the Commonwealth, the long title sets out in general terms the purposes of the parliamentary bill, and should cover everything in the bill.[18] Post-enactment of the bill into an Act of Parliament, the long title forms part of the Act in Roman-Dutch common law which is the law of general application in Botswana.[19]

The long title of the Financial Intelligence Act states that it establishes the Financial Intelligence Act being the FIU. It further states that the purpose of the Act is to establish a National Coordinating Committee on Financial Intelligence. It is stated in the long title that the Act is intended to provide a framework for the reporting of suspicious transactions and other cash transactions. It also introduces a concept of mutual assistance with respect to other FIUs pertaining to financial information and related issues.

The Financial Intelligence Agency

The establishment of FIUs by countries is provided for in terms of Recommendation 29 of the FATF standards. FIUs are intended to serve as national centres for the receipt and analysis of (i) suspicious transaction reports;[20] and (ii) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis.[21] The FIU should be able to obtain additional information from reporting entities, and should have access on a timely basis to the financial, administrative and law enforcement information that it requires to undertake its functions properly.

In the context of Botswana's FIU, the Financial Intelligence Agency (FIA) is established in terms of Section 3(1) of the Act,[22] which further provides that the FIA shall be headed by a director and other officers required for the proper performance or execution of the functions of the agency.[23] The discretion to appoint a director rests with the minister responsible.[24] The appointment of a director of the FIA is subject to the candidate having been screened or vetted by the Directorate of Intelligence and Security Services (DISS),[25] and issued with security clearance certifying that he/she is not a security risk, and that the candidate may not act in a manner prejudicial to the FIA in executing its functions.[26]

It is spelt out in terms of Section 4(1) of the Act that the FIA shall be the central unit for the purpose of requesting, receiving, analysing and disseminating, to the investigatory authority, supervisory authority or comparable body, disclosures of financial information.[27] The Section

defines an 'investigatory authority' as such a body legally empowered to investigate or prosecute unlawful offences.[28] Currently, such authorities may refer to entities such as the DCEC which is the primary investigatory body for a specialised crime of corruption. In that regard, it is submitted that information that may be referred by the FIA to the DCEC is the predicate offence of corruption.

Generally, the Botswana Police Service is responsible for the investigation of all other crimes in the country. On the other hand, the Director of Public Prosecution (DPP) holds the exclusive right to prosecute against the commission of crime in Botswana.[29] However, it is imperative to note that there can be prosecution by a private party in instances where the DPP would have refused to prosecute.[30] It appears that one other investigatory authority may be the DISS if, in the view of the FIA, the STRs and Cash Transaction Reports received and analysed by them borders on or threatens national security.[31]

The financial information that the FIA is mandated to transmit to the supervisory authority, investigatory authority or comparable body relates to suspicious transactions;[32] any financial information required to counter financial crime;[33] and information concerning the financing of terrorism.[34] In order to fulfil the functions detailed in Section 4(1), the FIA shall collect, process, analyse and interpret all the information before it is obtained, in terms of the Act, from specified parties obliged to submit information.[35] The FIA is also obliged to inform, advice and collaborate with an investigatory authority.[36]

Notwithstanding sounding tautological, the Act specifically further provides that the FIA shall forward financial intelligence reports to an investigatory authority.[37] The authority is also responsible for conducting examinations of a specified party to ensure compliance with the Act.[38] These examinations may include, but are not limited to, the sampling of data kept by specified parties and testing for compliance, examination of information technology devices and software, as to their ability to detect and identify suspicious transactions, and the threshold of cash transactions required to be reported.

As the primary authority for embedding and monitoring compliance of international AML standards and norms in Botswana, the FIA is statutorily responsible for guiding or providing technical assistance to specified parties pertaining to their performance of duties as outlined in the Act.[39] The law establishing the FIA provides for a two-way flow of information between it and the specified parties; that is to say that much as specified parties are obliged to submit suspicious transacting behaviour to the agency, having examined and analysed the said report, the FIA is under an obligation to give feedback to the specified party.[40] In that regard, it is submitted that this type of feedback may assist specified parties in improving their compliance

programme in giving more accurate hits in the event of a false hit; alternatively, if the hit was accurate, in making the processes and procedures better, to reduce money laundering and terrorist financing risk.

