

FinTech in South Africa: overview

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A Q&A guide to FinTech in South Africa.

The Q&A provides a high level overview of the financial services sector; the FinTech sector; regulatory environment for alternative finance activities, payment platforms, investment/asset management and InsurTech; regulatory compliance; government initiatives; cross-border provision of services and the future of FinTech.

This Q&A is part of the global guide to FinTech.

Overview of financial services sector

1. What are the types of entities that form the financial services sector in your jurisdiction?

Institutions that make up the South African financial services sector include:

- Banks.
- Insurers.
- Fund managers.
- Stock exchanges.
- Stock brokers.
- Central securities depositories.
- Central securities depository participants.
- Asset managers and other investment management and advisory firms.
- Credit providers.
- Credit bureaus.
- Debt collectors.
- Payment system operators.
- Money remitters.

- Collective investment schemes (including hedge funds).

2. What are the key regulatory authorities that are responsible for the financial services sector?

South African Reserve Bank (SARB)

The SARB is primarily responsible for the maintenance of price stability in the interest of balanced and sustainable economic growth in South Africa. The SARB is the main regulator of banking and payment services in South Africa. Its mandate has recently been extended to cover the regulation of prudential requirements for all financial services institutions in South Africa through its Prudential Authority function.

Financial Sector Conduct Authority (FSCA)

The FSCA is the market conduct regulator overseeing financial services providers, insurers, funds and fund managers, asset management and/or investment advisory entities, retirement funds, stock exchanges, stock brokers, central securities depositories, central securities depository participants and collective investment schemes, among others.

National Credit Regulator (NCR)

The NCR regulates certain aspects of the lending industry, specifically where:

- Consumers are natural persons or entities that fall below certain net asset value or annual turnover thresholds.
- The credit value exceeds prescribed thresholds.

The NCR regulates credit providers, credit bureaus and debt collectors. The National Credit Act 2005 applies to credit arrangements having effect in South Africa, regardless of the domicile of the credit provider.

Financial Intelligence Centre (FIC)

The FIC is South Africa's main anti-money laundering regulator. The Financial Intelligence Centre Act 2001 (FICA), designates "accountable institutions" that must comply with anti-money laundering reporting and client verification ("know your client") requirements. All financial institutions listed in [Question 1](#) are designated as accountable institutions under FICA.

Overview of FinTech sector

3. What areas of the financial services sector has FinTech significantly influenced so far?

The payment systems industry has been a major focus of FinTech activity in South Africa. A number of banks and non-bank players have introduced payment platforms and applications that enable money transfers.

FinTech is also starting to gain a foothold in peer-to-peer consumer and business lending. Lending platforms that are hosted offshore currently dominate the alternative lending market, but South African-developed platforms are starting to make their presence felt, and there is growing interest in the lending of cryptocurrencies for a return. There has been a significant growth in alternative funding through digital platforms (crowdfunding), mainly for the funding of small businesses and charitable causes. South Africa has also seen an increase in the number of initial coin offerings (by local and offshore issuers) and the establishment of cryptocurrency exchanges.

4. How do traditional financial services entities engage with FinTech?

From the authors' observations, traditional financial services entities are actively participating in FinTech developments and collaborating with start-up companies to develop FinTech-based products and services.

As FinTech developments have an impact on some of the core businesses of traditional financial institutions, such institutions realise the need to stay aware and involved in these developments to:

- Fully assess and manage their impact on their business models.
- Understand the scale of such impact and the potential for collaboration or mergers with FinTech companies.

This has resulted in some traditional financial services entities establishing incubators, FinTech accelerator/collaborative programmes and in-house innovation teams to specifically focus on FinTech developments. Consequently, legal mandates relating to data privacy, intellectual property, financial services regulation (such as licensing and outsourcing), financing and acquisitions (mainly private equity) are increasingly common. Traditional financial services entities are showing that they can use their influence, as significant financial services industry stakeholders, to understand, contribute and influence the direction of FinTech developments and regulation.

Regulatory environment

Alternative finance

5. How is the use of FinTech in alternative finance activities regulated?

The National Credit Regulator regulates all credit/lending activities that have an effect in South Africa in accordance with the National Credit Act 2005 (NCA). Credit/lending activities are regulated regardless of the means used to provide the credit. The NCA is broad enough to regulate any form of lending, regardless of the underlying platform used. For example, although crowdfunding is not specifically regulated, certain crowdfunding activities may require registration as a credit provider. These activities include where funds collected from the crowdfunding venture are on-lent to the market with interest, fees or other charges levied on the capital lent, to generate a return to investors.

