**TABLE OF COMMENTS ON GENERAL LAWS (ANTI-MONEY LAUNDERING AND COMBATING TERRORISM FINANCING) AMENDMENT BILL [B18-2022] SELECT COMMITTEE OF FINANCE**

**LIST OF COMMENTATORS**

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| 1. NGOLAW | 6. COSATU and SACTWU |
| 2. FORSA | 7. Cause for Justice |
| 3. Deputy Director of Public Prosecutions, North West Division (Adv S Maema) | 8. Helen Suzman Foundation |
| 4. Bafokeng Senior Prosecutor (Adv MC Tjaro | 9. Webber Wentzel |
| 5. NPO Working Group |  |

| **CLAUSE IN BILL** | **COMMENT** | **RESPONSE** |
| --- | --- | --- |
| **General comments** |
| Training of prosecutors, police and other role players | DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS, NORTH WEST DIVISIONThe enactment of appropriate legislation may just be a beginning to compliance with international standards, the crucial step is the training of prosecutors and police in the implementation of the legislation to equip the police with skills to investigate these complicated provisions and the prosecutors to be able not only to develop charges sheets but to guide investigations and to develop the law in this regardCOSATU AND SACTWUIt will also be critical that Treasury working with other key state organs, e.g. the Auditor-General, SARS, NPA, FIC and SAPS ensure that the relevant officials are trained and capacitated to enforce the Bill’s full implementation. | * Noted and guidance and awareness raising initiatives will be provided timeously.
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| Support for Bill | BAFOKENG SENIOR PROSECUTORThis Bill is an excellent tool in compliance with FATF stipulated regulations that we as signatory must abide in ensuring maximum fighting of this scourge. | Noted, with appreciation. |
| Short period for public comment | HELEN SUZMAN FOUNDATION* The HSF understands the urgency of ensuring compliance with the FATF to avoid “grey-listing”. However, the HSF notes that South Africa’s Mutual Evaluation Report of the Financial Action Task Force’ (“FATF Report”) was published in October 2021, and it is not at all clear why this matter is only now receiving the required attention in Parliament.
* The HSF notes that the public was only given a period of four days (two and a half working days) to make submissions in respect of this envisaged legislation.

