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South African Institute of Race Relations NPC,
Submission to the National Treasury regarding the
Draft Capital Flow Management Regulations **30 June 2026**
SYNOPSIS

1 Introduction

On 17 April 2026 the National Treasury ("the Treasury") invited interested persons to submit public comments on the Draft Capital Flow Management Regulations ("the Regulations") within 30 days or by 18 May 2026. It later postponed the deadline for comment to 30 June 2026.

This submission on the Regulations is made by the South African Institute of Race Relations NPC ("the IRR"), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation among the peoples of South Africa.

2 inadequate public participation

The Treasury has failed to comply with the Socio-Economic Impact Assessment (SEIA) Guidelines adopted by the government in 2015. Under these guidelines, the Treasury should have provided "a detailed evaluation of the likely effects of [the Regulations] in terms of implementation and compliance costs as well as the anticipated outcome." Moreover, this assessment should have accompanied the Regulations when they were gazetted for public comment.

The Treasury has also failed to comply with the National Policy Development Framework of 2020. This requires that policy makers must "inform and engage stakeholders" on "the nature and magnitude of a policy issue," as well as on its likely "impacts and risks". Such assessments, the Framework adds, must be "informed by the best available evidence, data, and knowledge."

The Treasury's tick-box approach to public consultation is inconsistent with this Framework and thus also in breach of Chapter Ten of the Constitution. This states (in Section 195(1)(e)) that "people's needs must be responded to and the public must be encouraged to participate in policy-making." As the Framework points out, this provision means that "the involvement of the public in policy making is a constitutional obligation that government institutions must respect and institutionalise."

Instead of complying with these obligations, the Treasury has provided limited and conflicting information as to why the Regulations are required. It has also given South Africans – even with the last-minute extension of its initial deadline – a very short period to comment on the most substantial overhaul of exchange control regulations in six decades. Overall, it has omitted to provide the public with the information it needs to “know about the issues” raised by the Regulations and then to have an “adequate say” on them. The Regulations are thus as procedurally unconstitutional as the various other laws that the Constitutional Court has struck down for similar failures.

3. The unconstitutionality of many of the proposed rules

Many of the provisions in the Regulations are prima facie inconsistent with guaranteed rights in Chapter Two of the Constitution. Many are also at odds with the rule of law, “the supremacy” of which is a foundational value of South Africa’s democracy. Some are inconsistent with other aspects of the Constitution. These include the doctrine against vagueness of laws and the need for regulations to be *intra vires* (within the powers) of their principal statutes. The separation of powers between the legislative, executive and judicial branches of government must also be upheld.

Many of these requirements have been disregarded. The resultant unconstitutionality is particularly evident in the rules regarding bitcoin and other crypto assets, which are the focus of the IRR’s submission.

The Currency and Exchanges Act of 1933, under which the Regulations are to be adopted, was enacted 93 years ago and more than six decades before the 1996 Constitution came into effect. The 1933 Act purports to authorise searches, attachments and forfeitures of the kind set out in the Regulations, but this is not nearly enough. All branches of government, including the National Treasury, must now comply with the Constitution at all times. Where regulations limit guaranteed rights – including the rights to privacy, property, and freedom of trade – such limitations must be “reasonable and justifiable,” as required by Section 36 of the Constitution.

Inconsistency with the Bill of Rights

Many of the rules regarding bitcoin and other crypto assets unjustifiably infringe on the right to freedom of trade in Section 22 of the Bill of Rights. Others conflict with the right to privacy in Section 14 of the Constitution. Under these provisions, as David Ansara, CEO of the Free Market Foundation, has warned: “Government officials may enter your home or place of work, search you, seize your devices, copy your data, and attach your property. Moreover, they can do so without a warrant.”

The Regulations also breach the right to privacy by demanding the surrender of all computer passwords and codes to bank accounts and other personal information. In the words of Ivo Vegter, Policy Fellow at the IRR: “[T]the Regulations require that, upon command, you surrender ‘full particulars in writing of all and any passwords, personal identification numbers or codes which are necessary to enable National Treasury to obtain access to and control over [your] crypto assets’.” They disregard the fact that “these same passwords might protect your personal data, private photographs, medical information, privileged professional communication, or corporate network access.”

