BOTSWANA RISK ASSESSMENT REPORT FOR LEGAL PERSONS AND LEGAL ARRANGEMENTS

SANITIZED VERSION

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Contents

"Corporate vehicles—such as companies, trusts, foundations, partnerships, and other types of legal persons and arrangements—conduct a wide variety of commercial and entrepreneurial activities. However, despite the essential and legitimate role that corporate vehicles play in the global economy, under certain conditions, they have been misused for illicit purposes, including money laundering (ML), bribery and corruption, insider dealings, tax fraud, terrorist financing (TF), and other illegal activities. This is because, for criminals trying to circumvent anti-money laundering (AML) and counter-terrorist financing (CFT) measures, corporate vehicles are an attractive way to disguise and convert the proceeds of crime before introducing them into the financial system" ***FATF[1] Guidance – Transparency and Beneficial Ownership, 2014***

[1] Financial Action Task Force is an independent inter-governmental body and a global standard setter and promoter of policies to prevent and combat money laundering, financing of terrorism and proliferation of arms of mass destruction in order to protect the international financial system

1. 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
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

2. 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.

3. BACKGROUND AND CONTEXT

In 2016, the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) conducted a review of Botswana's (AML) and (CFT) and Countering Proliferation Financing (CPF) measures for compliance with the Financial Action Task Force (FATF) Standards against ML, TF and proliferation financing (PF). In the main, the results of the 2017 mutual evaluation report (MER) revealed non-compliance with most of the FATF Standards on both Technical Compliance (TC) based on 40 FATF Recommendations and Effectiveness based on eleven Immediate Outcomes (IOs).

The peer review process covered legal and institutional frameworks for enhancing transparency of legal persons and arrangements to combat misuse by criminals. More specifically, the peer review focused on the features of legal persons and persons, understanding of ML and TF risks associated with legal persons and arrangements, availability of ultimate ownership information of legal persons and international cooperation to determine the level of compliance with specific requirements relating to transparency of legal persons and arrangements. The results of the MER revealed low level of compliance in respect of the four areas above for determining compliance with transparency of legal persons and arrangements requirements.

The major criticism in the MER was the fact that Botswana did not demonstrate an understanding of ML and TF risks associated with legal persons. The report recommended that Botswana should conduct ML and TF risk assessment of legal persons to assist the different stakeholders to understand the nature and extent of ML/TF risks posed by legal persons in Botswana and therefore implement measures appropriate measures to mitigate ML and TF risks. Botswana completed its first sector risk assessment of legal persons and arrangements to identify, assess and understand the nature and level of ML/TF risks prevalent in the sector and use the results to implement appropriate mitigating strategies.

3.1 Research Methodology

Botswana established a multi-disciplinary Working Group to coordinate the study on ML and TF risks of legal persons. The Working Group comprised relevant stakeholders given the scope of the work necessary to identify and assess the ML and TF risks. The Working Group comprised: -

- Ministry of Defence, Justice and Security (MDJS)
- The Master of The High Court (The Master)
- Registrar of Societies
- Bank of Botswana (BoB)
- Deeds Registry
- Companies and Intellectual Property Authority (CIPA)
- Botswana Unified Revenue Service. (BURS)
- Directorate on Corruption and Economic Crime (DCEC)
- Law Society of Botswana (LSB)
- Directorate of Intelligence and Security Services (DISS)
- Financial Intelligence Agency (FIA)
- Non-Bank Financial Institutions Regulatory Authority (NBFIRA)

The Working Group was assisted by Consultants from Botswana Accountancy College (BAC) and a Technical Advisors on AML/CFT/CPF to conduct the ML/TF risk assessment focusing on collection, collation and analysis of the data and information obtained. Furthermore, the Working Group and the Consultants conducted focused groups and one-on-one interviews with some members of the civil society, competent authorities and banking sector to elicit practical information and data on how ML/TF risk manifests in legal persons and legal arrangements.

The Working Group used various methods to collect data and information to identify and assess ML/TF risks associated with legal persons and arrangements in Botswana. These included:

i. focused groups;
ii. one-on-one interviews with some commercial banks, legal professionals, competent authorities such as CIPA, BURS and LSB;
iii. questionnaires; and
iv. literature review including guidance notes/papers, mutual evaluation reports, and typologies from reputable institutions such as the ESAAMLG, the FATF, the World Bank and the United Nations Office on Drugs (UNODC) and Botswana 2017 ML/TF National Risk Assessment (NRA)

Further, the study benefited immensely from expert analysis and review of available information to identify and assess the situation in relation to legal persons and legal arrangements Vis a Vis ML/TF situation in Botswana. The World

Bank National Risk Assessment Tool and the Enterprise Risk Management Tool were used to analyse and interpret the results of the assessment process.

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:

recently introduced obligations on enhancing transparency of legal persons including beneficial ownership (BO);

a. ML/TF risks and mitigating strategies prior the legislative changes;, and
b. Available techniques and methods of how legal persons or legal arrangements are being, or have been, used for ML and TF purposes.

Box 1: Definition of Specific Terminologies

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).

Source: www.fatf-gafi.org

Box 2: Description of FATF Recommendation 24 – Transparency of Legal Persons

Countries should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that are able to issue bearer shares or bearer share warrants, or which allow nominee shareholders or nominee directors, should take effective measures to ensure that they are not misused for money laundering or terrorist financing. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 (customer due diligence measures) and 22 (see table…below for details). The Recommendation apply to legal professionals when they prepare for and carry out certain specified activities, as follows:

i. Buying and selling of real estate;
ii. Managing of client money, securities or other assets;
iii. Management of bank, savings or securities accounts;
iv. Organisation of contributions for the creation, operation or management of companies; and
v. Creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

Source: FATF Recommendations, 2012 (as updated) www.fatf-gafi.org

3.2 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:

i. Competent authorities in Botswana to understand ML and TF risks associated with legal persons and arrangements;
ii. 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;

iii. 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;
iv. 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;
v. Competent authorities to provide international cooperation and exchange of information in relation to ultimate beneficial ownership (UBO).

