

SOUTH AFRICA

Philanthropy Law Report



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Contents

- Introduction..... 1
- Recent Developments..... 2
- Relevant Laws..... 4
 - Constitutional Framework 5
 - National Laws and Regulations Affecting Philanthropic Giving 5
- Analysis 8
 - Organizational Forms for Nonprofit Organizations 8
 - Registration of Domestic Nonprofit Organizations 9
 - Registration of Foreign Nonprofit Organizations..... 10
 - Nonprofit Organization Activities 11
 - Political Activities and Lobbying..... 11
 - Economic Activities..... 11
 - Restrictions on Operational Activities. 13
 - Prohibition on Distribution of Income or Assets/Private Inurement..... 13
 - Government Supervision..... 14
 - Reporting..... 15
- Termination, Dissolution, and Sanctions..... 16
 - Dissolution..... 16
 - Distribution of Assets..... 16
 - Sanctions. 17
- Charitable or Public Benefit Status..... 17
- Local and Cross-Border Funding..... 19
- Tax Law..... 20
- News and Events 22

SOUTH AFRICA

PHILANTHROPY LAW REPORT

| KEY INDICATORS ¹ | |
|-------------------------------|---------------------------------|
| POPULATION | 54,300,704 (2016 estimate) |
| CAPITAL | Pretoria |
| TYPE OF GOVERNMENT | Parliamentary Republic |
| GDP (PURCHASING POWER PARITY) | \$736.3 billion (2016 estimate) |
| GDP PER CAPITA | \$13,200 (2016 estimate) |
| GDP – REAL GROWTH RATE | 0.1% (2016 estimate) |

Introduction

The Republic of South Africa’s legal framework is considered supportive of civil society in general and philanthropic giving in particular. The Nonprofit Organizations (NPO) Act, which became effective in September 1998, is generally considered to be enabling of the sector.

The NPO Act aims to provide a regulatory and supportive function for smaller voluntary associations that were established under common law and had no registration or reporting capacity. While registration under the NPO Act is voluntary, in practice it has become a prerequisite for government funding. The South African government serves not only a regulator, but also a key donor to NPOs.

The objectives of the NPO Act are to encourage and support NPOs in meeting the diverse needs of South Africa’s population by:

- Creating an environment in which NPOs can flourish,
- Establishing an administrative and regulatory framework within which NPOs can conduct their affairs, and
- Encouraging NPOs to maintain adequate standards of governance, transparency and accountability and to improve those standards.

According to the NPO Act, “Within the limits prescribed by law, every organ of state must determine and coordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of NPOs to perform their functions.” The NPO Act

¹ Central Intelligence Agency, *The World Factbook* (Washington, DC: Central Intelligence Agency, 2016), <https://www.cia.gov/library/publications/the-world-factbook/index.html>.

repealed most of the Fundraising Act of 1978, which was a draconian piece of legislation used to suppress the fundraising activities of certain organizations.²

Amendments made to the Income Tax Act during 2001 established a more objective tax exemption system to promote local philanthropy and the financial sustainability of NPOs.³ NPOs may now access a number of tax benefits under the Income Tax Act, which can significantly contribute to their financial sustainability. In particular, the Income Tax Act allows tax exemption for public benefit organizations (PBOs)—that is, organizations that serve a broad range of public interest purposes.

Philanthropy is important in the South African context. The African concept of *ubuntu*, which is founded on the principle of caring for one another, is central to South African society. As a cultural tradition, *ubuntu* has inspired philanthropic activity on both the individual and organizational levels. One national study described South Africa as a “nation of givers.” More than 90 percent of those who participated in the study reported that they gave time, money, or in-kind donations. The study noted that giving is not the domain of the wealthy. Rather, it is part of everyday life for all South Africans, rich and poor alike. The *World Giving Index 2016* ranks South Africa sixty-first out of 145 countries in terms of overall giving.⁴ In the *World Giving Index 2015*, South Africa ranked among the top ten countries in terms of the number of people “helping a stranger.”⁵ The index comments that this ranking “supports the belief that *ubuntu*—the interconnectedness between people which underpins charitable giving—is still a strong motivator within South Africa.”