As alternative financing falls under the same regulatory regime as traditional types of lending, there is currently no expectation that the legislation will be amended extensively to regulate alternative lending platforms.

One form of alternative lending that may be considered as falling outside the regulatory regime is cryptocurrency lending, as cryptocurrencies are not currently recognised as legal tender. All three key financial services regulators in South Africa, namely the South African Reserve Bank, the Financial Services Board and the Financial Intelligence Centre, have confirmed that:

- They do not currently regulate virtual currencies.
- Any transactions using virtual currencies are performed entirely at the end-user's own risk.

Payment platforms

6. How is the use of FinTech in payments-related activities regulated?

The central bank, the South African Reserve Bank (SARB), regulates the payment system industry under the National Payment System Act 1998. The SARB has mandated the Payment Association of South Africa (PASA) to oversee the participation of banks and non-bank players in the payment system. The PASA's work spans the full payment process, from payer to beneficiary, as well as all the tools, mechanisms, systems and processes applied to effect payment.

Non-bank players must have formal authorisation from the PASA to participate in the payment system. Additionally, their responsibilities and limitations are rigorously defined. For example, non-bank providers of payment services are known as system operators. They can provide the technology and technical infrastructure for payment transactions, but only South African-registered banks can issue cash and electronic money (e-money).

In its Position Paper on Cryptocurrencies issued in 2014, the SARB pointed out that virtual currencies are not legal tender in South Africa and should not be used as payment for the discharge of any obligation in a manner that suggests they are perfect substitute for legal tender. Despite expressing its concerns regarding payments using virtual currencies, the SARB does not currently prohibit or regulate such payments.

Investment/asset management

7. How is the use of FinTech in the securities market regulated, if at all?

There is no specific regulation on the use of FinTech in the securities market. Existing legislation may apply to FinTech services and products that fall within the defined scope of existing legislation.

Wholesale securities market

The Financial Sector Conduct Authority regulates the provision of financial services in South Africa in respect of domestic and foreign financial products. The Financial Advisory and Intermediary Services Act 2002 (FAIS) defines "financial product" to include securities. Therefore, any investment advisory and/or management or assistance provided to clients for entering into transactions involving securities is regulated under the FAIS. This is regardless of the medium/technology used to provide such services.

Retail investment market

The same position applies as for the wholesale securities market (*see above, Wholesale securities market*). Additionally, any offers made by a company to members of the public for investment in its securities trigger certain additional registration and reporting obligations under the Companies Act 2008.

InsurTech

8. How is the use of FinTech in the insurance sector regulated?

The scope of insurance legislation is broad enough to apply to InsurTech. The applicable legislation has broad deeming provisions that allow the Financial Sector Conduct Authority (FSCA) to deem a person's conduct as insurance business conducted in South Africa, which requires licensing by the insurance registrars. The two primarily applicable statutes are the Log-Term Insurance Act 1998 and the Short-Term Insurance Act 1998. The Registrar of Short-term Insurance and the Registrar of Long-term Insurance are both officers of the FSCA, which currently oversees the non-banking financial services industry in South Africa.

Blockchain-based solutions

9. How is the use of blockchain in the financial services sector regulated?

Distributed ledger technology and blockchain, virtual/digital currencies, cryptocurrency exchanges and initial coin offerings (ICOs) are not regulated in South Africa. All finance industry regulators (that is, the South African Reserve Bank (SARB), Financial Sector Conduct Authority (FSCA), National Credit Regulator and Financial Intelligence Centre (FIC)) have confirmed this.

In December 2014, the SARB issued a Position Paper on Cryptocurrencies. The paper made it clear that the SARB does not oversee, supervise or regulate the virtual currency landscape for effectiveness, soundness, integrity or robustness. Therefore, all activities involving the acquisition, trading or use of virtual currencies are performed at the sole risk of the end-user.

This does not imply that the SARB or other regulators are hostile towards blockchain and virtual currencies. On the contrary, they have adopted a positive attitude towards FinTech generally, as evidenced in a media statement issued by the SARB in February 2018. In this statement, the SARB indicated that it is taking a balanced approach to technological innovations in light of potential benefits and risks. It has established a Financial Technology Programme to track and analyse FinTech developments and assist policymakers in formulating frameworks in response to FinTech innovations. The programme will focus on:

- Cryptocurrencies.
- Innovation facilitators (including innovation hubs, regulatory sandboxes and accelerators.)
- Gaining a practical understanding of distributed ledger technology.