The Act authorises the FIA to be able to share information of mutual benefit with other FIUs.[41] This provision is consistent with the Egmont Group's Principles for Information Exchange between FIUs.[42] It has been observed that the ability of FIUs to effectively cooperate and share necessary financial information is vital to adequately detect, prevent and prosecute financial crime at the international level.[43] The sharing of financial intelligence is normally operationalised between and among FIUs through the conclusion of bilateral agreements which specify the terms of such exchanges.[44]

The Act provides the FIA with operational independence at the discretion of the director to seek guidance from law enforcement agencies, the government and any other person or entity the director deems necessary.[45] This provision is wide enough to enable the FIA to enter into agreements and/or arrangements that allow it access to data through requests or direct access to the relevant databases, or indirectly, through another government authority or entity holding the information.[46]

One of the main weaknesses of the AML framework in Botswana at the time of carrying out the in-country assessment and the release of the Mutual Evaluation Report in 2007 was the lack of coordination between different agencies and institutions with different AML responsibilities. The Financial Intelligence Act creates an inter-agency committee which addresses the concerns of lack of cohesion and cooperation between financial crime law enforcement agencies. The nature and functions of the said committee is discussed in the following section.

Oversight of the FIA

Due to the sensitive nature of the operations of FIUs, the FATF requires them to be granted operational autonomy and independence.[47] However, it is important to note that as much as FIUs ought and should be free from interference, they remain government agencies and thus should be accountable for the manner in which they execute their functions.[48] It is indisputable that FIUs are part of national authorities that are responsible for receiving, analysing and disseminating financial intelligence submitted through suspicious reports by obliging institutions or persons.[49]

There are various models or mechanisms of ensuring FIUs' accountability, one being the Canadian model which allows the minister to direct the unit in any matters that materially affect public policy or the strategic direction of

the FIU.[50] The common model in most legal systems is that the FIU issues a periodic report on its activities to a specified authority, i.e. the parliamentary select committee.[51] Quite a few jurisdictions have a high-level committee, placed between the FIU and the minister, which exercises some sort of supervisory and governance role over the FIU.[52] The specific functions and the role played by such a committee differs from one country to another as is spelt out in the legislation. Botswana is one of the jurisdictions which have adopted the high-level committee model. The composition and functions of the said committee are discussed in the following section.

National Coordinating Committee on Financial Intelligence

The National Coordinating Committee on Financial Intelligence (hereinafter 'the Committee') is established in terms of Section 6(1) of the Act.[53] The Committee is comprised of the director of the FIA,[54] and the Director General shall be the Secretary to the Committee.[55] The members are the representatives of the Ministry of Finance and Development Planning who shall be Chairperson of the Committee,[56] a representative of the DCEC,[57] a representative of the Botswana Police Service is also a member,[58] the Attorney Generals Chambers is represented as well.[59] Also represented are the Bank of Botswana,[60] and the Botswana Unified Revenue Services.[61] Other members of the Committee include representatives of the Ministry of Foreign Affairs and International Cooperation,[62] the Department of Immigration,[63] the Non-Bank Financial Institution Regulatory Authority,[64] the DPP; the DISS,[65] and the Ministry of Defence, Justice and Security.[66]

Functions of the Committee

The overarching or core function of the Committee is to advise the minister on issues relating to financial offences.[67] The Committee is established to assess the effectiveness of existing policies and measures in combating financial crime.[68] It shall from time to time make recommendations to the minister to make administrative, legislative and policy reforms pertaining to financial offences.[69] This is necessary to ensure that the regulatory and administrative framework keeps up with changing international norms and standards. For the financial intelligence regime to be effective, it shall keep up with the changes in the international arena.

