

Greylisting as it relates to trusts

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Over the last 10 years, there has been large-scale domestic and international financial fraud in South Africa, and in some respects, trusts have been involved. Lisa Kahanovitz, project director: Tax Guidance at the South African Institute of Chartered Accountants (SAICA), sheds more light on this topic.



Lisa Kahanovitz, project director: Tax Guidance at the South African Institute of Chartered Accountants (Saica)

Before South Africa was officially greylisted by the Financial Action Task Force (FATF) on 24 February 2023, National Treasury and the Minister of Finance in December 2022 sought urgent legislative intervention in order to attempt to prevent the greylisting and tabled the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act, 22 of 2022 (AML Amendment Act). This Act introduced a definition of 'beneficial owner' in response to the FATF's concern that there is no transparency with regards to the identities of the ultimate owners and controllers of trusts. Furthermore, of the 38 recommendations initially made by FATF almost all of them impact trusts.

Following this, a new reporting obligation for trustees was gazetted on 31 March 2023, which amended the Trust Property Control Act, No. 57 of 1988, and with effect from 1 April 2023, trustees are obligated to lodge and keep up-to-date records of the beneficial ownership of trusts with the Master of the High Court. If you fail to comply there may be a penalty of up to R10m or five years' imprisonment. A beneficial owner is defined in this

Act to include a natural person who directly or indirectly ultimately owns the relevant trust property, individuals who exercise effective control of any trust, the founder, trustees and any named beneficiaries.

Three months later on 30 June 2023, Notice 3631 was published which sets out *Returns to be submitted by Third Parties* in terms of section 26 of the Tax Administration Act No. 28 of 2011 and now includes trusts and approved public benefit organisations (PBOs) in that list. Third-party reporting is nothing new, however it is new for trusts and PBOs. What the trust report requires is various details in relation to the beneficial owners of trusts. The due date for the first submission of this report for Trusts is 31 May 2024.

There is also a proposed draft definition of 'beneficial owner' in the Draft Tax Administration Laws Amendment Bill, 2023. In this regard, on 25 October 2023 National Treasury and Sars in a presentation to the Parliamentary Standing Committee on Finance ('SCoF') responded to public submissions made on the various Draft 2023 Tax Bills and they noted that this definition corresponds to *'the term "beneficial owner" as described in the Financial Action Task Force (FATF) Recommendation 10 and the Interpretative Note on Recommendation 10 of the 2012 FATF Recommendations'*.

This is important to know as it most likely means that this definition will not change from the proposed draft to the promulgated version and therefore we know what definition we have to comply with from a tax perspective.

In the SCoF presentation, National Treasury confirmed that the purpose for obtaining beneficial ownership information is primarily for tax administration purposes and *'to establish the identity of a beneficial owner for purposes of determining liability for tax or to investigate if a tax offence, such as tax evasion, has been committed.'*

National Treasury went on to say that *'secondly, the purpose is to align with South Africa's National Strategy on Anti-Money Laundering, Counter Terrorism Financing and Counter Financing Proliferation in developing a national integrated,*

interoperable and harmonised beneficial ownership framework, comprising of beneficial ownership registries and other sources to provide timely access to law enforcement and other competent authorities to adequate and accurate information on beneficial ownership and control in line with the FATF Recommendations.'

National Treasury confirmed that the beneficial ownership registry to be kept with Sars 'will function as a Tier 2 replicator beneficial ownership registry within the envisaged National BO registry framework, the Tier 1 repositories being Companies and Intellectual Property Commission (CIPC) and the Master of the High Court'.



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Over and above the administration of tax, this information will be checked against the other beneficial owner repositories such as the CIPC and the Master of the High Court, *'thus serving as a second layer of beneficial ownership information to ensure the information is accurate and up-to-date as required under the FATF Recommendations'*. The reporting of beneficial ownership to so many bodies is in line with the FATF's Interpretation Note to Recommendation 24, i.e. that countries should follow a multi-pronged approach.

These comments, if nothing else, serve to show that National Treasury and Sars are exceedingly committed to complying with the FATF recommendations. The main concern with regards to third-party reporting for trusts, as new reporters, is the time and cost that will need to be incurred in order to develop systems that will be used to submit this information to Sars, especially where for example a tax practitioner has many trusts to report on or where they currently do not have sufficient staff to gather and prepare the information. Furthermore, the gaining of technical expertise relating to the requirements for submission may take time or increase costs further, especially for smaller reporters of this information.

The concern though is that South Africa will be faced with a review by the FATF in 2025 and much of our economic stability may depend on a positive report. On 29 May 2023, the South African Reserve Bank issued its 2023 Financial Stability Review report which gave insight into the pressures felt by South Africa this year and touched on the greylisting in a number of instances.

This report noted that *'A related risk that emerged during the period under review is the possible imposition of secondary sanctions on South Africa which, coupled with the FATF greylisting, could lead to financial instability in South Africa'*. Secondary sanctions, the greylisting and the already low appetite of non-resident investors for new issuances of South African Government Bonds (possibly due to the greylisting) may lead to further financial stability risks.

Irrespective of these pressures and risks, trusts and PBOs still need to be in a position to report and 31 May 2024 may be too soon to arrange for the correct staff and systems in order to comply. Therefore, Saica will be making further submissions in the next few weeks with regard to third party reporting for trusts and PBOs, so kindly look out for that submission on the Saica website and our other social media platforms (i.e. LinkedIn) . The greylisting has certainly given rise to a 'battle' of opposing needs.

The Medium-Term Budget Policy Statement (MTBPS) will be presented on 1 November 2023 and there is little doubt that our measures to comply with the FATF recommendations will be discussed. It was previously rumoured that we would be reviewed by FATF in July 2023. However, since that has not transpired, it will be interesting to hear how much progress has been made in meeting the FATF's expectations.

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