AML/CFT and Financial Inclusion in SADC

Consideration of Anti-Money Laundering and Combating the Financing of Terrorism Legislation in Various Southern African Development Community (SADC) countries

Botswana Country Report

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BOTSWANA COUNTRY REPORT

FinMark Trust, an independent trust based in Johannesburg, South Africa, was established in 2002, and is funded primarily by UKaid from the Department for International Development (DFID) through its Southern Africa office. FinMark Trust's purpose is 'Making financial markets work for the poor, by promoting financial inclusion and regional financial integration' as well as institutional and organisational development, in order to increase access to financial services for the un-served and under-served.

While the underlying focus of this report is on the harmonisation and calibration of provisions found in Anti-Money Laundering (AML) and Countering the Financing of Terrorism (CFT) laws and regulations in the Southern African Development Community (SADC), it is hoped that the country reports will become "living documents" that will be used as a resource for SADC Member States to make appropriate amendments to their domestic laws and regulations, define the strategic direction to achieve the objectives of Annex 12 of the FIP and prompt further research and other initiatives that will support State Parties in fulfilling their harmonisation objectives.

FinMark Trust commissioned Compliance & Risk Resources to conduct the final review of the report and to circulate the report to country stakeholders in order to obtain support and facilitate finalisation. The initial research that informed this country report was conducted and prepared by Sarah Langhan and Associates. Raadhika Sihin, assisted in reviewing and editing the initial research and country report. She was assisted by a panel of technical experts comprising of Ben Musuku (World Bank), Tom Malikebu (ESAAMLG) and Prof Louis de Koker (Deakin University, School of Law, Faculty of Business and Law) who reviewed and provided guidance on the content for the initial edited research report.

The authors are grateful for the level of cooperation and assistance provided by all persons consulted during the research phase of the project. We especially acknowledge the willingness of those who made themselves available, often at very short notice, in all participating countries to answer questions, provide numerous documents and generally provide the information that was requested. In this regard, we acknowledge and thank all those who assisted.

1. Changes to the Legal and Regulatory Framework Post March 2007

Botswana was one of the first SADC countries to undergo an Eastern and Southern Africa 'Anti-Money' Laundering Group (ESAAMLG) Mutual Evaluation[1]. The in-country visit took place from the 26th February to March the 12th March, 2007. The Anti-Money Laundering and Counter-terrorist Financing (AML/CFT) Report and Executive Summary were adopted by the Task Force of Senior Officials and the Council of Ministers in August 2007. As represented in Table 1 below, only one key AML/CFT statute has been enacted since 2007 and, as such, is not included in the ESAAMLG Mutual Evaluation. The Financial Intelligence Agency Act, 2009[2] is however a fundamentally important piece of legislation as it provides for the establishment of the Financial Intelligence Agency, establishes a National Coordinating Committee on Financial Intelligence, provides for the reporting of suspicious transactions and other cash transactions, and also provides for mutual assistance with comparable bodies outside Botswana in relation to financial information and for matters connected therewith.[3] No regulations, exemptions or guidelines have been issued under this Act. Three Bills, namely the Anti-Terrorism Bill, the Anti-Chemical Weapons Bill and the Securities Bill, have yet to be passed by parliament.[4]

Table 1: Botswana: Legislation, Regulation Guidelines (Post ESAAMLG Evaluation)

Year	Legislation, Regulation Guidelines (Post ESAAMLG Evaluation)
In-country Assessment February – March 2007 **Adopted** 2007	• **Financial Intelligence Agency Act 6, 2009 (FIAA)** • Accountants Act 12, 2010 • *Anti-Terrorism Bill* • *Anti-Chemical Weapons Bill* • *Securities Bill*

2. Current AML/CFT Legislation and Regulation in Force in Botswana

Table 2 below provides an overview of the current laws, regulations, exemptions, guidelines and guidance notes in force in Botswana as of June 2014. The legislation is broken up into primary legislation (having a direct bearing on AML/CFT), additional relevant legislation (this covers laws and regulations that impact upon the AML/CFT legal and regulatory framework), laws and regulations applicable to banks, non-bank financial institutions (NBFIs), designated non-financial businesses or professions (DNFBPs) and non-profit organisations.[5]

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[1] See Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) 2007 *Anti-Money Laundering and Combating the Financing of Terrorism Mutual Evaluation/Detailed Assessment Report: Republic of Botswana.*

[2] Act 6 of 2009.

[3] Despite the Act having been passed in 2009 by the Financial Intelligence Agency (FIA), only sections of the Financial Intelligence Agency Act, 2009 have been implemented. An interview with the FIA in February 2013 revealed that the FIA has not yet started its core business and the Bank of Botswana is still receiving suspicious transaction reports. Problems with respect to the recruitment and employment of qualified staff and funding were also highlighted as areas of concern.

[4] Our meeting with the FIA in February 2013 indicated that the Anti-Terrorism Bill was high priority and that it is expected to be fast tracked.

[5] Whilst this diagram aims to be as comprehensive as possible, we do not claim that it represents each and every statute that has a bearing on the complex field of AML/CFT in Botswana.