The Committee is responsible for promotion coordination in the combating of financial crime between the FIA, investigatory bodies, supervisory authorities and any other relevant institution, in order to improve the effectiveness of existing AML policies.[70] This provision has addressed one of the fundamental findings of the 2007 Mutual Evaluation Report

which faulted the then AML regime for not providing for coordination and cooperation of state agencies in the combating of money laundering in Botswana. The Committee is statutorily mandated to formulate polices which protect and enhance the reputation of Botswana internationally, with regard to combating financial offences.[71] This is important as money laundering and financial crime generally have far-reaching consequences on the financial system of countries and negatively impact on the integrity of domestic economies.[72]

It is thus submitted that the Committee essentially operates as a board of directors or governance board for the FIA, albeit from an operational point of view. It is the custodian of the financial intelligence framework in Botswana which has a critical obligation to safeguard the integrity of the financial system and protect the integrity of the economy.

The Committee shall meet at least once every three months,[73] or when the minister so directs.[74] It has the autonomy to regulate its own meetings[75] and, if it deems fit, may request advice from anyone it finds necessary.[76] For efficiency and effectiveness in executing its duties, like other governance bodies, the Committee may appoint sub-committees constituted by its members.[77] The Committee has the discretion to co-opt any person, either for a specific period or a specific issue being dealt with.[78]

Operational provisions of the Act

Parts IV and V of the Act operationalise the combating of money laundering, terrorist financing and financial crime generally. They do so by providing for what should be done and by whom in managing financial crime risk in Botswana. This part of the article discusses the said provisions against the FATF Recommendations.[79]

Customer due diligence and record-keeping

The international standards pertaining to customer due diligence and record-keeping are set out in FATF Recommendations 10 and 11. FATF Recommendation 10 prohibits the keeping of anonymous accounts or accounts in obviously fictitious names. It places an obligation on financial institutions to conduct customer due diligence (CDD) when establishing business relationships.[80] CDD is based on the Know Your Customer (KYC) principles.[81] In that regard, KYC and CDD are at times used interchangeably. In terms of FATF Recommendation 10, CDD is also required in carrying out occasional transactions,[82] above the applicable designated threshold,[83] or that are wire transfers in circumstances covered by the Interpretive Note

to Recommendation 16.[84] CDD should also be carried out when there is a suspicion of money laundering or terrorist financing.[85] In a case when the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data, CDD should be carried out.[86]

FATF Recommendation 10 requires that individual countries should make it a legal requirement in their domestic legislation that financial institutions conduct CDD.[87] The specific CDD obligations remain at the discretion of each jurisdiction.[88]

Standards relating to Politically Exposed Persons

In terms of FATF Recommendation 12, financial institutions are required in respect of foreign Political Exposed Persons (PEPs),[89] in addition to performing normal CDD measures, to have appropriate risk-management systems to determine whether the customer or the ultimate beneficial owner is a PEP.[90] They are further expected to obtain senior management approval for establishing (or continuing, for existing customers) such business relationships;[91] to take reasonable measures to establish the source of wealth and source of funds;[92] and to conduct enhanced due diligence (EDD) ongoing monitoring of the business relationship.[93]

Further, financial institutions and/or any reporting entity should be required in law to take reasonable measures to determine whether a customer or beneficial owner is a domestic PEP or a person who is (or has been) entrusted with a prominent function by an international organisation.[94] In cases of a higher risk business relationship with such persons, financial institutions should be required to apply the measures referred to above.[95]

That is to say, in terms of foreign PEPs, EDD measures should be applied; while in the case of domestic and international organisation PEPs, the nature and extent of due diligence will ordinarily depend on the risk perceived by the bank in establishing a business relationship with such PEPs.[96] In determining the risk involved, the financial institution should take into consideration the risk posed by the product, service or transaction sought, as well as other factors that have a bearing on money laundering and corruption risks.[97] In instances of high risk PEPs, the AML/Counter Terrorism Financing (CTF) approach should be stricter accordingly, i.e. applying EDD measures even to domestic and international organisation PEPs.[98]