Recent Developments

The South African legal environment for NPOs and philanthropy has largely been stable, with no notable changes occurring in the past year.

² To understand the importance of the current legal framework for NPOs and philanthropy, it is helpful to consider the history of the sector’s regulation in South Africa. Prior to 1994 the legal environment was not conducive for NPOs and philanthropy. As South Africa approached its transition to democracy, the Development Resources Center commissioned a study aimed at improving the legal environment for NPOs. This study, entitled “The Independent Study into an Enabling Environment for the Nonprofit Sector,” focused on key policy and legal issues, including civil society and fundamental freedoms; the establishment, registration, and administration of NPOs; fundraising; and the taxation of NPOs. The study identified as challenges the unsatisfactory relationship between NPOs and the government, an unfriendly funding framework, lack of skilled management resources within the sector, registration and administrative problems, and a lack of information-sharing among organizations. The study was instrumental in the development of policy and legislation affecting the nonprofit sector in South Africa. In 1997 the Department of Welfare published its Draft White Paper for Social Welfare, which emphasized the need to reform legislation and policy governing the nonprofit sector. Both civil society and the government supported the need for a supportive regulatory framework.

³ The 2001 enactment of the Income Tax Act followed the 1999 publication of a report by the Katz Commission of Inquiry, which had been appointed by the South African government to investigate NPO tax issues.

⁴ Charities Aid Foundation, *CAF World Giving Index 2016* (October 2016), <https://www.cafonline.org/about-us/publications/2016-publications/caf-world-giving-index-2016>. The Index describes giving behavior as helping a stranger, donating money, and volunteering time to an organization.

⁵ Charities Aid Foundation, *World Giving Index 2015*, November 2015, <https://www.cafonline.org/about-us/publications/2015-publications/world-giving-index-2015>.

The Department of Social Development has recently embarked on a review of the provisions of the NPO Act. A research company has been appointed to lead this process. The text of the draft amendment has not yet been published for public comment; upon publication, the public and NPOs will have an opportunity to comment on the proposed amendment.

The Department of Social Development had previously identified challenges with “the implementation process of the NPO Act” as one of the reasons for a review.⁶ Additionally cited were the capacity of the Nonprofit Organizations Directorate (NPO Directorate) to monitor the expanding sector and an intent to bring about an enabling environment for South African NPOs to flourish. These issues were further deliberated during the Ministerial Provincial Dialogues that were held during June and July 2012 in all the nine provinces and culminated in a National NPO Summit in August 2012. These discussions and the issues raised necessitated a need to review the NPO Act in its current form.

In November 2016, the Parliament passed the Protected Disclosures Amendment Bill.⁷ The bill amends the Protected Disclosures Act (PDA) , which protects employees from being victimized or subjected to “occupational detriment” (broadly defined to include harassment, dismissal, transfer against the will of the employee, non-promotion, a denial of appointment, and other adverse effects) as a result of whistleblowing. The bill will be presented to the National Council of Provinces before it is submitted to the President to be signed into law. The amendment extends the application of the PDA to any person who works for the State, i.e. civil servants; independent contractors; agents; and individuals rendering services to an employer while employed through a temporary employment service. It also mandates that all employers adopt appropriate internal procedures regarding whistleblowing and protects whistleblowers from civil and criminal liability under certain prescribed circumstances in order to facilitate and encourage disclosures.

Between March and May 2017, the Department of Social Development (DSD) and the Department of Planning, Monitoring, and Evaluation embarked on a review of the provisions of the NPO Act. A research company was appointed to lead the process. The purpose of the evaluation, according to the DSD, was to assess the effectiveness of the regulatory system in creating an enabling environment for NPOs to deliver services and to identify how this can be strengthened. The evaluation concluded that DSD should consider amending the NPO Act to enhance governance and to improve regulation. The evaluation suggested that amendments should include: (1) a clarified definition of a non-profit organization which is aligned with the Companies Act and the Income Tax Act; (2) a name checking service to avoid duplication of names of registered NPOs; and (3) strengthening the power of the regulator to investigate complaints and progressively enforce compliance.

