BOTSWANA RISK ASSESSMENT REPORT FOR TRUSTS

SANITIZED VERSION

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Contents

*"Corporate vehicles—such as **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 Guidance – Transparency and Beneficial Ownership, 2014***

1. GLOSSARY OF TERMINOLOGY

FATF – Financial Action Task Force, 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.

2. LIST OF 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

3. 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 31st 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 Trust Service Providers (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.

4. BACKGROUND AND CONTEXT

In 2016, the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) conducted a review of Botswana's Anti-Money Laundering (AML) and Countering Financing of Terrorism (CFT) and Countering Proliferation Financing (CPF) measures for compliance with the Financial Action Task Force (FATF) Standards against money laundering (ML), terrorist financing (TF) and proliferation financing (PF). In the main, the results of the mutual evaluation (ME) 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 trusts to prevent misuse by criminals for ML and TF. More specifically, the peer review focused on the features of trusts, understanding of ML and TF risks associated with trusts, availability of ultimate ownership information of trusts and international cooperation in relation to exchange of information on trusts, to determine the level of compliance with specific FATF requirements relating to trusts. The results of the ME revealed a low level of compliance in the four areas used to determine compliance with transparency of trusts requirements. The major criticism in the MER was the fact that Botswana had not demonstrated a good understanding on the nature and extent of ML/TF risks posed by trusts in Botswana.

To address the deficiencies, Botswana completed its first risk assessment of trusts to identify, assess and understand the nature and level of ML/TF risks associated with trusts. The results of the risk assessment will be used to implement appropriate mitigating strategies.

4.1 Research Methodology

Botswana established a multi-disciplinary Working Group on assessing ML and TF risks associated with trusts in recognition of the multiplicity of stakeholders and the sources of vulnerabilities and threats at play in the trust environment. The core members of the Working Group are:

- Ministry of Defence, Justice and Security (MDJS);
- Registrar of Societies ;
- Bank of Botswana (BoB);
- Registrar of Deeds;
- Financial Intelligence Agency (FIA);
- Non-Bank Financial Institutions Regulatory Authority (NBFIRA);
- Law Society of Botswana (LSB);
- The Master of the High Court (The Master);

- Office of the Receiver;
- Botswana Police Service (BPS);
- Directorate of on Corruption and Economic Crimes (DCEC);
- Botswana Unified Revenue Service (BURS);
- Directorate of Intelligence and Security (DISS);
- Companies and Intellectual Property Authority (CIPA); and
- Botswana Council of Non-Governmental Organisations (BOCONGO).

The Working Group was assisted by Consultants from Botswana Accountancy College (BAC) and ML technical Advisor to conduct the ML/TF risk assessment of trusts. The role of the Working Group was collection, collation and analysis of data and information obtained using quantitative and qualitative techniques. The one-to-one interviews with relevant stakeholders was invaluable to obtain information that closed gaps where information was not available, inaccurate and/or incomplete. In addition, the Working Group relied on secondary sources of information such as the 2017 Mutual Evaluation Report of Botswana, various FATF and FATF Style Regional Bodies (FSRBs) trust and company service provider's typologies reports, Botswana ML and TF National Risk Assessment Report (NRA), and the FATF 40 Recommendations and guidance papers.

The Working Group used various methods to collect data and information to identify and assess ML/TF risks associated with trusts in Botswana. These were,

(a) Focused group discussions,
(b) One-on-one interviews with some commercial banks, accounting and legal professionals, competent authorities such as the Master of the High Court, Registrar of Deeds, CIPA, BURS and LSB;
(c) Questionnaires; and
(d) Literature review including guidance 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.

Further, the study benefited immensely from experts analysis of and judgement on available information to identify and assess trusts 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 study.

The scope of the study followed by the Working Group to identify and assess ML/TF risks of trusts was:

a. Description of incorporation/registration of trusts;
b. Role of company service providers in formation of trusts;
c. Description of types and forms of features of trusts;
d. Availability of beneficial ownership information of trusts; and

e. International cooperation processes and provision of beneficial ownership information on trusts.