CAUSE FOR JUSTICE* The Committee (and Parliament) is constitutionally bound to ensure adequate public participation takes place in respect of the Bill. The call for public comments opened on Thursday, 17 November 2022 and will close on 13:00 on Tuesday, 22 November 2022. This is a mere three and a half business days – an extraordinarily short period of time.
* CFJ is concerned that many stakeholders will only become aware of the call of comments too late (i.e. too close to or after the deadline), if at all. Of those stakeholders who are aware of the call for comments, many are likely hard-pressed – especially in the characteristically perpetually overextended and under-resourced NPO sector – to free sufficient capacity from existing prior work commitments on such extraordinarily short notice, in order to participate in the public consultation process.
 | * The National Treasury constituted a working group consisting of officials from the relevant government departments and regulatory authorities to develop the draft Bill after the FATF Report was published in 2021. As the Bill affected different Departments, it was essential to get the consensus from the Departments before the Bill was approved by Cabinet, and the Bill was Tabled in Parliament in under a year.
* The concerns regarding the public participation on the Bill were discussed during the Committee meeting.
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| Access to beneficial ownership information | COSATU AND SACTWU* We note with disappointment that the Bill does not seem to seek to make beneficial ownership registers publicly available. The Bill includes a reference in clause 53 to making annual returns available electronically but it is not clear that this would mean that such annual returns would then be publicly available.
* Trade unions, shop stewards, workers, civil society and journalists continue to play an important role in uncovering commercial crimes and corruption.
* By making beneficial ownership information publicly available, these groups and the public in general can continue to assist in the fights against tax evasion and corruption. This will help to effectively implement a beneficial ownership regime, not just to tick the box.
* Currently the Bill, in clause 5 for example, provides for some access to information on beneficial ownership. This amendment of the Trust Property Act limits the availability of the information in the register to “any person as prescribed”, which restricts the categories of people who could access the information.
* By not making registers public, we run the risk of such registers being stuck on hard drives and servers in a department somewhere without scrutiny.
* Some may raise concerns about personal data protection and privacy laws when responding to our call for a public beneficial ownership registry.
* In South Africa, privacy and data protection concerns are given legal effect through the Protection of Personal Information Act (POPIA). This Act may be proffered as blocking the publication of beneficial ownership data.
* Yet, sections 37 and 38 of POPIA list a number of grounds on which processing of personal information is not a breach of the processing conditions in the Act.
* Any one of these grounds could be relied upon to substantiate publishing beneficial ownership data when concerns are raised regarding privacy rights and data protection laws.
 | * Regulations will set out the details around the access to the information contained in the register. The Bill also provides for the regulations in the different laws to made after consultation with the Minister of Finance and the FIC.  This will ensure that the development of the regulations relating to the registers in the different laws are consistent and co-ordinated. It is envisaged that the registers accessible to competent authorities and obliged entities having CDD obligations, on a tiered access basis, taking into consideration the Protection of Personal Information Act and the Promotion of Access to Information Act.
* The question of open access to the general public is left by FATF to countries to decide. This decision has not yet been made as it requires full consultation with all stakeholders. The revised FATF Interpretation Note to Rec 2 , it is not mandated that the registry be public, but there must be some form of access by AML obliged persons to effect the sharing of information between designated authorities and institutions to effect cross-checking of data.
* It is further important to note, that a registry by itself is not a panacea, it does not ensure access to accurate information in a timely manner. It’s a base or a foundation but cannot be the only source to be relied on by authorities. It should be viewed as the icing on the cake or the ultimate step. Access to the various registers will be dealt through regulations after consultation with all stakeholders, and will be a staged process in line with the approach by most by other FATF compliant jurisdictions.
* Regulations will set out the details around the access to the information contained in the register. The Bill also provides for the regulations in the different laws to made after consultation with the Minister of Finance and the FIC.  This will ensure that the development of the regulations relating to the registers in the different laws are consistent and co-ordinated. It is envisaged that,, the registers be accessible to competent authorities and obliged entities having CDD obligations, on a tiered access basis, taking into consideration the Protection of Personal Information Act and the Promotion of Access to Information Act and international law.
* The question of open access to the general public is left by FATF to countries to decide. This decision has not yet been made as it requires full consultation with all stakeholders. The revised FATF Interpretation Note to Rec 2 , it is not mandated that the registry be public, but there must be some form of access by AML obliged persons to effect the sharing of information between designated authorities and institutions to effect cross-checking of data.
* It is further important to note, that a registry by itself is not a panacea, it does not ensure access to accurate information in a timely manner. It’s a base or a foundation but cannot be the only source to be relied on by authorities. It should be viewed as the icing on the cake or the ultimate step. If the goal is timely, accurate and updated information available to competent authorities, companies gathering info, banks, law enforcement and other competent authorities compelling the provision of this information are needed. If all this is being done, it is submitted that it is appropriate to put the information in a registry and make it available with sufficient safeguards and limitations such as to what is strictly necessary and proportionate to the objective pursued.
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| Alternative minor drafting suggestions | WEBBER WENTZELAlternative drafting proposals were included in the detailed submission throughout the Bill | The suggestions were noted and while the drafting proposals do offer an improvement in some instances it does not affect the meaning or interpretation of the provision in a substantial way. These may also be considered when the principal Acts are amended through processes that have already commenced, through the Regulation of Trust Property Bill, the Nonprofit Organisation Amendment Bill, and the Companies Amendment Bill. |
| **TRUST PROPERTY CONTROL ACT** |
| **Clause 7**Section 19(2) A trustee who fails to comply with an obligation referred to in section 10(2), 11(1)(e) or 11A(1), commits an offence and on conviction is liable to a fine not exceeding R10 million, or imprisonment for a period not exceeding five years, or to both such fine and imprisonment.’’. | WEBBER WENTZEL* Since trustees may need to place reliance on information that is provided to them, we submit that section 19 should be amended to provide that a trustee will not be guilty of an offence in terms of section 11A(1) if the trustee can show that the trustee took all reasonable steps to establish the beneficial ownership of the trust.
* We note that section 19(2)'s proposed introduction of these new offences (for failure to comply with an administrative obligation embodied in sections 10(2), 11(1)(e) or 11A(1)) is likely to disincentivise persons to act as trustees.
 | • This comment is noted, but it must be ensured that effective sanctions are provided for in relation to a trustee’s failure to establish and keep a register of beneficial ownership.• The forthcoming Regulation of Trusts Bill will propose to provide that a trustee that willfully fails to establish and keep register of the beneficial owners, or that knowingly keeps false information of a beneficial owner, is guilty of an offence. It will also provide for sanctions for the provision of wrong information to a trustee.• Effective but proportionate sanctions are provided for in relation to a trustee’s failure to establish and keep a register of beneficial ownership. |
| **NONPROFIT ORGANISATION ACT** |
| Alignment of NPO Amendment Bill with the GLAB | NPO WORKING GROUPThe recently re-issued NPO Amendment Bill and Explanatory Memorandum is not aligned with this latest position on restricted mandatory registration. HELEN SUZMAN FOUNDATION* The HSF remains apprehensive about processing the Bill and the Draft NPO Bill in separate proceedings. Consequently, the HSF advocates that the two Bills be withdrawn in order for them to be consolidated. The process must be combined to be more efficient and effective and prevent any contradictory outcomes arising from concurrent processes.
* In addition, aside from being processed by separate departments, the HSF is unaware of how the proposed amendments in the Bill and the Draft NPO Bill can be reconciled.
* The HSF would like to draw the Committee’s attention to two pertinent points. First, it is unclear how the proposed amendments in the Bill and the Draft NPO Bill can be read together as they offer contradictory amendments to section 12 of the Act.
* Secondly, the HSF submits that it is odd and potentially counter-productive that a more integrated process to manage the Bills has not been designed. They are introduced by separate departments, and the Bills and comments received in respect of each will be processed by different committees.
* The HSF advocates that the two Bills be withdrawn in order for them to be consolidated. The process must be combined to be more efficient and effective and prevent any contradictory outcomes that may arise from the concurrent processes.
 | * The NPO Amendment Bill is at a draft stage and has not been Tabled in Parliament as yet.
* The GLAB was developed to address specific deficiencies identified in the Mutual Evaluation Report.
* The further development of the NPO Amendment Bill will be based on NPO Act as amended by the GLAB. This will address the issues raised around the alignment as well as the additional issues not addressed in the GLAB.
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| Compulsory registration | FORSA* The footnote 28 to paragraph 6(b)(i) of the FATF’s Recommendation 8 (page 61) states that specific licensing or registration requirements for counter-terrorist financing purposes is unnecessary for NPOs that are already registered with tax authorities (i.e. SARS) and monitored in the context of qualifying for favourable tax treatment (e.g. Public Benefit Organisations (“PBOs”) who successfully applied for, and are monitored for tax exemptions).
* The Bill should exclude NPOs that are already registered as PBOs with SARS from being deemed “at-risk NPOs” that need to register with DSD.
* This will lessen the burden on the State and NPOs without falling foul of FATF’s recommendations. It will also prevent numerous religious organisations from being subjected to additional administrative / financial burdens which they may find difficult to cope with.