4. INTERNATIONAL FRAMEWORK ON ML AND TF RISKS OF LEGAL PERSONS

In 2012, the FATF AML/CFT Recommendations introduced a risk-based approach (RBA) which requires countries, competent authorities and private sector to identify and assess ML/TF risks associated with business relationships and transactions conducted through FIs and DNFBPs, and prioritise high-risk sectors when applying AML/CFT measures. In particular, the following apply:

4.1 Legal and Regulatory Measures

i. Recommendation 1 requires countries to identify and assess ML and TF risks and use the understanding to develop and implement mitigating measures commensurate to the risks identified.

ii. Criterion 24.1 of Recommendation 24 requires countries to identify and describe: (a) the different types, forms and basic features of legal persons in the country; and (b) the processes for the creation of those legal persons, and for obtaining and recording of basic and beneficial ownership information.

iii. Criterion 24.2 of Recommendation 24 requires countries to identify and assess the ML/TF risks associated with all types of legal persons created in the country.

4.2 EFfectiveness of Application of Legal and Institutional Measures

i. **Core Issue 1 of Immediate Outcome 4** requires FIs (e.g. banks) and DNFBPs (e.g. legal professionals acting as company service providers) to demonstrate an understanding of ML and TF risks associated with legal persons as clients and apply commensurate AML/CFT controls to mitigate identified risks.

ii. **Core Issue 2 of Immediate Outcome 5** in respect of legal persons requires competent authorities (e.g., CIPA) to demonstrate an understanding of ML and TF risks associated with and apply measures to prevent misuse of legal persons.

iii. **Core Issue 1 of Immediate Outcome 4** requires FIs (e.g. banks) and DNFBPs (e.g. legal professionals acting as company service providers) to demonstrate an understanding of ML and TF risks associated with legal persons as clients and apply commensurate AML/CFT controls to mitigate identified risks.

5. OVERVIEW OF LEGAL FRAMEWORK FOR INCORPORATION OF LEGAL PERSONS IN BOTSWANA

Botswana has laws and procedures for incorporation of legal persons before carrying on a business in the country. The Companies Act and Registration of Business Names Act are the primary legislation for formation of legal persons in Botswana and sets out incorporation procedures, compliance requirements during and the after the life of a company. Further, taxation and AML/CFT legal frameworks set obligations of legal persons to comply with before and after incorporation.

The Companies and Intellectual Property Authority Act establishes the CIPA as the registry for companies. It has the responsibility to conduct procedures for vetting and approval of applications for formation of companies. Furthermore, the Companies Act gives powers to the CIPA to obtain and maintain all information including BO on legal persons, and to monitor compliance by legal persons with the requirements of the Act.

5.1 Formal Requirements for Incorporation

Section 19 of the Companies Act stipulates formal requirements for incorporation of a company, as follows:

- A name of company;
- One or more shares in a case of a company limited by shares;
- One or more members in case of a close company or a company limited by guarantee;

- One or more directors in the case of a private company and two or more directors in case of a public company; and
- A Secretary in the case of all companies other than a close company, and an accounting officer in the case of a close company.

5.2 Incorporation Process

The Online Business Registration System (OBRS) has combined 3 procedures, namely the Name Reservation, Declaration and Registration into one procedure. The new process enables a customer to pay for the name and the company at once and submit both in a single application. If the name is approved and all information is correctly entered by the customer, CIPA would process the application and register the company within a day. Customers are no longer required to undertake declaration, they have to submit consent forms as provided by CIPA. This makes it faster and easier to register a company as the customer does not have to rely on the police or other authorised entities to take oath of information provided.

The final stage in the application process is for the CIPA to issue the proposed company with a Certificate of Incorporation in a prescribed form with information on the particulars of the company including unique company reference number.

5.3 Additional Legal Measures

The legal and regulatory framework for incorporation of, and carrying on of a business by a legal person provides for requirements and processes which enhances the transparency of BO information and improves measures in place to protect the misuse of companies by criminals: -

- Section 155 of the Companies Act requires companies to information on any changes with the CIPA within 20 days of the change.
- Section 249 of the Companies Act stipulates that shareholders and members of companies limited by shares and guarantee may be either natural or legal persons or arrangement and may directly or indirectly hold a member's interest in a close company.
- Sections 83 & 84 of the Companies Act require a company limited by shares to maintain, in Botswana, a share register with the names and the latest known address of each person who is, or has within the last seven years been, a shareholder.
- Section 43(3A) of the Companies Act stipulates that in order to transfer shares, the transferor must provide a transfer form to the company (or agent maintaining the register) and the company must enter the transferee's name on the register as required by Section 81 of the Act.

Furthermore, within 30 days of the transfer, a copy of the updated share register must be filed with the CIPA in terms of Section 43(3A) of the Act.