The Working Group has put a greater focus on:

a. Recently introduced obligations on enhancing transparency of trusts including beneficial ownership;
b. ML/TF risks and mitigating strategies prior the coming into force of the Trust Property Control Act, 2018 (TPCA) and amendments to the Financial Intelligence Act, 2019 (FI Act); and
c. Techniques and methods of how trusts can be, or are being, or have been, used for ML and TF purposes.

The absence of a proper trust registration regime prior to 2018 and the recent nature of the trust legislation and registry makes it difficult to assess the ML and TF risks prevalent in the trust sector. In the main, the available information enabled assessment of inherent vulnerability more than threats.

Box 1: Definition of Specific Terminologies

A Trust "is a structure in which a person (the settlor) transfers assets to another person (the trustee) who manages the entrusted assets following the settlor's instructions, but for the benefit of the beneficiaries (either persons named by the settlor to receive income or the entrusted assets at some point, or a defined class of unnamed persons)."

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 including a trust.

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).

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4.2Purpose 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; and
v. Competent authorities are enabled to provide international cooperation and exchange of information on beneficial ownership of trusts.

5. INTERNATIONAL FRAMEWORK ON TRUST SERVICE PROVIDERS

In 2012, the FATF AML/CFT Standards introduced a risk-based approach that 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/CT measures. In particular, the following apply:

Box 2 FATF Recommendation on transparency and beneficial ownership of legal arrangements

Legal and Regulatory Measures

- Countries should take measures to prevent the misuse of legal arrangements for money laundering or terrorist financing. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries that can be obtained or accessed in a timely fashion by competent authorities. 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 and 22.
- 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.

Effectiveness of Application of Legal and Institutional Measures

- Immediate Outcome 5 requires that there are measures in place which prevent trusts from being used for criminal purposes, are sufficiently transparent and are accurate and up-to-date basic and beneficial ownership information is available on a timely basis.
- 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 trusts as clients and apply commensurate AML/CFT controls (e.g. CDD) to mitigate identified risks.

6. OVERVIEW OF LEGAL FRAMEWORK FOR REGISTRATION OF TRUSTS IN BOTSWANA

Before 2018, Botswana had no statute for the creation and management of trusts. This means that the country had minimal to no registration and compliance requirements such as filing of statutory returns on trusts to the Master, or the trustees being required by the Master to account on affairs of a trust under their management. However, the tax laws and the AML/CFT laws required trustees to provide information on trusts for registration as taxpayers and to establish a business relationship or conduct a transaction with a private entity such as a bank.

In June 2018, Botswana brought into force the Trust Property Control Act, 2018 (as amended) to regulate and supervise the creation and management of trusts in the country. For this purpose, the Master is in the process of developing an electronic registration database to obtain and maintain comprehensive trust information consistent with the provisions of the TPCA.

The TPCA establishes a trust registry in the Office of the Master, with offices in Gaborone and Francistown. In terms of Section 4 of the TPCA the Master registers trustees and trusts and maintains a register thereof. Since there is a requirement for all trusts (old and new) to be registered under this Act, the trust register at the Master's office will have basic and ultimate beneficial ownership information.

Prior to the TPCA, some information on trusts was filed at the Deeds Registry. They obtained some information on trusts including identities of the settlor, trustees, property and beneficiaries in Botswana. The Registrar of Deeds maintains information on existing trusts predating the TPCA which made the Office of the Master responsible for registration of trusts.

6.1 Formal Requirements for Registration

The TPCA has codified the common law principle of fiduciary duty owed to trust beneficiaries by a trustee. In addition, the Act requires the trustees to register the trust with the Master. The Act requires that any person who wishes to become a trustee must be registered with the Master before taking control of the property.

The requirements for registration of a trust are:

a. Trust instrument (a will, a written or oral agreement, court order or a notarial deed);
b. Information on beneficial owners and address for service, and any amendment to the trust deed must be filed with the Master;
c. Information on the trustees (Appendix 1); and

d. Information on the trust property

A Trust Instrument or a certified copy accompanied by duly completed registration forms and the registration fee of BWP250 is filed with The Master. Thereafter the application is examined by the Master and if the Master is satisfied that the documents are in order, Letters of Authority will be issued in terms of Section 7 of the TPCA. Once letters of authority have been issued then one is recognized as a Trustee.