Table 2: The AML/CFT Regulatory Landscape in Botswana as of June 2014

	Core Acts			Issued Under the Act	
✓	Financial Intelligence Agency Act 6,2009			✘	
✓	Proceeds of Serious Crime Act 19, 1990 (As Amended)			✘	
●	Anti-Terrorism Bill, 2013			✘	
	Additional Relevant Legislation				
✓	Penal Code 1964 [Cap 08:01]			✘	
✓	Criminal Procedure and Evidence Act, 1939 (As Amended)			✘	
✓	Corruption and Economic Crime Act, 1994			✓	
✓	Drugs and Related Substances Act 18, 1992				
✓	Police Act, 1979			✓	
✓	Customs and Excise Duty Act 22, 1970			✘	
●	Anti-Chemical Weapons Bill			✘	
✓	Mutual Assistance in Criminal Matters Act, 1990			✘	
✓	Extradition Act 18, 1990			✘	
	Legislation Applicable to Banks				
✓	Bank of Botswana Act 19, 1996			✓	• Bank of Botswana (Bureaux de Change) Regulations, 2004
✓	Banking Act 13, 1995			✓	• Banking Regulations, 1995 • Banking (Anti-Money Laundering) Regulations, 2003
✓	Non-Bank Financial Institutions Regulatory Authority Act 2, 2007			✘	
✓	National Clearance and Settlement Systems Act 5, 2003			✓	• National Clearing and Settlement Systems Regulations (Under Section 27), 2005
	Legislation Applicable to NBFI's				
✓	Stock, Bonds and Treasury Bills Act [Cap 56:07]			✘	
✓	Botswana Stock Exchange Act, 1994			✘	
●	Securities Bill				
✓	Insurance Industry Act [Cap 46:01]				
✓	International Insurance Act, 2005				
✓	Non-Bank Financial Institutions Regulatory Authority Act 2, 2007			✘	
✓	Collective Investment Undertakings Act, 1999				
	Legislation Applicable to DNBPs and NPO's				
✓	Casinos	Casino Act [Cap 19:01] Lotteries and Betting Act [Cap 19:02]		✘	
✓	Lawyers	Legal Practitioners Act 13, 1996		✘	
✓	Accountants	Accountants Act 12, 2010		✘	
✓	Precious Metals and Stones Dealers	Mines and Minerals Act 17, 1999 Precious and Semi-Precious Stones Act Unwrought Precious Metals Act, 1944		✘	
✓	NPO's	Societies Act		✘	

3. Botswana's Approach to Recommendation 10: Customer Due Diligence (CDD)

The obligation to undertake CDD measures by identifying customers is set out in section 10 of the Financial Intelligence Agency Act, 2009[6], section 16A of the Proceeds of Serious Crime Act, 1990 (as amended)[7] and Regulation 9 of the Banking (Anti-Money Laundering) Regulations, 2003.[8]

3.1 When is CDD required in Botswana?

Section 10(1)(a) of the Financial Intelligence Agency Act, 2009[9] prohibits a specified party[10] from establishing a business relationship or concluding a transaction with a customer unless the specified party has undertaken due diligence measures and such other steps as may be prescribed to establish and verify the identity of the customer.

The Proceeds of Serious Crime (Amendment) Act, 2000[11] inserted section 16A into the Proceeds of Serious Crime Act, 1990.[12] Section 16A(5) prohibits designated bodies from entering into a business relationship, concluding a transaction or providing a service of a kind specified in the Schedule unless proof of identity has been obtained. In addition, "designated bodies must take reasonable measures to obtain the required proof of the identity of a person for whom it proposes to enter into a business relationship, conclude a transaction or provide a service of a kind specified in the Schedule if –

(a) The service is in respect of either a single transaction or a series of transactions which are or appear to be linked; or
(b) On reasonable grounds, it suspects that the business relationship, transaction or service is connected to the commission of a serious offence under this Act."

Regulation 9 of the Banking (Anti-Money Laundering) Regulations, 1995 requires banks to obtain information about the true identity of the person on whose behalf an account is opened or a transaction conducted if there is any doubt as to whether the customer is acting on his own behalf. Regulation 10 prohibits banks from keeping anonymous accounts or accounts in obviously fictitious names. The Financial Intelligence Agency Act, 2009 does not contain explicit provisions prohibiting the opening of fictitious accounts, however, section 10(4) makes it an offence for a person to transact with a specified party using false documents.[13]

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[6] Act 6 of 2009.
[7] Act 19 of 1990.
[8] This Regulation (by the Minister of Finance and Development Planning) was issued on the basis of Section 51 of the Banking Act.
[9] Act 6 of 2009.
[10] "Specified parties are listed in the First Schedule to the FIAA and are attorneys, accountants, registered real estate professionals, banks, bureau de change, building societies, casinos, non-bank financial institutions, persons running a lottery, the Botswana Postal Services, precious stones dealers, semi-precious stones dealers, Botswana Savings, the Botswana Unified Revenue Service, Citizen Entrepreneurial Development Agency, Botswana Development Corporation, National Development Bank, car dealerships and money remitters.
[11] Act 13 of 2000.
[12] Act 19 of 1990.
[13] Offenders are liable to a fine not exceeding P100 000 or to imprisonment for a term not exceeding five years or to both.