In April 2018 the SARB, FSCA, FIC and National Treasury launched the Intergovernmental Fintech Working Group (IFWG) and a concurrent, multiple stakeholder discussion form to initiate and curate public and private sector discussion and collaboration on FinTech matters generally, and a co-ordinated policy and regulatory approach specifically. The Competition Commission and the National Credit Regulator are expected to join the IFWG fold immediately.

Financial services infrastructure

10. What types of financial services infrastructure-related activities of FinTech entities are regulated?

The regulation of financial services in South Africa focuses on the substance of the financial product/service provided to clients, rather than the medium/infrastructure used for that purpose. Therefore, the Financial Advisory and Intermediary Services Act 2002 (FAIS) regulates any financial product or service (as defined under the FAIS), regardless of the platform used to provide the product or service. For example, the provision of a financial product or service in South Africa through blockchain infrastructure will require a licence from the Financial Sector Conduct Authority (FSCA).

Cryptocurrencies are not currently regarded as financial products. Therefore, financial services infrastructures that allow investors to invest in cryptocurrencies do not trigger the licensing requirement under the FAIS. However, the FSCA has the power to expand its own scope by deeming instruments or products to be financial products. Accordingly, it could (and is expected to) claim regulatory authority over cryptocurrencies in due course.

Regulatory compliance

11. What are the key regulatory compliance issues faced by FinTech entities?

The main regulatory compliance issues that FinTech companies face in South Africa are:

- Consumer protection.
- Data protection.
- Cybersecurity.
- Anti-money laundering and financial crime.

These compliance issues are not specific to FinTech, but apply to all companies doing business in South Africa.

While there are currently no specific regulations governing FinTech businesses, products and services, FinTech providers should model their businesses as closely as possible to the regulatory regime that applies to similar, non-FinTech businesses. For example, the Financial Advisory and Intermediary Services Act 2002 (FAIS) provides for the registration of financial services providers with the Financial Sector Conduct Authority.

Consumer protection

The Consumer Protection Act 2008 applies to all transactions between suppliers and consumers, unless specifically exempted. Exempted products include financial services if the Financial Services Board is the regulator responsible for overseeing the provider's conduct and the fair treatment of customers.

Data protection

FinTech companies that process personal data, domestically or across borders, must comply with the Protection of Personal Information Act 2013 (POPIA). POPIA is South Africa's first comprehensive data protection legislation. Only limited provisions of POPIA are currently in force, and its operative provisions governing data transfer and processing are expected to come into force during 2018. POPIA codifies the existing protections under the common law and the South African Constitution.

Cybersecurity

South Africa does not yet have a single, overarching legal and regulatory framework governing cybersecurity, which is dealt with in various pieces of legislation. This should change when the Cybercrimes and Cybersecurity Bill is enacted, which is expected during 2018.

Anti-money laundering and financial crime

South African laws and regulations in this area apply to FinTech providers as to any other company in the financial services sector or the broader economy. The main laws that combat money laundering and financial crime are the Financial Intelligence Centre Act 2001 (FICA) and the Prevention of Organised Crime Act 1998.

FICA requires regulated companies to (among other things):

- Conduct know-your-client checks and client verification procedures.
- Report suspicious activity in clients' accounts or transactions.

Other acts that deal with financial crime are the Prevention and Combating of Corrupt Activities Act 2004 and the Protection of Constitutional Democracy Against Terrorist and Related Activities 2004.

South Africa is also a member of international anti-money laundering organisations, such as the Financial Action Task Force and the Eastern and Southern Africa Anti-Money Laundering Group.

12. Do FinTech entities encounter any additional regulatory barriers in entering into partnerships or other arrangements with traditional financial services providers? How common are these arrangements in your jurisdiction?

Arrangements between FinTech entities and traditional financial services providers are common. However, some traditional financial services providers (such as banks) may require regulatory approvals to enter into such arrangements. The authors have not observed any specific challenges in this regard.

The Banks Act requires approval to be sought from the South African Reserve Bank (Prudential Authority) for contractual arrangements between a bank and a non-bank entity, where the parties undertake an economic activity that is subject to their joint control.

13. Do foreign FinTech entities intending to provide services in your jurisdiction encounter regulatory barriers that are different from domestic FinTech entities?

Foreign entities must obtain exchange control approval from the South African Reserve Bank (SARB) to both:

- Invest in South Africa.

- Remit investment returns or capital outside South Africa.