The diagram below indicates the parties to a trust in Botswana in terms of the TPCA.

Diagram 1: Simplified Creation of a trust

Role of Settlor – a person who makes or arranges for the making of a trust instrument under which the person's property is made over or bequeathed to another specified person. Their Role is to facilitate the formation of a trust by nominating persons to be appointed as trustees and identifies the beneficiaries.

A Trustee – is a custodian of the assets of a trust who manages the trust property for the benefit of a beneficiary and disburses the benefits realised in terms of the Trust Instrument.

A beneficiary – is an individual who stands to benefit from a trust in terms of the Trust Instrument.

In terms of Section 10 of the TPCA, a trustee owes fiduciary duties to the trust beneficiaries. Section 7 requires the former to know the identities of any other trustee, settlor(s), all beneficiaries, and any other person who exercises control over the trust.

7. TYPES AND FORMS OF TRUSTS IN BOTSWANA

Botswana has two registries for information on trusts. The table below shows the registries and the number of trusts per each registry up to December 2019. Since the coming into force of the TPCA in June 2018, the Master is the only trust registry in Botswana. Prior to the TPCA, there was no requirement for trusts to be registered and therefore the correct exact number of trusts in Botswana is unknown.

Table 3: Number of Trusts per Registry, 2019

Name of agency	Number of Trusts
Deeds Registry – Trust Deeds	175
Master – trust	14 Trusts
Master – trustees	53 Trustees

Since becoming operational in late 2018, the Master has received about 506 applications for registration of trusts. Of these, about 220 applications were considered, 14 Trusts were approved, and 53 Trustees were appointed. The rest of the applications were returned with comments on several areas for generally failing to meet statutory obligations such as failure to provide information on beneficiaries, trustees, trust property and the trust instrument not signed, etc.

In recent years, Botswana has been experiencing an increase in the number of trusts registered. Although a range of trusts exist in Botswana, many trusts in Botswana are generally created for charitable causes. A range of trusts are now in use in Botswana as described in Table 1.

The Deeds Registry is responsible for registration and preservation of deeds in the country. There was no different process for registration of trusts and as such, registration was conducted like any other property-related deed. The Deeds Registry had no formal registration process for trusts and, as such, it was done like any other property-related deed. The requirements were:

a. a resolution to form the trust;
b. object of the trust; and
c. certified copy of an Omang for locals and a Passport for foreigners

The purpose of the information on the object of a trust is to distinguish it from Not For Profit Organizations (NPOs). The Deeds Registry rejected trusts that had a similar object to an NPO and referred such to the Registrar of Societies.

The registration process at the Registrar of Deeds required information of trustees and beneficiaries of the trust, a resolution of the board of trustees, and the address where the trust will be operating. The Registrar of Deeds simply accepted the trust information as coming from the trustee or a trust service provider without verification of the information. Any change to the trust information post registration was filed with the Registrar through a notary.

Table 1: Types of Trusts

Type	Features of trust type
Business Trusts	• 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
Community Trusts	• Where a trust is set up for the benefit of a class of people not necessarily related to the founder, usually for charitable purposes
Will Trust/Testamentary	• 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
Family Trust	• An arrangement where a Trust is set up for the benefit of family members of the founder/settlor
Foundations	• A not-for-profit entity

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.

8. AVAILABILITY OF BENEFICIAL OWNERSHIP (BO) INFORMATION

At the heart of misuse of corporate vehicles for criminal purposes is the inability of competent authorities such as the law enforcement agencies to obtain evidence during investigations due to lack of accurate, reliable and up-to-date beneficial ownership information behind a trust at central registries. This situation is largely true of Botswana. The absence, or lack, of adequate beneficial ownership information may potentially facilitate commission of ML/TF through trusts.

Botswana has adequate laws, as detailed in Table 2 for obtaining and maintaining accurate and updated information on trusts and beneficial ownership. Except for tax laws, obligations to provide beneficial ownership information in relation to trusts came into force in June 2018, following the enactment of the TPCA 2018, which was amended in 2019 to expand the definition of beneficial owner in line with the FATF Standards. Therefore, implementation of the measures are recent and ongoing. The table below shows the recent changes in respect of the legal framework to obtain and maintain trust BO information in Botswana.