Specified parties are also required to establish the identity of the person on whose behalf the customer may be acting, and his or her authority to conclude the business relationship or a transaction on that other person's behalf. If another person is acting on behalf of the customer, both the identity of the customer and the other person's authority to act on behalf of the customer must be provided.[14] Regulation 5(3) specifically requires banks to identify the beneficial owner of an account and any person using remittance and safe custody facilities. If the bank fails to ascertain the identity of such an owner or person, it is required to close the account or deny the facilities concerned.

Anonymous accounts are not prohibited in the Financial Intelligence Agency Act, 2009 or the Proceeds of Serious Crime Act, 1990 (as amended). Regulation 10 of the Banking (Anti-Money Laundering) Regulations, 2003 however specifically prohibits banks from opening or keeping anonymous accounts or accounts in obviously fictitious names.

3.2 Identification measures and verification sources

The Financial Intelligence Agency Act, 2009 does not state the information that is to be obtained from each customer (ID, address, tax number, etc.). All that is stated is that the specified parties are to "establish and verify the identity of the customer". The Banking (Anti-Money Laundering) Regulations, 2003 are also deficient in this regard.

Section 10(3) of the Financial Intelligence Agency Act, 2009 explicitly states that, "proof of identity of a customer under this section shall be through the production of a National Identity Card for citizens and a passport for non-citizens". Likewise, Regulation 5(1) of the Banking (Anti-Money Laundering) Regulations, 2003 states that a bank shall require its personal customers when establishing business relations or conducting transactions with it to produce (a) an Omang identity card for a citizen of Botswana above the age of sixteen years; or b) a valid passport for a foreign national.[15] Both section 10(3) of the Financial Intelligence Agency Act, 2009 and Regulation 5 of the Banking (Anti-Money Laundering) Regulations, 1995 do not allow for the flexibility available through the adoption of a risk-based approach, whereby local authorities are permitted to allow a broader range of identification documentation in predefined types of business relationships and for specific financial inclusion products and accounts with low balance limits.

The Financial Intelligence Agency Act, 2009 does not contain any provisions on how the individual customer's identification is to be verified. This may be contrasted with Regulation 6 of the Banking (Anti-Money Laundering) Regulations, 1995 which requires banks to verify the names and addresses of their customers by any one of the following methods: (a) obtaining a reference from a well-known professional, an employer of the customer, a known customer of the bank who, or a customary authority that, knows the applicant; (b) in the case of non-residents, obtaining references from their foreign banks, where possible; (c) making a credit reference agency search; (d) requesting an original recent council rates or utility bill receipt; (e) using one of the address validation or verification services on offer; or (f) conducting a personal visit to the home of the applicant where appropriate, or possible. As the Banking (Anti-Money Laundering) Regulations, 1995 are only applicable to banks and not to any of the other specified parties listed in the Financial Intelligence Agency Act, 2009[16], the lack of a verification requirement in the Financial Intelligence Agency Act, 2009 represents a significant short coming in the Act. The Financial Intelligence

[14] S10(1)(b) and (c) Financial Intelligence Agency Act, 2009.
[15] It is requirement by law that every Motswana above the age of 16 have a National Identity Card. This card is commonly known as Omang.
[16] Act 6 of 2009.

Agency Act, 2009 also does not contain obligations for specified parties to conduct ongoing due diligence on the business relationship and to scrutinise transactions throughout the course of the relationship. Regulation 5(2), on the other hand, prescribes that banks should renew the identification of their customer whenever they have doubts as to the identity of a customer in the course of its business relationship with the said customer.

3.3 Timing of verification of identity

CDD measures are required before establishing a business relationship or before concluding a transaction with the customer.[17] Section 10(2) of the Financial Intelligence Agency Act, 2009 specifically states that "where a specified party had established a business relationship with a customer before the coming into force of this Act, the specified party shall not conclude a transaction in the course of that relationship unless it has complied with subsection (1), implying that no room was provided for the leniency provided by FATF Recommendation 10 with respect to completing the verification process as soon as reasonably practicable and where this is essential not to interrupt the normal conduct of business."[18]

The Financial Intelligence Agency Act, 2009[19] does not contain any provision requiring specified parties not to open an account, commence a business relationship or perform transactions in the situation where CDD measures cannot be met nor does it require specified parties to terminate the business relationship in such circumstances.

3.4 Risk-based approach to CDD: Simplified Measures

The Financial Intelligence Agency Act, 2009 does not contain any provisions related to simplified CDD measures that may be undertaken by specified parties in proven low risk situations. Section 16A(4) of the Proceeds of Serious Crime Act, 1990 (as amended) however appears to provide for a complete exemption from all the CDD (identification, record-keeping) as well as transaction reporting measures when the designated body "enters into a business relationship, concludes a transaction or provides a service of a kind specified under the Schedule for another designated body or a body corresponding to a designated body in a state or country prescribed for the time being by the Minister as not applicable".

