



30 October 2023

**To: The National Treasury**

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**RE: ADMINISTRATIVE IMPRACTICALITIES OF THE NEW GREYLISTING RULES FOR TRUSTEES AND COMPANIES**

As the South African Institute of Taxation (SAIT), we write this submission regarding the administrative impracticalities associated with the requirements that have arisen in response to the Financial Action Task Force's (**FATF**).

In making this submission, we agree that reform is necessary to ensure that South African financial flows do not fall into negative status. We are merely trying to simplify compliance and protect the minimum privacy standards of South African financial flows. We set out below our preliminary concerns regarding some of these administrative requirements that require urgent intervention and action.



## 1. THE DEFINITION OF ULTIMATE BENEFICIAL OWNERSHIP: NEED FOR UNIFORMITY

In the fact sheet, entitled “*What does FATF greylisting mean for a country*”, the National Treasury published a plethora of information regarding greylisting. Strategic deficiencies identified by the FATF that need to be addressed for South Africa to avoid “greylisting” would be:

*“to ensure that competent authorities have timely access to accurate and up-to-date **Beneficial Ownership** (BO) information on legal persons and arrangements and applying sanctions for breaches of violations by legal persons to BO obligations”*

We understand that the definition of beneficial owner/ beneficial ownership appears in four different sets of legislation (i.e. four different acts). The term “beneficial owner” or “beneficial ownership” differs slightly in each as indicated below.

### 1.1. FATF definition

The FATF definition of beneficial owner focuses on:

- natural (not legal) persons who own and take advantage of capital or assets of the legal person; and
- those who really exert effective control over it.

### 1.2. SARS definition

The SARS website provides a generic overview of the definition of a beneficial owner, which we note is only defined in relation to dividend tax (Section 64D of the Income Tax Act, No.58 of 1962) and not in relation to trusts or partnerships. The definition is as follows:

*“the person entitled to the benefit of the dividend attaching to a share.”*

Additionally, for purposes of CRS reporting for AML/KYC, SARS appears to hold the view that a natural person should be treated as a controlling person if the natural person meets the AML/KYC threshold for ultimate beneficial ownership. Thus, in turn for KYC purposes, we note that an ultimate beneficial owner is similarly and normally defined as a:

*“a person with significant control at the 'top of a tree' in a business”.*

Recent draft amendments to the Tax Administration Act, however, introduced a definition of “beneficial owner” in relation to companies, partnerships, and trusts (and merely refers to the respective definitions in the relevant acts) but the definition is nowhere applied in the draft amended Act. Prima facie the insertion of the definition refers to completion of form requirements that relate thereto.

### 1.3. FIC ACT

Section 1 of the Financial Intelligence Centre Act, 38 of 2001 defines a beneficial owner in respect of a legal person to mean:

*“(a) a **natural person** who directly or indirectly*

- (i) ultimately owns **or** exercises effective control of*
- (aa) a client of an accountable institution; or*

- (bb) a legal person, partnership or trust that owns or exercises effective control of, as the case may be, a client of an accountable institution; or  
(ii) exercises control of a client of an accountable institution on whose behalf a transaction is being conducted; and

**(b) includes**

- ...  
(iii) in respect of a trust, each natural person contemplated in section 21B(4)(c), (d) and (e)”

The definition of “trust arrangement” in this Act excludes:

- Trusts created by a court order
- Trusts created by a testamentary disposition
- Trusts created for person under curatorship
- Trusts created by the trustees of a retirement fund in respect of benefits payable to the beneficiaries of that retirement fund

1.4. CIPC definition

The *User Guidelines on Beneficial Ownership* as published by the CIPC defines beneficial ownership in respect of a company to mean:

*“an individual who, directly or indirectly, ultimately owns that company or exercises effective control over that company”*

1.5. TPCA

The TPCA defines a beneficial owner as:

- “(a) a **natural person** who directly or indirectly ultimately owns the relevant trust property;
- (b) a **natural person** who exercises effective control of the administration of the trust arrangements that are established pursuant to a trust instrument;
- (c)(i) each founder of the trust; or
- (c)(ii) if a founder of the trust is a legal person, a person acting on behalf of a partnership or in pursuance of the provisions of a trust instrument, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person or partnership or the relevant trust property or trust arrangements 5 pursuant to that trust instrument;
- (d)(i) each trustee of the trust; or
- (ii) if a trustee of the trust is a legal person or a person acting on behalf of a partnership, the natural person who directly or indirectly ultimately owns or exercises effective control of that 10 legal person or partnership; and
- (e)(i) each beneficiary referred to by name in the trust instrument or other founding instrument in terms of which the trust is created; or

*(ii) if a beneficiary referred to by name in the trust instrument is a legal person, a partnership or a person acting on behalf of a partnership or a person acting in pursuance of the provisions of a trust instrument, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person*

*or partnership or the relevant trust property or trust arrangements pursuant to that trust instrument; "*

## **Request**

We request that there be uniformity in respects to the information that is requested from the varying entities as outlined in the documentation that is referred to in **Annexure A**<sup>1</sup> as well as in the associated links to the Google Forms document required by the Masters' office<sup>2</sup> and the link to the CIPC e-services platform that contains the Beneficial Ownership Register functionality<sup>3</sup>.

Based on the above, the legal definitions of "beneficial owner" vary. We request that there be uniformity with respect to the definition of "beneficial owner" for purposes of greylist reporting. We also need to understand the relationship between beneficial owner versus ultimate beneficial owner for SARS purposes and whether the other areas of legislation need the same distinction.

We request that the exclusions in the Financial Intelligence Centre Act be applied to all legislation referred to above, and even more, as the risk of money laundering and terrorist financing is small for these types of trusts. The following trusts are therefore proposed to be excluded:

- Trusts created by a court order;
- Trusts created by a testamentary disposition to the extent that the trust will last for a limited duration (i.e., to a single generation);
- Trusts created for person under curatorship;
- All investment trusts, including trusts that have been created by the trustees of a retirement fund in respect of benefits payable to the beneficiaries of that retirement fund; and
- Special trusts.

We also request clarity in respects to the information that is requested by the various entities. For example, the Regulations require that the income tax number be provided for South African residents. However, the Masters' office template in contrast makes no space to enter this number in the provided Google Forms template. We thus request that clarity be provided either through amending the Masters' office template or the Regulations regarding a way to resolve this.

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<sup>1</sup> The share register information in relation to the Corporate (ITR14) tax return can be found on page 6. The beneficial ownership information for the Trust on the (ITR12T) can be found on page 34.

<sup>2</sup>

<https://docs.google.com/forms/d/e/1FAIpQLSe4v2Nqi2wpSZn3oyozs1cHyv0CGXJr5kEKGSoCAHC3wCaQmg/viewform?pli=1>

<sup>3</sup> [https://eservices.cipc.co.za/DomainNameServices\\_processPayment.aspx](https://eservices.cipc.co.za/DomainNameServices_processPayment.aspx)