Approval must be obtained before any transaction is concluded. An application for exchange control approval must be made through an authorised dealer (that is, any of the large South African registered banks) to the Financial Surveillance Department of the SARB. However, these requirements are not unique to FinTech entities.

Additionally, foreign entities may be required to:

- Comply with immigration laws if they intend to send employees to South Africa.
- Register a branch/external company in South Africa (*Companies Act 2008*).

The Financial Sector Conduct Authority (FSCA) has started taking particular interest in the obligation of foreign financial services providers, under the Financial Advisory and Intermediary Services Act 2002, to register external companies in accordance with section 23 of the Companies Act 2008. The FSCA requires any applicant entity to disclose whether it will register an external company if it is granted a licence. However, this is only relevant to FinTech entities that require a licence to provide financial services/products.

Other regulators (such as the South African Reserve Bank and National Credit Regulator) have always required any person that intends to operate a regulated business in South Africa to establish a local presence by registering a subsidiary or an external company.

14. What steps can be taken in your jurisdiction to protect FinTech innovations and inventions?

IP protection measures can be taken to protect FinTech innovations and inventions. The most relevant categories of IP protecting FinTech innovations are copyright, patents, confidential information, trade secrets and know-how.

Copyright vests in the employer if the work was created in the course and within the scope of the author's employment. Patent rights vest in the holder of a patent registered under the Patents Act 1978.

Confidential information, trade secrets and know-how are protected under the common law against their misappropriation and misuse. A person who obtains information in confidence from another cannot use it in a manner that is detrimental to the disclosing party. Parties usually rely on contractual undertakings to protect these rights.

Government initiatives

15. To what extent have governments and/or regulators in your jurisdiction sought to create a more favourable regulatory environment for FinTech entities?

The regulatory authorities have a positive attitude towards FinTech generally. The South African Reserve Bank (SARB) issued a media statement in February 2018 setting out its approach to FinTech innovations and convened the Intergovernmental Fintech Working Group in April 2018 (see [Question 9](#)).

Virtual currencies are not currently regulated, so that transactions involving these currencies are conducted at the end-user's own risk, with no recourse to regulators.

16. Are there any special regimes in place to facilitate access to capital for FinTech entities?

The authors are not aware of any special regimes in place to facilitate access to capital for FinTech entities.

17. Is the government taking measures to encourage foreign FinTech entities to establish a domestic presence?

The authors are not aware of any such measures.

Cross-border provision of services

18. Are there any special rules that affect the cross-border provision of financial products or services by both domestic and foreign FinTech entities?

Domestic FinTech entities

The Financial Advisory and Intermediary Services Act 2002 regulates the provision of financial services (in relation to financial products) and products to clients in South Africa by both domestic and foreign entities (on a cross-border basis). However, foreign financial services providers benefit from certain exemptions (such as relief from the requirements to take the local prescribed regulatory examinations, to appoint a local auditor and to maintain a local bank account).

Foreign FinTech entities

See above, [Domestic FinTech entities](#).

The future of FinTech

19. Are there any ongoing regulatory measures or initiatives that may affect FinTech in your jurisdiction?

The current state of play is promising for FinTech. Developments are market and industry-driven, and the regulators are observing and monitoring innovation in this sector rather than intervening in it.

The South African Reserve Bank (SARB) has recently issued a media statement setting out its approach to FinTech innovations and convened the Intergovernmental Fintech Working Group in April 2018 (see [Question 9](#)).

The regulatory authorities

South African Reserve Bank (SARB)

Main activities. The SARB is primarily responsible for the maintenance of price stability in the interest of balanced and sustainable economic growth in South Africa and it houses the Prudential Authority. The SARB is the main regulator of banking and payment services in South Africa. Its mandate has recently been extended to cover the regulation of prudential requirements for all financial services institutions in South Africa.

W www.resbank.co.za

Financial Sector Conduct Authority (FSCA)

Main activities. The FSCA is the main financial services regulator. It primarily regulates financial services providers, insurers, collective investment schemes and other funds, asset management and/or investment advisory entities, pension funds, securities exchanges and depositories, among others. The FSCA is responsible for overseeing market conduct of financial institutions.

W www.fsca.co.za/Pages/Default.aspx

National Credit Regulator (NCR)

Main activities. The NCR regulates certain aspects of the lending industry, specifically where consumers are natural persons and **[lending]** entities exceed certain net asset value or annual turnover thresholds, and/or the credit value is below prescribed thresholds. The NCR regulates credit providers, credit bureaus and debt collectors. The National Credit Act 2005 applies to credit arrangements having effect in South Africa, regardless of the credit provider's domicile.