Table 2: Legal and Beneficial Ownership Legal Framework

Statutes	Implementing Institution	Description of Legal requirement
Trust Property Control Act	Trustees and The Master of the High Court	Trustees in Botswana must file beneficial ownership information with Master of the High Court
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.
Societies Act	BURS and Registrar of Societies	Societies to obtain and maintain a list of members
Income and Tax laws	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 DNFBPs to identify and verify beneficial ownership information when engaging in business relationships or transactions. The table below illustrates a summary of availability of beneficial ownership information of trusts in Botswana.

Table 3: Availability of Legal and Beneficial Ownership Information in Botswana

Type	TPCA	Tax Law	FI Act
Master	**trusts – basic info available** UBO – some info available	N/A	N/A
Trustees	**trusts – basic info available** UBO – some info available	N/A	N/A
BURS	**N/A**	**trusts – basic info available** UBO – some info available	N/A
FIs and DNFBPs	N/A	N/A	**trusts – all info available** UBO – some info available

The table above illustrates the availability of beneficial ownership information relating to trusts at four sources. Due to the recent nature of the beneficial ownership requirements and the on-going capacitation of the Master's office, Botswana has a long way to go to obtain and maintain beneficial ownership information in all trusts. The BURS and commercial banks have some beneficial ownership information, to which Law Enforcement Agencies have access. The table indicates that Botswana has a significant deficiency in relation to obtaining and maintaining complete beneficial ownership information.

BO Information at the Master

The TPCA creates obligations for trustees to obtain, maintain and file beneficial ownership information and file the information with the Master. The information which must be kept covers:

a. Trust;
b. Trustees;
c. Settlors; and
d. Beneficial owners.

The Master plans to develop and implement a BO database, which will enable it to, inter alia, (a) obtain and maintain updated information on trust, trustees, settlors and beneficial owners and (b) promote accessibility of its information by law enforcement, FIs, DNFBPs and the public at large.

The table below assesses inherent vulnerability of The Master measures.

Table 4: Availability of Basic and BO information at The Master

Indicator (legal requirement or procedure)	Availability	Quality (rating)
Basic info at registration	Yes	Poor
BO info at registration	Yes	Poor
Provide basic and BO information to the Master annually and as changes occur to keep it up-to-date	Yes	Poor
Basic information on trust is publicly available	Yes	Fair
BO information could be made publicly available	Yes	Poor
Trustees are natural persons	Yes	Good
Trustees are legal persons / arrangement	Yes	Poor
Information on trustees and natural persons authorized to act on behalf of the company	Yes	Poor
Obtain and maintain a list of trustees	Yes	Poor
BO information is available to specified parties or accountable institutions.	Yes	Fair
Access of information is online	No	-
Search function support multiple search fields	No	-
Master register is recorded digitally and is searchable	No	-
Regular application of sanctions for non-compliance	No	
Provision of false info attracts administrative, civil and criminal sanctions	Yes	Poor
Trustees held personally liable	Yes	Good
Capability of database to identify indicators of misuse or unusual activity	No	-
Dissuasive sanctions for non-compliance	No	Poor
Overall Vulnerability Rating		High

The table above indicates that the extent of availability of basic and beneficial ownership information at The Master is weak. This indicates a high inherent vulnerability for ML and TF.

9. TRUST SERVICE PROVIDERS

The nature and extent of ML and TF risks facing trusts are determined by the activities carried out by trusts, the persons creating, operating and managing the trust, the ethical and supervisory capacity of existing supervisory structure for Trust Service Providers (TSPs) and the susceptibility or vulnerability of activities relating to trust to ML and TF.

The nature of services offered by TSPs are covered in **Box 4**. In Botswana, accountants accredited by Botswana Institute of Chartered Accountants (BICA) and lawyers registered with LSB provide most of the services. In practice, the legal professionals have a lion 'share of the market. It is for this reason that the risk assessment focused mainly on legal professionals.

In addition, the level of compliance with AML/CFT obligations including maintaining basic and ultimate beneficial ownership information in respect of Trusts is similar. Therefore, the findings and the usefulness of the risk assessment will apply largely in the same way as the accountants as TSPs. A few trustees register trusts with the Master without the assistance of a TPS.