In addition, many of the proposed rules conflict with the property rights guaranteed in Section 25 of the Constitution. Among other things, they demand the compulsory sale of supposedly “excess” crypto assets, either to the Treasury or to a “Crypto Asset Service Provider” (“CASP”). In addition, such forced sales will take place either at the initial prices at which the assets were bought – regardless of their subsequent appreciation – or at the prices decided by the Treasury or a CASP. Comments Mr Vegter: "The Treasury or its authorised agents will [often] decide how much the bitcoin owner is to be paid, regardless of the market value of his or her bitcoin. This is expropriation with arbitrary (or no) compensation by another name."

Absurdly, and unconstitutionally, the Regulations also provide for the forfeiture of bitcoin which owners are suspected of "exporting" or seeking to "export" from South Africa. Yet bitcoin has no physical location in any country and therefore cannot be exported.

Unlike conventional assets, crypto assets exist on distributed blockchains: ledgers replicated across thousands of nodes in multiple jurisdictions simultaneously. A crypto asset is not "located" in any single country. What the owner holds is a private key, a cryptographic string that grants control over the asset on the blockchain. Whether that key is stored on a device inside South Africa or memorised by its owner, the underlying asset remains distributed across the network.

For the state to seize bitcoin for an alleged breach of an export ban is both illogical and unconstitutional. The unconstitutionality is compounded where – in the absence of an attempted or actual "exporting" offence – the bitcoin is also forfeited to the Treasury. In this situation, the unwarranted forfeiture to the state prima facie amounts to an expropriation for which just and equitable compensation must be paid.

Under Section 25 of the Constitution, moreover, the onus lies on the Treasury to show that this expropriation is for "public purposes" or "in the public interest", as defined in Section 25(4) of the Constitution (which deals with land reform and equitable access to natural resources). The Treasury must also show that the amount of compensation, along with its timing and manner of payment, "have been" agreed with the owner or "decided or approved by a court" *before* ownership shifts to the state. The Regulations disregard these requirements.

In addition, the limits imposed on freedom of trade, as well as the rights to privacy and property, cannot be justified under Section 36 of the Constitution. This is primarily because "less restrictive means" of "combating money laundering, terrorist financing and the proliferation of illicit financial flows" can readily be devised.

Unconstitutionality on other grounds

Some of the proposed rules are inconsistent with core principles of the Constitution that are not included in the Bill of Rights and hence cannot be justified under the limitations clause in Section 36.

For example, some of the proposed rules are so vague – if not so unintelligible – that different officials are sure to interpret them in different ways at different times. This puts them in breach of the doctrine against vagueness of laws. This doctrine is intrinsic to the rule of law, the "supremacy" of which is a founding value of South Africa's democracy under Section 1(c) of the Constitution.

Other proposed rules are *ultra vires* the 1933 Act, with its short and relatively simple provisions. This is particularly true of the clauses dealing with crypto assets, which seek to extend the provisions of a 93-year-old statute to a novel and entirely different asset class. Many of these clauses are thus *ultra vires* the principal statute, making them unconstitutional for this reason too. In addition, the National Treasury is part of the executive and has no law-making powers under the separation-of-powers doctrine. Hence, many of the rules the Regulations purport to introduce need to be enacted by Parliament instead.

4 New rules that are economically unwise

South Africa urgently needs to push up the growth rate and bring down the unemployment one. However, it cannot succeed on either of these aims without attracting much more fixed investment into factories, machines and ports, along with its road, rail and energy infrastructure. Only investment of this kind will increase the productive capacity of the economy, so equipping it to grow and generate many more jobs.

The average annual fixed investment rate across the world is 26% of GDP a year. Some countries, China in particular, have long had significantly higher rates. The National Development Plan (NDP) of 2012 recommends a fixed investment rate for South Africa of 30% of GDP by 2030. In 2025, however, the country's fixed investment rate – which had long hovered at around 15% of GDP – sank further to 13.7% of GDP. This is far off the global average and less than half what the NDP urges. Unless South Africa raises its fixed investment rate to at least 20% or 25% of GDP, it will battle to bring down its national unemployment rate (37.2%) and its sky-high youth unemployment rate (60.9% for those aged 15 to 24).