- Section 249(1) of the Companies Act stipulates for close Corporations to be run by natural persons only.
- Section 14 of the FI Act 2019 requires specified parties to apply Customer Due Diligence (CDD) procedures on legal persons including a beneficial owner before entering into and during the course of a business relationship or completing a transaction.
- Section 3 of Re-Registration of Companies Act and Business Names Act requires every company before the recent changes must re-register with the CIPA by 2 June 2020 (within 12 months of the Act coming into effect) to avoid being automatically de-registered and removed from the company's register.
- Section 347 of the Companies Act requires external (i.e., foreign) companies must provide the names and addresses of shareholders and beneficial owners, and any change must be lodged with the CIPA within a month.
- Section 11 of Companies Registration of Business Names Act requires any changes to ultimate beneficial owners to be lodged with the CIPA within 14 days.
- Section 217 of the Companies Act (as amended) requires companies to file annual returns with the CIPA containing information on updated Directors and Shareholder information, updated share allotment and updated registered office and company addresses.
- Tax laws in Botswana require companies to register for tax with BURS and must provide two major beneficial shareholders. Any changes to the information must be lodged with the BURS.
- Section 16 of the FI Act requires that in case of companies, specified parties must identify and verify the legal existence of the company and identify its directors, beneficial owners, and management of a company.
- Section 489 of the Companies Act, in relation to dormant companies, has been repealed such that the CIPA will keep active companies on the companies register only.

5.4 Partnerships

Botswana has no statute regulating formation and governance of partnerships. The main source of law for partnerships is Roman-Dutch Common Law. Partnerships may register business names under the Registration of Business Names Act and provide identity information of the partners with the CIPA and must lodge changes to the business name with the CIPA. The information required for incorporation by the CIPA and tax obligations by the BURS (e.g., each partner must file own tax return in addition to the partnership business) appear enough to identity partnership information.

Types and Forms of Legal Persons

The table below illustrates the forms of business allowed to conduct business activities in Botswana.

Table 1: Forms of businesses

Form	Features of Business Operation
Business name	• business owned by one or more persons
Partnership	• Formed through a contract between persons, not exceeding twenty in number. • Partners agree to contribute together to carry on a business with the sole object of making profit for their joint venture.
Registered company	• Formed by a person or persons to carry on a business for gain.
Co-operative	• Principal object is to promote economic interests of its members in accordance with cooperative principles, or a society established for the benefit of its members
Public corporation	• State-owned enterprises set up by statutes to operate certain industries reserved for government for the benefit of all its citizens.

6. CHARACTERISTICS OF LEGAL PERSONS

There are three main forms of doing business in Botswana, namely, (a) business name, (b) partnerships, and (c) registered companies.

Table 2: Characteristics of Business Associations in Botswana

Characteristics	Registered Company	Partnership
Formation	Companies Act stipulate requirements for existence	Exist on oral or written contract. No formalities.
Limited Liability	Has limited liability	Has no limited liability
Corporate personality	Separate personality	No separate legal existence

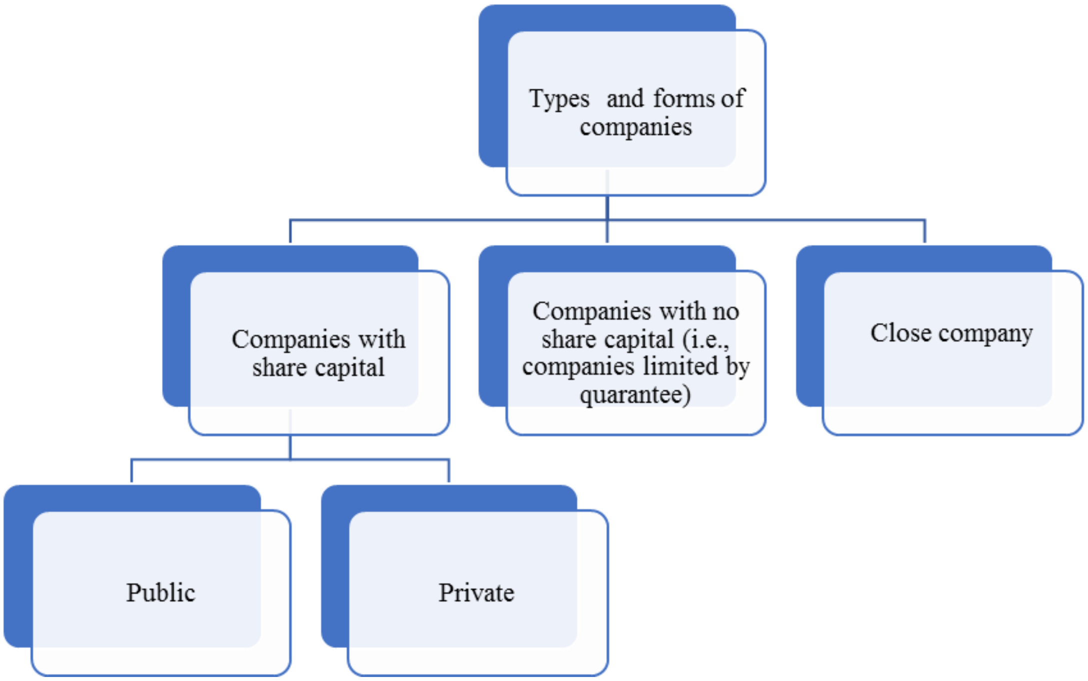
Perpetual succession	Enjoys perpetual existence as an artificial person.	Death of a member may result in dissolution
Tax Liability	Pays corporate tax.	Each partner pays tax on income shared.
Privacy	Only Public registered companies and non-exempt private companies are required to disclose information on its accounts and annual returns, as well as documents and records at CIPA.	Enjoys a degree of privacy except for filing of tax returns.
Control	Separation of control and management	Partners share control and management of their firm and act as each other's agents.
Capacity	Unlimited capacity	Unlimited capacity
Raising of capital	Greater access to sources of funding including from lending institutions	Limited sources largely from contributions from members and less from lending institutions

Source: Companies Act, 2003 and John Kiggundu, 2010: Company and partnership Law in Botswana

6.1 Types and Forms of Companies in Botswana

There are three types and forms of companies in Botswana: (i) those that have a share capital, (ii) those without a share capital, and (iii) a close company (commonly used for small traders who prefer to benefit from the legal personality protection afforded to this type of company). Public and private companies are the only ones with share capital in Botswana. The graph below illustrates the types and forms of companies in Botswana.

