



May 29<sup>th</sup>, 2020


**NBFIRA 3/3/9-I (55)**

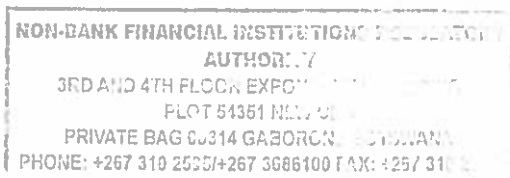
To: AML/CFT Compliance Officers / Principal Officers - Non-Bank Financial Institutions ("NBFIs")

**SUBJECT: BOTSWANA NATIONAL RISK ASSESSMENT ON LEGAL PERSONS AND LEGAL ARRANGEMENTS, NON PROFIT ORGANISATIONS (NPO'S) AND TRUSTS**

1. We refer to the above captioned subject matter.
2. Botswana has an obligation to support international efforts to combat *money laundering*, prevent, suppress and disrupt *proliferation of weapons of mass destruction* as well as the *financing of terrorism*.
3. The purpose of this communicate is to disseminate and submit the Risk Assessments on Legal Persons and Legal Arrangements, Non Profit Organisations (NPO's) and Trusts summary to NBFIs in order for them to utilize it in addressing AML/CFT & P issues as well as use the findings as a basis to inform their understanding of ML/TF risks and develop programmes to mitigate the identified risks.
4. Regulated entities are advised to update their risk assessments, policies and any other related control measures to address the identified risks. For any further clarity on the above, kindly contact the AML/CFT Department: [amlcft@nbfira.org.bw](mailto:amlcft@nbfira.org.bw)

Yours faithfully,

  
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Sriram Gade (Mr)  
ACTING CEO





**NBFIRA**

Non Bank Financial  
Institutions Regulatory  
Authority

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**BOTSWANA NATIONAL RISK ASSESSMENT ON LEGAL PERSONS AND LEGAL  
ARRANGEMENTS, NON PROFIT ORGANISATIONS (NPO'S) AND TRUSTS  
SUMMARY FOR THE NBF I SECTOR**

**AML/CFT & P Note 2 of 2020**

## **ACRONYMS**

AML/CFT - Anti-Money Laundering/Countering the Financing of Terrorism  
BICA – Botswana Institute of Chartered Accountants  
BITC - Botswana Investment and Trade Centre  
BO - Beneficial Ownership  
BoB - Bank of Botswana  
BOCONGO - Botswana Council of Non-Governmental Organisations  
BPS - Botswana Police Service  
BURS - Botswana Unified Revenue Service  
CDD – Customer Due Diligence  
CIPA - Companies and Intellectual Property Authority  
CPF - Countering Proliferation Financing  
DCEC - Directorate on Corruption and Economic Crime  
DISS - Directorate of Intelligence and Security  
DNFBPs – Designated Non-Financial Businesses and Professions  
ESAAMLG - Eastern and Southern Africa Anti-Money Laundering Group  
FATF – Financial Action Task Force  
FIs - Financial Institutions  
FIA - Financial Intelligence Agency  
IFSC - International Financial Services Centre.  
INFO - Information  
LEAs - Law Enforcement Agencies  
LSB - Law Society of Botswana  
MDJS - Ministry of Defence, Justice and Security  
MER - Mutual Evaluation Report  
ML - Money Laundering  
NBFIs – Non-Bank Financial Institutions  
NBFIRA-Non-Bank Financial Institutions Regulatory Authority  
OBRS - Online Business Registration System  
PF – Proliferation Financing  
TF - Terrorism Financing  
The Master - Master of the High Court.  
UBO - Ultimate Beneficial Ownership

## **INTRODUCTION**

### **Background**

The Anti-Money Laundering (AML) and Counter Financing of Terrorism (CFT) National Risk Assessment of the Republic of Botswana was officially launched on the 4th of March 2015 by the Permanent Secretary, Ministry of Finance and Development Planning. The assessment was based on the Financial Action Task Force (FATF) Recommendations of 2012, and was conducted using the National Risk Assessment (NRA) Tool developed by the World Bank. The first NRA issued by Botswana did not cover sectors such as Legal Persons and Legal Arrangements, Non-Profit Organisations (NPO's) And Trusts, which was eventually identified as a deficiency by the MER of Botswana. This document serves as an NBFIRA summarized version for a comprehensive use by the NBFI sector. It is a live document, and the risks identified continue to change with the financial market.