The need for specialised customer identification and account monitoring pertaining to PEPs and their associates is mainly because of the ways in which corrupt PEPs launder their ill-gotten gains.[99] The scale of the plunder of state assets and impact on confidence in financial institutions and the financial system in general requires greater scrutiny of business relationships

with PEPs, with a view to addressing potential corruption and relatively high levels of money laundering risks associated with these customers.[100]

It was concerning that neither the Financial Intelligence Act nor the regulations made thereunder provided for EDD in respect to PEPs, foreign or domestic, for over eight years of coming into operation. In fact, these pieces of legislation did not recognise the concept of PEPs and the risk they pose to the financial system due to their likelihood to engage in financial offences. For almost a decade, specified parties were not under an obligation to exercise EDD when dealing with PEPs, contrary to international best practice as laid down by the FATF and/or the Model Provisions on Money Laundering, Terrorist Financing, Preventative Measures and Proceeds of Crime, hereinafter 'the Model Law'. The model section pertaining to PEPs aims to provide for an elaborative procedure of identifying the source of wealth of PEPs, their families and associates and further seeks to provide enhanced risk analysis when dealing with the business and transactions of PEPs.[101]

Notwithstanding the above, in June 2018, the legislature in Botswana passed amendments to the Financial Intelligence Act which among other changes introduced the concept of PEP. However, the parliament adopted a different nomenclature for the same concept that has been used in the statute, i.e. Prominent Influential Person (PIP). The amendment omits listing foreign PIPs as those required to be classified as high risk customers by financial institutions and other reporting entities. High ranking military and police officers have not been listed in the statute. This is notwithstanding the influence and power they hold in the society, including the possibility of being bribed. Despite the current omission of foreign PEPs, the clause in the amendment statute gives the minister the power to list or prescribe any other person as a PIP.

General obligations of specified parties

Part IV of the Act is applicable to specified parties. The said specified parties are listed in Schedule I of the Act as follows: a firm of practising attorneys,[102] a firm of practising accountants,[103] practising real estate professionals,[104] a bank,[105] a bureau de change,[106] a building society,[107] a casino.[108] Other specified parties in terms of the Schedule are: a Non-Bank Financial Institution,[109] a person running a lottery,[110] Botswana Postal Services,[111] a precious[112] and semi-precious stones dealer,[113] Botswana Savings Bank;[114] Botswana Unified Revenue Service,[115] and the Citizen Entrepreneurial Development Agency.[116] Furthermore, Botswana Development Corporation,[117] National Development Bank,[118] car dealerships,[119] and money remitters[120] are equally specified parties listed in Schedule I of the Act.

The Act makes it mandatory for a specified party to implement and maintain a customer acceptance policy, internal rules, programmes, policies, procedures or any other relevant controls as may be prescribed in law to safeguard the systems of the specified party against financial crime.[121] Specified parties are required to have a compliance function which shall be responsible for the implementation and embedding of internal AML or financial crime programmes, including the maintenance of statutory records and reporting of suspicious transactions.[122] The law makes it mandatory for the leadership of the compliance function to have a place in the decision-making and/or at the managerial level of the specified party.[123] The compliance officers should be entitled to have unrestricted access to CDD data, transaction records and/or any other information relevant in executing their duties.[124] All specified parties are required to implement and maintain compliance programmes.[125]

The internal compliance programmes and procedures should be designed to be in line with any guidelines, instructions and/or recommendations issued in term of Section 27(1)(b) of the Act.[126] The said supplementary guidelines may include provisions relating to the high standards of integrity of staff members of the specified party and a system to evaluate their personal, employment and financial history.[127] The guidelines may also include directions as regards the ongoing employee training programme to enhance compliance with the provisions of the Act.[128] Furthermore, the recommendations, instructions or guidelines issued in terms of Section 27(1)(b) may be related to an independent internal audit function to check compliance with programmes. It is obligatory for specified parties to ensure that their internal compliance policy is made available to all employees, particularly information relating to records required to be kept,[129] the identification of reportable transactions, i.e. suspicious or cash transactions,[130] and staff training, in order to recognise financial offences.[131]

