

MFSA: Thematic Review on Reporting of Beneficial Ownership Information of Trusts in the Trusts Ultimate Beneficial Ownership Register (“TUBOR”)

Summary of Findings and Regulatory Requirements

1. Written Procedures on the Reporting of Beneficial Ownership Information on TUBOR

- The absolute majority of the trustees forming part of this Review had in place procedures on the reporting of beneficial ownership information on TUBOR, in line with the applicable legislative and regulatory framework. Nonetheless, in most cases such procedures were deemed to be too high level and lacked sufficient detail in relation to the practicalities of reporting of beneficial ownership information on TUBOR.
- A number of procedures did not include any references to:
 - (i) the stipulation of the reporting timeframes in line with Regulation 3(2) of the Regulations
 - (ii) the person responsible for the reporting of such information on TUBOR,
 - (iii) the nature and level of identification details and information to be reported with respect to individual and body corporate beneficial owners, or
 - (iv) any definition or explanation as to which parties to a trust are to be deemed to be “beneficial owners” in terms of the Regulations.
- Some procedures fell short of including any guidance on the reporting requirements of specific scenarios and did not cover the process to be followed when:
 - (i) reporting security trusts as per FAQ 5 of the FAQs;
 - (ii) a trust is transferred to another trustee in terms of FAQ 8 of the FAQs;
 - (iii) a trust is terminated as indicate in FAQ 9 of the FAQs;
 - (iv) where the trustee is acting as co-trustee with another trustee as explained in FAQ 2 of the FAQs;
 - (v) a trust is set up for charitable purposeFAQ6(d)(ii) of the FAQs);
 - (vi) a settlor is a trust (FAQ6(a) of the FAQs);
 - (vii) a beneficiary is the trustee of another trust or a charitable organisation (FAQ 6(d)(i) of the FAQs); and
 - (viii) a settlor is deceased or a body corporate settlor is struck off (FAQ6(a) of the FAQs).
- In other instances, the procedures had not been updated to reflect the legislative changes introduced by the amendments to the Regulations through by LN 27 of 2020.

Regulatory Requirements

- Trustees are to have proper and comprehensive policies and procedures in place to manage the trustee’s business affairs, including ensuring compliance with legal obligations and standards and specifically, on the reporting of beneficial ownership information on TUBOR.

- Trustees are required to ensure that they have in place systems, controls, and procedures, to ensure that staff perform their duties in a diligent and proper manner. Staff members should therefore be made of aware of such procedures, and adequate training provided to the employees on an on-going basis to ensure that the employees are also aware of any changes to the legislative and regulatory framework.

2. Timeliness of Reporting of Beneficial Ownership Information on TUBOR

- Trustees were generally in compliance with the time periods stipulated in the Regulations. However, the Authority encountered instances where reporting was not done within the applicable timeframes – both in relation to the initial reporting of the declaration of beneficial ownership information submitted on TUBOR and also with respect to changes made thereafter
- Late reporting instances were generally noted where trustees did not have adequate procedures in terms of reporting of beneficial ownership information on TUBOR or in the absence of adequate internal controls to ensure such timely reporting.

Regulatory Requirements

- Regulation 3(1) of the Regulations clearly stipulates that trustees authorised in terms of Article 43 or registered in terms of Article 43B of the Act are obliged to submit a declaration of beneficial ownership on TUBOR within fourteen days of being appointed as trustee of an express trust.
- Regulation 5(1) of the Regulations establishes the time period within which changes to the submitted declarations of beneficial owners are to be made to the Authority, that is, within fourteen days from the effective date of the change or from the date the trustee became aware of such changes to the beneficial ownership information of a trust.
- Under Section 6.0 and Section 9.0 of the Code of Conduct, trustees are required to implement robust and effective systems and controls to ensure compliance with all legal and regulatory requirements, which in this case includes the reporting of beneficial ownership information of trusts within the timeframes stipulated by the Regulations.

3. Reporting of Adequate, Accurate and Up-to-Date Beneficial Ownership Information

- The Authority found a general inclination by trustees to ensure that adequate, accurate and up-to-date information is reported on TUBOR through for example, the implementation of internal controls by trustees in order to ensure accuracy when reporting beneficial ownership information of trusts under their administration or having in place an internal beneficial ownership register held by the trustee, in order to ensure that the data reported on TUBOR is complete, accurate and up-to-date at all times.
- Authority noted discrepancies and errors in the reported beneficial ownership information when verified against the records of the trustee.

