FISA

THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA

Amended submission to the Parliamentary Standing Committee on Finance (SCOF) on certain provisions of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill relating to amendments to the Trust Property Control Act, 57 of 1988

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1. Summary

1.1. The General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill (the Bill), in its current form and in so far as it proposes to amend the Trust Property Control Act, 57 of 1988 (the Act) **contains an inherent contradiction** with the existing definition of "trust" in section 1 of the Act, and is in conflict with the trite principles of ownership in South African (trust) law.

1.2. The definition of "beneficial owner" in clause 1 of the Bill is in conflict with the provisions of section 9 of the Act.

1.3. The definition of "beneficial owner" in clause 1 of the Bill, together with the proposed insertion of section 11A into the Act, contains provisions which may open the door to premature acquisition of certain rights by beneficiaries of the trust. This will encroach on the discretion afforded to trustees and severely limit existing rights of trustees and the founder of a trust.

1.4. The definition of "beneficial owner" in clause 1 of the Bill contains terms which are either impractical or impossible to comply with, or both, in certain respects.

1.5. The Bill appears to operate from the assumption that a trust in South African law has legal personality, which it does not.

1.6. The proposed insertion of section 11A into the Act by clause 5 of the Bill refers to "beneficial ownership" (as opposed to "beneficial owner"), a term which is not

defined in the Act or in the Financial Intelligence Centre Act, 38 of 2001 (as amended).

1.7. The proposed insertion of section 11A into the Act imposes a burden on trustees in language that can only be described as vague and should, for that reason alone, be rejected.

1.8. There is another way of achieving the oversight apparently desired without jeopardising the nature of the office of trustee or existing rights of parties.

2. Trusts in South Africa

2.1. Trusts have a vital role to play in South Africa. Trusts are used to hold and manage a variety of assets for the benefit of a variety of beneficiaries, such as:

2.1.1. Minors under the age of 18 years;

2.1.2. Mentally or legally incapacitated persons;

2.1.3. Victims of road accidents and medical negligence;

2.1.4. Children from a previous marriage whose interests should be protected from the whims of a current or future spouse who is not their parent, or a future spouse of such a spouse;

2.1.5. Family members who are deemed unsuitable to be entrusted with substantial wealth under their direct control, because they are ill equipped to manage assets;

2.1.6. And many more.

2.2. In many instances the beneficiaries are vulnerable and the funds and assets kept in trust are not substantial. Undue compliance burdens contribute to an increase in the costs of administering these trusts and negatively impact these vulnerable citizens.

2.3. This document does not aim to deny that trusts are sometimes abused and that it may include money laundering and the financing of terrorism.

2.4. What this document aims to do is to point out that the proposed legislative changes:

2.4.1. Fly in the face of existing South African trust law and the South African law of property in certain crucial respects and are therefore manifestly undesirable;

2.4.2. Are undesirably vague in certain respects;

2.4.3. Will have unintended consequences that infringe the rights of citizens involved in trusts; and

2.4.4. Place undesirable, unfair and costly burdens on parties involved in trusts, specifically in relation to trustees.

3. Background

3.1. The General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill was published by Treasury on 29 August 2022.

3.2. The period for public comment was opened on 4 October 2022 and closed at midday on 10 October 2022, giving a mere six days for submission of comment.

3.3. Public comment was then re-opened until 16:00 on 25 October 2022.

3.4. A public hearing by SCOF was held on 11 October 2022.

3.5. FISA has engaged with the Financial Intelligence Centre (FIC) over the years upon invitation from the FIC. FISA's views about the (to South African trust Law) foreign concept of "beneficial owner" of a trust were shared repeatedly with the FIC, to no avail apparently.

3.6. FISA was invited to a meeting at the FIC in March this year, on 24 hours' notice. As the FISA Chief Executive is based in Cape Town and had several previous commitments, it was an unreasonably short notice with no possibility to accept it.

3.7. FISA, as a fiduciary industry body representing around 800 fiduciary professionals in South Africa, was never consulted since March 2022 about any of the aspects covered in the proposed legislation.

3.8. As some of the proposed amendments may have unforeseen consequences, it is undesirable that such fundamental changes be effected without proper consideration of the legal framework of trusts in South African law.