A failure by the specified party to put in place internal systems and procedures as required by the Act to ensure that neither it nor its services are capable of being used to commit or facilitate the commission of financial crimes shall be liable to an administrative fine imposed by a supervisory authority, not exceeding P100,000.[132, 133]

Duty to identify customers

Part V of the Act which is made up of Sections 9–16 seeks to domesticate FATF Recommendations 10 and 11. In terms of the Act, it is prohibited for a specified party to establish a business relationship or conclude a transaction with a customer unless due diligence has been undertaken.[134] If the customer is acting on behalf of another person, the specified party

is required to establish (i) the identity of the beneficial owner,[135] (ii) authorisation by the beneficial owner, instructing the customer to establish a business relationship or conclude a transaction on their behalf.[136]

With respect to a business relationship established prior to the coming into force of the Act, the specified parties are prohibited from transacting for and/or on behalf of such a customer unless there is strict compliance with the new CDD provisions.[137] Essentially, the specified party is required to freeze the accounts or suspend the relationship with the client or customer until after such a period when the said client or customer has renewed his/her KYC documentation. The Act recognises proof of identity as a National Identity Card, in respect of citizen customers, and a passport for non-citizens.[138]

The production of a false identity document to a specified party in the conduct of business is a criminal offence attracting a fine of P 500,000.00 or imprisonment not exceeding ten years or both.[139] A specified party who fails to comply with the provisions relating to identifying customers or contravenes any part of Section 10 of the Act, shall be liable for an administrative fine not exceeding P 1,000,000.00 as may be imposed by the supervisory authority.[140]

Duty to keep and maintain records

Overview of international record-keeping standards

The international framework pertaining to the keeping and/or maintenance of records is established in terms of FATF Recommendation 11. In terms of this Recommendation, legal provisions should be made obliging the financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic and international, to enable them to comply swiftly with information requests from the competent authorities.[141] The said records to be kept and maintained must be sufficient to permit reconstruction of individual transactions so as to provide, if necessary, evidence for prosecution of criminal activity.[142]

Any entity required by the law should maintain all records obtained through CDD measures, account files and business correspondence, including the results of any analysis undertaken (e.g. inquiries to establish the background and purpose of complex, unusual large transactions), for at least five years after the business relationship is ended, or after the date of the occasional transaction.[143] FATF standards require that the CDD information and the transaction records should be available to domestic competent authorities whenever requested by the appropriate authority.[144]

Keeping of records under the Act

The prevailing regime provides that a when a specified party establishes a business relationship or concludes a transaction with a customer, the specified party should maintain the records of identity of the customers;[145] for instance, where the customer is acting on behalf of someone else, the recorded identity of the person on whose behalf the customer is acting,[146] and the customer's authority to act on behalf of that other person, i.e. this may be a power of attorney or resolution of board of directors in respect to the juristic person.[147]

In a factual matrix where another person is acting on behalf of the customer, the documents to be obtained and kept are the identity of that other person,[148] and the other person's authority to act on behalf of the customer.[149] The specified party is also required to record and keep an explanation of how its employee(s) established the required identities.[150] Further information required to be kept is in regards to the nature of the business relationship or transaction,[151] the amounts of money involved in the transaction and the parties to the transaction.[152]

The specified party is required to keep the records of all accounts involved in a transaction concluded in the course of a business relationship or single transaction.[153] The name of the employee(s) of a specified party who obtained the requisite information should also be recorded and kept.[154] Identity documents, either a National Identity Card or passport obtained in the identity verification process should be kept as well.[155] The records may be kept either as paper-based copies or be saved electronically in a retrievable form.[156]

The records referred to above are to be kept or maintained for at least five years from the date a transaction is concluded.[157] However, if so required in writing by an investigating authority, a specified authority may be under an obligation to maintain such records for a longer period, as may be specified in the written request.[158] It is worth noting that specified parties are at liberty to outsource the carrying of CDD and record-keeping to a third party.[159] Where such a duty is outsourced to a third party, the specified party is required to inform the FIA and furnish it with the details of such a service provider.[160] Failure by a third party to perform on behalf of a specified party does not absolve the latter of its statutory obligations under the Act; as a matter of fact, it shall be liable for the failure.[161] Any document saved or kept in electronic form shall be admissible as evidence in a court proceedings.[162]