W www.ncr.org.za

Financial Intelligence Centre (FIC)

Main activities. The FIC is South Africa's main anti-money laundering regulator. Under the Financial Intelligence Centre Act 2001, the FIC designates "accountable institutions" that must comply with anti-money laundering reporting and client verification (know-your-client) requirements.

W www.fic.gov.za

Online resources

Southern African Legal Information Institute (SAFLII)

W www.saflii.org/za/legis/num_act

Description. SAFLII is an online repository of legal information that aims to promote the rule of law and judicial accountability by publishing legal material for open access. SAFLII also hosts legal materials from other countries in the region, which are obtained through partnerships and collaborative efforts with governments, courts, law societies and more recently through linking to other Legal Information Institutes established in the region.

Contributor profiles

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Professional qualifications. Attorney and Notary, High Court of South Africa; Accredited Commercial Mediator, Centre for Effective Dispute Resolution (CEDR)

Areas of practice. Financial institutions and services; pensions; healthcare; environmental, social and governance and responsible investment; impact investing; advisory and contentious regulatory.

Non-professional qualifications. BA LLB, University of Cape Town

Recent transactions

- Advising on initial coin offerings (ICOs) and crypto-exchange formations in South Africa.
- Advising deVere Group on financial services regulation in South Africa.
- Advising Liberty Group Ltd in relation to an industry-wide Financial Services Board inspection.
- Representing Transnet SOC Ltd in defence of South Africa's largest class action, relating to pensions.

Languages. English

Publications

- *Lex Mundi Global Token Sales Guide 2018.*
- *Lexology: Fintech South Africa 2018.*
- *Lexis Nexis Law of South Africa: Pensions, 2010.*

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Professional qualifications. Attorney, High Courts of South Africa.

Areas of practice. Banking; financial services (advisory and asset management, FinTech, securities, insurance, capital markets, investment funds structuring, payment services and exchange control).

Non-professional qualifications. Bachelor of Laws, University of Limpopo; Master of Laws, University of Witwatersrand

Publications

- *Lex Mundi Global Token Sales Guide 2018.*
- *Lexology: Fintech South Africa 2018.*

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Professional qualifications. Attorney, South Africa

Areas of practice. Banking and financial services regulatory law.

Non-professional qualifications. LLB and LLM (Banking Law) degrees (both awarded cum laude), Rand Afrikaans University (RAU) (now the University of Johannesburg); senior lecturer at the Faculty of Law of the University of Johannesburg (responsible for the Law of Contract and, at post-graduate level, Financial Services Regulation)

Relevant experience

- Advised wiGroup Proprietary Limited on the regulatory implications of a mobile application which facilitates peer-to-peer money transfers.
- Advised Wirecard South Africa Proprietary Limited on the issuance of pre-paid debit cards supported by Mercantile Bank Limited.
- Advised Airbnb Payments UK Limited on its proposed offering of peer-to-peer payment capabilities in South Africa.
- Acted as African counsel for Validus Holdings in its acquisition of Flagstone Reinsurance Holdings RSA, a New York Stock Exchange listed entity, and specifically in relation to Flagstone's subsidiary, Flagstone Reinsurance Africa Limited, a South African-domiciled short-term insurer.
- Advised Midbrook Lane Pty Ltd, Riskowitz Value Fund, Protea Asset Management LLC and Khrom Investments Fund, LP regarding the acquisition of increased indirect shareholding in three registered insurers forming part of the Constantia group.
- Advised Alexander Forbes Group Holdings on its dual track M&A and ZAR9.8 billion IPO process, which resulted in Alexander Forbes Group Holdings listing on the JSE. After announcing its intention to float, the company launched an offer for subscription and a concurrent offer for sale by existing shareholders.
- Regularly advises Credit Suisse AG (Switzerland), Morgan Stanley, J.P. Morgan, Bank of America, N.A., Barclays Bank plc, Bank of New York Mellon, BNP Paribas, Investec Asset Management and

T. Rowe Price International Limited regarding all aspects of South African banking and financial services regulation.

- Recognised by *Who's Who Legal 2018* in the following categories: Banking: Regulatory; and Banking: Fintech.
- Named as a Leading Lawyer in *Who's Who Legal Banking: Regulatory 2017*.

Publications. Amendment of the *Notice on Qualifications, Experience and Criteria for Approval as Compliance Officer*.

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