4. Specific comment on certain of the proposed amendments

4.1. <u>The proposed definition of "beneficial owner" is in conflict with existing definition of "trust", the trite principles of property ownership in South African law, and the established principles relating to the abuse of the trust form versus "sham" trusts</u>

4.1.1. The existing definition of "trust" in section 1 of the Act makes it clear that a trustee does not own or hold trust property for own benefit.[1]

[1] The definition of "trust" in section 1 of the Act reads as follows:
*"trust" means the arrangement through which **the ownership in property** of one person is by virtue of a trust instrument made over or bequeathed—*

4.1.2. To include, as the proposed amendment in the Bill does, a trustee under the proposed newly introduced definition of "beneficial owner" is in direct conflict with the ordinary meaning and context of the existing definition of "trust".

4.1.3. It is clear that the existing definition of "trust" correctly reflects the legal position in South African trust law. A trustee cannot, by virtue only of the office of trustee, be a "beneficial owner" of the trust property. The trust property is always owned (in the case of a trust as defined in par (a) of the definition) in an official capacity for the benefit of the beneficiaries or the impersonal object of the trust (in the case of, e.g. charitable trusts). This type of trust is known as an "ownership trust". In a par (b) trust, also known as a "bewind", the trust property is owned by the beneficiary, but placed under administrative control of the trustee, again not for the benefit of the trustee.

4.1.4. This is underlined in South African case law, where it was held: "In a trust, on the other hand, it is usual that the goods concerned come entirely from the settlor. **No goods of the trustee are involved and he does not acquire any beneficial ownership** or right to the settlor's goods. It is merely *pro forma*, and by way of more or less technical legal abstraction that he is recognised as the holder of the *dominium*, **denuded of all benefit to himself**,"[2] (our emphasis), and "... the present matter, [is] a case of persons entrusted with the ownership and administration of property in which they had no beneficial interest *qua* trustees."[3]

4.1.5. The core idea of a trust in South African law is the separation of control and enjoyment of the trust property.[4]

4.1.6. While it is possible in some legal systems that one person can be founder, sole trustee and sole beneficiary of a trust, this is not possible in South African law. While a trustee may also be a beneficiary of the trust, any

*(a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument **for the benefit of the person or class of persons designated in the trust instrument** or for the achievement of the object stated in the trust instrument; or*

*(b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument **for the benefit of the person or class of persons designated in the trust instrument** or for the achievement of the object stated in the trust instrument,*

but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965); (our emphasis)

[2] See Crookes, NO and Another v Watson and Others 1956 (1) SA 277 (A), at 304H-305A.

[3] See Commissioner for Inland Revenue v Pretorius 1986 (1) SA 238 (A), at 243G.

[4] See Land and Agricultural Development Bank of SA v Parker and others [2004] 4 All SA 261 (SCA) at par 22.

beneficial interest stems from being a beneficiary, and not from being a trustee. This is also statutorily confirmed by section 12 of the Act.[5]

4.1.7. For similar reasons to those expressed above, the suggested definition of "beneficial owner" conflicts with the statutory definition of "trust" in the Act to the extent that it contemplates the inclusion of "each *trust founder*" of a trust: As soon as any trust founder (of for that matter any other person) has "made over or bequeathed" … "ownership in property" to the trustees (in the case of an ownership trust) or to the beneficiaries (in the case of a *bewind* trust), any such trust founder or other person is divested of his or her (sole) ownership which, respectively, passes to either the trustees (in their capacity as such) or to the beneficiaries.[6]

4.1.8. It is a trite principle in South African law that ownership is singular (or unitary).[7] This means that ownership (*dominium*) is *absolute, autonomous and indivisible*, and it prescribes that "*a person either has full ownership or he or she does not*".[8] More than one person may hold ownership (as joint co-owners, which is usually the case in an ownership trust), but the contents of ownership is indivisible. This is in contrast, for example, to English (trust) law that recognises divided title in that a trustee holds "legal ownership" and the beneficiary holds "equitable ownership" in the same trust property. Therefore, in South African law a trust beneficiary under an ownership trust does not hold a real right to the trust property, but only a personal right against the trustee to enforce the provisions of the trust deed.[9] The use of the term "beneficial owner / ownership" to describe the legal position of the trust beneficiary is, at best, loose and inaccurate, which must be used with circumspection lest it "wrongly reflect[s] the English law notion of a 'divided' ownership".[10]

4.1.9. The preceding point also illustrates that the proposed blanket inclusion of "each *beneficiary* referred to by name in the trust deed or other founding instrument in terms of which the trust is created" as a "beneficial owner" (as per Paragraph (b)(v) and (vi) of the Bill) is also untenable in South