Failure to keep the records as required and for the specified period of time shall attract a fine not exceeding P 1,000,000.00 as may be imposed by the supervisory authority.[163] It is a criminal offence to remove any record, register or document kept in terms of the Act, attracting a fine not exceeding P500,000 or imprisonment for a term not exceeding ten years, or both.[164] An examiner of the FIA or supervisory authorities are entitled to have access to any records kept in terms of Section 11 of the Act and may make extracts from or copies of any such records.[165] An 'examiner' means a person so designated in writing by the FIA or supervisory authority.[166] An examination and audit of books and records of specified parties may be carried out at any time by the FIA or a supervisory authority to investigate compliance with the requirements of the Act or compliance with any guidelines, instructions, recommendations or regulations made under the Act.[167]

In order to investigate compliance with the Act by a specified party, the examiner may make a written request or orally require the specified party, or any other person whom the FIA or supervisory authority reasonably believes has in their possession or control a document or any other information that may be relevant to the examination, to produce or furnish the information as specified in the request.[168] Further, an examiner is entitled to examine, make copies of or take an extract from any document or thing that the examiner considers relevant or may be relevant to the examination.[169] The examiner may keep or retain any document it deems necessary.[170] Officers or employees of specified parties may be required orally or in writing by an examiner to provide information about any documents that in the view of the examiner, may be relevant to the examination.[171]

Specified parties, their officers and employees are under a legal obligation to give the examiner full and unlimited access to the records and other documents as may be reasonably required for the examination.[172] Any person who intentionally obstructs the examiner in the performance of any of his or her duties, or fails without reasonable basis to comply with a request of the examiner in the performance of the examiner's duties, shall be guilty of an offence and liable for a fine not exceeding P1 000, 000.00 or imprisonment for a term not exceeding ten years or both.[173]

An authorised officer of an investigatory authority may apply to court for a warrant to exercise the powers ordinarily exercised by an examiner.[174] The said warrant shall be issued if the court is satisfied, upon reading the averment contained in the affidavit so deposed, that there are reasonable grounds to believe that the records may assist the investigatory authority to prove the commission of a financial crime.[175]

Conclusion and recommendation

Generally, Botswana has taken considerable strides in complying with international norms and standards relating to AML and CFT, following the release of the 2007 Mutual Evaluation Report. The Financial Intelligence Act in terms of Sections 9–16 has sufficiently domesticated the FAFT Recommendations relating to the Duty to identify customers and keep records.

Consistent with the recommendations of the Mutual Evaluation Report, a standalone FIU in the form of the FIA was established. The structure and functions of the FIA largely comply with FATF Recommendation 26 relating to FIUs. It is also largely similar to the provision of the Model Law on the various structures and shapes that an FIU may take. Notwithstanding the above, it is observed that the Director General of the FIA and his/her officers are considered to be public servants, in terms of the Public Service Act.[176] This may be understood to mean that, administratively, the director is accountable to the Head of the Public Service, i.e. the Permanent Secretary of the President, like any other administrative head of a government department, in terms of Section 8(4) of the Public Service Act. The only difference with the other heads is that the director is appointed in terms of the Financial Service Act. However, since June 2018 the term of appointment of the FIA Director General has since been aligned with that of the Director General of the DISS appointed not under the provisions of the Public Service Act but under those terms and conditions the President deems fit, as recommended by the National Security Council.[177] In the appointment of the Director General of, the Committee only determines the qualifications he/she should possess and on conditions as may be recommended by the minister.