⁶ This is discussed in a policy document entitled “Draft NPO Policy Framework on the Amendments of the Nonprofit Organizations Act 71 of 1997.”

⁷ Gaye Davis, “Whistle-blower Bill One Step Closer to Becoming Law,” *Eyewitness News*, Nov. 23, 2016, <http://ewn.co.za/2016/11/23/whistle-blower-bill-one-step-closer-to-becoming-law>.

In April 2017, the Financial Intelligence Centre Amendment Act was signed into law by the President of South Africa. The Amendment Act amends the Financial Intelligence Centre Act, which is geared towards combating money-laundering activities. The Amendment Act seeks to make it easier to identify owners of companies and accounts — including those of “domestic prominent influential persons” — to bolster the fight against corruption. The Amendment Act is a law of general application that will impact the operations of NPOs, which will have to ensure that their board members are properly verified by accountable institutions, especially banks. NPOs that do not comply with the verification requirements may be prevented from accessing their bank accounts.

| INTERNATIONAL RANKINGS | | |
|--------------------------------------|------|------------------------------|
| RANKING BODY | RANK | RANKING SCALE (BEST – WORST) |
| UN HUMAN DEVELOPMENT INDEX | 116 | 1-188 |
| FOREIGN POLICY: FRAGILE STATES INDEX | 108 | 178-1 |
| CAF WORLD GIVING INDEX | 61 | 1-145 |
| • HELPING A STRANGER | 19 | |
| • DONATING MONEY | 107 | |
| • VOLUNTEERING TIME | 35 | |
| HUDSON PHILANTHROPIC FREEDOM INDEX | 29 | 1-64 |

Relevant Laws

The South African legal system combines common, cultural, and statutory law. Common law originates from the Roman-Dutch tradition and has been developed by the courts over the years. South Africa’s statutory legal system consists mainly of laws and regulations. Customary law may differ from community to community, but at least two versions of customary law are recognized: the “official customary law” relied upon by the courts, and the “living” law observed in communities.⁸ Customary marriages, cultural succession practices, and alternative dispute resolution are examples of matters that may be covered by customary law. The South African government introduced the Recognition of Customary Marriages Act, No 120 of 1998, for example, to give legal recognition to marriages performed under African customary law.

South Africa became a democracy in 1994 and adopted its current constitution in 1996. In furtherance of the country’s constitutional goals, the South African parliament reportedly approved more than 1,200 laws and amendments between 1994 and 2014.⁹

⁸ South African Law Commission, “Project 90: The Harmonisation of the Common Law and the Indigenous Law,” 74, http://www.justice.gov.za/salrc/reports/r_prj90_conflict_1999sep.pdf.

⁹ Department of Justice and Constitutional Development, Government of South Africa, “Draft National Action Plan to Combat Racism, Racial Discrimination, Xenophobia, and Related Intolerance (2016-2021),” October 2015, <http://www.justice.gov.za/docs/other-docs/nap.html>.

Constitutional Framework

The Constitution of the Republic of South Africa, Act 108 of 1996 (as amended), is the supreme law of South Africa. The current constitution was adopted in 1996 and came into effect on February 4, 1997. The constitution includes a number of protections for fundamental human rights that are relevant to NPOs, philanthropic organizations, and philanthropic giving. Specifically, the constitution protects the right to freedom of association (Clause 18) and freedom of expression (Clause 16), the latter including freedoms of the press and other media, freedom to receive and impart information and ideas, freedom of artistic creativity, academic freedom, and freedom of scientific research. These rights can be limited only by another provision in the constitution or by a law of general application “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors,” including:

- The nature of the right,
- The importance of the purpose of the limitation,
- The nature and extent of the limitation,
- The relation between the limitation and its purpose, and
- Less restrictive means to achieve the purpose (Clause 36).