CAUSE FOR JUSTICE* Even at a cursory glance, the identified limited subset of NPOs is still too broad, including a wide array of NPOs; and
* Practically, all religious organisations that make donations or provide services outside of South Africa’s borders (likely a vast number), will be required to register and comply with the NPO Act– or face administrative sanctions.
 | PPBO’s are currently monitored for submission of the tax returns and for compliance with section 30 provisions of the Income Tax Act. The  monitoring is conducted annually, when PBO’s file tax returns. SARS does not at this stage monitor specifically funds expended on activities conducted outside South Africa ( SA), except in the instances of S18A approved entities where funds may not be expended outside of SA.   The organisation must take into account that the two pieces of legislation (the Income Tax Act and the Non Profit Organisations Act) are aimed at two different objectives) and the registration under one piece of legislation does not absolve the organisation from registering under another piece of legislation, and it is important that NPOs who are required to register are subject to the requirements of the NPO Act. Should one want to allow such a deviation for the religious sector, it would also mean that other entities identified in the at risk category, will not have to register with DSD if they are registered with SARS.  From a practical point of view, the objective of introducing the register of NPOs is to have a unified register for the categories of NPOs that are identified as being at potential risk and that have to comply with the NPO Act.Refer further to the response to the comments on the inappropriateness for the DSD to accommodate the Non-Profit Organisations Directorate, below. |
| Constitutionality of the amendments to the NPO Act | CAUSE FOR JUSTICE* The amendments proposed in the Bill will only be necessary – and constitutionally defensible – if:
* Actual and sufficiently important problems and/or legislative gaps exist that are not adequately addressed by existing legislation; and
* The proposals contained in the Bill are able to successfully address these problems and gaps, without enabling unjustifiable violations of fundamental rights.
* The Bill proposes drastic change from the status quo: from encouraging voluntary registration and compliance to compelling it against the threat of administrative sanctions.
* The proposed amendments will impose legal obligations and limit the constitutional rights of affected NPOs, their governors and office-bearers, the majority of whom are unlikely to ever be involved in money laundering or the financing of terrorism.
* To ensure the proposed amendments are necessary and constitutionally justified, we need to answer two critical preliminary questions concerning the:
* Likelihood of the legislative amendments achieving their purpose (Question 1); and
* Existence of less restrictive means to achieve the legislative purpose (Question 2).
* It is our firm conclusion that the legislation as it stands does not pass the requirements of factor (e) of section 36(1) in that it does not employ the least restrictive means to achieve its purpose. We are also convinced that if the legislation is not amended, it will not establish a rational relationship between the limitations imposed by it and the purpose for which is it proposed. It will not comply with the requirements of section 36(1) and will be unconstitutional.
 | A copy of the opinion of Senior Counsel has been shared with the Committee that assesses the constitutionality of the relevant provisions amending the NPO Act. |
| Inappropriateness for the DSD to accommodate the Non-Profit Directorate | NGOLAW/NPO WORKING GROUP* The DSD is not the appropriate place for the Non-Profit Directorate to sit
* Support an Independent Body to serve non-profit organisations.
* A credible and effective Registry or oversight body which serves and enables the full scope and ambit of non-profit work should not be housed under a government department but should be established and given the status of an Independent statutory body reporting to Parliament. This could be achieved either by shifting and upgrading the current NPO Directorate, or by beginning afresh.
* There is broad support in the sector for an oversight body which is independent of DSD and which has the funding, staffing and systems to effectively serve the sector, and play a responsive and supportive role.
* A wide consultative process would have to be followed in setting up such an independent registry.
* To consider adding a definitions to the FIC Act of a cross-border non-profit entity”(OR: “at-risk non-profit entity’ OR ‘external flow non-profit entity’) as the current unsuitability of the NPO Directorate for the gathering, secure storage and separation out of the data required we suggest that the mandatory registration of the at-risk class of non-profits takes place under FICA.
* The reporting institution structure already in