Diagram 1: Types and Forms of Companies



Source: John Kiggundu, Company and Partnership Law in Botswana, p.52

Table 3: Number of Legal Persons in Botswana

Legal person type	2019
Companies limited by shares	69026
Companies limited by guarantee	63
External companies	44
Total companies	**69133**

The table above shows private companies (largely SMEs in Botswana) is the main company in Botswana, distantly followed by the public company.

International Financial Services Centre

In 2003, Botswana set up International Financial Services Centre (IFSC) to attract foreign direct investment. The IFSC is promoted by Botswana Investment and Trade Centre (BITC) which is a state-owned entity. The focus of the BITC is to position Botswana as a financial and business- services hub into the region and the African continent through granting of tax benefits to IFSC companies. These include exemption from VAT, capital gains tax and discounted company income tax. An IFSC company can conduct its transactions in foreign currency only. Most business services permitted to operate under the IFSC are of banking and insurance in nature and these activities are regulated and supervised for

AML/CFT and prudential compliance by the Bank of Botswana (BoB) and the NBFIRA, respectively.

The holding and management of companies dominate the IFSC business services. On average, One-third of the 94 IFSC-licensed companies do conduct business activities at the time of the assessment. The majority failed to start business operations in the stipulated first six months after getting the license. In 2017, the NRA rated IFSCs as high risk for ML/TF vulnerability because the entities were foreign-owned, transacting in foreign currency only, and there was no readily available information on their compliance with AML/CFT obligations in country of origin.

7. AVAILABILITY OF BENEFICIAL OWNWERSHIP (BO) INFORMATION

Most studies by the FATF, the World Bank and UNODC Stolen Asset Recovery Initiative (StAR) and Egmont Group of Financial Intelligence Units (FIUs) found that the misuse of corporate vehicles for illicit purposes, including ML/TF is perpetuated by the lack of adequate, accurate and timely BO information to the public (e.g., law enforcement agencies) and private sector (e.g., banks). Therefore, at the heart of the fight against misuse of corporate vehicles for criminal purposes is the ability of competent authorities such as the company registries, FIs and DNFBPs to obtain and maintain accurate, reliable and up-to-date BO information behind a legal person or legal arrangement which carries on a business and ensure that the information is accessible.

Botswana has legal and institutional framework which enables the public (e.g., CIPA and BURS) and private entities (e.g., banks and legal professionals) to obtain and maintain accurate and updated information on legal ownership and BO. Except for tax laws, obligations on BO information in relation to companies came into force from mid-2018, with the UBO obligations under the amendments to the Companies Act coming into force in June 2019. Therefore, implementation of the measures is recent and on-going. The table below shows the recent changes in respect of the legal framework for availability of BO information in Botswana.

Table 3: Legal Framework on Beneficial Ownership in Botswana

Statute Requirement	Institution	Description of Legal requirement
Financial Intelligence Act	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.
Companies Act	Companies and CIPA	Companies to maintain and provide beneficial ownership including external companies to CIPA.
Trust Property Control Act	Trustees and The Master of High Court	Trustees in Botswana must file beneficial ownership information with Master of the High Court
Income and Tax laws	BURS	Legal persons and arrangements including societies must obtain tax certificate and file annual tax returns

The recent key legislative changes to promote transparency of BO information in respect of legal persons are as follows:

a) Introduction of obligation for the CIPA and the legal persons to obtain and maintain information on BO and legal persons to provide the information and update any changes;

b) Requirements for legal persons to file annual returns electronically;

c) External companies to provide shareholder and BO information to CIPA; and

d) Every existing company must re-register by 2 June 2020, failing which such a company will be de-registered.

Re-registration of a company obliges such a company to disclose information relating to its Bos. As of 03rd June 2019, all newly registered companies were required to provide information relating to their BOs.

The table below illustrates a summary of availability of legal ownership (i.e., Directors and shareholders) and UBO information necessary to combat misuse of legal persons for ML and TF.

Table 4: Availability of Legal and Beneficial Ownership in Botswana

Type	Company Law	Tax Law	AML/CFT Law
Company limited by shares	**Legal – all information (info) available** UBO – some info available	**Legal – all info available** UBO – some info available	**Legal – all info available** UBO – some available
Company limited by guarantee	**Legal – all info available** UBO – some info available	**Legal – all info available** UBO – some info available	**Legal – all info available** UBO – some info available
Close company	**Legal – all info available** UBO – some info available	**Legal – all info available** **UBO – all info available**	**Legal – all info available** UBO – some info available
External companies	**Legal – all info available** UBO – some info available	**Legal – all info available** UBO – some info available	**Legal – all info available** UBO – some info available

Source: Global Forum on Transparency and Exchange of Information for Tax Purposes – Peer Review Report on the Exchange of Information on Request, Botswana (Second Round), OECD, September 2019

The table above illustrates the following in respect of availability of information held by CIPA, BURS, FIs and DNFBPs:

- Botswana has information on legal ownership of legal persons.
- Botswana has, to some extent, information on UBO of legal persons.