As noted in the ESAAMLG Mutual Evaluation report, "the wording of this provision raises several ambiguities: it is unclear whether the 'not applicable' refers to the state or country, or more broadly to the categories of designated bodies. Read together with section 16A(26), which stipulates that the Minister may issue regulation prescribing 'the states or countries for the purposes of subsection (4)', the first option above seems to be the relevant one though; it is unclear whether the exemption covers other designated bodies (even in Botswana) when they act as the customer on their own account or on behalf of one of their clients. The terminology 'enters into a business relationship, concludes a transaction or provides a service [...] for another designated body' is ambiguous in that respect. The authorities indicated that this provision is aimed at allowing for simplified or reduced

[17] S S10(1)(a).
[18] FATF Recommendation 10 states: "Countries may permit financial institutions to complete the verification as soon as reasonably practicable following the establishment of the relationship, where the money laundering and terrorist financing risks are effectively managed and where this is essential not to interrupt the normal conduct of business."
[19] Act 6 of 2009.

due diligence when the customer is another financial institution, applying AML-related CDD requirements, as allowed under FATF Recommendation 5 [new Recommendation 10]."[20]

Section 16A(8) of the Proceeds of Serious Crime Act, 1990 (as amended) provides a further exemption by stating that the identification requirements (including those related to the structuring of transactions and to the identification when there is suspicion of money laundering related to the business relationship, the transaction or the service) do not apply for long term insurance business when (i) the amount of the periodic premiums to be paid in respect of the life policy in any twelve month period does not exceed the amount prescribed in Regulations; or (ii) a single premium to be paid in respect of a life policy does not exceed the amount prescribed for by the purpose in the Regulations. None of these amounts have been prescribed in regulation. Under (i), the Proceeds of Serious Crime Act, 1990 (as amended) excludes "(i) a pension scheme taken out by virtue of a contract of employment or the occupation of the person to be insured under the life policy provided that the life policy in question does not contain a surrender clause and may not be used as collateral for a loan; or (ii) a transaction or a series of transactions taking place in the course of a long term insurance business in respect of which payment is made from an account held in the name of the other party with a designated body or a body corresponding to a designated body prescribed under section." These provisions are drafted in a highly technical and confusing manner, making their interpretation difficult.

In a meeting held with the Bankers Association of Botswana, it was intimated that the banks in Botswana are of the opinion that the Bank of Botswana should review its entire approach to AML.[21] A request has recently been submitted to the Bank of Botswana through the Bankers Association requesting the Bank of Botswana to scale down KYC/CDD requirements for certain classes of customers through the application of a threshold approach. This request is currently under consideration.[22]

4. Botswana's Approach to Recommendation 11: Record Keeping

The record keeping requirements for all specified parties is set out in sections 11 to 15 of the Financial Intelligence Agency Act, 2009[23], sections 16A(10) to 16A(13) of the Proceeds of Serious Crime Act, 1990 (As Amended)[24] and Regulations 12 and 13 of the Banking (Anti-Money Laundering) Regulations, 1995.

Section 11(1) of the Financial Intelligence Agency Act, 2009[25] requires specified parties, when establishing a business relationship or concluding a transaction with a customer, to maintain records of the identity of the customer; the identity of another person if the customer is acting on behalf of that person; the customer's authority to act on behalf of that other person; if another person is acting on behalf of the customer, the identity of that other person, and that other person's authority to act on behalf of the customer; the manner in which the identities of the persons were established; as well as the nature of the business relationship and transaction. In addition, specified parties are required to keep records of the amount involved in the transaction and the parties to the transaction and the name of the person who obtained the required information. Importantly,

[20] Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) 2007 *Anti-Money Laundering and Combating the Financing of Terrorism Mutual Evaluation/Detailed Assessment Report: Republic of Botswana* 56.
[21] This meeting held in Botswana in February 2013.
[22] At a meeting held with the FIU, it was stated that "banks have alluded that AML/KYC is not their business."
[23] Act 6 of 2009.
[24] Act 19 of 1990.
[25] Act 6 of 2009.

section 11(1)(i) requires specified parties to maintain records of "any document or copy of a document obtained by the specified party in order to verify a person's identity".

Records may be kept in an electronic form[26] and must be kept for at least five years from the date a transaction is concluded,[27] however an investigatory authority may by request in writing, require a specified party to keep and maintain a record for such longer period as may be specified in the request.[28] Section 14 specifically states that, "an electronic record kept in accordance with section 11 shall be admissible as evidence in court." Section 13(1) allows for the record keeping obligations of a specified party to be performed by a third party on behalf of the specified party. The provisions on record keeping as set out in the Financial Intelligence Agency Act, 2009[29] are compliant with the requirements of the FATF Recommendation 11.

5. Botswana's Approach to Recommendation 13: Correspondent Banking

Reference is made to the "electronic transfer of money into or out of Botswana" in section 21(1) of the Financial Intelligence Agency Act, 2009 which reads "a specified party that through electronic transfer, receives into or sends out of Botswana money in excess of the prescribed amount on behalf or on the instruction of a customer or any person, shall report to the Agency such particulars of the transfer as may be prescribed". No reference is made directly to correspondent banking in the Financial Intelligence Agency Act, 2009 and none of the required measures set out in the FATF Recommendation 13 are met. The obligations of banks, with respect to their correspondent banking relationships, are also not mentioned in the Banking Act 1995[30] and its regulations, nor in the National Clearance and Settlement Systems Act, 2003.[31]

6. Botswana's Approach to Recommendation 14: Money Transfer Services

Financial "money remitters" are listed as a specified party in the First Schedule to the Financial Intelligence Agency Act, 2009[32] and are therefore subject to the requirements of the Act, including section 21. (See section 6.4 above for a discussion on this clause.)