## **LEGAL PERSONS AND LEGAL ARRANGEMENTS**

### **TERMS**

**Legal persons** “any entities other than natural persons that can establish a permanent customer relationship with a financial institution or otherwise own property. This can include companies, bodies corporate, foundations, partnerships, or associations and other relevantly similar entities.

**Legal arrangements** “express trusts or other similar arrangements”.

**Beneficial owner** refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.

**Risk** is a function of threat, vulnerability and consequences. Threat is a person or group of people with the potential to cause harm (e.g. criminals, terrorist groups and their facilitators, their funds, and their activities).

**Vulnerabilities** are the things that either can be exploited by the threats or may support or facilitate their activities (e.g. weaknesses in the AML/CFT systems or controls for a particular sector, or a financial product or type of service that enables them to be misused for ML/TF).

**Consequences** are the impact or harm that ML/TF may cause (e.g. the effect of the underlying criminal activity happening).

## **EXECUTIVE SUMMARY**

This is the first risk assessment by Botswana to identify and assess the nature and level of Money Laundering (ML) and Terrorism Financing (TF) risks relating to legal persons and legal arrangements excluding trusts. The risk assessment has taken into consideration the newly introduced obligations in the company law and Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) laws to enhance transparency of legal persons, forms and features of legal persons' availability of beneficial ownership information in public and private entities. Case examples to identify techniques and methods of

misuse of legal persons and mechanisms to facilitate exchange of beneficial ownership information were also considered.

The primary legislation underpinning company law in Botswana is the Companies Act Cap 42:01 and Registration of Business Names Act Cap Number 26 of 2018. The law provides for creation of companies with a share capital, companies without a share capital and a close company.

The risk of misuse of legal persons for illicit purposes involves simple and complex dealings. The proceeds generated from the criminal use of legal persons and arrangements in Botswana have an international dimension but differ in terms of complexity depending on the size of and parties to the transactions. Complex transactions involve domestic companies which create complex structures, especially when engaging in transactions in which government has a direct or an indirect interest, to disguise ownership and flow of funds. Typically, these types of companies use foreign entities in their country of destination to layer the proceeds and thereafter acquire investment portfolios mostly in financial and real estate sectors in different locations across the world. The simpler transactions involve moving of funds between domestic and foreign companies, but the funds can either be spent in Botswana or in a foreign country, or both.

In the early 2000s, Botswana introduced special type of business initiatives which enjoyed tax benefits to attract foreign direct investment as part of a drive to position the country as a financial and business services hub in the region and continent. The businesses posing higher ML risks are banking, securities, insurance, asset/fund management and company service providers such as legal professionals and accountants when they engage in prescribed activities. Despite posing inherently high ML and TF risks, no case has been identified which involved International Financial Services Centre (IFSCs).

In the end, legal persons and legal arrangements excluding trusts have been identified as posing **Medium High risk for ML and Medium Low for TF**. The differences are based on empirical evidence drawn from live cases as well as vulnerabilities arising from implementation of AML/CFT obligations and monitoring for compliance by AML/CFT supervisors. The main threats arise from tax evasion, fraud and corruption, the proceeds of which are largely externalized through cross-border transactions using banks.

The results of the risk assessment will be used to develop understanding of ML and TF risks associated with legal persons and legal arrangements by stakeholders including (Financial Institutions) FIs and Designated Non-Financial Businesses and Professions (DNFBPs), provide guidance/training to FIs and DNFBPs on how to factor legal persons when they conduct entity ML and TF risk assessment. Law enforcement agencies should consider the trends and methods of misuse of legal persons and legal arrangements for illicit activities when conducting investigations on legal persons and arrangements.

The scope of the ML/TF assessment study was: -

- a. Description of incorporation/registration of legal persons and arrangements;
- b. Role of company service providers in formation of legal persons and arrangements;
- c. Description of types and forms of features of legal persons and arrangements;
- d. Availability of beneficial ownership information; and
- e. International cooperation processes and provision of beneficial ownership information.

The Working Group has put greater focus on,

- a. recently introduced obligations on enhancing transparency of legal persons including beneficial ownership (BO),
- b. ML/TF risks and mitigating strategies prior the legislative changes, and
- c. Available techniques and methods of how legal persons or legal arrangements are being, or have been, used for ML and TF purposes.