place refers to, and that list currently contains only car dealers and those who deal in Kruger Rands. Propose adding to Schedule 3 of the FICA this class of non profits is an effective way of exercising oversight, empowering intervention and in a neutral way which does not seem to vilify these organisations but places them in a category with others who are carrying on legitimate activities but whose way of operating may place them at greater risk of being used for money laundering, terrorist financing or fraud.CAUSE FOR JUSTICE* There are serious reservations as to if and how the Directorate will be able to effectively implement and manage the additional responsibilities (and increased workload) that will necessarily follow the implementation of the proposed amendments, let alone effectively identify and address money laundering and terrorism financing (the primary objective of the amendments). Even if the proposed amendments are able to address and resolve the identified social ills (of money laundering and terrorism financing), but are not proactively and effectively implemented, the FATF requirements will (still) not be complied with – and grey-listing will not be avoided.
* The B-version of the Bill proposes mandatory registration of all ‘at-risk’ NPOs with the Directorate. However, according to FATF Recommendation 8, it is unnecessary to impose specific licensing or registration requirements (for counter-terrorist financing purposes) on NPOs that are already registered with tax authorities (i.e. SARS) and monitored in the context of qualifying for favourable tax treatment (for e.g. Public Benefit Organisations (“PBOs”) who successfully applied for and are monitored for tax exemptions).
* Excluding NPOs that are registered as PBOs with SARS from being deemed ‘at-risk’ NPOs that need to register with DSD, will lessen the burden on the State and NPOs without falling foul of FATF’s Recommendations. It will simultaneously prevent numerous religious organisations from being subjected to additional administrative and/or financial burdens which such organisation may find difficult to cope and comply with.
 | * The response to the comments in respect of the compulsory registration as a PBO, above, are also relevant to this comment.
* The requirements for NPOs under the NPO Act for which they are supervised under the Act, and which are relevant to address the Recommended Action in the Mutual Evaluation Report are:

• To have a constitution that meets the requirements of section 12(2);• To keep accounting records (section 17(1)(a));• To draw up annual financial statements and balance sheets (section 17(1)(b));• To have annual audits of its financial statements and its activities under its constitution (section 17(2));• To submit an annual report with a narrative and its financial statements to the Director (section 18(1);)• To inform the Director of changes in its constitution (section 19(2)).* The monitoring or supervision of NPOs must be to oversee compliance with these obligations and there is no other entity or agency that has the legal mandate to do this. Parliament has granted the Directorate that legal mandate.
* SARS, the FIC, the CIPC and the Master’s Office do not currently have the responsibility in its core functions for supervising NPOs for compliance with the NPO Act. Consequently, no other entity has any capacity to supervise NPOs for compliance with the NPO Act.
* More importantly, it is highly undesirable from a policy perspective to have a system where one category of NPOs (those who register voluntarily) are supervised by one entity and another category (those who have to register) are supervised for the compliance with the same requirements by another entity.
* The discussion on capacitating the DSD to be effective as a supervisor of compliance with the NPO Act is key to demonstrate effectiveness under Immediate Outcome 10. The amendments to the NPO Act are necessary to address some of the Technical Compliance deficiencies in respect of Recommendation 8, but they also lay the basis for us to address the IO.10 finding that the “authorities have not applied specific measures, nor commenced monitoring or supervision, of organizations at risk of TF abuse” and the recommended action that “South Africa should implement an action plan with clear departmental responsibilities and deliverables. They should designate a competent authority responsible for the supervision or monitoring of NPOs, ensuring that the designated competent authority is fully integrated within the country’s AML/CFT (Anti-Money Laundering and Combating the Financing of Terrorism) regime as being a member of the security cluster”.
* Part of the plan underway by DSD is to enhance the NPO system. The benefits thereof is to ensure seamless integration with SARS, CIPC, and other regulators. Further this will ease supervision of targeted NPOs that fall within the FATF definition and also those that are deemed to be at high risk.
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| New definition to replace ‘office bearer’ | NGOLAW/NPO WORKING GROUPUpdate: Note that if NPO registration will be compulsory for any class of non-profits it is very important to fix this misalignment in the current NPO Act* Directors of non-profit companies and trustees of trusts are those responsible for governance, who sit on the governing board and who have ultimate fiduciary responsibility for the organisation. In Voluntary Associations, those who govern and have ultimate fiduciary responsibility are those who are elected by the members to serve on the committee governing body.
* The reference in the current definition to ‘executive’ position is to those who manage/administer- the management team employed by the organisation. The correction is required to ensure that it is the same functional group or status being referred to and tracked across all three types of legal entities. If the amendment is not made then Voluntary Associations would not have to disclose details of their board, but those of their CEO and senior managerial staff.
* Substituting the definition of office bearer with the following wording:

 Definition of ‘office bearer’Office bearer means a director, trustee or person ~~holding executive position~~ elected to the committee or governing board of the organisation”.The amending and correcting of the definition of ‘office bearer’ is crucial for this to function as it should, and have the intended effect. | * Consideration of amending the definition will explored when the Act is amended by the DSD in the separate Nonprofit Organisation Amendment Bill process.
* The Governing Structures in the Voluntary Associations (VAs) is referred to as Office Bearers. That is those who have the governing powers. In addition, the other staff members (management) are those who are referred to as Executives.
* Part of the plan underway by DSD is to enhance the NPO system. The benefits thereof is to ensure seamless integration with SARS, CIPC, and other regulators.

.* Part of the plan underway by DSD is to enhance the NPO system. The benefits thereof is to ensure seamless integration with SARS, CIPC, and other regulators. Further this will ease supervision of the targeted NPOs that fall within the FATF definition and also those that are deemed to be at high risk.
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| **Clause 9**Section 2 of the Nonprofit Organisations Act, 1997, is hereby amended by the substitution for paragraphs *(b)* and *(c)* of the following paragraphs:‘‘*(b)* establishing an administrative and regulatory framework within which registered nonprofit organisations **[can]**  must conduct their affairs;*(c)* **[encouraging]**  requiring registered nonprofit organisations to maintain adequate standards of governance, transparency and accountability and to improve those standards.’’. | CAUSE FOR JUSTICE* It is our firm conclusion that blanket compulsory registration of a limited subset of NPOs (“affected NPOs”) will not comply with the requirements of section 36(1) and will be unconstitutional.
* CFJ does not support the compulsory registration of any NPO. Many affected NPOs choose not to register for various legitimate reasons. Compulsory registration will automatically impose additional compliance burdens on such NPOs and administrative sanctions for non- compliance. This will necessarily divert valuable and scare human and financial resources away from performing good public benefit work in order to fulfil and meet administrative functions and obligations.
* Alternatively, CFJ would support registration being made compulsory for a limited subset of ‘at-risk’ NPOs, subject to:
* The limitation of rights and freedoms of the limited subset of ‘at-risk’ NPOs being constitutionally defensible (i.e. rational); and
* The explicit and effective protection of religious freedom rights.
 | See above on the issue of constitutionality |
| **Clause 11**Section 12 of the Nonprofit Organisations Act, 1997, is hereby amended— (a) by the substitution for subsection (1) of the following subsection:‘‘(1) (a) A nonprofit organisation referred to in paragraph (b) must apply, and any other nonprofit organisation that is not an organ of state may apply, to the director for registration, subject to paragraph (c), and in accordance with the requirements and procedure contemplated in 50 sections 13, 14 and 15.(b) A nonprofit organisation must be registered under this Act if it— (i) makes donations to individuals or organisations outside of the Republic’s borders; or(ii) provides humanitarian, charitable, religious, educational or 55 cultural services outside of the Republic’s borders. | NGOLAW/NPO WORKING GROUP* Our first proposal and preferred outcome is that the compulsory registration of a limited and defined class of non-profits takes place not under the NPO Act, but under FICA, as a “reporting institution” OR under CIPC, as a second option.
* However, if this is not accepted, the pre-requisite for limited-ambit compulsory registration as an NPO would need to be that:

1. The NPO Directorate (internally) kept this list oforganisations separate from those of voluntaryNPO registrations, so that they can be separatelytracked; 2. The NPO Directorate systems are substantially upgraded and reinforced for security, stability and to allow data required to be found and extracted;3. The NPO Directorate is relocated as structure independent of DSD; 4. The staffing and skills at the NPO Directorate are overhauled and upgraded. People with legal, forensic and audit skills should be on the team. For foreign voluntary associations or equivalent, we suggest that the provisions of section 23 of the Companies Act are broadened to reach these and please see proposed amendments in the relevant section of this submission. CAUSE FOR JUSTICE* CFJ does not support the compulsory registration of any (or any particular limited subset of) NPOs. CFJ prefers and supports registration remaining completely voluntary.
* Alternatively, CFJ would support registration being made compulsory for a rationally identified (i.e. constitutionally defensible), appropriate limited subset of ‘at-risk’ NPOs only.
* To this end, CFJ would confirm and support ngoLAW’s concerns and submissions in respect of the amendment of section 12,64 and specifically confirm our agreement with and support for:
* Limiting compulsory registration to a rationally identified, appropriate “defined class of at-risk [NPOs]”;and
* Inserting a (new) definition for ‘at-risk NPO’ into section 1 of the NPO Act.

WEBBER WENTZEL* It would be helpful to clarify that this registration is required notwithstanding other forms of registration nonprofit organisations may already have or wish to have, eg as non-profit companies under the Companies Act, 2008. We submit that it is also essential to clarify that the nonprofit organisation registration under the Act will be in addition to any form of existing registration and that nonprofit organisations will not have to de-register from existing forms of registration. In addition, it is important to clarify whether nonprofit organisations are required to have a constitution in addition to their existing governing documents (ie their memorandum of incorporation or trust deed).
 | * The response put forward above in respect of other agencies taking on the responsibility of registration of NPOs applies.

See aboveThe provisions in this Bill do not affect any obligations placed on NPOs in terms of other legislation, eg Tax Laws |
| **Clause 12**Section 13 ‘‘(7) The director may only refuse to register a nonprofit organisation on the grounds that the applicant has not complied with the requirements for registration in section 12 or has not complied with a notice issued in terms of subsection (3), as referred to in subsection (6).(8) A nonprofit organisation that has submitted an application for registration is deemed to be registered unless and until the director has given notice to the applicant in terms of subsection (3) and the process envisaged in subsections (4) to (6) has been completed.’’. | WEBBER WENTZELAs regards subsection (8), we submit that the legislator should clarify that a nonprofit organisation that has submitted an application for registration will be deemed to be registered with effect from the date of submission of the application. | An amendment to this effect is not supported as subsection (8) contains the deeming provision.  |
| **Clause 17**Section 29 ‘‘(4) The following contraventions of this Act by a nonprofit organisation are subject to a prescribed administrative sanction:(a) a registered nonprofit organisation that fails to perform any duty imposed or comply with a requirement in terms of section 12 or 18(1)(bA); and(b) a nonprofit organisation that is required to register in terms of section 12(1)(b) but fails to do so.’’. | WEBBER WENTZEL* As regards section 29(4), we note that it is not clear who will prescribe the envisaged administrative sanction and how it will be prescribed – whether in the Act or in regulations.
 | The use of the term ‘prescribed’ denotes that regulations will be made by the Minister of Social Development in respect of administrative sanctions, i.e., the types of administrative sanctions and maximum financial penalty.Consideration potentially will be given to addressing administrative sanctions further in the NPO Amendment Bill. |
| **FINANCIAL INTELLIGENCE CENTRE ACT** |
| Proposals to amend the FIC Act to provide for NPOs to be regarded as reporting institutions | NGOLAW/NPO WORKING GROUPA number of proposals to amend sections of the FIC Act to provide for voluntary associations or NPOs providing funds outside the country to be registered with the FIC  | The responses provided above with regard to other agencies taking on the responsibility of supervision of NPOs applies. |
| **Clause 18**Section 1‘‘ ‘**beneficial owner’**—(a) means a natural person who directly or indirectly—(i) ultimately owns or exercises effective control of—(aa) a client of an accountable institution; or(bb) a legal person, partnership or trust that owns or exercises effective control of, as the case may be, a client of an accountable institution; or(ii) exercises control of a client of an accountable institution on whose behalf a transaction is being conducted; and(b) includes—(i) in respect of legal persons, each natural person contemplated in section 21B(2)(a);(ii) in respect of a partnership, each natural person contemplated in section 21B(3)(b); and(iii) in respect of a trust, each natural person contemplated in section 21B(4)(c), (d) and (e);’’; | WEBBER WENTZELNoting that it appears to be the intention "to provide best practice through guidance", we submit that it is important for the legislator to clarify what is meant by the term "effective control" to provide certainty or some guidance. | Consideration will be given to providing guidance that will ensure consistent application of the term in the different Acts. |
| Clauses 40 to 45 dealing with administrative sanctions for non-compliance | COSATU AND SACTWUThese clauses refer to the FIC Act, in which, in section 45C, a fine is capped at R10 million for natural persons and R50 million for legal entities. However, having set fines without consideration of a natural person’s net worth or a company’s turnover may result in little or no impact if the person is particularly rich or the company particularly large. This needs to be revised to take into account net worth or turnover.Ideally, they should be strengthened in the Bill but if not then in the Regulations. | * Over and above the financial penalties, there are other administrative sanctions such as restricting the business activities or suspension.
* Also, the penalties are per offence so if there are a number of contraventions the penalties will be commensurate with the number of contraventions.
* The penalty will differ based on the circumstances of each non-compliant natural person or entity and various factors that are typically taken into account such as the effectiveness of the fine (given size/turnover) to decide the quantum of the fine.
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| **COMPANIES ACT** |
| Foreign Company | NGOLAW/NPO WORKING GROUP* Foreign non-profit companies and foreign trusts are already required to register in South Africa under section 23 of the Companies Act and section 8 of the Trust Property Control Act.
* This proposed amendment requires the registration with CIPC also of the foreign equivalents of voluntary associations (unincorporated or unregistered bodies and organisations) which may be carrying out non- profit activities in South Africa.
* This proposed amendment either replaces the AML-CTF Bill proposal to make registration as an NPO compulsory for these entities OR is needed to support the compulsory registration under FICA or NPO, as one then has a local registration number, regardless of type of legal entity.
* Add the following definition to section 1:

Section 1 definition of “foreign company"means an ~~entity~~ incorporated or unincorporated entity or organisation outside theRepublic, irrespective of whether it is—(a)a profit, or non-profit, entity; or(b)carrying on business or non- profit activities, as the case may be, within the Republic. | The CIPC does not support this proposal, as this would involve taking over the mandate of another authority. The CIPC maintains that it will continue to cater for external Non-profit companies in as far as they meet the criteria set out in section 23. We do not think this is a matter which can be addressed in the current GLAB. The proposal to revise the definition of foreign companies is therefore not supported. |
| **Clause 55****‘‘beneficial owner’’**, in respect of a company, means an individual who, directly or indirectly, ultimately owns that company or exercises effective control of that company, including through—*(a)* the holding of beneficial interests in the securities of that company;*(b)* the exercise of, or control of the exercise of the voting rights associated with securities of that company;*(c)* the exercise of, or control of the exercise of the right to appoint or remove members of the board of directors of that company;*(d)* the holding of beneficial interests in the securities, or the ability to exercise control, including through a chain of ownership or control, of a holding company of that company;*(e)* the ability to exercise control, including through a chain of ownership or control, of—(i) a juristic person other than a holding company of that company;(ii) a body of persons corporate or unincorporate; (iii) a person acting on behalf of a partnership;(iv) a person acting in pursuance of the provisions of a trust agreement; or*(f)* the ability to otherwise materially influence the management of that company,’’. | COSATU AND SACTWUParagraph (b) of this definition states that the definition “includes but is not limited to a natural person”. By its internationally accepted definition, a beneficial owner should always mean a natural person and nothing else.[[1]](#footnote-2) We proposed the removal of this reference in section 52 to ensure the definition only refers to a natural person. The amendment to the GLAB is as follows:*Section 1 of the Companies Act, 2008, is hereby amended by the insertion after the definition of ‘‘beneficial interest’’ of the following definition:* *‘‘****‘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 company,* ***[includes, but is not limited to,] is*** *a natural person who, directly or indirectly, ultimately owns or exercises control of a company…*Without a reference to a natural person, only the first layer of ownership may be pierced and the actual owner may never be revealed. It is critical that all layers are pierced to find the actual natural person who benefits from the shares.WEBBER WENTZELWe submit that it is not clear whether the legislator intends for the concept of "control" as set out in sections 2 and 3 to apply to this definition as well. We submit that, if that is the legislator's intention, the concept of "control", as used in the definition, should be expressly linked to sections 2 and 3 of the Act. | The wording has been removed in the B version of the Bill.The term ‘control’ will take on the ordinary dictionary meaning and interpreted in a manner consistent with FATF guidance and international law. However, for consistency additional domestic guidance will be considered to assist in the consistent application of the term in the different Acts. |
| **Clause 56**Section 33 ‘‘(1A) (a) The Commission must make the annual return contemplated in subsection (1) available electronically to any person as prescribed.(b) The prescribed requirements referred to in paragraph (a) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).’’. | COSATU AND SACTWU* Clause 53 of the Bill proposes amendments to section 33 of the Companies Act. In order to require proactive disclosure in respect of annual returns, we recommend section 1A be amended so that it reads:

*“(a) The Commission must* *annually publish all annual returns on a publicly accessible platform and make the annual return contemplated in subsection (1) available electronically* ***[to any person]*** *as prescribed* ***to any person****.*”* The Bill’s formulation appears to be ambiguous as it could be read to mean that “any person” could be qualified in regulations (by for example allowing only certain classes of person access to the information). Patently, the information should be available to any person without qualification, although the information so made available may be qualified. Our proposal removes the ambiguity.
* We also recommended an inclusion in subsection (b) to ensure public access to the information governed by this provision. so that it reads:

 *“(b) The prescribed requirements referred to in this section must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001). The requirements provide for access for members of the public to the register.”** Except for the Companies Act, the government's central register of beneficial ownership available for use by government agencies, whether held by the CIPC or the Financial Intelligence Centre (FIC), should also be publicly available, for the reasons set out above. It is not clear to us that this is the case at the moment.
* We also support the information about trusts’ beneficial ownership being made available publicly. Trusts’ beneficial ownership records at the Masters’ offices should mirror how companies’ records are envisaged in the Bill to be published and made available – annually but also when updated.
* COSATU and SACTWU would have preferred that the provisions and definitions of beneficial owners be further expanded in the Bill, but given the constraints of time, accepts Treasury’s commitment to do so in the Bill’s Regulations once the Bill is assented to by the President. COSATU and SACTWU trust that Treasury will engage with Organised Labour, stakeholders and the public when the draft Regulations are ready for further engagement.
 | * **[to any person]** indicates that the wording is to be deleted
* Access to the various registers will be dealt through regulations after consultation with all stakeholders, s and will be a staged process in line with the approach by most by other FATF compliant jurisdictions.
 |
| **Clause 58**Section 56 ‘‘(12) A company that does not fall within the meaning of an ‘‘affected company’’ must file a record with the Commission, in the prescribed form and containing the prescribed information, regarding the individuals who are the beneficial owners of the company, and must ensure that this information is updated by filing notices with the Commission within the prescribed period after any changes in beneficial ownership have occurred.(13) The prescribed requirements referred to in subsection (12) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).(14) The Commission must maintain a register of the information contained in the records contemplated in subsections (7)(aA) and (12).’’. | COSATU AND SACTWU* This Bill has introduced the requirements for annual disclosure of beneficial ownership through the filing of annual returns under section 33, but subsection 12 of section 56 would require the filing of additional notices within a “prescribed period”.
* While we cannot know what that prescribed period will be until it is prescribed in terms of the Act, it seems clear that it will be more regular than annual (because of the annual requirements elsewhere in the legislation). We would argue that this should be at least quarterly.
* These new sections are commendable and will enable the CIPC to collect information on beneficial ownership throughout the year without having to wait for the annual returns.
* However, there is no provision for disclosure of this information or for access to that information. We therefore recommend an additional provision be added, and that the provisions be amended to read:

*“(12) A company must file a record with the Commission, in the prescribed form and containing the prescribed information, regarding the natural persons who are the beneficial owners of the company, and must ensure that this information is updated by filing Notices with the Commission within the prescribed period after any changes in beneficial ownership have occurred.**(13) The Commission must make any updates received in subsection 12 available on a publicly accessible platform in the prescribed form and containing the prescribed information for publication.**(14) The prescribed requirements referred to in subsections (12) and (13) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001). The requirements must provide for access for members of the public to the register.”*These amendments will create a two track-system for access to information about companies’ beneficial ownership:* through the publication by the Commission of companies’ *annual* returns and
* through the publication by the Commission of updated information as and when it is received

This does not remove the rights of individuals to apply for access to information through the Promotion of Access to Information Act but creates a proactive and up-to-date record which will be accessible to any interested person.  | The provisions provide for setting the prescribed period within which the company must file any changes in beneficial ownership. |

1. See for instance, Open Ownership’s guidance to states on definitions, published in July 2021. [↑](#footnote-ref-2)