

Cultivating a Culture of “Trust”

The Trust Property Control Act: Amendments and Consequences of Non-compliance

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INTRODUCTION

In March of 1989, the Trust Property Control Act 57 of 1988 (the “**Act**”) came into operation in South Africa. This specific piece of legislation became fundamental in governing the management and control of trusts, in addition to reinforcing oversight over trustees and their management of trusts. However, as South African jurisprudence evolved, the need arose to address several gaps left by the Act since its promulgation.

In March of 2023, and in an effort to avoid being grey listed by the Financial Action Task Force (the “**FATF**”) (an intergovernmental organisation South Africa is a member of, which specialises in the development of policies to combat money laundering), the legislature amended the Act. The amendments are geared towards, inter alia, the combating of terrorist financing and money laundering. These amendments were devised to be in line with SARS’ new compliance requirements for submission of trust annual financial statements. These amendments, which came into effect from 1 April 2023, were introduced in terms of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022 (which itself came into force in December 2022) in order to provide anti-money laundering agencies more independence and power against corruption.

AMENDMENTS TO THE ACT

Amongst the amendments, the defined terms “accountable institution” and “beneficial owner” have been inserted. The definition of “accountable institution” is consistent with that contained in section 1(1), read with Schedule 1, of the Financial Intelligence Centre Act 38 of 2001 (“**FICA**”). The definition of “beneficial owner” includes natural persons who directly or indirectly own trust property, or exercise effective control over trust administration arrangements established pursuant to a trust instrument. Simply put, a beneficial trust owner is a person who has an ultimate interest in the trust property, either directly or indirectly. This is aimed to ensure further transparency of ownership of trusts and to assist with the facilitation of financial crime investigations. The issue of transparency of beneficial

ownership is not recent and has always been a problem within the legislative framework.

Section 11A of the Act sets out the requirements for maintaining up-to-date beneficial ownership registers and records, placing an onus on the trustees to safeguard the integrity of trust operations. The amendment specifically seeks to place responsibility on the trustees to disclose the identities and additional documentation of beneficial owners of the trust, such as:

- full names;
- date of birth;
- nationality;
- official identity document number or passport number, including the type of document and the issuing country;
- citizenship;
- residential address;
- address for service of notices (if different from the residential address);
- other means of contact (e.g., email, phone);
- tax number (if the person is a registered taxpayer in the Republic);
- the class or category of beneficial ownership under which the person falls;
- the date on which the person became a beneficial owner of the trust; and
- the date on which the person ceased to be a beneficial owner of the trust, if applicable.

The above amendment seeks to provide more transparency on the beneficial owners of trusts and to allow SARS and law enforcement the opportunity to more closely examine trust ownership structures, should there be a need to.

In maintaining and submitting the up-to-date beneficial owner records with the Master’s Office, the amendment further requires the founder of the trust to update the FICA profile at the relevant time for each and every beneficial owner. This requirement extends to entities which assume the role of a beneficial owner at any point and the natural persons within these entities who will ultimately benefit will be recorded.

Section 10(2) of the Act requires trustees to disclose to accountable institutes they interact with that they are engaging with them in their capacity as trustee and that the transactions or the business relationship they are engaged in/with concerns trust property. This is crucial in preventing money laundering and crime financing as accountable institutions are liable to other entities, such as financial institutions, which combat money laundering and associated financial crimes/offences.

Section 11(1)(e) mandates trustees to record the prescribed details relating to accountable institutions which they engage as agents.

Although there has been much concern surrounding the disclosure of the beneficial owner's personal information on the electronic registers, the registers are only accessible to the trustees of the trust and the Department of Justice has released further statements ensuring the bulking up of their cyber security following a breach in 2021.

NON-COMPLIANCE WITH THE ACT

The Act sets out harsh penalties for non-compliance with the Act and the new amendments thereto. Offences include, inter alia, failure to disclose to an accountable institution that the transaction or business relationship relates to trust property, failure by a trustee to record the prescribed details of accountable institutions engaged as agents, failure to establish and record the beneficial ownership information of a trust, failure to maintain an up-to-date record of beneficial ownership information, and failure to lodge a register of beneficial ownership information with the Master of the High Court.

The penalties imposed for non-compliance include a fine up to R10 million, imprisonment of up to five years, or both. Such heavy penalties indicate just how essential diligent compliance with the Act truly is.

CONCLUSION

Although it has been just over a year since these amendments were effected, many complaints have arisen over the expectation that these regulations are to be implemented immediately and all those affected are to be immediately compliant, despite many registers already in the Master's office being unequipped to account for such complex ownership scenarios.

In response, on 17 September 2024, the Department of Justice and Constitutional Development released a media statement which addressed the amendments as well as non-compliance with them. This statement warned of the new, harsher penalties for non-compliance set out in the amendments and further that trustees have until 15 November 2024 to file the beneficial ownership registers and become fully compliant.

This will allow for South Africa to exit the grey list in January 2025, which is hoped to have a significant and beneficial impact on South Africa's international standing in respect of trust regulation.



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