Box 4: FATF Recommendations Applicable Legal Professionals as 'gatekeepers'

R.22 sets out composite requirements for accounting and legal professionals 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 Accountants and legal professionals (as designated non-financial businesses and professions) 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, foreign branches, subsidiaries (R.18), Higher-risk countries (R.19), reporting of suspicious transactions (R.20), tipping-off and confidentiality (R21) apply to accounting and 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, accounting and legal professionals should be required to promptly report their suspicions to an 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

9.1 Accounting and Legal Professionals as Trust Service Providers

Accounting and legal professionals act as TSPs by offering services under R.22. When they provide these services, they are required under the FI Act to comply with AML/CFT obligations. The table below gives a summary of the level of compliance with the FI Act obligations and the inherent vulnerability associated with each obligation. The conclusions in the table are based on the findings of the inspections reports jointly conducted by the LSB and the FIA; questionnaires responses administered for the risk assessment, one-on-one interviews with legal and accounting firms, and BLS and industry experts in the Working Group.

9.2ML and TF Vulnerability for TSP

Mitigating measures	Compliance Level	Inherent Vulnerability
ML/TF risk assessment	Low (1)	High
AML/CFT policies and procedures	Low (1)	High
Compliance officer	Medium (2)	Medium
Training	Low (1)	High
Customer due diligence, incl. BO information	Low (1)	Medium High
Record keeping	Medium (2)	Medium High
Suspicious transaction reporting	Low (1)	High
Tipping off	Low (1)	High
High-risk jurisdiction	Low (1)	High
UNSCR sanctions screening	Low (1)	High
Foreign branches	Low (1)	Medium
PEPs/PIPs	Low (1)	High
New technologies	Low (1)	Medium
Reliance on third parties	Low (1)	Medium
Overall ratings	Low	High

The table above indicates a low compliance level with AML/CFT obligations under the FI Act by legal and accounting professionals. The average inherent vulnerability is high for ML and TF abuse.

9.3Selected High-Risk Services Provided to Trusts

Below are some of the main services provided to trusts, which inherently pose higher ML and TF risk.

9.4Trust Account

The law in Botswana requires accounting and legal professionals who hold funds of clients to do so with a bank licensed by the Bank of Botswana. The account must be separate from the account of the individual professional and TSP. The opening of this business relationship is subject to AML/CFT obligations set out in the FI Act as required under R.22. It is also a statutory requirement that the property held in trust must be for a lawful purpose directed by the client. For every transaction conducted, the TSP must account for the funds. The law further requires that the Trust accounts be audited by an external auditor and the audit report filed with the LSB. This is one of the preconditions for a TSP to obtain a practicing certificate and then run their business.

It is this nature of a business relationship (i.e., holding of client's funds) which raises inherent vulnerability for criminals to misuse or to obscure the identity of the funds held in trusts for laundering or TF purposes.

9.5 Formation of Trusts

TSPs create, or operate or manage Trusts on behalf of beneficiaries for a lawful business. Members of the public are also able to register a trust themselves directly with the Master. In Botswana, a large proportion of trusts are registered by TSPs not by individuals. This is because most of the trusts in Botswana are family trusts intended to preserve family property. The creation of trusts by TSPs 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 trusts from law enforcement agencies, accounting and legal professionals are at a risk of unwittingly assisting criminals to misuse trusts for ML/TF purposes. Ways to avoid this includes the following: Accounting and legal professionals in Botswana act as trustees and must provide identity information to the Master and the bank.

- The banks take reasonable steps to verify the identity of trustees and beneficial owners. The challenges of not having beneficial ownership information at the Master, Deeds Registry, and the BURS coupled with the general inadequate application of CDD measures by accounting and legal professionals, create a significant potential for anonymity and therefore possible misuse of Trusts for ML and TF.