[5] "**Separate position of trust property** – Trust property shall not form part of the personal estate of the trustee except in so far as he as trust beneficiary is entitled to the trust property".
[6] Cameron, E; De Waal, MJ and Solomon, P *Honoré's South African Law of Trusts* 6th ed (2019) Juta at 7, 8.
[7] See Lucas' Trustee v Ismail and Amod 1905 TS 239 at 244; De Waal, MJ "The Core Elements of the Trust: Aspects of the English, Scottish and South African Trusts Compared" (2000) 117 *South African Law Journal* 548 at 550.
[8] See Du Toit, F; Smith, BS and Van der Linde, A *Fundamentals of South African Trust Law* (2019) LexisNexis at 21 (note 35).
[9] Du Toit, F "The South African Trust in the *Begriffshimmel*? Language, Translation and Taxonomy" *The Rabel Journal of Comparative and International Private Law* (2015) 852 at 869 (emphasis supplied).
[10] Cameron, E; De Waal, MJ and Solomon, P *Honoré's South African Law of Trusts* 6th ed (2019) Juta at 67 and 598.

African trust law. This is because under an ownership trust, the beneficiary has no ownership whatsoever in the trust property, because the trustee has ownership (dominium). Similarly, in the case of a *bewind* trust (where the beneficiary becomes the owner of the trust property) such beneficiary has dominium of the property, albeit subject to administrative control by the trustee. Therefore, any attempt to categorise a beneficiary as a "beneficial owner" (irrespective of whether an ownership or a *bewind* trust is at issue) is entirely meaningless.

4.1.10. For the reasons expressed in 4.1.1 – 4.1.9 above, regarding any trust founder, trustee, trust beneficiary or any person who "exercises effective control of the trust" as a "beneficial owner" is contrary to the established principles of South African trust law. Furthermore, such a definition is a meaningless abstraction without any legal justification or substance. This is particularly so when one considers that:

4.1.10.1. The proposed insertion of Paragraph (a) of the suggested definition of "beneficial owner" cross-references the definition of this concept in the Financial Intelligence Centre Act, 38 of 2001 (as amended). However, the definition in the latter Act is clearly confined to "a legal (or juristic) person", which a trust is not. This cross-reference is accordingly meaningless.

4.1.10.2. The entire Paragraph (b) of the suggested definition of "beneficial owner" is premised by the phrase that this definition applies "*for the purposes of this Act* [i.e. the Trust Property Control Act 57 of 1988]". This implies that any "beneficial owner" in terms of Paragraph (b) is in fact *not* a "beneficial owner" for the purposes of any other legislation, such as the Financial Intelligence Centre Act, 38 of 2001 (as amended). The intended purpose behind simply (and blanketly) classifying all persons listed in Paragraph (b) – which essentially include all of the parties to a trust - as "beneficial owners" is unclear, especially given that:

(i) there is *no definition* of the concept "beneficial *ownership*" that the Bill intends to insert into the Trust Property Control Act (also see 4.7 below); and

(ii) there is no indication of what *the consequences* of such a classification could entail in terms of the Trust Property Control Act (or in terms of any other legislation).

4.2 The definition of "beneficial owner" in clause 1 of the Bill is in conflict with section 9 of the Act.

4.2.1 Section 9 of the Act provides that a trustee shall act with the care, diligence and skill expected of a person managing the affairs of another.[11]

4.2.2 The reason why this provision was included in the Act is because that is exactly what a trustee is – a person managing the affairs of another for the benefit of the other person or persons.

4.2.3 Therefore, including a trustee under the definition of "beneficial owner" in the Bill is incompatible with the fiduciary duty required of a trustee as envisaged by section 9.

4.3 The definition of "beneficial owner" in clause 1 of the Bill may lead to the premature acquisition of rights that preclude amendments to the trust deed

4.3.1 The fact that a beneficiary is identified by name in a trust instrument[12] (a will, an *inter vivos* trust deed or a court order) does not necessarily mean that the beneficiary can never be removed as a beneficiary. The trust instrument may provide that the trustees may have a discretion to remove a beneficiary and/or add other beneficiaries.

4.3.2 It is sometimes necessary to remove a beneficiary and this is done by an amendment of the trust instrument, mostly so in the case of *inter vivos* trust deeds. An example would be where trustees are given a discretion to determine which of the named beneficiaries should receive benefits and under what circumstances, such as where a grandfather names his grandchildren by name as beneficiaries and then states that should any of them inherit substantial wealth, or acquire wealth above a certain specified level, they should be removed as beneficiaries.