Overall, the results of the analysis represent notable ML and TF risk posed by legal persons in relation to availability of BO. Upon the completion of re-registration process (by 2nd June 2020), it is expected that Botswana would have obtained information on UBOs for all registered companies as required by the FATF standard.

7.1 Partnerships

Partnerships in Botswana are largely in legal, accounting and auditing professions within the scope of DNFBPs. These professionals have oversight bodies who subject them to fitness and probity requirements before issuing them with practicing certificates, from which they can form partnerships with each other. CIPA maintains a list of partnerships in Botswana. When they engage in services covered under R.22, they are subject to AML/CFT obligations under the FI Act including verification of beneficial owners. For tax purposes, businesses register with BURS but it is the partners that are liable for tax on the income they generate from their shareholding. Therefore, the information relating to legal and BO of the partnerships will be available at BURS.

Challenges in respect of supervision and compliance with AML/CFT obligations by specified parties and the recent nature of the BO requirements make partnerships vulnerable to ML/TF risks.

Partnerships agreements drafted by legal professionals as company service providers featured prominently in one of the cases where they facilitated the misuse of the companies for misappropriation of the funds of the public corporation through a large-scale sophisticated and complex ownership scheme and management structures. The ML risk exposure of partnerships in Botswana is high especially as they enable the misuse of companies to engage in illicit financial activities. The TF risk exposure is medium in the absence of TF cases within and outside Botswana which involved a domestic partnership.

7.2 BO Information at CIPA

The Companies Act was recently amended and came into force in June 2019 to introduce the legal requirements to collect and maintain accurate and complete basic and UBO information in respect of legal persons. Lastly, the Companies Act requires companies to obtain, maintain and provide accurate and updated basic and UBO information to CIPA.

The CIPA has also put in place a systems modernization project which seeks to, inter alia, (a) improve the integrity of the company information it holds, (b) enhance collection and keeping of updated basic and BO information, and (c) promote accessibility of its information by law enforcement, FIs and DNFBPs and the public at large. CIPA is due to undergo major organizational restructuring to build adequate capacity to effectively exercise its expanded mandate under the Companies Act. The table below assesses inherent vulnerability of the CIPA measures.

Table 5: Availability of basic and BO information at CIPA

Indicator (legal requirement or procedure)	Availability	Quality
Basic BO information at registration	Yes	Good
BO information	Yes	Moderate
Basic and BO information to CIPA annually and as changes occur to keep it up-to-date	Yes	Moderate
Declaration on beneficial owner and ownership structure	Yes	Good
Verification of identity of beneficial owners	Yes	Weak Good
Basic information on company is publicly available	yes	Good
BO information could be made publicly available	Yes	Good
Directors are natural persons	Yes	Good
Information on board of directors, senior management and natural persons authorized to act on behalf of the company	Yes	Good
Obtain and maintain shareholder information	Yes	Good
BO information is available to specified parties and accountable institutions	Yes	Moderate
Access of information is online	Yes	Good
Search function support multiple search fields	Yes	Weak Good
Company register is recorded digitally and is searchable	Yes	Good
Regular application of sanctions	No	Weak
Provision of false info attracts administrative, civil and criminal sanctions	Partial	Weak
Company representative held personally liable	Yes	Good
Checking identity info against independent sources	Yes	Moderate
Capability of database to identify indicators of misuse or unusual activity	No	Weak
Dissuasive sanctions applied for non-compliance	No	Weak
Submission of Financial statements	Yes	Moderate
Overall availability of information		**Moderate**

The table above indicates that the CIPA has most of the basic ownership information and some BO information. The overall quality and availability of the information held by CIPA is moderate. Nonetheless, the modernization project is expected to improve information management and accessibility including obtaining and keeping basic and BO information. Under the modernization project which captures company information provided under the Re-Registration of Companies Act, there were 43 951 companies which re-

registered while 15, 550 new companies were registered as at November 2019, on the new online business registration platform. The remaining companies have until 2 June 2020 to re-register or face automatic deregistration from the register of companies by the CIPA.

Overall, the results of the analysis on availability of BO represent notable ML and TF risks posed by legal persons.

8. MISUSE OF LEGAL PERSONS

The Financial Action Task Force, the World Bank, UNODC, StAR and the Egmont Group of FIUs have conducted in-depth studies on misuse of corporate structures for criminal activities. The studies identified a few factors which facilitate misuse of legal persons. It should be borne in mind, as indicated in the Research Methodology, that there is no universally accepted set of risk factors as each depends on the risk and context of a legal professional and a country. It has also been noted that there is no specific methodology to interrogate and apply the risk factors and categories. But there are commonly-applied risk factors to assess the underlying factors for ML/TF risk exposure of legal professionals as company service providers.

The Working Group applied a similar methodology relying mostly on case studies from Law Enforcement Agencies (LEAs) and FIA as well as information from one-on-one discussions with banks and legal professionals. Expert judgment from CIPA, BoB and NBFIRA provided invaluable insight. Below are the three case examples from several cases considered by the Working Group in the analysis of prevalence of the factors facilitating misuse of legal persons in Table 6.