## 2. ADMINISTRATIVE EASE AND RULES REGARDING DATA PROTECTION AND PRIVACY OF INFORMATION

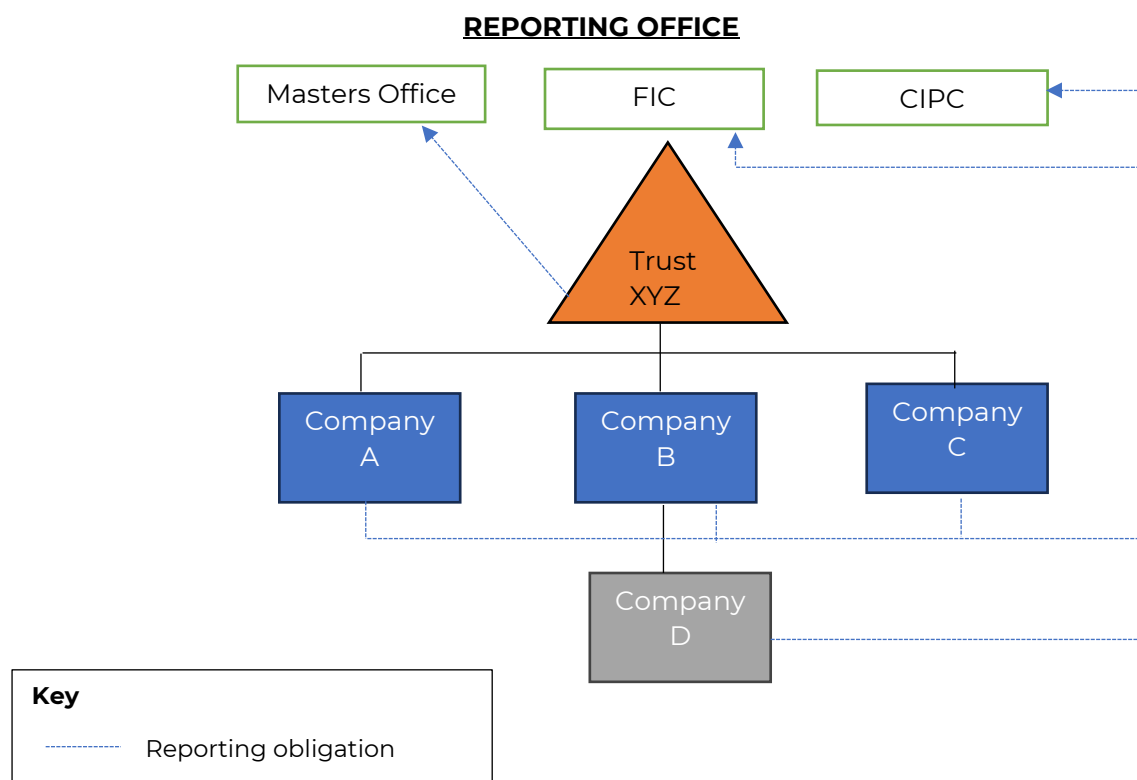
### 2.1. Centralisation

We note that there are four systems that trustees and companies are currently using (*inter alia* the FIC, SARS, the portal of the Master of the High Court and the CIPC platform) to lodge information relating to beneficial owners. We further understand that required information is required to be submitted through all relevant channels, **separately**.

Having to report beneficial ownership separately through all the different channels is, in our view, not only time consuming but also an administrative burden (especially if required at different times), leaving room for finger trouble and reconciling differences, having provided it at different times. We thus recommend that consideration be given to centralising this reporting function.

There is also a concern that the beneficial ownership reporting requirements on the CIPC platform presently have many layers of reporting that amount to essentially the same outcome. For instance, assume a domestic trust owns all of the shares of four wholly-owned subsidiaries. In this circumstance, the parties involved must send four reports for each governmental organisation even though all of the ultimate beneficial ownership is the same for all four entities (refer to Diagram 1 below).

**Diagram 1**





We therefore recommend that thought be given to centralisation of this reporting function. Entities with the same ultimate owners should also be able to submit a combined report.

## 2.2. Multiple roles per entity

Currently on the trust tax return data regarding the same beneficial owner has to be captured per role, such as the founder, trustee and beneficiary. This adds a huge extra burden to capture the same information more than once. Functionality should be provided to auto-fill fields where the same person fills more than one role at the same time.

Additionally, besides reporting on entities, there is also an obligation to report for other actors such as trustees, protectors etc (refer to diagram 1 above).

## 2.3 Data protection

### 2.3.1. *Limited legal privacy*

While we understand that the flow of information between these various systems is critical, we would like assurance that the information lodged by trustees and companies on these systems will be limited to the relevant agencies in government and will not fall into the hands of the public. Assurance must exist that this information will not be wrongly leaked. This private information cannot be allowed to fall into the hands of unscrupulous people who will utilise this information for vexatious litigation, kidnapping for ransom or other nefarious reasons.