4.3.3 All good and well, except that the Supreme Court of Appeal has authoritatively ruled that if a beneficiary accepted benefits under an *inter vivos* trust, the deed of that trust cannot be amended without that beneficiary's agreement to the amendment.[13] This because an *inter vivos* trust (e.g. the typical "family trust") is regarded, in South African law, as

[11] *9. **Care, diligence and skill required of trustee.**—(1) A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.*
(2) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1).

[12] See par (b)(v) of the definition of "beneficial owner" in clause 1 of the Bill.

[13] See Potgieter v Potgieter (629/2010) [2011] ZASCA 181; 2012 (1) SA 637 (SCA) par 18.

akin to a contract for the benefit of a third person, entered into between the trust founder and the trustee(s). After the beneficiary has accepted benefits under such a contract, the contract (i.e. trust deed) can only be amended with the permission of the beneficiary. This is because, by virtue of his or her acceptance of the benefit, that beneficiary "acquire[s] rights under the trust".[14]

4.3.4 Therefore, if a beneficiary learns from the disclosure required by the proposed amendments that s/he is a beneficiary, that beneficiary can notify the trustees in writing that the benefit is accepted and can then never be removed as beneficiary without his/her agreement. This is an undesirable outcome that not only potentially encroaches on the independent discretion required to be exercised by trustees (thus also potentially hampering effective trust administration), but also infringes on the rights of citizens to manage their own affairs in the manner that they choose.

4.3.5 Although this SCA ruling has been criticised by at least one academic,[15] it still remains positive and standing law in South Africa.

4.4 <u>The Bill, in clause 1, defines "beneficial owner" in relation to a trust in terms which are either impractical or impossible (or both) to comply with</u>

4.4.1 The definition of "beneficial owner" includes the natural person who ultimately controls a juristic person which is the founder, a trustee or beneficiary of the trust.[16]

4.4.2 In certain circumstances this may be impractical or impossible to determine, for instance where the founder, trustee or beneficiary is a juristic person of which the shares are held by another juristic person which is a listed (or for that matter unlisted) public company or a private company.

4.4.3 The proposed insertion of section 11A into the Act by clause 5 of the Bill places the burden on the trustee to record the "beneficial ownership" of the trust. This implies that in the case as set out above, the proposed amendments to the Act require a trustee not only to acquire the share registers of such companies, but also to keep the records of such share registers up to date. This is an unfair burden on professional trustees and an even more unfair burden on private trustees who have to appoint a

[14] See <u>Potgieter v Potgieter</u> (629/2010) [2011] ZASCA 181; 2012 (1) SA 637 (SCA) par 18.
[15] See Van Zyl, R., "The question of rights, acceptance and amendments of inter vivos trusts in terms of the stipulatio alteri", *South African Law Journal*, Vol 136 Part 4 (2019), at p717.
[16] See par (b)(ii), (iv), and (vi) of the definition of "beneficial owner" in clause 1 of the Bill.

professional trustee as independent trustee in order to comply with the requirements set by the Master of the High Court. Surely, if the juristic person's details are available as a matter of public record (e.g. CIPC), the FIC or other state and law enforcement agencies can do the checking to determine the identity of the natural persons themselves. It is unreasonable and unfair to shift that duty to the trustee.

4.4.4 But, it gets worse. If a professional trustee takes on the trusteeship of an existing trust which was formed thirty years ago, all that information must now be obtained about the founder of the trust. This is impractical, unfair and could well be impossible. That founder may have been the legal secretary in a law firm which does not exist anymore (a common practice thirty years ago, mainly for tax reasons). Yet, failure to comply with this requirement could potentially make a criminal out of an ordinary citizen.[17]

4.5 <u>The Bill appears to operate from the assumption that a trust in South African law has legal personality</u>

4.5.1 Paragraph (b)(vii) of the definition of "beneficial owner" in clause 1 of the Bill refers to someone who "control[s] the votes of the trustees".[18]

4.5.2 A trustee in South African law cannot *legally* be "controlled" by another person. Any attempt at such "control" is null and void[19] and, for the reasons mentioned in 4.5.6.2 below, where such *de iure* control is written into a trust instrument, will result in a void trust.[20]

4.5.3 The notion that a trustee can be "controlled" by another "shareholder" or "stakeholder" seems to arise from a mistaken assumption that a trust has legal personality. This suspicion is confirmed by the proposed insertion of Paragraph (a) of the suggested definition of "beneficial owner" in the Bill,

[17] See the proposed amendment of section 19 of the Act by clause 6 of the Bill.