National Laws and Regulations Affecting Philanthropic Giving

Table 1 lists the national laws and regulations affecting philanthropic giving in South Africa.

Table 1. National Laws and Regulations Affecting Philanthropic Giving in South Africa

| TITLE OF LAW REGULATION | YEAR ENACTED | DESCRIPTION | LINKS TO LAW OR REGULATION |
|---|-----------------|---|----------------------------|
| FRAMEWORK LAWS | | | |
| COMPANIES ACT 71 OF 2008 (AS AMENDED) | 2011 | Provides for the incorporation and regulation of nonprofit companies and others | English |
| NON-PROFIT ORGANIZATIONS ACT 71 OF 1997 (AS AMENDED) (“NPO ACT”) | 1998 | Provides for the registration facility for all NPOs | English |
| COMMUNAL PROPERTY ASSOCIATIONS ACT, 28 OF 1996 | 1996 | Provides for the formation and regulation of communal property associations | English |

| | | | |
|---|------|--|--------------------------------|
| TRUST PROPERTY CONTROL ACT 57 OF 1988 (“TPCA”) | 1988 | Provides for the registration of nonprofit trusts and other trusts | <u>English</u> |
| TAX LAWS | | | |
| VALUE ADDED TAX ACT 89 OF 1991 (“VATA”) | 1981 | Provides for the regulation of value-added tax | <u>English</u> |
| INCOME TAX ACT 58 OF 1962 (AS AMENDED) | 1962 | Provides tax benefits to NPOs | <u>English</u> |
| LAWS PROVIDING FUNDING FOR THE NPO SECTOR | | | |
| LOTTERIES ACT, No. 57 OF 1997 | 1998 | Provides for the funding of NPOs from proceeds of national lotteries | <u>English</u> |
| NATIONAL DEVELOPMENT AGENCY ACT, No. 108 OF 1998 | 1998 | Provides for the funding of NPOs from the government | |
| EMPLOYMENT LAWS | | | |
| SKILLS DEVELOPMENT ACT, No. 97 OF 1998 | 1998 | Provides a framework to devise and implement strategies to develop and improve the skills of the South African workforce | <u>English</u> |
| EMPLOYMENT EQUITY ACT, No. 58 OF 1998 | 1998 | Promotes equity in the workplace by promoting equal opportunity and fair treatment in employment, through the elimination of unfair discrimination and through the implementation of affirmative action measures | <u>English</u> |
| BASIC CONDITIONS OF EMPLOYMENT ACT, No. 75 OF 1997 | 1998 | Provides for basic conditions for employees and governs the basic conditions relating to working time, leave and record-keeping | <u>English</u> |
| LABOUR RELATIONS ACT, No. 66 OF 1995 | 1995 | Provides for the regulation of employment relations and establishment of trade unions | <u>English</u> |
| COMPENSATION FOR OCCUPATIONAL INJURIES | 1993 | Creates a system that provides a form of | <u>English</u> |

| | | | |
|---|------|--|----------------|
| AND DISEASES ACT, NO. 130 OF 1993 | | insurance for employers if their employees are injured at the workplace | |
| LAWS OF GENERAL APPLICATION | | | |
| PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT, NO. 12 OF 2004 | 2004 | Provides for strengthening of measures to prevent and combat corruption and corrupt activities | <u>English</u> |
| FINANCIAL INTELLIGENCE CENTRE ACT, NO. 38 OF 2001 | 2001 | Requires accountable institutions, including nonprofit trusts, to verify details of clients and report suspicious transactions | <u>English</u> |
| PROMOTION OF ACCESS TO INFORMATION ACT, NO 2 OF 2000 | 2000 | Gives effect to the constitutional right of access to any information held by the state and any information held by another person that is required for the exercise or protection of any rights | <u>English</u> |
| PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT, NO. 4 OF 2000 | 2000 | Gives effect to the letter and spirit of the constitution, in particular to the equal enjoyment of all rights and freedoms by every person, the promotion of equality, and the prevention of unfair discrimination and protection of human dignity | <u>English</u> |
| PREVENTION OF ORGANISED CRIME ACT, 1998 (ACT 121 OF 1998) | 1999 | Introduces measures to combat organized crime, money laundering and criminal gang activities, to prohibit certain activities relating to racketeering activities and to provide for the prohibition of money laundering | <u>English</u> |
| EXCHANGE CONTROL REGULATIONS, 1961 | 1961 | Regulates cross-border flow of national currency, especially outward flow | <u>English</u> |