With good reason, Regulation 3D(1)(c) requires the Master to keep an electronic register in such a manner that provides for *"adequate security measures for the protection of the information contained in the register"* and even if an interim electronic medium was implemented as allowed under Regulation 3D(2), it is also required to have *"adequate security measures"* in terms of Regulation 3D(2)(a).

Regulation 3E of the TPCA stipulates that access to information regarding beneficial ownership is restricted to various government bodies such as the National Prosecuting Authority, the Independent Police Investigative Directorate, State Security Agency, the Intelligence Division of the National Defence Force, a Special Investigating Unit, the South African Revenue Service, the Financial Intelligence Centre and such other bodies as named in the Regulations. Whilst we understand the need for the above-mentioned entities to have access to the information relating to beneficial ownership, we reiterate our request that assurance be provided that the information lodged on the above-mentioned systems will be limited as requested above. This assurance must exist in respect of each governmental organisation seeking reports.

### 2.3.2. The need for *safe IT platforms*

The Master's website now provides for the upload of an electronic register on their portal through Google Forms. There are concerns and questions regarding the security of information that is submitted via the Google Docs template. Although the Google Docs template is *"excellent for collaboration"*, research has shown that it is not *"particularly secure"*.

It would be in the best interest of all (including the regulator) to provide the necessary enablement and assurance around data security, as this will go a long way towards encouraging submissions / advancing broader compliance.



The following information regarding Google Docs has also come to light:

*"It shouldn't be used for confidential information, whether that's content under embargo, an unpublished financial report, board meeting minutes, etc. In theory, you can protect documents in Google Docs to stop users from sharing, downloading, printing or copying, and add an expiration date to give access for a limited time period. In practise however this **protection is trivial to remove**."*<sup>4</sup>

The core issue with Google Docs' security is that it's browser-based. We recommend that a more secure platform be utilised, even as an interim measure. A number of trustees are reluctant to submit sensitive information, especially concerning minor children, and are reluctant to submit such information until reassurance has been provided that the data will be safe. We also need reassurance that the reporting systems for the other governmental organisations are fully secure.

### 3. TIMING OF REPORTS: NEED FOR GOVERNMENT SYNCHRONISATION

Section 11A(1) of the TPCA read with the corresponding Regulations requires that a trustee must (*inter alia*):

- a. establish and record the beneficial ownership of the trust;
- b. keep a record of the prescribed information relating to the beneficial owners of the trust;
- c. lodge a register of the prescribed information on the beneficial owners of the trust with the Master's Office;
- d. ensure that the prescribed information referred to in paragraphs (a) to (c) is kept up to date.

Whilst we do not dispute the need for reporting to be "kept up to date", the required reporting for all different government organisations should be synchronized. These differing timelines create confusion for trustees as well as a trap for the unwary.

It must further be borne in mind that details of beneficial owners of trusts may change frequently. In certain instances, beneficial owners are not aware that they are beneficiaries named in trust deeds. Other trusts have multiple beneficial owners. Keeping track of ultimate beneficial owners through several tiers of ownership will be even more challenging.

Therefore, trustees, who are mandated to report on and lodge information relating to beneficial owners may not – at all material times – be aware of each change. We instead recommend that all reporting be annual and not with regards to each ownership change.

Another alternative would be that subsequent to initial reporting, only those trusts which have had amendments to the Letters of Authority / Trust deeds need to file a revised BO document with the Master's office annually (on same timeline / date). This will reduce the need to submit duplicate information annually / having to submit changes within a set time period as is the case with CIPC. It will also remove ambiguity on timelines if timeline was set on the same time annually.