9.6 Availability of Basic and Beneficial Ownership Information

As *gatekeepers,* accounting and legal professionals in Botswana engage in services related to formation, administration and management of Trusts and are therefore required to maintain accurate and reliable basic and beneficial ownership information on the Trusts. In addition, the TPCA requires accounting and legal professionals as accountable institutions to submit basic and ultimate beneficial ownership information to the Master when registering a trust for recordkeeping. Based on the information generated from inspection reports, interviews and responses to questionnaires, accounting and legal professionals in Botswana have a low level of understanding and compliance with the beneficial ownership obligations under the FI Act and the TPCA. This situation creates significant ML/TF vulnerability for abuse of Trusts by criminals as the TSPs suffer from inadequate understanding and application of obligations relating to transparency of beneficial ownership on trusts in Botswana.

The overall ML/TF risks posed by accounting and legal professionals as gatekeepers for the specified activities is mainly as a result of weak systems in place by the professionals and the Master's Office.

10. SUPERVISION AND ENFORCEMENT ACTION FOR ENHANCING TRANSPARENCY OF TRUSTS

Botswana has several supervisory bodies, which supervise and monitor compliance with measures to enhancing transparency when engaging with clients on specified activities.

10.1 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 through 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 taxpayer to comply before imposing a sanction. The BURS has yet to extend audit of basic BO information to beneficial owners when monitoring for compliance with tax obligations. For instance, in 2017 the total number of taxpayers was 360 006 of which 90 681 were corporates. Of these, only 51 percent complied with tax filing obligations. The number of audits conducted were 163 on companies, 2 on partnerships and 81 on individuals.

The average monetary value of sanctions imposed by the BURS is BWP23 million per annum. The average compliance level has been 50 percent since 2015. This makes it difficult to ascertain availability of accurate and updated Ultimate beneficiary Owner (UBO) information held by the BURS and therefore increases the chances of trusts being abused for ML and TF.

10.2 FIs and DNFBPs

Banks (FIs) and accounting and legal professionals (DNFBPs) are obliged to comply with the BO requirements under the FI Act and the TPCA. Due to the recent nature of the beneficial owners' obligations under the FI Act, the banks, and accounting and legal professionals keep some BO information. This creates a significant ML/TF risks arising from inadequate implementation of measures to obtain and maintain accurate and complete BO information when entering into business relationships or conducting transactions involving trusts. Due to these failures, the risk exposure to FIs particularly banks operating or managing a trust is medium relative to inherently high risk for legal and accounting professionals.

10.3 LSB and BICA

The FI Act designates the LSB and BICA as the AML/CFT supervisor of legal and accounting professionals, respectively. The LSB members who held practicing certificates for 2019 were 497. There were 291 law firms in 2019 compared to 266 in 2018. This represents a significant increase in the number of law firms and requires the LSB to increase its supervisory capacity for compliance with both the Legal Practitioners Act and the FI Act.

There has been some joint-inspections and outreach activities by the FIA and the LSB in the most recent months in respect of legal professionals. The results showed that legal professionals lacked understanding of ML/TF risks and AML/CFT obligations that apply to them when providing services related to trusts. This situation creates a significant ML/ and TF risks to legal professionals when they create and manage trusts.

The following significant challenges have been identified which accentuate the ML/TF risk exposure of accounting and legal professions when engaging in specified activities for trusts: -

- Accounting and legal professionals have not demonstrated commitment to comply with the AML/CFT obligations, respectively. Similarly, BICA and LSB are yet to develop capacity to supervise and monitor accounting and legal professionals when offering trust services.
- The lack of basic appreciation of ML/TF risks and AML/CFT obligations that apply to accounting and legal professionals makes it difficult for application of risk-sensitive measures by the accounting and legal professions when engaging in specified activities.
- Accounting and legal professionals have not taken reasonable steps to identify and verify through independent reliable sources of information the identity of persons for whom services relating to creation and management of trusts is undertaken. This means that these professionals are reliant on information provided by the clients themselves without any further due diligence and this creates a significant vulnerability for accounting and legal professions as TPSs.
- Accounting and legal professionals in Botswana appear less interested in using AML/CFT measures to protect themselves against the risk of financial offence. However, appears there is reliance on the FIA to take charge of the process.
- Consequently, there has not been enforcement action taken by the BICA and the LSB against an accounting and a legal professional for non-compliance with the AML/CFT obligations. For instance, despite evidence on non-compliance from the inspection reports conducted by the FIA on legal professionals, there has been no sanction issued imposed by the

supervisors. However, the LSB has applied administrative sanctions for failure to comply with the Legal Practitioners Act and Code of Conduct, including on abuse of trust accounts.