There are no specific laws dealing with volunteers, and rules that affect volunteers are captured in labor laws. Cross-border donations are regulated by South Africa's exchange control regulations.

Analysis

Organizational Forms for Nonprofit Organizations

Nonprofit organizations in South Africa can primarily operate through four legal forms: voluntary associations, nonprofit trusts, nonprofit companies, and external companies.

Voluntary Associations. A voluntary association is an agreement between three or more people to achieve an agreed objective. A voluntary association cannot have as its main objective the pursuit of profits. These associations are regulated by common law, not statute. A voluntary association is not required to register with the government to exist in South Africa.

Nonprofit Trust. A trust is established under the Trust Property Control Act of 1988. A nonprofit trust is one of several types of trusts (other types include business trusts, family trusts, and testamentary trusts). The terms of the trust deed distinguish these types. The Master of the High Court appoints the trustees, and the trustees are required by the Trust Property Control Act to lodge the trust deed with the master. Trustees can only act as trustees when authorized to do so in writing by the master.

Nonprofit Company. The Companies Act of 2008 provides for the incorporation of a nonprofit company for a public benefit objective, an objective relating to one or more cultural or social activities, or communal or group interests. The Companies Act recognizes the nonprofit company as a separate category of company that is different from a for-profit company. It must have at least three directors and can be established with or without members. It is incorporated by submitting a copy of its memorandum of incorporation, a notice of incorporation with the prescribed fee, and supporting documents to the Companies Commission.

External Company. The Companies Act provides for the registration of an external company, which can be either a nonprofit or for-profit company. No new company comes into existence with the registration of the external company. The foreign company is merely registered (not incorporated) under the Companies Act.

The chart below provides the approximate number of the various organizational forms registered under the NPO Act. Some NPOs (voluntary associations, nonprofit trusts, and nonprofit companies) may not be registered under the NPO Act, and as a result, the numbers below do not necessarily reflect the total number of NPOs in South Africa.

| NONPROFIT COMPANIES | NONPROFIT TRUSTS | VOLUNTARY ASSOCIATIONS | TOTAL |
|---------------------|------------------|------------------------|---------|
| 6,500 | 2,491 | 141,462 | 150,453 |

Database: Directorate of Nonprofit Organizations

The incorporation of an organization is not mandatory, and individuals may create informal organizations to carry on lawful activities without forming a legally recognized entity. However, informal organizations may find it challenging, for example, to open and maintain bank accounts.

Registration of Domestic Nonprofit Organizations

The incorporation requirements for the different types of NPOs are as follows.

Voluntary Associations. A voluntary association is not required to incorporate. There are no limitations on who may found a voluntary association.

Nonprofit Trust. The Master of the High Court is responsible for registering nonprofit trusts. There are no limitations on the permissible founders of a trust. However, if the trust intends to seek tax benefits, it must have at least three directors who are unrelated. To form the trust, the initial trustees lodge the prescribed application form, the trust deed, and the initial trustees' acceptance of trusteeship forms, which include the physical and postal addresses and other contact details of the trustees. The fee for registration of a trust is approximately \$10.

Nonprofit Company. A nonprofit company is incorporated with the Companies and Intellectual Properties Commission. A nonprofit company must appoint at least three directors, and if the organization intends to seek tax benefits, at least three of its directors must be unrelated. To incorporate, the incorporators submit a memorandum of incorporation, notice of incorporation, details about the incorporators (including their physical and postal addresses), and contact details for the company. It costs approximately \$25 to incorporate a nonprofit company.