### CIPC's reporting

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<sup>4</sup> <https://www.locklizard.com/document-security-blog/how-secure-are-google-docs/>





The informal guidance in relation to the 5 percent threshold to be applied for BO identification contained in the CIPC guidance and CIPC FAQs is not, to our knowledge, substantiated in any Regulations. This percentage seems to be out of kilter with the FATF guidance and global standards which normally provide that 25 per cent should be used as a benchmark and revised downwards using a risk-based approach. It would be difficult to argue that those who hold less than 25 percent of shares / voting rights can exercise effective control. Even when adjusting for risk we are not aware of many instances where the threshold is reduced below 10 percent.

#### **4. NON-COMPLIANCE PENALTY: THE NEED FOR COMMENSURATION AND LENIENCY**

##### 4.1. Unsynchronised penalties

We understand that there are four differing penalties levied on trustees, companies and accountable institutions in instances of non-compliance even though most violations will probably have the same origin. These penalties are as follows.

##### *4.1.1. Trust Property Control Act, No. 57 of 1988*

The new Section 19(2) of the Trust Property Control Act, No. 57 of 1988 (**TPCA**) states that if a trustee fails to comply with specific requirements outlined in section 10 and 11 of the TPCA, such trustee will be deemed to commit an offence and on conviction liable to fine not exceeding **R 10 million or imprisonment not exceeding 5 years or both**<sup>5</sup>.

##### *4.1.2. FICA*

Non-compliance with FICA can lead to hefty penalties for accountable institutions, including **imprisonment for a period not exceeding 15 years or a fine not exceeding ZAR100 million**.

##### *4.1.3. SARS*

SARS imposes penalties for non-compliance, but the specific administrative penalty amounts vary depend on the nature and extent of the non-compliance.

##### *4.1.4. Office of the Master*

In addition to the above penalties, the Office of the Master of the High Court can also levy additional sanctions. For example, the Master also has powers to remove trustees if they are judged to have performed unsatisfactorily, refused a lawful request, been convicted of dishonesty, bankrupted, declared mentally incapable or failed to give sufficient security.

##### *4.1.5. CIPC*

In terms of section 171 of the Companies Act, a compliance notice may be issued and an administrative penalty of **over R1 million or 10% of the entity's turnover** may be imposed in terms of section 175 of the Companies Act in the case of non-compliance.

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<sup>5</sup> Our interpretation of this penalty suggests that the trustee – if found to have committed the offence will be liable for the fine. In the aim of not exposing the trust assets to any risk, We request clarity on who the fine will be levied against. Would this be against the trust or the trustee in their personal capacity.





## **Request**

Varying penalties for mostly the same violations is excessive, especially given some of the amounts. We request and recommend that the four differing penalties be aligned and made to be commensurate in combination.

Additionally, prior to levying any penalty, consideration should also be given to the size of the violation (i.e., does the violation relate to non-reporting of changes to beneficial owners in a way to disguise the beneficial owners or just an administrative updating of details of already known beneficial owners.). Following this inquiry, any penalty by each governmental organisation that is levied should be proportional. Flat penalties of such magnitude are hard to justify, especially for clerical errors. These penalties could easily “wipe out” smaller (and essentially valid) trusts.

Stated differently, the imposition of the non-compliance penalty should not be a mechanical process in which predetermined punishment is imposed on a “blanket basis”. We are of the view that the:

*“Punishment should fit the criminal as well as the crime, be fair to society and be blended with the measure of mercy according to the circumstances.”<sup>6</sup> [Own emphasis]*

Prior to levying the penalty, we further recommend that an inquiry be made as to whether the error or omission was “an innocent mistake” or whether the non-compliance error was intentional.

## **CONCLUSION**

We appreciate that the matters raised in this submission may require further engagement. We would be grateful to receive such an audience.

Please do not hesitate to reach out to us should you have any queries or require further clarification.

Yours sincerely,

CEO of the South African Institute of Taxation

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<sup>6</sup> S v Rabie 1975 (4) SA 855 (AD)