10.4 Guidance on Potential ML/TF Risks and Application of AML/CFT Obligations

Supervisors and the FIA have not provided information on potential ML/TF risks nor guidance to accounting and legal professionals on how to conduct ML/TF risk assessment as trust service providers. As a result, it has made it difficult for accounting and legal professionals to identify and assess ML/TF risks that apply to trusts. Furthermore, information gleaned from inspections reports, responses to questionnaires and interviews indicated low levels of understanding of ML/TF risks and AML/CFT obligations by accounting and legal professionals. The lack of guidance provided to accounting and legal professionals by the supervisory bodies poses a significant potential ML/TF vulnerability particularly as the sector has a low level of compliance with AML/CFT obligations and lacks understanding of possible abuses of the services they provide.

The overall conclusion is that the supervision and monitoring framework for ensuring transparency of BO information of trusts by trust service providers in Botswana is less developed and creates a significant vulnerability for ML and TF.

11. ACCESS TO BENEFICIAL OWNERSHIP INFORMATION

Competent authorities in Botswana have a wide range of legal powers and processes in place to provide each other with information on trusts upon request. These powers are also used to access trust information held by financial institutions and TSPs. The powers include the authority 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. The competent authorities have powers to provide international cooperation and exchange information on legal and beneficial ownership information to foreign counterparts spontaneously and upon request.

However, due to the recent nature of beneficial ownership obligations and generally low levels of compliance across the spectrum, the information held by competent authorities such as the BURS and the Master and by FIs and DNFBPs may not be accurate and up-to-date. For instance, about two-third of trustees do not file annual returns to the Master and BURS as they should and this creates a vulnerability as availability of beneficial ownership information for exchange of information cannot be ascertained.

12. RECOMMENDATIONS

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

In order to raise the level of understanding of ML and TF risks and application of commensurate AML/CFT obligations, Botswana should create a platform for public bodies such as the Master of the High Court and CIPA and private sector could exchange experiences and information to prevent possible abuse of trusts for ML and TF. The engagement could also be extended to law enforcement agencies 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 supervisory bodies, the CIPA and the Master of the High Court should have consultative sessions to address the unequal understanding of the conceptual meaning and practical application of beneficial owners' obligations to ensure that there is proper interpretation and effective application of the regulatory requirements relating to beneficial ownerships. Out of this engagement, the supervisors and BO registries should consider issuing guidance to assist the professionals acting as trust service providers to obtain and maintain accurate and complete BO information for access by competent authorities.

12.3 Electronic Capability at the Master of the High Court

The Master should develop an electronic registration database to obtain and maintain comprehensive trust information consistent with the provisions of the TPCA. This information should be made available to competent authorities, FIs, and DNFBPs.

12.4 Enforcement Actions for Compliance

The supervisors (e.g., Master of the High Court) should use their powers in the FI Act and primary legislation (e.g., the TPCA, for the Master) to monitor and enforce compliance with AML/CFT obligations related to identification and verification of trusts by accountants and legal professionals when they engage in the specified activities. Supervisors should ensure that they have adequate procedures for inspections to identify and remedy areas of non-compliance.

12.5 *Targeted Guidance for Uniform Application of BO Obligations*

The Master of the High Court, LSB and BICA should issue targeted guidance to regulated entities providing specified activities in relation to trusts, the guidance of which should be outline high-level principles of risk-based approach to AML/CFT compliance with obligations related to trusts.

The supervisors may conduct training of the professionals providing specified services related to trusts to ensure that there is a clear understanding of the regulatory expectations.

12.6 *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 Master of the High Court, LSB and BICA should include written AML/CFT 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 trusts.

The effectiveness of 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.

12.7 Operational Capacity of Registries

The Master of The High Court, BICA 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, law enforcement agencies 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 of The High Court 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.

12.8 *Promoting Compliance through Outreach*

The results of the ML and TF risk assessment of 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.

12.10 *Keeping NRA up-to-date*

The results of the ML and TF risk assessment of trusts should be considered by the NCCFI to review the findings of the NRA.