



► Changes that affect trustees

Legislative update

More paperwork and possible penalties for trustees from 1 April 2023.

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In this guide

Overview

1

What has changed?

Acts' provisions that have been changed by the Amendment Act

When did these changes come into effect?

How the Amendment Act changed the provisions of the TPCA

2



Overview

What has changed?

On 29 December 2022 the General Laws (Anti-Money Laundering and Combating Terrorism Financing) **Amendment Act** (Amendment Act), 22 of 2022, was signed into law to address the shortcomings in current legislation that deals with the combating of money laundering and terrorist financing.

The Amendment Act changed the provisions of the following acts:

- 1 The Companies Act, 71 of 2008.
- 2 The Financial Intelligence Centre Act (FICA), 38 of 2001.
- 3 The Financial Sector Regulation Act, 9 of 2017.
- 4 The Non-profit Organisations Act, 71 of 1997.
- 5 The Trust Property Control Act (TPCA), 57 of 1988.

When did these changes come into effect?

Some sections of the Amendment Act came into effect on 29 December 2022 and the remainder became effective on 1 April 2023.

1

2

PG 3





How the Amendment Act changed the provisions of the TPCA

Sections in the Amendment Act	Impact on the TPCA	Impact on trustees
Section 1	<p>Added definition: 'accountable institution'</p> <p>'Accountable institution' has the same meaning as in the FICA, ie accountable institutions report into supervisory bodies.</p>	<p>Increased administrative burden – trustees must now comply with FICA.</p> <p>In terms of section 10 of the TPCA, trustees must make disclosures, as explained below.</p> <p>In terms of the FICA, trustees must formulate and implement internal rules about:</p> <ul style="list-style-type: none"> • the establishment and verification of the identity of persons whom the institution must identify; • the information of the records that must be kept; • the manner in which and the place where these records must be kept; • the steps that must be taken to determine when a transaction is reportable to ensure that the institution complies with its duties; and • any other matters, as prescribed.
	<p>Added definition: 'beneficial owner'</p> <p>'Beneficial owner' (as defined in FICA), includes the founder of the trust, the trustees and each beneficiary listed in the trust instrument.</p>	<p>Increased administrative burden – for FICA purposes, the founder, the trustees and each named beneficiary must now comply with FICA.</p> <p>In terms of section 11 of the TPCA, trustees must keep specific additional records, as explained below.</p> <p>The definition of 'beneficial owner' seems to be in conflict with the role of a trustee as set out in the definition of 'trust' in the TPCA. In terms of South African law, a trustee does not hold trust property for their own benefit, but for the benefit of others. Therefore, a trustee can never be the 'beneficial owner' of the trust property.</p> <p>The intention of the amendments seems to:</p> <ul style="list-style-type: none"> • prevent the misuse of trusts; and • ensure that information available to authorities regarding the control of trusts is adequate, accurate, and timely.

Sections in the Amendment Act	Impact on the TPCA	Impact on trustees
<p>Section 2</p>	<p>Section 6 of the TPCA: Added criteria that would disqualify persons or representatives from being appointed or continuing to act as trustees.</p>	<p>More record keeping and administration for trustees.</p> <p>Persons or representatives will be disqualified from acting as trustees if they:</p> <ul style="list-style-type: none"> • are an unrehabilitated insolvent; • have been prohibited by a court to be a director of a company, or declared by a court to be delinquent in terms of section 162 of the Companies Act or section 47 of the Close Corporations Act, 69 of 1984; • are prohibited in terms of any law to be a director of a company; • have been removed from an office of trust on the grounds of misconduct involving dishonesty; • have been convicted, in South Africa or elsewhere, and imprisoned without the option of a fine, or have been fined more than the prescribed amount in terms of section 69 of the Companies Act for theft, fraud, forgery, perjury, or an offence – <ul style="list-style-type: none"> – involving fraud, misrepresentation or dishonesty, or money laundering, terrorist financing or proliferation financing activities as defined in section 1(1) of the FICA; – in connection with the promotion, formation or management of a company, or in connection with any act set out in section 69(2) or (5) of the Companies Act; or – under this Act, the Companies Act, the Insolvency Act, 24 of 1936, the Close Corporations Act, the Competition Act, 89 of 1998, the FICA, the Financial Markets Act, 19 of 2012, Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004, the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004, or the Tax Administration Act, 28 of 2011; • are subject to a resolution adopted by the Security Council of the United Nations when acting under Chapter VII of the Charter of the United Nations, providing for financial sanctions that entail the identification of persons or entities against whom member states of the United Nations must take the actions specified in the resolution; or • are unemancipated minors or under similar legal disabilities. <p>Trustees must update their trust deeds, where appropriate, and ensure that they comply with the updated provisions.</p>
<p>Section 3</p>	<p>Section 8 of the TPCA: A foreign trustee can act in that capacity only if the Master of the High Court has authorised it in writing.</p>	<p>This requirement simply enforces the existing practice – written authorisation from the Master of the High Court is required before a foreign person may act as a trustee.</p>

Sections in the Amendment Act	Impact on the TPCA	Impact on trustees
Section 4	<p>Section 10 of the TPCA: A trustee must disclose their position as trustee to any accountable institution.</p>	<p>Increased administrative burden – trustees must now comply with FICA.</p> <p>A trustee must disclose their position as trustee to any accountable institution with which the trustee engages in that capacity, and must make it known to the accountable institution that the relevant transaction or business relationship relates to trust property.</p> <p>Trustees must be aware of the additional requirement to disclose when dealing with an accountable institution as defined in FICA.</p>
Section 6	<p>Section 11 of the TPCA: Added section that specifies information related to beneficial owners that the trustees of a trust and the Master of the High Court must keep.</p>	<p>Increased administrative burden – the founder, trustees and each named beneficiary must now comply with FICA.</p> <p>A trustee must:</p> <ul style="list-style-type: none"> • establish and record the beneficial ownership of the trust; • keep a record of the information relating to the beneficial owners of the trust as required by FICA; • lodge a register of the prescribed information about the beneficial owners of the trust with the Master’s Office; and • ensure that the information is kept up to date. <p>The Master must keep a register of the information about the beneficial ownership of trusts.</p> <p>Trustees and the Master of the High Court must ensure proper record keeping in line with the enhanced requirements.</p>
Section 7	<p>Section 19 of the TPCA: Specifying certain offences and penalties that apply to trustees who do not perform their duties.</p>	<p>Probable increased cost of professional trustee services that would likely discourage non-professional trustees from taking on this responsibility.</p> <p>A trustee who does not comply with an obligation referred to in section 10 or 11 of the Amendment Act commits an offence and, on conviction, will be liable to pay a fine of up to R10 million or will face imprisonment of up to five years, or both.</p> <p>Trustees must be aware of the new offences and applicable penalties.</p>
Section 8	<p>Section 20 of the TPCA: Added criteria related to the removal of a trustee from office by the Master.</p>	<p>In terms of section 6 of the Amendment Act, trustees can be removed from office.</p> <p>Trustees must be aware of the additional criteria and update the trust deed if appropriate.</p>

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