### **Purpose of the Risk Assessment**

This study is the first step by Botswana to identify and assess the nature and level of ML and TF risks in respect of legal persons and arrangements legal persons to assist both the public and private sector to enhance transparency and prevent criminal misuse of legal persons and arrangements. The primary purpose of the results of the ML/TF risk assessment are for: -

1. Competent authorities in Botswana to understand ML and TF risks associated with legal persons and arrangements;
2. Assist CIPA obtain and maintain accurate and timely BO information necessary to prevent abuse of legal persons and arrangements legal persons for ML and TF risks and implement appropriate monitoring and enforcement programmes;
3. Inform FIs and DNFBPs to enhance their processes of identifying and assessing ML/TF risks associated with legal persons and legal arrangements and put in place appropriate due diligence measures when engaging with legal persons;
4. LSB to understand ML/TF risks associated with legal professions and professionals when they prepare for, or carry out, transactions for their clients concerning certain specified activities and put in place commensurate risk-based supervisory and enforcement programmes.
5. Competent authorities to provide international cooperation and exchange of information in relation to ultimate beneficial ownership (UBO).

### **Underlying Factors for Misuse of Legal Persons in Botswana**

Indicator of misuse of legal person for illicit purpose	Vulnerability		Threat		Overall Risk	
	ML	TF	ML	TF	ML	TF
Shell companies	High	Low	High	Low	High	Low
Complex ownership and control structures	High	Low	High	Low	High	Low
Bearer shares/bearer share warrants	n/a	n/a	n/a	n/a	n/a	n/a
Nominee shareholders where identity of nominator is hidden	Low	Low	Low	Low	Low	Low

<b>Nominee directors where identity of nominator is hidden</b>	Low	Low	Low	Low	Low	Low
<b>Unrestricted use of legal persons as directors</b>	Medium	Low	Medium	Low	Medium	Low
<b>Trusts and other legal persons for separation of legal ownership and UBO assets</b>	High	Low	High	Low	High	Low

### Summary of Findings

From the findings, it is established that legal persons and legal arrangements excluding trusts have been identified as posing Medium High risk for ML and Medium Low for TF. The businesses posing higher ML risks are banking, securities, insurance, asset/fund management and company service providers such as legal professionals and accountants when they engage in prescribed activities.

### NON PROFIT ORGANISATIONS

#### EXECUTIVE SUMMARY

Non-Profit Organisations (NPOs) include religious organisations, burial societies, community-based and sporting societies.

This is the first risk assessment by Botswana to conduct a comprehensive ML and TF risk assessment of Non-Profit Organisations (NPOs). The primary focus of the assessment was to identify Money Laundering (ML) exposure of NPOs in general and those NPOs posing higher Terrorism Financing (TF) risks. The results thereof are intended to assist the Registrar of Societies and other competent authorities to target those NPOs identified as posing higher TF risks and to ensure that legitimate work of NPOs is not negatively impacted. The risk assessment used both quantitative and qualitative methods to collect and analyse data by focusing on adequacy of controls in place against threats.

The risk assessment experienced data and information challenges which made the analysis in most areas qualitative and relying on expert judgment. The main areas of focus were pre-and-post registrations conditions, preventative measures, transparency and accountability of transactional records, national coordination and cooperation, international links and exchange of information with foreign counterparts, and high-risk jurisdictions. Threat assessment considered the likelihood of individuals and/or groups with funds derived from proceeds of predicate offences, or legitimate sources diverted for abuse, exploiting the NPOs.

The risk assessment identified that religious organisations, burial societies, community-based and sporting societies hold more than 70 percent of the total number of NPOs in Botswana. In terms of proportion of financial resources and connection to international activities, NPOs engaged in religious activities, business, charitable and cultural activities have significant presence. The findings of analysis of annual returns for 2018 showed that about 70 percent of the resources were concentrated in religious-based NPOs.

The main areas of non-compliance include non-submission of annual returns by NPOs to the Registrar of Societies. While about 40 percent of the total number of NPOs file annual returns, there is a significant number of NPOs with a proportion of distribution of financial resources and coverage of the country which file annual returns. This mitigates the risk of NPOs exposed to higher ML and TF from being exploited. NPOs in Botswana use bank account to raise, store and move funds for operations of NPOs. Generally, benefactors such as donors require a bank account to transfer funds to support social programmes and they also have systems and procedures in place to promote accountability over the use of the funds.