Table 6: 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
Nominee directors where identity of nominator is hidden	Low	Low	Low	Low	Low	Low

Unrestricted use of legal persons as directors	Medium	Low	Medium	Low	Medium	Low
Trusts and other legal persons for separation of legal ownership and UBO assets	High	Low	High	Low	High	Low
Use of company service providers	High	Low	High	Low	High	Low

9. GATEKEEPERS

A working group from FATF identified several professions as gatekeepers with respect to money laundering. These professions included legal professionals. The nature and extent of ML and TF risks facing legal professionals and other professionals like accountants are determined by the activities carried out by the legal professional, the ethical and supervisory capacity of existing supervisory structure for professionals and the susceptibility or vulnerability of activities of a professional to ML and TF. The nature of services they provide are covered under R.22 of the FATF as covered under Section 33 of the FI Act. For purposes of this section of the risk assessment, findings on legal persons as company service providers will apply to other service providers like accountants as the process and state of compliance with requirements on AML/CFT and BO obligations is similar. In addition, the AML/CFT supervisors are yet to monitor the professions for compliance.

Box 6: FATF Recommendations Applicable to Legal Professionals as 'Gatekeepers'

R.22 sets out composite requirements for legal persons to apply Customer Due Diligence (R.10), record-keeping (R.11), PEPs (R.12), new technologies (R.15) and reliance on third parties (R.17) in certain circumstances. R.22 applies to legal professionals when they prepare for and carry out certain specified activities, as follows:

- *Buying and selling of real estate;*
- *Managing of client money, securities or other assets;*
- *Management of bank, savings or securities accounts;*
- *Organisation of contributions for the creation, operation or management of companies; and*
- *Creation, operation or management of legal persons or arrangements, and buying and selling of business entities.*

Unless legal advice and representation consist of preparing for or carrying out one or more of these specified activities, legal professionals are not subject to the FATF Recommendations. Therefore the ML/TF risk assessment focuses on situations where legal professionals prepare for and carry out transactions for the clients concerning the specified activities set out above.

Furthermore, R.23 requires that requirements for Internal controls and foreign branches and subsidiaries (R.18), Higher-risk countries(R.19), reporting of suspicious transactions(R.20) and tipping-off and confidentiality(R21) apply to legal professionals when they engage in a financial transaction on behalf of a client, in relation to the specified activities under R.22. In case of any suspicions regarding ML/TF, legal professionals should be required to promptly report their suspicions to the FIU. Subject to certain limitations, legal professionals are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege consistent with the lawyer-client privilege which is protected in Botswana.

Source: Adapted from the *FATF RBA Guidance for Legal Professionals* by FATF www.fatf-gafi.org

The following provides a selected analysis of ML and TF risk exposure to legal professionals when they engage in the following activities.

9.1 Trust Accounts

The law in Botswana requires legal professionals to hold funds of clients with a bank licensed by Bank of Botswana, separate from those of the law firm and his or her personal account. This business relationship is subject to AML/CFT obligations set out in R.22 and the fiduciary obligations for the funds to be used for the authorised purpose. For every transaction conducted, the legal professional must account for the funds. The law further requires that the trusts accounts be audited by an external auditor, the report of which must be filed with the LSB. This is one of the preconditions to obtain annual practicing certificate to operate a law firm and run a trust account.

It is this nature of a business relationship (i.e., holding of client's funds) which raises inherent vulnerability for criminals to misuse it to obscure the identity of the funds for laundering or TF purposes. There have been cases in which the LSB has investigated and taken enforcement actions on some law firms over concerns of mismanagement of client's funds and non-compliance with financial management requirements under the Legal Practice Practitioners Act. The misuse of trust accounts for ML and TF purposes is high and low, respectively.

9.2 Formation of Companies

Legal professionals create companies for clients who intend to conduct lawful business. Members of the public are also able to register a company themselves directly with CIPA. The creation of companies by legal professionals makes it attractive to criminals to hide ill-gotten assets from competent authorities. Since these services are potentially attractive to criminals as vehicles to hide ownership and control of legal persons and arrangements from law enforcement agencies, legal professionals are at a risk of unwittingly assisting criminals to misuse legal persons for ML/TF purposes.

The vulnerability applies to trusts and other similar legal arrangements as well. Shell companies may be used for criminal purposes to conceal flow of transactions which further complicates the ability to establish the true ultimate beneficial owners especially if there is a transnational element to the crime. Some cases discussed by the Working Group under Part V of this report involved legal professionals as facilitators of money laundering schemes.

9.3 Acting as Nominee

Individuals may sometimes have legal professionals or other persons hold their shares as nominees, where there are legitimate privacy, safety or commercial concerns. However, criminals may also use nominee shareholders to obscure their ownership of assets. Legal professionals should apply CDD measures to identify beneficial owners when establishing business relations in these situations. This requires the legal professional to conduct potential ML and TF risk assessment to identify vulnerabilities and address the risk thereof. For legal persons who accept to act as nominees, they should base the decision on full knowledge of what the position entails and on having full facts on the identity of the beneficial owner of the shares and that the purpose is lawful.

Finally, legal professionals provide a variety of specialised services (creation of financial instruments and arrangements, creation of powers of attorney etc.) which are of interest to criminals seeking to disguise criminal proceeds or obscure UBO information away from LEAs.

9.4 Management of Companies

Where legal professionals in Botswana act as trustees and or directors of companies, their identities must be provided to The Master and CIPA (companies), respectively and to FIs (if acting on behalf of a customer when opening a business relationship or conducting a transaction). Their identities must be verified, including identities of the person for whose behalf they are acting. The Master and CIPA do not verify the information on identities of directors nor beneficial owners regardless of the risk exposure by the legal entity beyond verification through national identification card. The banks take reasonable steps to verify the identity of the directors and beneficial owners. However, the availability of BO information challenges experienced at the CIPA with regard to companies which have not re-registered and BURS coupled with the general lack of application of CDD measures by legal professionals, create a significant potential for anonymity and therefore possible misuse of companies.