Money remitters are however not included in the definition of "non-bank financial institutions" in the Non-Bank Financial Institutions Regulatory Authority Act, 2007[33] and are therefore not "under the scope of this authority, and subject to the associated licensing / registration requirements" as stated in the ESAAMLG Mutual Evaluation.

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[26] Section 11(2).
[27] Section 12(1).
[28] Section 12(2). Regulation 12(2) of the Banking (Anti-Money Laundering) Regulations, 1995 states that "a bank shall keep records under this regulation by way of original documents, either in the form of hard copies or by using electronic storage devices" and does not seem to be inconsistent with the provisions of the FIAA.
[29] Act 6 of 2009.
[30] Act 13 of 1995.
[31] Act 5 of 2003.
[32] Act 6 of 2009.
[33] Act 2 of 2007.

7. Botswana's Approach to Recommendation 15: New Technologies

The Financial Intelligence Agency Act, 2009[34], Proceeds of Serious Crime Act, 1990 (as amended)[35], Banking (Anti-Money Laundering) Regulations, 1995, the Banking Act, 1995 and the National Clearance and Settlement Systems Act, do not contain any provisions related to new technologies and non-face-to-face transactions. Two statutes have recently been promulgated into law to address technology-related matters, namely, the Electronic Records (Evidence) Act, 2014 and the Electronic Communications and Transactions Act, 2014. This legislation contains provisions related to new technologies and non-face-to-face transactions. The commencement dates of the aforementioned Acts will be set in the near future, pending the finalisation of supporting regulations. The Cyber-Crime and Computer Related Fraud Act is under review to bring it in line with the latest technological advances.

The Payments and Settlement Department of the Bank of Botswana has however indicated that they are currently working on an e-money policy paper with the technical assistance of the International Monetary Fund (IMF).

8. Botswana's Approach to Recommendation 16: Wire Transfers

The Financial Intelligence Agency Act, 2009[36], Proceeds of Serious Crime Act, 1990 (as amended)[37], Banking (Anti-Money Laundering) Regulations, 1995, the Banking Act,1995 National Clearance and Settlement Systems Act do not contain any provisions related to wire transfers. Whilst in practice, the banks include the required and accurate originator information and required beneficiary information with SWIFT messages, and there is no obligation relating thereto in the regulatory requirements.[38]

9. Botswana's Approach to Recommendation 17: Reliance on Third Parties

Section 13 of the Financial Intelligence Agency Act, 2009[39] allows for the record keeping obligations set out in section 11 of the Act to be performed by a third party on behalf of the specified party. Specified parties must provide the Financial Intelligence Agency with the particulars of the third party, as may be prescribed.[40] Section 13(3) of the Financial Intelligence Agency Act, 2009 places the liability for non-performance of the obligations imposed by section 11 by the third party on the

[34] Act 6 of 2009.
[35] Act 19 of 1990.
[36] Act 6 of 2009.
[37] Act 19 of 1990.
[38] In this regard, it is noted in the ESAAMLG Mutual Evaluation that "Absent an explicit requirement, there is no compliance verification by BoB, which focuses on the compliance by banks of their obligations to submit, for balance of payments purposes, forms for each wire transfer (outgoing and incoming) above P 10.000 ('A bank shall complete such a form as the Central Bank may prescribe to record an outward transfer or a foreign currency payment and such other form as the Central Bank may prescribe for any foreign currency receipts or funds from external sources where the transaction involves an amount of P10,000 or more; and shall require a customer to provide full details of the transaction including the name, identity number and full address of the customer and the beneficiary, as well as the purpose of the transaction'). There are no similar requirements for domestic transfers."
[39] Act 6 of 2009.
[40] S13(2). It appears as if nothing has been prescribed to date.

specified party. The Financial Intelligence Agency Act, 2009 is silent on CDD obligations being undertaken by third-parties.

10. Botswana's Approach to Recommendation 18: Internal Controls

Section 9 of the Financial Intelligence Agency Act, 2009 requires specified parties to implement and maintain a customer acceptance policy, internal rules, programmes, policies, procedures or such controls as may be prescribed to protect its system from financial offences.[41] In line with the FATF 18 Recommendation, specified parties must designate Compliance Officers at management level who will be in charge of the implementation of internal programmes and procedures, including the maintenance of records and reporting of suspicious transactions.[42] Section 9 also requires specified parties to implement and maintain compliance programmes and to develop and maintain audit functions to evaluate any policies, procedures and controls developed to ensure compliance with the measures taken by the specified party to comply with the Act as well as the effectiveness of those measures.[43] The provisions contained in the Financial Intelligence Agency Act, 2009 make no reference to the application of a risk-based approach or that the type and extent of the measures to be undertaken should be appropriate, with regards to the risk of money laundering and terrorist financing.