[18] ''**'beneficial owner'**— (a) has the meaning defined in section 1(1) of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001); and
(b) for the purposes of this Act, in respect of a trust, includes, but is not limited to, a natural person who directly or indirectly ultimately owns the relevant trust property or exercises effective control of the administration of the trust, including—
(i) to (vi) ...
(vii) a person who, through the ability to control the votes of the trustees or to appoint the trustees, or to appoint or change the beneficiaries of the trust, exercises effective control of the trust.''.

[19] See <u>Hoosen NO and Others v Deedat and Others</u> [1999] ZASCA 49; [1999] 4 All SA 139 (A), and <u>PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union</u> [2007] ZAGPHC 146; 2008 (2) SA 351 (W).

[20] See <u>Humansdorp Co-Operative Ltd v Wait</u> Unreported Case No 2896/2012, Eastern Cape Division of the High Court, Grahamstown of 1 November 2016, as well as Smith, BS "Sham trusts in South Africa: *Tempora mutantur*, *nos et* mutamur in *illis* (Times change, and we change with them). *South African Law Journal* Vol 136 (2019) 550 – 580.

which in turn cross-references the definition of this concept in the Financial Intelligence Centre Act, 38 of 2001 (as amended).

4.5.4 In a company (which has legal personality) the company directors can be "controlled" to some extent by the shareholders.

4.5.5 A trust, in South African law, does not have legal personality, in other words it is not a juristic person. It is an accumulation of assets and liabilities.[21] The trustees are the actors who perform the administration of the trust, buy and sell trust property, receive donations and inheritances, sue and be sued, etc. in their capacity as trustees and in fulfilment of their fiduciary duty in the best interests of the existing and future beneficiaries of the trust, or in pursuit of the impersonal object of the trust.

4.5.6 The inclusion of any "person who, through the ability to control the votes of the trustees or to appoint the trustees, or to appoint or change the beneficiaries of the trust, exercises effective control of the trust" (as per Paragraph (b)(vii) of the Bill) is also in conflict with established principles of South African trust law. This is so for two reasons:

4.5.6.1 Firstly, if any person (such as the trust founder, a co-trustee or a beneficiary) "exercises *effective* control" of the trust, such control is at best regarded as *de facto* (as opposed to *de iure*) control of the trust,[22] points to abuse of the trust form (see 4.1.4 above) and may lead to "the making of a declaration that a trust asset shall be made available to satisfy the personal liability of a trustee, *but it does not detract from the character of the asset as one of the trust and not that of the trustee [in his or her personal capacity]*; the existence of the trust remains acknowledged."[23] As such, the fact remains that "[t]he maladministration of an asset validly vested in a properly founded trust does not afford a legally cognisable basis to contend that the trust does not exist, *or that the asset no longer vests in the duly appointed trustees*."[24]

4.5.6.2 Secondly, case law[25] permits the conclusion that where the "effective control of the trust" is in fact *written into the trust deed*, such control is then of a *de iure* (legal) nature, which can

[21] See Land and Agricultural Development Bank of SA v Parker and others [2004] 4 All SA 261 (SCA) at par 10.
[22] See Badenhorst v Badenhorst 2006 (2) SA 225 (SCA) at par 9.
[23] See Van Zyl and Another NNO v Kaye NO and Others 2014 (4) SA 452 (WCC) at par 21 (our emphasis).
[24] See Van Zyl and Another NNO v Kaye NO and Others 2014 (4) SA 452 (WCC) at par 10 (our emphasis).
[25] See Humansdorp Co-Operative Ltd v Wait Unreported Case No 2896/2012, Eastern Cape Division of the High Court, Grahamstown of 1 November 2016.

lead to the "trust" being void from the outset (because it is a sham) due to the failure of the founder to evince the true intention to create a trust, because insufficient independence has been conferred on the trustees.[26] As such, in accordance with the principle of substance over form (*plus valet quod agitur*), effect will be given to the trust founder's true intention (as opposed to the ostensible intention), so that the "trust" may, for example, be revealed in truth to be a partnership or a relationship of agency.[27]

4.6 <u>The term "beneficial ownership", used in the proposed insertion of section 11A is not defined</u>

4.6.1 The term "beneficial ownership" is not defined anywhere in the Bill (for insertion into the Act), but is used in the proposed section 11A which is to be inserted into the Act.

4.6.2 Nevertheless, the proposed section 11A requires a trustee to "establish and record the beneficial ownership" of a trust.