9.5 Availability of Basic and Beneficial Ownership Information

As *gatekeepers,* Legal professionals, amongst other professionals in Botswana engage in the formation, administration and management of legal persons and are therefore required to maintain accurate and reliable basic and BO information. These professionals, gatekeepers submit basic and ultimate BO information to the CIPA for recordkeeping. Based on the information generated from inspection reports, interviews and responses to questionnaires, legal persons in Botswana have low level of understanding and compliance with the BO obligations under the FI Act and the Companies Act. This situation creates significant ML/TF vulnerability in relation to transparency of BO on legal persons and legal arrangements in Botswana.

The overall risk posed by legal persons and legal arrangements is medium high for ML and Medium Low for TF. This is primarily because of the cases in which legal professionals were involved in misuse of companies and partnership schemes for ML while no such evidence exists for TF.

10. SUPERVISION AND ENFORCEMENT FOR ENHANCING TRANSPARENCY OF LEGAL PERSONS

Botswana has several institutions charged with the responsibility to supervise and monitor compliance with measures on enhancing transparency on BO information. In general, there is insufficient capacity to adequately exercise the supervisory functions to ensure AML/CFT compliance. In addition, implementation of the recent BO obligations will take a while before there is compliance across the board. This creates vulnerability across the FIs and DNFBPs to collect and maintain accurate and reliable BO information and make it accessible to competent authorities upon request.

10.1 CIPA

CIPA monitors filing of annual returns by companies on its database. The database has an automated notification application that alerts clients that their companies are due for filing returns. Further, the database allows CIPA to run a report on outstanding annuals returns. The table below sets out the number of filed annual returns by company type and sanctions imposed for late filing against both domestic and foreign companies. The compliance level with the obligation for filing of annual returns has consistently been low, with one-third of the companies complying. Following the changes to the Companies Act which gives the CIPA the right to automatically de-register a company which fails to file annual returns on time and the on-going modernisation of CIPA database, it is expected that the compliance level by companies with statutory reporting obligations under the Companies Act will increase. Available statistics up to 2017, shows that the average compliance level for filing of annual returns was about 30 percent.

10.2 BURS

The BURS monitors submission of BO information mainly through filing of annual tax returns and audits. Non-compliance is monitored through a third-party information generally via banks, employers, informants and other government information sources. There is a taxpayer database which generates alerts for non-compliance. The general approach applied by the BURS is to first encourage the tax payer to comply before imposing a sanction. BURS has yet to extend audit of legal ownership information to UBO information when monitoring for compliance with tax obligations. For instance, in 2017 the total number of tax payers was 360 006 of which 90 681 of the taxpayers were corporates. Of these, only 51 percent complied with tax filing obligations. The number of audits conducted were 163 for companies, 2 for partnerships and 81 for individuals. The average monetary value of sanctions imposed by the BURS is P23 million per annum. The average compliance level has been 50 percent since 2015. This makes it difficult to ascertain availability of accurate and updated UBO information held by the BURS.

10.3 FIs and DNFBPs

Specified parties comprises the FIs and DNFBPs as designated by the FIA Act for purposes of AML/CFT compliance. The banks and larger non-bank financial institutions supervised by the BoB and the NBFIRA appreciate BO requirements and have taken some steps to obtain and maintain BO information when establishing business relationships and conducting transactions. Due to the recent nature of the BO information requirement, it cannot be ascertained whether the FIs and DNBFPs do keep BO information as per the obligations. This creates a significant ML/TF risks arising from unavailability of complete BO information when entering into business relationships and conducting transactions involving legal persons.

10.4 BoB and NBFIRA

FIs are being supervised and monitored for compliance with AML/CFT obligations by the BoB (banks) and the NBFIRA (non-bank financial institutions including capital markets). The supervisors are in the process of strengthening supervisory capacity including risk-based inspection procedures to ensure that the specified parties under their purview comply with AML/CFT obligations including obtaining and maintaining BO information required under the FI Act 2019. For instance, the BoB has recently started strengthening its AML/CFT-specific processes and personnel to conduct inspections in respect of compliance with BO obligations by banks. Despite the recent nature of the BO obligations under the FI Act and on-going efforts to build adequate supervisory capacity, banks have been able to provide some UBO when requested to do so by LEAs. The absence of complete BO information owing to the recent nature of the BO obligations and the on-going capacity-building at the supervisors create ML/TF vulnerability to the supervised entities.

10.5 LSB

The Law Society of Botswana (LSB) is the statutory body charged with the responsibility of regulating and supervising legal professionals in Botswana. The FI Act designates LSB as the AML/CFT supervisor of legal professionals and requires them to report a suspicious transaction when, on behalf of or for a client, they engage in financial transactions in relation to the activities listed under Section 33 (3).

In 2019 there were 497 LSB members who held practicing certificates and 291 law firms in 2019 compared 266 in 2018. This represented a significant increase in the number of law firms and requires the LSB to increase its supervisory capacity to ensure compliance for both the Legal Practitioners Act and the FI Act.

The LSB has no capacity to supervise and monitor for compliance with AML/CFT obligations by legal professionals and this represents a significant ML/TF vulnerability to the sector.

There has been joint-inspections and outreach activities by the FIA and the LSB in the most recent months. The results showed that legal professionals lacked understanding of ML/TF risks and AML/CFT obligations that apply to them. This situation creates significant ML and TF risks from creation and management of legal persons by legal professionals in Botswana considering the gatekeeping role described in Part V of this report.

There has been no enforcement action taken by the LSB against a legal professional for non-compliance with the AML/CFT obligations despite there been evidence from the inspection reports of gross compliance failures. However, the LSB has applied administrative sanctions for failure to comply with the Legal Practitioners Act and Code of Conduct including on allegations of abuse of trust accounts.