3.1. Omissions in Reporting of Beneficial Owners

3.1.1 Reporting of Economic Settlor

- On two separate occasions, trustees which administered trusts where the settlor indicated on the trust instrument was acting as mandator for another person (the ‘Economic Settlor’ or ‘Mandator’), the trustees only reported on TUBOR the details of the person indicated as the settlor on the trust instrument (the ‘Nominal settlor’).

Regulatory Requirements

- FAQ 6(a) sets out that trustees are obliged to report both the nominal and economic settlor/s in the designated sections of the beneficial ownership declaration. The details of economic settlors should be reported in the section relating to “any parties exercising control over the trust” on TUBOR and trustees are to indicate the person being reported is an economic settlor of the trust.

3.1.2 Reporting of Individual Beneficiaries

- In fourteen instances, the Authority identified situations where trustees failed to report beneficiaries who have been identified either in the trust instrument or in letters of wishes duly acceded to by the trustees.
- Three instances out of the fourteen cases indicated above related to scenarios wherein a settlor was also a beneficiary of the trust and the trustees only reported these individuals in their capacity as settlors.
- In four instances, the Authority noted instances whereby in the field for the class of beneficiaries in the declaration of beneficial ownership, the trustees included individuals who were effectively the settlor(s), and therefore clearly identifiable, as well as other beneficiaries who had also been duly determined and identified from the class. Therefore, since these individuals were identified and/or identifiable from the class and already reported in their individual capacity in the relevant declarations, it would have been expected that these would no longer be referred to in the description of the class.

Regulatory Requirements

- Any beneficiaries which have been identified, either in the trust instrument or in letters of wishes duly acceded to by the trustees, as well as settlors of trusts who also stand to benefit as beneficiaries, must be reported in their individual capacity and not referred to in the description of the class of beneficiaries.
- Where any of the beneficiaries which form part of a class of beneficiaries are identifiable or are appointed as beneficiaries by the trustees, the said trustees are required to report the details of the named beneficiaries, in line with Regulation 3(2) of the Regulations and FAQ 6(d)(i) of the FAQs.
- Trustees are also requested to ensure that any references to the identified beneficiaries and/or settlors from the class of beneficiaries’ section are removed.

3.1.3 Reporting of Body Corporate Beneficiaries

- The Authority noted that trustees omitted to report charitable organisations as body corporate beneficiaries despite the fact that such organisations had been identified in the relevant trust instruments and supplementary deeds.

Regulatory Requirements

- Trustees are to report charitable organisations named in the trust documentation as body corporate beneficiaries, and all available information on these organisations should be reported on the beneficial ownership information declaration.
- Trustees are not required to report the details of the Ultimate Beneficial Owners of charitable organisations.

3.1.4 Reporting of Classes of Beneficiaries

- The failure to report all the classes of beneficiaries as set out in the trust instruments, any supplemental deeds as well as any letters of wishes which have been acceded to by the said trustees.
- The Authority also observed that in the case of four trustees, the said trustees omitted certain classes of beneficiaries from their reporting, which was often attributable to a matter of interpretation as to whether a particular description of potential beneficiaries was to be considered as a class of beneficiaries or otherwise.

Regulatory Requirements

- In line with Regulation 3(3) of the Regulations where the trust includes a class/classes of beneficiaries, trustees are required to report a description of the relevant class/classes and its/their members.¹
- The description of the relevant classes and its members should be provided on the respective declarations and any descriptions reported on TUBOR should be as faithful as possible to the wording used in the relevant trust documentation.

3.1.5 Reporting of Other Persons Exercising Ultimate and Effective Control over the Trust

- Some trustees omitted the reporting of third parties (such as another trustee of a related trust within the same structure) deemed to be exercising ultimate and effective control over the trust on TUBOR.

Regulatory Requirements

- Regulation 2(1)(e) of the Regulations clearly sets out that any person exercising ultimate and effective control over the trust by any means, including any person (other than the other parties to the trust defined by law as beneficial owners) whose consent is to be obtained, or whose direction is binding in terms of the trust instrument or of any other instrument in writing, for material actions to be taken by the trustee, is deemed to be a beneficial owner as defined in Prevention of Money Laundering and Funding of Terrorism Regulations.

¹ This requirement is further supplemented by the guidance set out in FAQ6 (d)(ii) in relation to the reporting of classes of beneficiaries on TUBOR.