4.6.3 Without a definition it is unclear what this term includes. It appears that the information required about "beneficial ownership" is to be regulated by the Minister in consultation with the FIC, without any need to involve industry bodies or Parliament. This is clearly undesirable as it places far too much power in the hands of the Minister and the FIC to dig into the private affairs of individuals.

4.6.4 Furthermore, the deficiencies pointed out in 4.10 above highlight not only that both Paragraphs (a) and (b) of the definition of "beneficial owner" are fundamentally flawed, but also that the very purpose behind classifying these persons as "beneficial owner[s]" is unclear given the lack of a definition of the concept of "beneficial ownership" coupled with the absence of any indication as to what *the consequences* of such a classification may be. As such, classifying the persons listed in Paragraph (b) as "beneficial owner[s]" amounts to a meaningless abstraction that holds no legal justification, substance or significance.

[26] See Smith, BS "Sham trusts in South Africa: *Tempora mutantur*, *nos et* mutamur in *illis* (Times change, and we change with them). *South African Law Journal* Vol 136 (2019) 550 – 580; Cameron, E; De Waal, MJ and Solomon, P *Honoré's South African Law of Trusts* 6th ed (2019) Juta at 138.
[27] Cameron, E; De Waal, MJ and Solomon, P *Honoré's South African Law of Trusts* 6th ed (2019) Juta at 158.

4.7 <u>The proposed insertion of section 11A into the Act imposes a burden on trustees in language that can only be described as vague and is grossly unfair</u>

4.7.1 The proposed section 11A provides, inter alia, that a trustee must "establish and record" the "beneficial ownership" of the trust.

4.7.2 There is no indication as to how far a trustee must go to "establish" the "beneficial ownership".

4.7.3 If the ordinary meaning of the word is applied, this means that the trustee must do whatever it takes to establish the (again undefined) "beneficial ownership".

4.7.4 This means that nobody knows at this stage what the Minister and the FIC may come up with – hardly a fair burden to place on a professional trustee or a private individual.

4.8 <u>There is another way of achieving the apparently desired oversight without jeopardising the legal position and fiduciary duty of trustees</u>

4.8.1 A trustee is not a beneficial owner of a trust and should not be included in the definition.

4.8.2 For the reasons set out in 4.1 above, no person listed in paragraph (b) of the proposed definition of "beneficial owner" should be regarded as a "beneficial owner", because there is no place for this concept in South African trust law. The inclusion of the definition seems a convenient and thoughtless solution with no due observance of the nature of the trust form in South African law.

4.8.3 It is unclear why the, to South African law totally foreign and meaningless, concept of "beneficial owner" is at all deemed to be necessary.

4.8.4 It is accepted that it is important for law enforcement agencies to know who the parties (potential or real) controlling, or deriving benefit from, a trust happen to be. This can be achieved by placing appropriate duties of disclosure on the trustees, with the proviso that these duties should not place unfair and impractical burdens on trustees, as set out in 4.4 and 4.7 above.

4.8.5 A far better option would be to place reporting duties on the trustees of a trust to:

4.8.5.1 submit details with regard to all the parties to a trust to the Master of the High Court in a prescribed format upon lodging of the trust instrument with the Master; and

4.8.5.2 to submit details of any changes to these parties or details to the Master within a reasonable period of time.

4.8.6 Appropriate powers for the FIC to inspect these records on a regular basis or demand access to the records kept by the trustee will ensure compliance and access to the information necessary to combat money laundering and the financing of terrorism.

4.8.7 As some information about trusts is already a matter of public record, provision should be made that the identity and other details of named beneficiaries should not be open to anyone other than the Master and the FIC, to prevent the premature acquisition of rights under the trust by such beneficiaries as referred to under 4.3 above.

5 Conclusion

There are two options open:

- Take note of the serious concerns expressed in this document and seek ways to achieve the goal of preventing money-laundering and financing of terrorism through trusts without contradicting the established principles of South African trust law or imposing unclear, arduous and unrealistic burdens on the trustees of a trust that have the potential to make criminals out of honest citizens doing their job as best they can; or
- Pass this legislation as is and:
  - Create confusion;
  - Run the risk of some of these proposed provisions being overturned by the courts on the basis of irrationality;
  - Saddle good, honest people with unfair, irrational and impossible compliance burdens;
  - Make criminals out of ordinary citizens who are simply trying to do their duty;
  - Substantially increasing compliance costs for trusts caring for the vulnerable in society.

We recommend the former.