No reference is made in the Financial Intelligence Agency Act, 2009 to the implementation of group wide programmes against money laundering and terrorist financing, and the requirement to implement policies and procedures for sharing information within the group. The Financial Intelligence Agency Act, 2009 is also silent on the FATF recommendation that financial institutions should be required to ensure that their foreign branches and majority-owned subsidiaries apply AML/CFT measures consistent with the home country requirements.

The Financial Intelligence Agency Act, 2009[44] does not include any provisions relating to foreign branches and majority owned subsidiaries.[45]

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[41] S9(1)(a).

[42] Section 9(1)(c) requires the specified party to ensure that a designated compliance officer has, at all times, timely access to customer identification data, transaction records and other relevant information.

[43] S9(1)(e). Regulation 17(1) of the Banking (Anti-Money Laundering) Regulations, 1995 prescribes the adoption of an internal "anti-money laundering program", defined as "the anti-money laundering measures to be put in place and practices to be adopted in order to detect and prevent the commission of the offence of money laundering; and shall ensure that the staff of the bank is familiar with and complies with the programme". Regulation 17 (2) details the minimum content of the AML programme.

[44] Act 6 of 2009.

[45] It is noted in the ESAAMLG Mutual Evaluation that "the PSCA contains no provision related to the application of AML measures to foreign branches and subsidiaries. The Banking Act and the Banking (AML) Regulation do not contain such requirements either. Neither this Act nor Regulation requires Botswanan banks to inform the banking supervisor if their foreign branches and subsidiaries are unable to implement AML measures. The Banking Act in its Section 24 (1) allows the Central Bank to undertake on-site examinations of foreign branches of banks established in Botswana. As Botswana's banks do not have foreign branches or subsidiaries at the date of the on-site mission, it is the assessors' view that this is not practically of concern for the time being."

11. Botswana's Approach to Recommendation 20: Suspicious Transaction Reports (STRs)

Reporting obligation and cash transactions are the subject matter of Part IV section of the Financial Intelligence Agency Act, 2009[46]. This Part of the Act covers *inter alia* the obligation to report suspicious transactions (section 17), the reporting of cash transactions above prescribed limit (section 18) and general reporting (section 19). Section 17 of the Act reads "a specified party shall, within such period as may be prescribed, report a suspicious transaction to the Agency" and section 19(1) "a person who carries on, is in charge of, manages, or is employed by a business, shall report a suspicious transaction to the Agency." No Guidelines or Guidance Notes have been issued by the FIA on how suspicious transactions should be reported. The application of a risk-based approach to this issue has not been documented or communicated to specified parties.

Regulation 14 requires banks to "report to both the Central Bank and the Financial Intelligence Agency, in the Form set out in the Second Schedule, any transaction involving large amounts of money or suspicious activities by its customers and shall, for this purpose, send to those institutions copies of the relevant documents and retain the originals."[47]

The National Payment System Department of the Bank of Botswana confirmed that the Financial Intelligence Agency is the principal institution responsible for receiving STRs, despite the fact that the section 21(4) of the Banking Act states that "a bank shall notify the Central Bank of any transaction by any of its customers which it suspects to be money laundering"[48] and section 16A(15) of the Proceeds of Serious Crime Act, 1990 (as amended)[49] states that "where a designated body that is party to the transaction in respect of which there are reasonable grounds to suspect that the transaction brings or will bring the proceeds of serious crime into its possession, or that it may facilitate the transfer of the proceeds of serious crime, the designated body shall, within ten days of becoming party to such transaction, report the suspicion to the Directorate and to the Regulatory Authority."[50]

S 21(4) of the Banking Act and section 16A(15) of the Proceeds of Serious Crime Act, 1990 (As Amended) needs to be amended as soon as possible as these sections are in direct contradiction with section 4(1)(a) of the Financial Intelligence Agency Act, 2009[51] which reads "the Agency shall be the central unit responsible for requesting, receiving, analysing and disseminating to an investigatory authority, supervisory authority or comparable body, disclosures of financial information concerning suspicious transactions."[52]

In practice, banks are submitting STRs to Financial Intelligence Agency and copies are still sent to Bank Supervision, as the Financial Intelligence Agency is not yet fully operational.[53] The Directorate of Corruption and Economic Crime (DCEC) is however under the impression that they still have residual responsibility for receiving STRs and noted that a lack of coordination, conflicting legislation and conflicting messages with respect to the reporting of suspicious transactions is a key concern. An interview with the Financial Investigation Unit (FIU) however, revealed that the FIU are

[46] Act 6 of 2009.
[47] Regulation 14 Banking (Anti-Money Laundering) Regulations, 1995
[48] Section 21(4) Act 13 of 1995.
[49] Act 19 of 1990.
[50] Directorate of Corruption and Economic Crime (DCEC).
[51] Act 6 of 2009.
[52] Section 4(1)(a).
[53] Banks are reported to have Banks do have people that are monitoring low value transactions. If they see a trend they have been red flagging multiple transactions and reporting these as suspicious transaction.

under the impression that the Bank of Botswana is the default "receiver" of STRs, as the Financial Intelligence Agency does not have the operational capacity to receive STRs yet.