The risk assessment identified fraud, tax evasion, inadequate vetting of foreign nationals holding senior positions in NPOs and cash-intensive nature of sources of NPO funding as the main threats facing the sector. **The threat was rated Medium.**

The assessment indicated that:

- Religious organizations, sporting societies, charitable associations and farmers associations have been identified as posing ML risks ranging from medium to high risk rating level.
- Religious organizations, community-based associations, civil society organizations and charitable associations have NPOs posing higher TF risks.
- Religious organizations and charitable associations are the two categories of NPOs which pose higher risk for both ML and TF – albeit at varying levels and underlying reasons.

**Overall, the assessment identified the level of ML risk to be Medium and TF risk to be Medium-High.**

### **Purpose of NPO Risk Assessment**

A recent study conducted by the Centre for Global Counter-Terrorism Cooperation and the United Nations Counter-Terrorism Committee Executive Directorate identified in its key findings that the level of understanding of the risks associated with the NPO sector was uneven globally. Furthermore, Botswana obtained a Non-Compliant (NC) rating for Technical Compliance (TC) for R.8 and Low Level of Effectiveness for Immediate Outcome 10 (Core Issue 10.2 focuses on NPOs) in its 2017 AML/CFT mutual evaluation conducted by the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG). In the main, the Mutual Evaluation Report (MER) found that Botswana had not undertaken risk assessment of NPOs and showed low level of understanding of vulnerabilities and threats facing NPOs. The MER concluded that due to the lack of understanding of NPO risks, there was no targeted risk-based monitoring of those NPOs posing higher TF risks.

It is for this reason that Botswana has undertaken the assessment of the threat and vulnerabilities faced by NPOs to improve its awareness and understanding of the risk posed to the NPO sector by terrorists financing individuals and/or groups, and apply a risk-based monitoring of NPOs posing higher TF risks. This is a significant step by the Government of Botswana to develop a comprehensive understanding of the vulnerabilities and threats prevalent in the country's NPO sector with a view to applying robust monitoring programmes commensurate to the risks identified.

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### **Summary of Findings**

**The risk assessment identified fraud, tax evasion, inadequate vetting of foreign nationals holding senior positions in NPOs and cash-intensive nature of sources of NPO funding as the main threats facing the sector. The threat was rated Medium.**

**Religious organizations and charitable associations are the two categories of NPOs which pose higher risk for both ML and TF – albeit at varying levels and underlying reasons.**

**Overall, the assessment identified the level of ML risk to be Medium and TF risk to be Medium-High.**

### **TRUSTS**

The Trust Property Control Act (TPCA) came into force in 2018, with the aim to facilitate the Registration of Trusts by the Master. The obligations on ultimate beneficial owner (UBO) is found under the TPCA and the Financial Intelligence Act (FI Act) which oblige trust service providers to obtain and maintain UBO information.

### **EXECUTIVE SUMMARY**

This is the first risk assessment by Botswana to identify and assess the nature and level of Money Laundering (ML) and Terrorism Financing (TF) risks relating to trusts. Prior to 2018, Botswana had no statute on trusts and relied on the Common Law. Trusts were registered with the Deeds Registry as notarial deeds. There was no regulatory framework for trusts. The Trust Property Control Act (TPCA) came into force in 2018. It is an Act to facilitate the Registration of Trusts by the Master.

The TPCA designates the Master of the High Court as the competent authority for the management of trust information. At the time of the assessment, there were 506 trust applications received by the Master. Of these, 14 trusts were approved while 53 trustees were appointed. The Master is building capacity to supervise trusts for AML/CFT compliance and maintain an electronic database of trusts in Botswana. All

trusts that were in existence prior to the coming into effect of the TPCA have to be validated by registering with the Master before 31<sup>st</sup> December 2020”

Botswana introduced the obligations on ultimate beneficial owner (UBO) under the TPCA and the Financial Intelligence Act (FI Act) to oblige trust service providers to obtain and maintain UBO information. Since the legal requirement to obtain UBO information is relatively, new it was difficult to ascertain whether there was compliance with the new obligations.

