

Ref: number #774150

12 February 2023

The Director-General: Justice and Constitutional Development
ATT: Ms. V Letswalo
BY EMAIL: bills3@justice.gov.za

Dear Ms. Letswalo

SAICA COMMENT LETTER ON THE DRAFT REGULATION RELATING TO BENEFICIAL OWNERSHIP REGISTERS AND RECORDS OF DETAILS OF ACCOUNTABLE INSTITUTIONS, 2023

We refer to the Department of Justice and Correctional Service's invitation of 11 January 2023 for written comments on the Draft Regulation Relating to Beneficial Ownership Registers and Records of Details of Accountable Institutions, 2023. Our comments are in response to the proposed amendments in the Government Gazette.

We wish to extend our appreciation for providing us with an opportunity to convey our comments and questions prepared by the South African Institute of Chartered Accountants (SAICA).

Our comments have been included in the following sections:

1. General comments
2. Detailed comments

We are available to further discuss and engage with the Department of Justice and Correctional Services to ensure that further consultation and dialogue ensues to better understand the expectations of our members and associates.

Yours sincerely

(Signed electronically)



Thandokuhle Myoli

Executive: Assurance



Juanita Steenkamp

Project Director: Governance and Non-IFRS Reporting

1. General comments

- 1.1 SAICA understands the haste and the need to implement the General Laws Amendment Act (“Act”) and its related legislation. We do however note that the implementation of the regulations also relies on the Department of Justice, specifically the Master’s Office providing an electronic register. The Master’s Office has been under pressure and has been receiving media exposure due to poor service delivery.
- 1.2 The Master’s Office is also dependent for information technology services on the SITA. We have concern with whether the SITA will be able to deliver such an electronic system in the near future.
- 1.3 The Master’s Office in February 2022 invited stakeholders, including SAICA members to test a new Deceased Estates Online Portal and Trust Online Portal. Prior to testing it was cancelled in March 2022 due to issues with the development of the portals. Up to now they Master’s Office has not been able to continue with the roll-out of the portal. This leads to concern on whether the Master’s Office and the information technology service providers can meet the requirements as set out in the Draft Regulations.
- 1.4 The Department of Justice was also subject to a security breach which led to the websites being off-line for some time. This leads to concerns over security of personal data as the Master’s Office has a large number of data which needs to be protected.
- 1.5 The Draft Regulations and the Act does not deal with the period that the data needs to be retained. In terms of section 14 of the Protection of Personal Information Act, 2013 (POPIA) personal information may not be retained for longer than is necessary for achieving the purpose it was collected for unless the retention meets the requirements. The Draft Regulations needs to provide for the time period for which the data must be kept.
- 1.6 The Draft Regulations do not deal with any transitional provisions as well as the period from which the information must be kept. Clarity is required on whether information from previous years is to be updated on the electronic register as well and where the trusts may no longer exist, whether the Master’ Office will be responsible for updating the information.

2. Specific comments

2.1 Establishment and maintenance of a public register of persons disqualified from serving as trustees

- 2.1.1 Section 2 of the Draft Regulations state that the Master is required to establish an electronic register that provides for various information to be submitted to the Master. The effective date of Section 6(1H) in section 2 as amended, has not yet been published. Section 6(1)(G) is however effective from 1 April 2023. The Master therefore, although the register is not yet effective, has the obligation to inform all trusts of trustees that are convicted of offences.
- 2.1.2 Without such electronic register the Master will not be able to implement Section 6(1)(G).
- 2.1.3 The Master’s Office has been trying to implement a new system to assist in the lodging of changes to trusts and estates for over a year now, and has not been successful. We therefore wish to raise serious concerns on whether the Master’s Office will be able to meet the set deadlines.

2.1.4 **Submission:** We submit that the requirement for the Master to inform all trusts of trustees that have orders or convictions from 1 April 2023 is not attainable as the Master still has to establish and maintain such public register.

2.1.5 We submit that the Department of Justice needs to consider petitioning the FIC to re-consider the implementation date of the relevant sections of the FIC Act and the Draft Regulations.

2.2 Beneficial ownership information to be recorded by trustee

2.2.1 Section 4 refers to beneficial ownership to be recorded by a trustee. The Draft Regulations state that a trustee must keep records of various information relating to each identified beneficial owner of the trust.

2.2.2 The definition of a beneficial owner includes the trustee. There is no clarification on which trustee will be holding all this information. Where there are 20 trustees, the question arises on whether all 20 trustees will have to keep all the required information of the beneficial interest holders including their fellow trustees?

2.2.3 The Draft Regulations also state that the trustee must keep the detail of when the person became a beneficial owner. With past changes on trusts, current trustees might not be aware of when the person became a beneficial interests holder.

2.2.4 There are no transitional provisions and many trustees would be non-compliant from the 1st of April 2023.

2.2.5 There is no clarity on trusts where the beneficiaries are children or future children or community members. The Draft Regulations make no provision for the documentation of minors, which information is protected under the POPIA.

2.2.6 The Draft Regulations state that a trustee must keep records of the grounds on which the person holds beneficial interest. The definition of beneficial interest is new and guidance are required by many trustees on when a person holds a beneficial interest and how to classify a beneficial interest practically.

2.2.7 **Submission:** Clarity is required on which trustee will keep these records. Are all the trustees required to keep beneficial owner information?

2.2.8 The definition of beneficial owner also includes trustees, clarity is required on whether the trustee must include his/her own information.

2.2.9 In a case where a trust has many beneficial owners, are the trustees expected to keep this information for all the beneficial owners.

2.2.10 Clarity is required on what is expected from trustees where the founder of the trust is no longer alive; what would be expected from the trustee in such instances?

2.2.11 Personal data will also be retained by individual trustees and this will be a huge risk for personal information.

2.2.12 It is submitted that in some cases the trust deed is not clear on who the beneficial owner is. The trust deed might refer to future children or the community. Clarity and guidance is required to assist trustees to identify the beneficial ownership.

2.3 The Master's register on the beneficial ownership of trusts

2.3.1 Draft Regulation 5 requires the Master to develop and keep a register of the beneficial owners of trusts. As mentioned above, the Master's Office has been trying to implement and modernise over the past few years but have not been able to launch a new online system for trusts and deceased estates.

2.3.2 SAICA has concerns with regards to the current ability of the Master's Office to implement this requirement to develop a register on beneficial owners of trusts.

2.3.3 There are also trusts with a large number of trustees or beneficiaries. The requirement for each trustee to keep the details as required and then to have to update this information on a system is very labour intensive. There is also no clarity on which of the trustees will be responsible to update the electronic register. Most trusts has more than one trustee, and currently the wording of the draft regulations states that "a trustee" must keep and upload the information. This seems to create a duplication of effort if all trustees of a trust need to keep the required records and upload all of it on the electronic register.

2.3.4 There is also no clarity on which information must be uploaded on the electronic register. Additionally, would trustees be required to update past beneficial owners?

2.3.5 **Submission:** Guidance and clarity is required on the data to be kept by trustees and to be uploaded on the Master's Office electronic portal. At present the Master's Office has not been able to implement a trust and deceased estates portal and urgent intervention would be required to implement the requirement of the Master to develop and implement an electronic portal.