External Company. An external company is registered with the Companies and Intellectual Properties Commission. To register, an external company must submit, among other things, its founding document, details of its directors (including their physical and postal addresses), and contact details for the person who will accept service of documentation in South Africa. It costs approximately \$25 to register an external company.

Registration under the NPO Act. The NPO Directorate registers NPOs under the NPO Act. The NPO Act does not provide specific requirements regarding the founders of an NPO, but in practice an NPO must have at least three board members, one of whom must be resident in South Africa.

To register, an organization must submit a copy of its founding document, which must include certain required clauses confirming its nonprofit status and details about the board members,

including their business and residential addresses, identity numbers, and telephone numbers. There are no fees associated with registration under the NPO Act.

The NPO Act aims to create an enabling environment for NPOs and to promote public accountability. In doing so, it creates a voluntary registration facility for all NPOs. This is especially important for voluntary associations, which do not come into existence through registration at a public facility. Most community-based organizations (CBOs) are legally established as voluntary associations, and the NPO Act provides a registration facility for such organizations. Registration pursuant to the NPO Act has become, for the most part, a standard requirement to access funding from a government department.

All forms of NPOs must be established for lawful purposes. Voluntary associations and trusts face no other restrictions on their permissible purposes. A nonprofit company may only be incorporated for a public benefit objective, an objective relating to one or more cultural or social activities, or communal or group interests.

Effective implementation of laws governing registration has been a challenge in South Africa, largely because registration facilities are under-resourced. The Companies Commission and the NPO Directorate have adopted electronic registration systems, which has significantly improved the registration process. Nonprofit trusts are registered manually, but there are about fourteen offices of the Master of the High Court across the country to handle this responsibility. Registration requirements are ordinarily applied in an equitable manner.

Registration of Foreign Nonprofit Organizations

To operate in South Africa, a foreign NPO may either establish a domestic NPO (voluntary association, nonprofit trust, or nonprofit company) or register as an external company under the Companies Act of 2008. Both nonprofit and for-profit external companies can register under the Companies Act.

Section 23 of the Companies Act provides that an external company must register with the Companies Commission within twenty business days after it first begins to conduct business or nonprofit activities in South Africa. Certain activities are regarded as constituting the conduct of business. These include the employment of staff and the conduct of activities over a period of at least six months, which is sufficient to reasonably conclude that the company intends to continually engage in business or nonprofit activities.

In order to secure its registration as an external company, the foreign NPO must submit a number of documents to the Companies Commission, including:

- A certified copy of the foreign NPO's Registration Certificate and its founding document,
- Certified copies of passports for all board members of the foreign NPO, and
- Completed prescribed forms, including a notice identifying the person in South Africa who will accept service on behalf of the foreign NPO.

The Companies Act does not require the external company to have initial capital or physical premises. However, the company must provide a physical address to serve as its official address. There are no other requirements that are exceptional to foreign NPOs. The Companies Act does not limit the activities of the external company beyond the requirement that its activities be lawful. It also does not impose any requirements upon the founders of the external company. Foreign NPOs are not discriminated against, whether in law or practice, when they apply to register as external companies pursuant to the Companies Act.

Once the required documents are submitted to the Companies Commission, the foreign NPO may be registered within twenty-five business days. There are usually no complications with the registration process once all the required documents have been submitted. The fees to register an external company are less than \$40.

Nonprofit Organization Activities

Political Activities and Lobbying. The law generally does not restrict or define “political activities.” However, the law and the constitution do address political rights, and they provide that “every citizen is free to make political choices, which includes the right to form a political party; to participate in the activities of, or recruit members for, a political party; and to campaign for a political party or cause.” The Constitutional Court has commented that “The rights entrenched under section 19 are directed to elections, to voting, and to participation in political activities.”

The only restriction on political activities is that approved PBOs may not use their resources directly or indirectly to support, advance, or oppose any political party under section 30(3)(h) of the Income Tax Act. Non-PBOs may support, advance, or oppose political parties.