The Master of the High Court, Botswana Institute of Chartered Accountants and Law Society of Botswana are yet to establish supervisory capacity to ensure compliance with the TPCA and the FI Act obligations by TSPs under their purview. Further, TSPs have minimal to no application of preventative measures under the FI Act in respect of trusts. As a result, the **inherent vulnerability for misuse of trusts for ML and TF is high**. However, there has been no case of misuse of trusts for ML and TF in Botswana.

Supervisors, LEAs, FIs, will use the results of the risk assessment and DNFBPs to develop an understanding of ML and TF risks associated with trusts and implement measures to prevent misuse of trusts in Botswana.

#### **Purpose of the Risk Assessment**

The purpose of this risk assessment is to identify and assess the nature and level of ML and TF risks in respect of trusts. The results of the assessment will assist both the public and private sectors to enhance transparency and prevent criminal misuse of trusts. The intended primary use of the results of the ML/TF risk assessment is for:

- i. Competent authorities in Botswana to understand ML and TF risks associated with trusts;
- ii. The Master and the BURS to obtain and maintain accurate and timely beneficial ownership information necessary to prevent abuse of trusts for ML and TF and implement appropriate monitoring and enforcement systems;
- iii. Financial Institutions (FIs) and Designated Non-Financial Businesses and Professions (DNFBPs) to enhance their processes of identifying and assessing ML/TF risks associated with trusts and put in place appropriate due diligence measures when engaging with trusts;
- iv. Botswana Institute of Chartered Accountants (BICA) and Law Society of Botswana (LSB) to understand ML/TF risks associated with accounting and legal professionals when they prepare for, or carry out, transactions for their clients concerning trusts and related activities and put in place commensurate risk-based supervisory and enforcement systems.
- v. Competent authorities are enabled to provide international cooperation and exchange of information on beneficial ownership of trusts.

## Types of Trusts

Type	Features of trust type
<b>Business Trusts</b>	<ul style="list-style-type: none"> <li>Also known as a common law trust, a form of business organization which is like a corporation in which investors receive transferable certificates of beneficial interest</li> </ul>
<b>Community Trusts</b>	<ul style="list-style-type: none"> <li>Where a trust is set up for the benefit of a class of people not necessarily related to the founder, usually for charitable purposes</li> </ul>
<b>Will Trust/Testamentary</b>	<ul style="list-style-type: none"> <li>A trust that is created in terms of a Will for the benefit of beneficiaries once the settlor has died and details how the assets must be dealt with after the death of the settlor</li> </ul>
<b>Family Trust</b>	<ul style="list-style-type: none"> <li>An arrangement where a Trust is set up for the benefit of family members of the founder/settlor</li> </ul>
<b>Foundations</b>	<ul style="list-style-type: none"> <li>A not-for-profit entity</li> </ul>

The above information is based on the 14 trusts that were registered with The Master. The exact number of the different types of trusts in Botswana are unknown mainly because it was not law in the past that trusts be registered and that the TPCA which codifies the Common Law in respect of trusts is new and the Master is yet to set up sufficient capacity to register trusts.

## Legal and Beneficial Ownership Legal Framework

Statutes	Implementing Institution	Description of Legal requirement
<b>Trust Property Control Act</b>	Trustees and The Master of the High Court	Trustees in Botswana must file beneficial ownership information with Master of the High Court
<b>Financial Intelligence Act</b>	Specified parties and Accountable Institutions	Financial Institutions (e.g. Banks) and designated non-financial institutions and professions to identify and verify beneficial ownership information and keep records thereof.
<b>Companies Act</b>	Companies and CIPA	Companies to maintain and provide beneficial ownership including external companies to CIPA.

<b>Societies Act</b>	BURS and Registrar of Societies	Societies to obtain and maintain a list of members
<b>Income and Tax laws</b>	BURS	Legal persons and arrangements including trusts must obtain tax certificate and file annual tax returns

In June 2018, Botswana introduced obligations for Trusts, FIs and DNFBS to identify and verify beneficial ownership information when engaging in business relationships or transactions. The table above illustrates a summary of availability of beneficial ownership information of trusts in Botswana.

### **Summary of Findings**

**Findings establish that inherent vulnerability for misuse of trusts for ML and TF is high.**

### **NOTE:**

NBFIs should utilize the NRA to inform their institutional risk assessments as well as controls in place to mitigate the identified risks. NBFIs should further take into consideration controls put in place by the sectors to cap ML/TF & P risks.

**\*\*\* END \*\*\***