It is commendable that in order to guarantee the independence and the operational autonomy of the Director General in executing his/her duties, his/her removal for alleged misconduct has been tied to the constitutional provision for the removal of the Director of Public Prosecutions. This change has been brought through the 2018 amendment to the Act and the direct opposite of the earlier legislative framework in which the Director General essentially served at the pleasure of the appointing authority. One of the drafting notes in the Model Law states that drafters of national legislations should consider a provision that sets a fixed term for the director with dismissal permissible only in the case of verifiable misconduct.[178] This is in recognition of the fact that in an instance where the director serves at the discretion of the minister, it is very difficult to rule out political interference in the operations of the FIU.[179] In that note, the recent amendment has

codified the tenure of the Director General to five(5) year term renewable once or until he or she attains the age of 60 years, whichever comes first.[180]

Another concerning provision of the Act are Sections 5(4)–(5) which state that the DISS may withdraw the security clearance certificate of the director or any officer of FIA if it is of the view that he/she is a security risk.[181] Withdrawal of the security clearance certificate means that the office of the director or of the officer shall become vacant,[182] and a replacement Director General or officer shall be appointed.[183] This is problematic in the context of Botswana where the DISS, commonly referred to as the 'DIS', is often accused of money laundering and other financial offences.[184]

In an environment where the DISS is not accountable to anyone and there are no functional oversight mechanisms, the withdrawal of a security certificate may be a counter-intelligence strategy to collapse money laundering investigations against it. In as much as there is security vetting of the FIA Director General and his/her officers, this has to be done in a context where there are checks and balances on the exercise of the national security vetting duty by the DISS. That is to say that the withdrawal of a security certificate should only be done in an instance where its objectivity is verifiable and the intelligence outfit has not turned rogue as the DISS is often accused of. As it is, the DISS, in order to suppress any investigation against itself or its officer, may withdraw the director's certificate and that of any other officer in the FIA.

In as much as the precedent submission sounds like a scene from a fictional spy movie, the legal framework in Botswana allows the DISS to act as it pleases without being questioned, even by the courts. Essentially, the decisions or actions of the DISS are not reviewable in Botswana. The Court of Appeal, in the case of *Kenneth Good v Attorney General,* held that 'where the … decision is based on the interests of national security or is made in the national interest … such a decision should neither be open to public disclosure nor be the subject of scrutiny by the courts'.[185] It is thus recommended that Section 5(4) of the Financial Intelligence Act be repealed without delay in order to protect the operational independence of the FIA and to safeguard it from possible institutional bullying orchestrated by the DISS.

In light of the foregoing, it is concluded that notwithstanding the legislative deficiencies identified, the provisions of the Act subject to discussion in this article comply to a large extent with international norms and standards. The discussed weaknesses are capable of being cured by the legislature and through secondary legislation to improve the level of compliance and the realisation of an effective AML/CTF framework in Botswana.

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Notes

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7. Cap. 08:05 [Laws of Botswana].
8. Section 6(c).
9. Cap. 08:03 [Laws of Botswana].
10. Cap. 46:04 [Laws of Botswana]
11. Act No. 24 of 2014.
12. Act No. 28 of 2014.
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14. United Nations Convention against Transnational Organised Crime.
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16. Eastern and Southern African Anti-Money Laundering Group, 2007, *Anti-Money Laundering and Countering of Terrorist Financing in Botswana,* First Mutual Evaluation Report, Dar as Salaam: Eastern and Southern African Anti-Money Laundering Group, p. 49.
17. *ibid.*, p. 48.
18. F.A.R. Bennion, 1990, *Bennion on Statute Law*, 3rd edition, London: Longman, p. 125.
19. *Perishable Products Export Control Board* v *Molteno Bros* 1943 AD 265 at pp. 273–4.
20. Recommendation 29.
21. *ibid.*
22. Cap. 08:07 [Laws of Botswana].
23. *ibid.*
24. Section 3(2).
25. Section 5(1)(a).