South African law does not expressly prohibit lobbying by NPOs. For example, one of the activities recognized for the approval of a public benefit (tax exempt) organization is the promotion or advocacy of human rights and democracy. The Income Tax Act does not include a definition of lobbying, and tax exempt organizations may lobby members of parliament to support or oppose proposed legislation. Indeed, lobbying activities are frequently undertaken by public benefit organizations that are also tax exempt. NPOs may also encourage their members or the public to communicate with legislators about proposed legislation, including through the mass media, so long as such activities are consistent with the organization’s objectives. The law does not impose limits on the percentage of an NPO’s budget that may be devoted to lobbying. An NPO may, for example, resolve to dedicate its entire budget to advocate for human rights or democracy and to ensure that laws are consistent with democratic principles.

Economic Activities. An NPO may carry on economic activities so long as the main objective of the NPO is not to pursue profit for its members. NPOs that are not tax exempt may trade in a similar manner as for-profit entities but will be taxed on the income to the same extent as taxable entities.

The situation is different for NPOs that have tax exempt status, which include both approved PBOs (including voluntary associations, nonprofit trusts, nonprofit companies, and external companies) and a variety of other NPOs. Approved PBOs may carry on trading activities within the parameters set out below and will not be taxed on the trading income derived within those parameters. Other types of tax exempt NPOs may be subject to different trading restrictions.

The Income Tax Act allows for the following permissible trading activities for PBOs.

First Trading Category

- The undertaking or activity is integral and directly related to the sole objective of the PBO,
- Substantially the whole of its revenues is directed toward the recovery of its costs, and
- The undertaking or activity does not result in unfair competition in relation to taxable entities.

Second Trading Category

- The undertaking or activity is of an occasional nature and substantially performed by uncompensated volunteers.

Third Trading Category

- The undertaking or activity is approved by the Minister of Finance by notice in the Gazette, taking into account the following factors:
 - The scope and benevolent nature of the undertaking or activity,
 - The direct connection between the undertaking or activity and the sole purpose of the PBO,
 - The profitability of the undertaking or activity, and
 - The economic distortion that may result from allowing a tax exempt organization to carry out the undertaking or activity.

Fourth Trading Category

- The undertaking or activity does not qualify under any of the above criteria, and the revenues it generates do not exceed the greater of the following:
 - 5 percent of the PBO's total receipts and accruals during the relevant year of assessment, or
 - ZAR 200,000 (approximately \$14,000).

The minister has not approved any activity pursuant to the Third Trading Category. The South African Revenue Service published an interpretative note to explain the practical aspects of the trading categories.

If the income generated from the business or trading activities of an approved PBO exceeds the set parameters, the excess trading income will usually be taxable. The taxation of the excess trading income is determined based upon the tax return submitted by the approved PBO. In some instances, the approved PBO may forfeit its tax exempt status—for example, if it carries on a related trading activity, per the first trading category, while competing unfairly with taxable

entities. The South African Revenue Service will usually first approach the organization and propose that its excessive trading activities be housed in a separate taxable entity before proceeding to withdraw its tax exempt status.

Restrictions on Operational Activities. An NPO's operational activities are not, as a general rule, restricted beyond the requirement that its activities be lawful.

Prohibition on Distribution of Income or Assets/Private Inurement. A voluntary association will ordinarily include conditions relating to private inurement in its founding document. Board members of voluntary associations are generally bound by their common-law fiduciary duty to act in good faith and avoid conflicts of interests.

Section 22 of the Trust Property Control Act allows trustees to receive reasonable remuneration for executing their official duties. The act also requires trustees to "act with the care, diligence, and skill which can reasonably be expected of a person who manages the affairs of another." Trustees are, under common law, prohibited from allowing their personal interests to conflict with those of the trust.