12. Botswana's Approach to Recommendation 34: Guidance and Feedback

The Financial Intelligence Agency (FIA) is established under section 3(1) of the Financial Intelligence Agency Act, 2009. Section 4 of the Financial Intelligence Agency Act, 2009 sets out the functions of the FIA and specifically mandates the FIU to give guidance to a specified party regarding the performance by the specified party of duties under the Act and provide feedback to a specified party regarding a report made in accordance with the Act. As the FIA is not fully operational, the Agency has not provided any guidance or feedback to specified parties yet.

13. High Level Recommendations for Botswana

The recommendations set out in Table 3 below are not intended to be exhaustive. These high level recommendations provide an indication on how specific sections in the Financial Intelligence Agency Act, 2009 could be amended to bring the law in line with the several of the revised FATF Recommendations.

Table 3: High Level Recommendations for Botswana

R10	CDD: Component A - When CDD is Required
It is recommended that section 10 of the Financial Intelligence Agency Act, 2009 be amended to require specified parties to conduct CDD in the following additional circumstances: occasional transactions above USD 15,000 threshold, carrying out occasional wire transfers in the circumstances covered by Recommendation 16, where there is a suspicion of ML/TF and where the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data. It is also recommended that the Financial Intelligence Agency Act, 2009 be aligned with the Proceeds of Serious Crime Act, 1990 (as amended).	
R10	CDD: Component B - Identification Measures and Verification Sources
Section 10(3) of the Financial Intelligence Agency Act, 2009 explicitly states that, "proof of identity of a customer under this section shall be through the production of a National Identity Card for citizens and a passport for non-citizens". Likewise, Regulation 5(1) of the Banking (Anti-Money Laundering) Regulations, 1995 states that a bank shall require its personal customers when establishing business relations or conducting transactions with it to produce (a) an Omang identity card for a citizen of Botswana above the age of sixteen years; or b) a valid passport for a foreign national. Both section 10(3) of the Financial Intelligence Agency Act, 2009 and Regulation 5 of the Banking (Anti-Money Laundering) Regulations, 1995 do not allow for the flexibility, available through the adoption of a risk-based approach, whereby local authorities are permitted to allow a broader range of identification documentation in predefined types of business relationships and for specific financial inclusion products and accounts with low balance limits. It is recommended that this issue be addressed. The Financial Intelligence Agency Act (FIAA), 2009 does not contain any provisions on how the	

individual customer's identification is to be verified whilst Regulation 6 of the Banking (Anti-Money Laundering) Regulations, 1995 does. As the Banking (Anti-Money Laundering) Regulations, 1995 are only applicable to banks and not to any of the other specified parties listed in FIAA, the lack of a verification requirement in the FIAA represents a significant short coming in the Act. This should be addressed through amendments to the FIAA or by the issuing of relevant Regulations.

The Financial Intelligence Agency Act, 2009 also does not contain obligations for specified parties to conduct on-going due diligence on the business relationship and to scrutinise transactions throughout the course of the relationship. Regulation 5(2), on the other hand, prescribes that banks should renew the identification of their customer whenever they have doubts as to the identity of a customer in the course of its business relationship with the said customer.

It is recommended that the authorities consider addressing these deficiencies as soon as is reasonably practicable.

R10	CDD: Component C - The Timing and Verification of Identity

Section 10(2) of the Financial Intelligence Agency Act, 2009 specifically states that "where a specified party had established a business relationship with a customer before the coming into force of this Act, the specified party shall not conclude a transaction in the course of that relationship unless it has complied with subsection (1)" implying that no room was provided for the leniency provided by FATF Recommendation 10 with respect to completing the verification process as soon as reasonably practicable" and "where this is essential not to interrupt the normal conduct of business".

The Financial Intelligence Agency Act, 2009 does not contain any provision requiring specified parties not to open an account, commence a business relationship or perform transactions in the situation where CDD measures cannot be met nor does it require specified parties to terminate the business relationship in such circumstances.

It is recommended that the authorities consider rectifying these deficiencies as soon as is reasonably practicable.

R10	CDD: The Risk-Based Approach to CDD - Simplified Measures and Exemptions

The Financial Intelligence Agency Act, 2009 does not contain any provisions related to simplified CDD measures that may be undertaken by specified parties in proven low risk situations or to the adoption of a risk-based approach.

The Section 16A(4) of the Proceeds of Serious Crime Act, 1990 (as amended) however appears to provide for a complete exemption from all the CDD (identification, record-keeping) as well as transaction reporting measures when the designated body "enters into a business relationship, concludes a transaction or provides a service of a kind specified under the Schedule for another designated body or a body corresponding to a designated body in a state or country prescribed for the time being by the Minister as not applicable". However, the wording of this section is ambiguous and should be reviewed.