- Trustees are obliged to report the details of such individuals as well as the nature and extent of such control and/or influence, in the relevant field FAQ 6(e) of the FAQs also provides further guidance on this requirement.

3.1.6 Reporting of any Suspension of the Trustee's Duty to Inform a Beneficiary of his/her benefit under the trust/that he forms part of a class of beneficiaries

- Some trustees did not indicate for certain beneficiaries, in the relevant declarations submitted on TUBOR, whether the trust instrument, or other document from the settlor, refers to any suspension of the trustee's duty to inform the said beneficiaries of their benefit under the trust or that they form part of a class of beneficiaries, or otherwise.

Regulatory Requirements

- In terms of regulation 3(2)(g) of the Regulations, trustees must report for each beneficial owner of a trust, in the case of beneficiaries, the nature and extent of the benefit as well as, where applicable, an indication as to whether the trust instrument includes any suspension of the trustee's duty to inform such beneficiary of his benefit under the trust or that he forms part of a class of beneficiaries which may so benefit.

4. Accuracy of Reported Beneficial Ownership Information

- Regulation 3 of the Regulations obliges trustees to report beneficial ownership information, which is adequate, accurate and up to date. Some discrepancies and inaccuracies were noted.

4.1. Errors in Reported Beneficial Ownership Information Details

- In some instances, whilst the correct parties were reported on TUBOR as beneficial owners, in line with the applicable requirement, the Authority noted errors in the identification details of the said reported beneficial owners.
 - The name and surname, date of birth, nationality, identification document number and country of residence reported did not match the details indicated in the due diligence documents held on file either due to human error or due to information being reported from expired documentation.
 - The identification details reported for certain beneficiaries, which had not yet received a benefit, were cited from expired identification documents.
 - Discrepancies in the date of registration, registration number and country of registration reported on the respective declarations for body corporates.
 - Discrepancies between the date of appointment of trustees, trust names reported on TUBOR, the appointment dates and trust names indicated in the relevant trust instruments or deeds of appointment.

Regulatory Requirements

- Trustees are to ensure that all beneficial ownership information reported on TUBOR is complete, accurate and up to date at all times in line with Regulation 3(1) of the Regulations.
- In scenarios whereby beneficiaries have not received a benefit, trustees are only obliged to verify and report the identification details of such beneficiaries prior to a distribution being made. Should a decision be made by the trustees to report the identification details

prior to a distribution being made, the trustees are then obliged to ensure that the reported information is accurate and up to date.

4.2. Inaccurate description of the Nature and Extent of the Benefit

- The information reported in the nature and extent fields did not always reflect the nature and extent of the benefit indicated in the trust instruments, supplemental deeds or any letters of wishes which were acceded to by the trustees.
 - The trustees reported that beneficiaries stood to benefit from the trust assets in a discretionary manner. However, upon review of the trust documentation it was noted that such beneficiaries stood to benefit in a fixed term manner.
 - Trustees fell short of indicating that the benefit was subject to a number of conditions in the relevant nature and extent fields on TUBOR.
 - Trustees failed to report changes in relation to the benefit status of various beneficiaries, referring to those circumstances where beneficiaries who were originally reported as never having received a benefit from the trust, subsequently received a benefit. Whilst the Authority found on file various documents which indicated that there had been multiple distributions to beneficiaries, the trustees did not submit a revised declaration to report these changes in a timely manner.

Regulatory Requirements

- Trustees are requested to ensure that the information reported in the nature and extent field is complete, accurate and up to date at all times, in line with Regulation 3(2)(g) of the Regulations and FAQ 6(d)(i) of the FAQs.
 - Type of changes to reported beneficial ownership information which are to be reported within 14 days from the date on which the change is recorded by the trustee, in terms of Regulation 5(1) of the Regulations, including any changes to the benefit status of beneficiaries.

4.3. Inaccurate reporting of the Suspension of Trustee's Duty to Inform Beneficiaries of their Entitlement

- In some instances, trustees reported that there was no suspension in place in relation to various beneficiaries. However, upon review of the relevant trust instrument it was noted that in fact there is a suspension in place which was not reported by the said trustees.
- Whilst the trustees correctly reported that the trustee was indeed subject to such a suspension of their duty to inform the beneficiary being reported of their entitlement under the trust, as verified from the trust instruments reviewed during the course of on-site inspections, the description reported on the beneficial ownership information declarations did not reflect the wording in the latest trust documentation.²
- In other cases, the trustees reported that there was such suspension of duty applicable also to beneficiaries who were also the settlors of the relevant trusts. In this regard, trustees would generally be expected to indicate that there is no such applicable suspension on the trustee's duty to inform the settlor, qua beneficiary, of his entitlement under the trust, on the understanding that the settlors would have set up the relevant trust and thus, be fully aware of their entitlement.