11. ACCESS TO BENEFICIAL OWNERSHIP INFORMATION

Competent authorities in Botswana have broad legal powers and processes in place to provide each other with information they hold upon request and apply them to access information held by financial institutions and designated non-financial businesses and professions. The powers include the ability to compel production of information, conduct searches and request information on behalf of other foreign counterparts.

The competent authorities have procedures and processes in place to protect the security and confidentiality of information in their possession and the requests made and responded to. They also have powers to provide international cooperation and exchange information on legal and BO information to foreign counterparts spontaneously and upon request.

However, due to the recent nature of BO obligations and generally low compliance levels across the spectrum, the information held by competent authorities such as BURS, CIPA, FIs and DNFBPs may not be accurate and updated. For instance, about two-third of companies do not file annual returns at BURS as they should, and this creates a vulnerability as availability of BO information cannot be ascertained at the BURS.

Based on the cases described in Part V of this report, LEAs were able to obtain complete UBO information from the CIPA which assisted in their investigations of the simple and complex cases of misuse of legal persons.

Domestic co-operation and information exchange between FIA and LSB and among competent authorities including law enforcement, intelligence, FIU, BURS, supervisors and SRBs is also important for effective monitoring/supervision of the sector.

12. RECOMMENDATIONS

12.1 Formal Mechanism For Public-Private Sector Engagement on AML/CFT

Within the broader approach of creating a formal mechanism for sharing of experience and information on ML and TF risk information and applicable preventative measures between the public sector AML/CFT bodies and the private sector whose activities fall under the ambit of the AML/CFT legal framework in Botswana, the LSB and the accountancy SRB working closely with the FIA, the Master and the CIPA should create a platform that allows for engagement with the professions like the trust and company services providers, to promote understanding of risks and preventative measures in relation to legal persons especially on beneficial owners requirements. The engagement could also be extended to LEAs especially DCEC, BURS and AML/CFT Unit of the BPS to strengthen use of parallel financial investigations methods on tracing beneficial owners.

12.2 Consultative Engagement Between BO Registries and AML/CFT Supervisors

At a public sector level, the AML/CFT supervisor's bodies and the CIPA and the Master should have consultative sessions to address the unequal understanding of the conceptual meaning and practical application of beneficial owner's obligations to ensure that there is proper interpretation and effective application of the regulatory requirements relating to BO. Out of this engagement, the supervisors and BO registries should consider issuing guidance to assist the professionals acting as company service providers to obtain and maintain accurate and complete BO information for access by competent authorities.

12.3 Enforcement Actions for Compliance

Supervisors should use their powers in the FI Act and parent legislation to monitor and enforce compliance with AML/CFT obligations related to identification and verification of legal persons by their respective regulated entities when they engage in the specified activities. Supervisors should ensure that they have adequate procedures and procedures for post-inspections monitoring of inspected entity's progress to remedy areas of non-compliance identified during inspections and that the corrective actions are done in a timely manner.

12.4 Targeted Guidance for Uniform Application of BO Obligations

Supervisors should issue targeted guidance to regulated entities providing specified activities in relation to legal persons, the guidance of which should be outline high-level principles of RBA to AML/CFT compliance with obligations related to legal persons. The supervisors may conduct training of the professionals providing specified services related to legal persons to ensure that there is a clear understanding of the regulatory expectations.

12.5 Adequate Supervisory Capacity as a Condition for Compliance

Supervisors of legal and accounting professionals should develop supervisory capacity with sufficient staff who are trained, at a practical level, on how to conduct compliance monitoring of their respective professionals when engaging legal persons. The supervisory capacity of the LSB and BICA should include written risk-based manuals, inspections and enforcement procedures and understanding of ML and TF risk associated with their professionals when they engage in specified activities relating to legal persons. The expertise developed should be measured against the ability of the staff to improve compliance levels by testing the adequacy of the AML/CFT obligations and taking proportionate interventions, when necessary.

12.6 Operational Capacity of Registries

CIPA, The Master and BURS should have adequate capacity to (human, financial and technical) obtain and maintain accurate, complete and up-to-date BO information which is accessible on a timely basis by FIs, DNFBPs, LEAs and supervisors.

The responsible Ministries should ensure that agencies under their political executive direction are provided with adequate resources to put in place mechanisms that will ensure effective supervision and databases in respect of BO obligations. In this regard, the Ministry of Defense, Security and Defense should ensure that The Master has sufficient resources to create a registry on trusts which contains accurate and complete BO information which is current and available to stakeholders in a timely manner.

12.7 Targeted Compliance Monitoring in the Financial Sector

NBFIRA and BoB should take necessary supervisory actions to ensure that banks and non-bank financial institutions comply with BO obligations as part of the broader AML/CFT compliance within the entities.

12.8 Promoting Compliance through Outreach

The results of the ML and TF risk assessment of legal persons and arrangement (except trusts) should be shared with the private sector in a coordinated manner including having practical engagements with key industries regulated by the BoB (i.e., banks), NBFIRA (i.e., asset / fund managers and investment advisors) and professionals acting as company services providers (i.e., legal professionals and accountants).

12.9 Future Risk Assessment of Trusts

The Authorities should consider undertaking a second risk assessment using the information generated through supervisory activities by the Master of the High Court, BICA and LSB once they have built adequate capacity.

12.10Keeping NRA up-to-date

The results of the ML and TF risk assessment of legal persons should be considered by the NCCFI to review the findings of the NRA in respect of risks associated with misuse of legal persons and legal arrangements by criminals for ML and TF purposes.