

# Corporate & Commercial and Trusts & Estates

**ALERT**

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INCORPORATING  
KIETI LAW LLP, KENYA

## IN THIS ISSUE

Recent amendments to South Africa's trust and non-profit organisation legislation in response to the Financial Action Task Force greylisting: Part two

Part one of this series ([which you can read here](#)) dealt with the amendments that are relevant to non-profit organisations.



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## Recent amendments to South Africa's trust and non-profit organisation legislation in response to the Financial Action Task Force greylisting: Part two

Part one of this series ([which you can read here](#)) dealt with the amendments that are relevant to non-profit organisations.

As alluded to in that article, the General Laws (Anti Money Laundering and Combatting Terrorism Financing) Amendment Act 23 of 2022 also amended the Trust Property Control Act 57 of 1988 (TPCA). The Legislature passed amendments (effective from 1 April 2023) which impose disclosure and administrative obligations on trustees (specifically when transacting with institutions listed in the Financial Intelligence Centre Act 38 of 2002 (FICA)).

Amendments were made to sections 1, 6, 8, 10, 11, 19 and 20 of the TPCA, as well as the regulations thereto.

Three primary obligations have arisen, namely to:

1. Collect, record and maintain details pertaining to **beneficial ownership** of the trust.
2. Lodge such information with the Master of the High Court (Master) by means of an **electronic register**.

3. Collect, record and maintain details pertaining to **accountable institutions** with which the trustees have dealings.

The prescribed information in respect of beneficial owners must also be made available to any person or entity prescribed in Regulation 3E to the TPCA, examples of which include the National Prosecuting Authority, the South African Revenue Service (SARS) and the Financial Intelligence Centre.

### Who is a beneficial owner in the context of trusts?

The term is defined in section 1 of the TPCA and means:

- each founder (also known as a donor, or the creator) of the trust;
- each trustee of the trust;
- a natural person who directly or indirectly ultimately owns the trust property (this person appears to be distinguished from a beneficiary);



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- a natural person who exercises effective control of the administration of the trust (this person appears to be distinguished from a trustee); and
- each beneficiary referred to by name in the trust deed/s, including any amendments thereto (it does not appear that each person within a class of beneficiaries must be identified, but regard must be had to the third point above, which may broaden the scope in this regard).

If a beneficiary has ever received a distribution from a trust, then the new rules would appear to apply to that beneficiary even if the beneficiary is not specifically named in the trust documentation.

It is also important to note that if any of the parties is a juristic person then the natural person who directly or indirectly ultimately owns or exercises effective control of that juristic person is considered the beneficial owner.

### What information must be collated in respect of beneficial owners?

Regulation 3C sets out the prescribed information, which is listed below. Additionally, a certified or verified copy of the official identity document or passport of each beneficial owner must be retained by the trustees (this needn't be uploaded to the Master's register).

- Full names
- Date of birth
- Nationality
- Official ID or passport number, indicating the type of document and country of issue
- Citizenship
- Residential address and, if different, address for service of notices
- Other means of contact
- South African income tax number, if applicable
- Class or category of beneficial ownership under which the person falls (e.g. founder, beneficiary, trustee, etc.)
- Date upon which the person became a beneficial owner of the trust

- Where applicable, the date upon which the person ceased to be a beneficial owner of the trust

### Actions to be taken

As a starting point, it is important to note that the trustees bear the responsibility of reporting in terms of the law. Trustees must establish and record the beneficial ownership of the trust and keep a record of the prescribed information relating to the beneficial owners. They must also lodge a register of the prescribed information on the Master's online portal. The Department of Justice has set up a Google form to enable trustees or their representatives to upload the beneficial ownership register.

### Accountable institutions

The term "*accountable institution*" is defined in clause 1 of the TPCA, with reference to section 1(1) of and Schedule 1 to FICA. The list of accountable institutions includes legal practitioners, estate agents, banks and financial services providers.