² This was the case where the original trust instruments were replaced by supplemental deeds, where the said trustees fell short of submitting revised declarations to reflect the change in the wording.

Regulatory Requirements

- Regulation 3(2) stipulates that any details relating to any trust instrument provisions setting out a suspension on the trustee's duty to inform a beneficiary of his/her entitlement under the trust are reported on TUBOR, and the information reported must be complete, accurate and up to date at all times.
- Trustees are required to ensure that the necessary internal control mechanisms to ascertain that the information reported is reliable.

5. Verification of Reported Beneficial Ownership Information

5.1. Missing Due Diligence Documents

- In some instances, no documentary evidence confirming the details reported on TUBOR were found on file. In various cases the Authority was unable to verify the residential details reported in relation to a number of beneficial owners as no valid proof of residence documentation was found on file.

Regulatory Requirements

- Trustees are to have valid supporting documentation on file, in line with section 9.6 of the Trustees Code of Conduct which addresses the requirement for trustees to maintain adequate and up-to-date records, to enable the verification of information reported on the beneficial ownership information declarations.
- Where the requirement to verify the identity of beneficiaries has not been triggered in terms of the AML/CFT regulatory framework, but all details were nonetheless reported on TUBOR, trustees are to ensure that adequate records are kept on file which clearly indicate where the trustee obtained the identification details of these beneficiaries for the purposes of reporting.
- Should trustees resolve to report the details of beneficiaries which have yet to receive a distribution on TUBOR, said trustees are obliged to ensure that all information reported is complete, accurate and kept up to date, in adherence with Regulation 3(1) of the Regulations.
- Where trustees report that one of the beneficial owners is deceased, trustees are to ensure that any relevant death certificate or other documentation confirming such event is kept on file.

5.2. Inconsistencies relating to due diligence documents held on file

- In a number of instances, the documentation provided to verify the beneficial ownership information reported in the declaration on TUBOR was outdated. Therefore, trustees reported beneficial ownership information on TUBOR which was not up to date.
- In other cases, whilst updated due diligence documentation had been obtained by the trustees and was found on file, the trustees failed to amend the relevant declarations to reflect the updated beneficial ownership information details on TUBOR.

- Other instances were also noted whereby the documentation provided to the Authority was illegible and thus, the Authority was unable to review and verify the accuracy of the information reported on TUBOR.
- Some documents provided were either in a different language and no translated copies were provided to the Authority or the documents were not certified as per the applicable AML/CFT requirements.

Regulatory Requirements

- Trustees are requested to ensure that all due diligence documentation obtained and maintained by trustees is in line with the applicable AML/CFT regulatory regime, and that adequate and effective controls are in place to ascertain that the beneficial ownership information reported is complete, accurate and up to date at all times.

5.3. Record-Keeping: Documentation of Key Decisions

- Some trustees failed to have sufficient documentation in place evidencing decisions taken by the trustee's board of directors including key decisions which impact the beneficial ownership structure of the trust. These related to: the acceding, or otherwise, to letters of wishes received providing directions/wishes relating to the trust administration and possible distributions, matters relating to any loans taken to purchase any trust property and settlement of additional assets under trust.
- Inadequate records were also noted by the Authority with regards to any discussions held in relation to whether trusts generate tax consequences or otherwise prior to the introduction of LN 27 of 2020.

Regulatory Requirements

- Trustees are required to ensure that adequate records of any discussions and subsequent decisions taken by the board are duly kept on file and made available to the Authority, upon request under the Code of Conduct.
- Where trustees are in receipt of letters of wishes, however a decision whether to accede to such wishes is yet to be taken by the Board, trustees are required to ensure that they keep a written record of the fact that the contents of the letter of wishes are still to be considered by the trustee and that no decision has yet been made thereon.

Gap Analysis Exercise

- Trustees are expected to carry out a gap analysis exercise in order to ensure that the beneficial ownership information of the trusts they administer and which they have reported on TUBOR is accurate and up-to-date and according to the Authority's expectations.
- Should any gaps or discrepancies be identified, trustees are required to take the necessary steps to update and resubmit the declarations of beneficial ownership information submitted on TUBOR, where necessary, immediately and without any delay.