Section 16A(8) of the Proceeds of Serious Crime Act, 1990 (as amended) provides a further exemption by stating that the identification requirements (including those related to the structuring of transactions and to the identification when there is a suspicion of money laundering related to the business relationship, the transaction or the service) do not apply to long term insurance business when (i) the amount of the periodic premiums to be paid in respect of the life policy in any twelve month period does not exceed the amount prescribed in Regulations; or (ii) a

single premium to be paid in respect of a life policy does not exceed the amount prescribed for the purpose in Regulations. None of these amounts have been prescribed in regulation. Under (i), the Proceeds of Serious Crime Act, 1990 (as amended)[54] excludes "(i) a pension scheme taken out by virtue of a contract of employment or the occupation of the person to be insured under the life policy, provided that the life policy in question does not contain a surrender clause and may not be used as collateral for a loan; or (ii) a transaction or a series of transactions taking place in the course of a long term insurance business in respect of which payment is made from an account held in the name of the other party with a designated body or a body corresponding to a designated body prescribed under section from the exemption.

It is recommended that Botswana specifically introduces the risk-based approach into law and requires specified parties to determine the extent of customer due diligence measures on a risk sensitive basis depending on the type of customer, business relationship, product or transaction. Reporting entities should also be able to demonstrate to their supervisory authority that the extent of the measures is appropriate in view of the risks of money laundering, financing of terrorism or other criminal conduct.

Additionally, simplified due diligence processes should be specifically provided for in the law that allows reporting entities to apply simplified measures when there is a clear and demonstrated lower risk of money-laundering or the financing of terrorism, and there is no suspicion of either. The mandate to apply simplified due diligence measures should be extended to specified low risk products, services, transactions and delivery channels, particularly to products or services that provide appropriately defined and limited services to certain types of customers so as to increase access to financial services. (See South Africa Exemption 17, Circular 6 and the Proven Low Risk Exemption for Low Value Prepaid Instruments).[55]

R11	Record Keeping

The provisions on record keeping as set out in the Financial Intelligence Agency Act, 2009 are compliant with the requirements of FATF Recommendation 11.

R13	Correspondent Banking

No reference is made directly to correspondent banking in the Financial Intelligence Agency Act, 2009 and none of the required measures set out in FATF Recommendation 13 are met. The obligations of banks with respect to their correspondent banking relationships are also not mentioned in the Banking Act 1995[56] and its regulations, nor in the National Clearance and Settlement Systems Act, 2003.[57]

It is recommended that the authorities consider resolving this deficiency as soon as is reasonably practicable.

R15	New Technologies

The Financial Intelligence Agency Act, 2009, Proceeds of Serious Crime Act, 1990 (as amended)' Banking (Anti-Money Laundering) Regulations, 1995, the Banking Act, 1995 and the National

[54] Act 19 of 1990.
[55] In a meeting held with the Bankers Association of Botswana, it was intimated that the banks in Botswana are of the opinion that the Bank of Botswana should review its entire approach to AML. A request has recently been submitted to the Bank of Botswana through the Bankers Association requesting the Bank of Botswana to scale down KYC/CDD requirements for certain classes of customers through the application of a threshold approach. This request is currently under consideration.
[56] Act 13 of 1995.
[57] Act 5 of 2003.

Clearance and Settlement Systems Act, do not contain any provisions related to new technologies and non-face-to-face transactions.

It is recommended that authorities consider resolving this deficiency as soon as is reasonably practicable.

R16	Wire Transfers

The Financial Intelligence Agency Act, 2009, Proceeds of Serious Crime Act, 1990 (as amended), Banking (Anti-Money Laundering) Regulations, 1995, the Banking Act,1995 and National Clearance and Settlement Systems Act do not contain any provisions related to wire transfers. While in practice the banks include the required and accurate originator information and required beneficiary information with SWIFT messages, there is no obligation to do so set down in legislation.

It is recommended that the authorities consider resolving this deficiency as soon as is reasonably practicable. When proposing an amendment to the law and or regulations, authorities consider the inclusion of the suggested *de minimus* threshold of US$1,000.

R17	Reliance on Third Parties

Section 13 of the Financial Intelligence Agency Act, 2009 allows for the record keeping obligations set out in section 11 of the Act to be performed by a third party on behalf of the specified party. Specified parties must provide the Financial Intelligence Agency with the particulars of the third party, as may be prescribed.[58] Section 13(3) of the Financial Intelligence Agency Act, 2009 places the liability for non-performance of the obligations imposed by section 11 by the third party on the specified party. The Financial Intelligence Agency Act, 2009 is silent on CDD obligations being undertaken by third-parties. In addition, third parties are currently not required by Law or Regulation to make available to the financial institution copies of identification data and other documentation upon request and without delay, and a financial institution is not required by Law or Regulation to satisfy itself that the third party is regulated, supervised and has measures in place to meet CDD and record keeping requirements.

It is recommended that the authorities consider resolving these deficiencies as soon as is reasonably practicable.

R18	Internal Controls

No reference is made in the Financial Intelligence Agency Act, 2009 to the implementation of group wide programmes against money laundering and terrorist financing, nor to the requirement to implement policies and procedures for sharing information within the group. The FIAA is also silent on the FATF recommendation that financial institutions should be required to ensure that their foreign branches and majority-owned subsidiaries apply AML/CFT measures consistent with the home country requirements.

It is recommended that the authorities consider resolving these deficiencies as soon as is reasonably practicable.

[58] S13(2). It appears as if nothing has been prescribed to date.