



# LEGISLATIVE UPDATE

A summary of the new Legislative Developments published in the Government Gazette.

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1. The objective of this report is to inform our valued clients of new legislative developments during the reporting period of March 2022. The report provides a record of new legislation published in the Government Gazette in a summary form. Legislation for purposes of this report refers to Acts of Parliament, regulations prescribed pursuant to Acts of Parliament, any other statutory instruments and Bills before the National Assembly.
2. For purposes of the below table, terms defined and used in each row will bear the meaning as given to them in their respective row and will not bear the same meaning when used in other rows.

UPDATE	COMMENTS
<b>Virtual Assets Act, 2022 - Act No. 3 of 2022 (the "Act")</b>	<p>The Act regulates the sale and trade of virtual assets.</p> <p>In the main, the sale and trade of virtual assets is regulated by requiring persons who operate virtual asset businesses amongst others, to apply for a licence to do so.</p> <p>In terms of the Act, no virtual asset business may be carried on without a licence. The Act recognises two types of licences that are available to a person who trades or wishes to trade virtual assets, these are:</p> <ul style="list-style-type: none"><li>• Virtual Asset Service Provider Licence; and</li><li>• Issuer of Initial Token Offerings Licence.</li></ul> <p>This Act provides for the following:</p> <ul style="list-style-type: none"><li>• Functions and powers of the Non-Bank Financial Institutions Regulatory Authority under the Act ("NBFIRA");</li><li>• Licensing of virtual asset businesses;</li><li>• Obligations of licence holders;</li><li>• Professional conduct and compliance of licence holders; and</li><li>• General provisions on offences, penalties, administrative sanctions and appeals against decisions of NBFIRA.</li></ul>

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**Virtual Assets Regulations, 2022 – S.I. No. 18 of 2022 (the “Regulations”)**

These Regulations supplement the Virtual Assets Act (the “Act”) in respect of the requirements for applying for a licence under the Act and set out the standard of resources that a virtual asset business should maintain.

The Regulations further require the use of systems and controls which are suitable for the virtual asset business and satisfactory transaction recording procedures.

Finally, the Regulations provide for the safeguarding of customers’ interests and set out the ongoing obligations of licence holders.

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**Trust Property Control Act, 2018 (the “Act”)**

The Act is a re-enactment of the Trust Property Control Act, 2018 (the “2018 Act”) with amendments, to align it with the Financial Intelligence Act.

The Act has introduced the following changes:

- The definition of a beneficial owner has been aligned with the definition given under the Financial Intelligence Act;
  - The definition of a financial institution has been aligned with the definition under the Proceeds and Instruments of Crime Act [CAP 08:03];
  - The definition of Master has been expanded to include the Deputy Master, Senior Assistant Master and Assistant Master appointed under the Administration of Estates Act [CAP 31:01];
  - Section 4 provides for the registration of trusts, trustees and trust service providers. Trust service providers are prohibited from operating without registering with the Master. According to sub-section 7, trust service providers who do so will be committing an offence punishable by a maximum fine of P500 000 or maximum of 10 years imprisonment;
  - The concept of a non-profit trust has been introduced and incorporated into the definition of a trust;
  - The concept of a protector of a trust has been introduced;
  - Section 5 stipulates the content that a trust instrument must contain as it relates to the identification of beneficiaries;
  - Section 17 requires trustees to keep records and makes provision for the Minister to make regulations regarding the administration of the records;
  - Section 9 makes provision for foreign trustees to establish a sub trust through which trust property located in Botswana shall be administered and disposed of. It further makes a requirement for the appointment of a resident co-trustee and provision of security in accordance with the Act;
  - Section 23(2) empowers trustees and protectors to remove the trustees in accordance with the terms of the trust instrument;
  - Section 28 makes provision for trust instruments executed before 29th June 2018 to be lodged with the Master for 6 months after commencement of the Act; and
  - Section 29 provides for the establishment of the Void Trust Fund to which all monies and property -collected under the Act shall be paid.
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**Financial Intelligence (Implementation of United Nations Security Council Resolutions) Regulations, 2022 (the “Regulations”)**

The Regulations supplement the Financial Intelligence Act, 2022 to align it with the United Nations Security Council Resolutions (the “Resolutions”) relating to the prevention and suppression of terrorism, countering the financing of terrorism, proliferation and any other threat to the international peace and security according to the United Nations Security Council (the “Security Council”). The Regulations revoke the Counter Terrorism (Implementation of United Nations Security Council Resolutions) Regulations, 2020.

The Regulations provide for:

- The insertion, removal and circulation into a list, of persons, entities or structured groups that are engaged or reasonably believed, through the findings of the Financial Intelligence Committee (“the Committee”) to be engaged in offences relating to terrorism and activities that finance terrorism (“listed persons”);
  - The freezing of the funds, property or other economic resources of nationally listed persons, entities or structured groups to prevent financing of terrorist activities and submission of returns within 8 hours of receipt of the list (or a nil return where no property is identified), and also outlines the procedures required to be removed from the list, and
  - Prohibitions and sanctions imposed upon persons, entities and structured groups that are involved in terrorist financing activities.
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**Movable Property (Security Interests) Act, 2022  
No. 5 of 2022 (the “Act”)**

The object of the Act is to improve the use of movable property as collateral for credit facilities.