The imperative need for much more fixed investment, as the key to rising growth, employment and prosperity, makes the Regulations particularly economically unwise. If the proposed rules are adopted in their current form, they will make it even more difficult for South Africa to attract more of the fixed investment it so urgently requires. They could also help trigger an outflow of capital which the country cannot afford.

As Mr Vegter points out, "capital goes where capital is treated best." Not surprisingly, it is averse to going to countries where laws are damaging and exchange controls could prevent it from repatriating the returns it has made on its investments. He adds:

> "In a globally interconnected world, investment tends to go towards countries that protect private property rights, where local laws are rational, transparent, and enforceable, and where the returns on capital can be realised and expatriated. It's a counterintuitive point. Countries that make it easier to take money out are more likely to convince investors to put it in. Panama, Singapore, Mauritius, and the United Arab Emirates are global trade and financial hubs for this exact reason.
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> As economist Chris Hart posted on X.com: 'There is only one purpose for capital controls – that is to shield bad policies. Countries with good policies have no need for capital controls.' Hart is right... Government's efforts to weaken, rather than strengthen, private property rights, its willingness to impose extractive policies such as Black Economic Empowerment (BEE), and its punitive tax regime make it a hard sell for investors. Its latest attack on cryptocurrency further weakens the investment case."

Western democracies do not apply comprehensive exchange controls of the kind introduced in South Africa in 1961 and now to be extended under the Regulations. There are no equivalent controls in the United States (US), the United Kingdom (UK) or member states within the

European Union (EU). Instead, these countries have targeted financial controls aimed at countering money-laundering, inhibiting the funding of terrorism, or enforcing financial sanctions against specified countries and individuals. Significant cash transactions must thus be declared, but the thresholds for reporting are relatively high: £10,000 in the UK, $10,000 in the US and €10,000 in the EU. (These sums, in rand values, range from about R160,000 to R200,000.) Moreover, these rules are tools deployed for criminal justice and national security reasons. They are not macroeconomic tools intended to keep capital corralled within these countries.

If South Africa wants to attract more fixed investment, it should be following the example of these states. Instead, via the Regulations, it is further aligning itself with autocracies such as China, Cuba, Iran, Russia, Venezuela and Zimbabwe, all of which have extensive exchange controls.

South Africa's existing exchange control regulations were introduced by the National Party government in 1961 to curb capital flight during the apartheid era. When it came to power in 1994, the African National Congress (ANC) government could have dispensed with these apartheid era rules. Instead, it retained them, saying this was needed to maintain macroeconomic stability. More than 30 years after the political transition, these "anachronistic controls persist to this day," notes Mr Ansara. The real need is to put an end to them – not to expand them even further, as the Regulations propose.

5 The way forward

The Regulations are unconstitutional on both procedural and substantive grounds. Procedural unconstitutionality is evident from the Treasury's "tick-box" approach to public consultation, which has failed to provide the public with the information it needs to "know about the issues" and then to have an "adequate say."

Substantively, the Regulations are unconstitutional too. Many of the proposed new rules unjustifiably limit guaranteed rights. Many lack the certainty required by the rule of law. Some are *ultra vires* the 1933 Act, making them unconstitutional for this reason too. Some introduce complex rules on a new asset class (crypto assets) which – if they are to be adopted at all – need to be enacted by Parliament, in keeping with the doctrine of the separation of powers.

The Regulations are also economically unwise. In particular, they are sure to deter the inflows of foreign capital urgently needed to raise the fixed investment rate from 13.7% of GDP a year to 25% at least – and ideally to the 30% of GDP the National Development Plan recommends. Yet without fixed investment at the 25% rate, it will be extremely difficult to achieve the increased growth the Government of National Unity to pledged to promote.

The many flaws in the proposed new rules are too fundamental to be corrected. Instead, the Regulations should simply be withdrawn.

South African Institute of Race Relations NPC **30 June 2026**