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Section 10(2) of the TPCA requires that trustees disclose their position as trustees to any accountable institution with which the trustees engage in that capacity and must make it known to the accountable institution that the relevant transaction or business relationship relates to trust property.

Section 11(1)(e) of the TPCA further requires that trustees record the prescribed details pertaining to accountable institutions that they use as agents to perform any trustee functions relating to trust property and from which trustees obtain any services in relation to the trust.

Regulation 3B provides further clarification as to the prescribed details to be recorded by trustees in relation to accountable institutions, namely:

- the name of the accountable institution;
- if the accountable institution is a person other than a natural person, the registration details of that person;

- if the accountable institution is a natural person, the official identity or passport number of the natural person, indicating the type of the document and the country of issue;
- if trustees used or use the accountable institution as an agent to perform trustee functions, the nature of such functions (use of both the past and future tense seems to indicate that the details of historic relationships must be maintained);
- if trustees obtained or obtain services from the accountable institution, the nature of the services (use of both the past and future tense seems to indicate that the details of historic relationships must be maintained);
- if trustees entered into a single transaction, as defined in FICA, with the accountable institution, the date on which the single transaction was entered into and the nature of the single transaction; and

- if trustees entered into a business relationship as defined in FICA with the accountable institution, the date on which the business relationship was entered into and nature of the business relationship that was entered into.

### **Penalties**

Trustees who fail to comply with the obligations outlined in the regulations could, upon conviction, be liable for a fine not exceeding R10 million or imprisonment not exceeding five years, or both.

### **SARS**

Additionally, during December 2022, SARS published requirements pertaining to the disclosure of:

- distributions from trusts to beneficiaries or other persons (this appears to include instances where payments are made on behalf of beneficiaries); and
- beneficiaries' demographics.



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This appears to be with effective from September 2023 and each disclosure will be with regard to the previous tax year.

The trustees must take this into account when instructing the trust's accountants going forward.

### Conclusion

Certain requirements may be impractical, or unreasonable to achieve. In some instances, compliance may simply be impossible.

As the fiduciary field works with the new provisions of the TPCA, further guidance will likely be sought as to the scope of certain requirements.

We recommend that, to start, substantial compliance be achieved to the best of the trustees' ability, and that any queries be raised in

writing with the Master to the extent that an issue arises in obtaining and collating the required information. This could indemnify the trustees should failure to adhere to the TPCA and regulations result from failure to fully comprehend the sections which have not yet been tested in practice.

If properly implemented by the relevant regulators, these amendments could go a long way to addressing shortcomings in South Africa's legal framework identified by the Financial Action Task Force (FATF), by combating money laundering, corruption and tax evasion. If these amendments are properly administered and enforced, it may lead to South Africa being removed from the FATF grey list.

**Emily West, Menachem Gudelsky, Mbonisi Ndlovu and Gaby Wesson**



Cliffe Dekker Hofmeyr

### 2023 RESULTS

**Chambers Global 2021 - 2023** ranked our Corporate & Commercial practice in **Band 1: Corporate/M&A** and in **Band 2 Capital Markets: Debt and Capital Markets: Equity**.

**Ian Hayes** ranked by **Chambers Global 2022 - 2023** in **Band 1: Corporate/M&A**.

**David Pinnock** ranked by **Chambers Global 2022 - 2023** in **Band 1: Corporate/M&A: Private Equity**.

**Peter Hesseling** ranked by **Chambers Global 2022 - 2023** in **Band 2: Corporate/M&A** and in **Band 3 Capital Markets: Equity for 2023**.

**Willem Jacobs** ranked by **Chambers Global 2022 - 2023** in **Band 2: Corporate/M&A** and in **Band 3: Corporate/M&A: Private Equity**.

**Sammy Ndolo** ranked by **Chambers Global 2021 - 2023** in **Band 4: Corporate/M&A**.

**David Thompson** ranked by **Chambers Global 2022 - 2023** in **Band 4: Corporate/M&A**.

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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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