The Act does this, inter alia, by:

- Establishing the collateral registry office to facilitate registration of security rights in movable assets;
- Establishing an electronic collateral registry to facilitate the registration of notices; and
- Enabling remote access to the collateral registry office's electronic database for those searching the electronic registry to check for any existing interests in the collateral.

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**The Companies (Amendment) Act, 2022 No. 7 of 2022 (the “Act”)**

The Act amends the Companies Act (CAP 42:01) to effect the East and Southern African Anti-Money Laundering Group (“ESAAMLG”) and Financial Action Task Force (“FATF”) recommendations and amendments consequential to the enactment of the Movable Property (Security Interests) Act, 2022 No. 5 of 2022.

The Act made the following amendments:

- The definition of “beneficial owner” is aligned with its meaning under the Financial Intelligence Act;
- Definition of “entitled person” is extended to include a beneficial owner;
- New definition for “competent authority” has the meaning assigned to it under the Financial Intelligence Act;
- Definition of “nominator” is inserted to mean a person who issues instructions to a nominee to act on their behalf in a certain capacity and includes a shadow director and silent partner;
- The definition of “security interest” as defined in the Movable Property (Security Interests) Act is inserted;
- Section 11 to enable the Registrar to include beneficial owner information in the Register;
- Section 21 inserts subsection (2)(c) with a new paragraph detailing the requirements for applying to register a company;
- Section 22 requires the Registrar to verify on registration, beneficial owner information using information held by financial institutions and other competent authorities;
- Section 27 is amended to oblige a resident director and company secretary to provide information on beneficial ownership when required to do so;
- Section 37 now requires all companies to have a constitution. Furthermore, companies have been granted a transitional period of 12 months from the commencement of the Amendment to comply with this requirement;
- Section 38 requires that powers and obligations of the company, its board, directors and shareholders as outlined in the constitution of the company are consistent with the Act;
- Section 39 of the old Act which addresses the effects of not having a constitution on the rights, powers, duties and obligations of the Board, Directors and Shareholders has been deleted;
- Section 41 has been amended to require that regulating powers, beneficial ownership and names of those having control over and holding senior management in the company are included as basic information in the constitution of a company;
- Section 40 is amended by deleting the words “if it has one” and deleting paragraph (b) since all companies are required to have a constitution;
- Section 50 is amended and now prohibits the issuance of shares to bearer or an unidentified shareholder;
- Section 84 includes beneficial owner information in the company's principal register;
- Section 88 of the Act provides for the inclusion of a trust in the share register where the beneficial owner is a trust;
- Section 186 is amended and now requires record keeping of information on beneficial ownership for seven years;
- Amendment of section 218 ensures that information on beneficial ownership is publicly available;
- A new section 329A is inserted and requires a nominee shareholder to disclose the identity of the nominator; and
- Section 113 is amended to ensure the enforceability of security interests and their registration.

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**Financial Intelligence Regulations, 2022 – S.I. No 13 of 2022 (the “Regulations”)**

The Regulations revoke the Financial Intelligence Regulations – S.I. No. 104 of 2019. The Regulations require information on customers to be collected (due diligence) to be carried out as a prerequisite to opening bank accounts and commencing business relationships where the identity of such customers is ascertained through the collection of certain information from the customer and its verification.

**The Regulations:**

- List the steps required for establishing the identity of individual customers, body corporates, partnerships and trusts. They also stipulate which transactions require enhanced due diligence and which require simple due diligence;
- Provide for ways in which to report suspicious transactions, the reporting of wire transfers out of Botswana or into Botswana from other countries, and the internal rules of recordkeeping; and
- Provide for group programmes for financial groups by supervising authorities; means of ensuring that financial offences are not committed, and processes are carried out safely.
- The Regulations further provide for a certificate as evidence of the provision of due diligence information in the absence of the original report.

**The Regulations further amend the Schedule as follows-**

- By providing for an affidavit granting authority to a third party to act on behalf of another in respect of financial transactions (Form A);
- A form for reporting a cash transaction report of P10, 000 or more. This form sets out fields where the user is to set out their account details, details of the account holder, details of the third party (if any) conducting the transaction on their behalf, details of any other party/beneficiary details of transaction and of the reporting entity (Form B);
- A form for reporting a suspicious transaction (Form C); and
- A certificate issued by the Financial Intelligence Agency after carrying out a report (Form D).

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**Financial Intelligence (Amendment) Act, 2022 – S.I. No. 2 of 2022 (the “Act”)**

The Act has been amended to align it with the United Nations Security Council Resolutions on the prevention of terrorism and proliferation, establish the Financial Intelligence Agency (the “Agency”) and to re-establish the National Coordinating Committee (the “Committee”) and its sub-committees and to define its duties.

The Act has been further amended to define the grounds upon which a person, entity or structured group may be described as a terrorist group for the prevention of terrorism and the financing thereof.

The Act was also amended to allow the performance of certain customer due diligence by a third party and lay down the obligations relating to agents for money or value transfer services.

The Act was also amended to enable the Agency to initiate analysis of information collected through customer due diligence and establish a suspicious transaction, its contents and for other connected matters.

Section 54, which previously required a declaration of assets by the Director General of the Agency has been deleted.

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