26. Section 5(1)(b).
27. Section 4(1).
28. Section 2.
29. Section 7 of the Crime Procedure and Evidence Act [Cap.08:02] Laws of Botswana.
30. Section 16 of the Crime Procedure and Evidence Act [Cap.08:02] Laws of Botswana.
31. See generally, Intelligence and Security Service Act [Cap. 23:02] Laws of Botswana.
32. Section 4(1)(a).
33. Section 4(1)(b).
34. Section 4(1)(c).
35. Section 4(2)(c).
36. Section 4(2)(b).
37. Section 4(2)(c)
38. Section 4(2)(d).
39. Section 4(2)(e).
40. Section 4(2)(f).
41. Section 4(2)(g).
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54. Section 6(2).
55. Section 6(3).
56. Section 6(2)(a).
57. Section 6(2)(b).

58. Section 6(2)(c).
59. Section 6(2)(d).
60. Section 6(2)(e).
61. Section 6(2)(g).
62. Section 6(2)(h).
63. Section 6(2)(i).
64. Section 6(2)(j).
65. Section 6(2)(k).
66. Section 6(2)(l).
67. Section 7(e).
68. Section 7(a).
69. Section 7(b).
70. Section 7(c).
71. Section 7(d).
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74. Section 8(2).
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76. Section 8(3)(b).
77. Section 8(3)(c).
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80. Recommendation 10(i).
81. Josetta S. McLaughlin and Deborah Pavelka, 2013, 'The use of customer due diligence to combat money laundering', *Accountancy Business and the Public Interest* 13: 57–84, at p. 57.
82. Recommendation 10(ii).
83. *ibid.*
84. *ibid.*
85. Recommendation 10(iii).
86. Recommendation 10(iv).
87. Recommendation 10, paragraph 3.
88. *ibid.*
89. A PEP is defined by the FATF as an individual who is or has been entrusted with a prominent public function.
90. Recommendation 12(a).
91. Recommendation 12(b).
92. Recommendation 12(c).
93. Recommendation 12(d).
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95. *ibid.*

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103. Schedule I(2).
104. Schedule I(3).
105. Schedule I(4).
106. Schedule I(5).
107. Schedule I(6).
108. Schedule I(7).
109. Schedule I(8).
110. Schedule I(9).
111. Schedule I(10).
112. Schedule I(11).
113. Schedule I(12).
114. Schedule I(13).
115. Schedule I(14).
116. Schedule I(15).
117. Schedule I(16).
118. Schedule I(17).
119. Schedule I(18).
120. Schedule I(19).
121. Section 9(1)(a).
122. Section 9(1)(b).
123. *ibid.*
124. Section 9(1)(c).
125. Section 9(1)(d).
126. Section 9(2)(a).
127. Section 9(2)(a)(i).
128. Section 9(2)(a)(ii).
129. Section9(2)(b)(i).
130. Section9(2)(b)(ii).
131. Section9(2)(b)(iii).
132. P1.00 = US$ 0.097 (as of 12 December 2017).
133. Section 9(3).
134. Section 10(1).

135. Section 10(1)(b)(i).
136. Section 10(1)(b)(ii).
137. Section 10(2).
138. Section 10(3).
139. Section 10(4).
140. Section 10(5).
141. FATF Recommendation 11.
142. *ibid.*
143. *ibid.*
144. *ibid.*
145. Section 11(1)(a).
146. Section 11(1)(b)(i).
147. Section 11(1)(b)(ii).
148. Section 11(1)(c)(i).
149. Section 11(1)(c)(ii).
150. Section 11(1)(d).
151. Section 11(1)(e).
152. Section 11(1)(f).
153. Section 11(1)(g).
154. Section 11(1)(h).
155. Section 11(1)(I).
156. Section 11(2).
157. Section 12(1).
158. Section 12(2).
159. Section 13(1).
160. Section 13(2).
161. Section 13(3).
162. Section 14.
163. Section 15(1).
164. Section 15(2).
165. Section 16(1).
166. Section 16(6).
167. Section 16(2).
168. Section 16(3)(a).
169. Section 16(3)(b).
170. Section 16(3)(c).
171. Section 16(3)(d).
172. Section 16(4).
173. Section 16(5)(a)-(b).
174. Section 16(7).
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178. See Drafting Note to Section 38 in respect of the Establishment and Structure of FIUs.
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