The Companies Act prohibits a nonprofit company from, directly or indirectly, paying any portion of its income or transferring any of its assets to any incorporator, member or director, except:

- As reasonable remuneration for goods delivered or services rendered to the company,
- As reasonable payment of, or reimbursement for, expenses incurred for the benefit of the company,
- As payment under a bona fide agreement between the company and that person,
- As payment in respect of any rights of that person, to the extent that such rights are administered by the company in order to advance the company's objectives, or
- In respect of any legal obligation binding on the company.

Directors of companies are required to disclose any personal financial interests to the board of directors.

In order to register under the NPO Act, an NPO must state in its founding document (or the legislation under which it has been established must specify) that its income and property are not distributable to its members, officers, or trustees, except as reasonable compensation for services rendered. The NPO Act specifically provides that the members or office holders have no rights in the property or other assets of the organization solely by virtue of being members or office holders. NPOs are permitted under the NPO Act to pay reasonable remuneration to employees without violating the prohibition on distribution of income or assets.

The portions of the Income Tax Act pertaining to approved PBOs provide that no person is allowed to economically benefit from a PBO in a manner that is not consistent with the objectives of the organization. Section 30 of the act provides that approved PBOs may not pay any remuneration to

any person that is excessive in comparison to what is generally considered reasonable in the sector and in relation to the service rendered. The Income Tax Act thus does not support excessive remuneration or undue economic benefit to persons involved with the organization.

While the Trust Property Control Act, the Companies Act, and the NPO Act all make provision for the payment of “reasonable remuneration,” the term is not defined in legislation and will, when the occasion arises, be interpreted by the South African courts. The precise meaning of excessive remuneration has not been explored through litigation.

Government Supervision. The government bodies with authority to supervise NPOs are those that register organizations or provide grants or other benefits, such as tax benefits provided by the South African Revenue Service.

Nonprofit Trusts. The Master of the High Court is responsible for the registration and supervision of trusts. In an administrative capacity it receives and files trust deeds and amendments. The master’s office is also responsible for authorizing trustees to act in their capacity as trustees, receiving resignations from trustees, and conducting investigations in certain instances. This will usually occur as a result of allegations of mismanagement on the part of trustees. The master also has the power to approach the court to ensure compliance with the Trust Property Control Act or to have a trustee removed from office. Trustees may also be called upon to account to the master on the administration of a trust and disposal of trust property. The master’s office will, in practice, intervene in the affairs of a trust only in exceptional instances (for example, serious mismanagement).

Nonprofit Companies. The Companies and Intellectual Property Commission has the responsibility to supervise nonprofit companies. If a nonprofit company is alleged to have violated or seeks to assert a right under the Companies Act, options for resolving the issue include alternative dispute resolution, adjudication by the Companies Commission or the Companies Tribunal, filing suit in the High Court, and filing a complaint with the commission. Part C of Chapter 7 of the Companies Act is entitled “Voluntary Resolution of Disputes,” and Section 166, which falls under this chapter, makes clear that a person may refer a matter to the Companies Tribunal or an accredited entity for mediation, conciliation, or arbitration. A person may accordingly approach a court directly without first pursuing alternative dispute resolution.

The Companies Commission may also de-register companies that have failed to submit their annual reports, although a company may be reinstated once it has filed the delinquent reports.

Although the Companies Commission may, at times, operate ineffectively, it has not been accused of exercising its powers to target NPOs and does not prevent companies from registering or indiscriminately de-register companies.

Registered NPOs. The NPO Directorate is responsible for the supervision of NPOs registered under the NPO Act. The NPO Directorate may de-register an organization that is non-compliant but otherwise has limited enforcement powers.

In 2013, the NPO Directorate embarked on a process of de-registering a large number of NPOs (more than 20,000) that were, according to the NPO Directorate, non-compliant with the reporting requirements of the NPO Act. After a public outcry, the Department of Social Development, where the NPO Directorate is located, reinstated all organizations and granted a six-month grace period for NPOs to submit outstanding narrative and financial reports. The department has, according to a media statement, “undertaken a road show” around the country to assist NPOs with issues of compliance; educate NPOs on good governance, transparency, and accountability; and register new NPOs. No further large-scale de-registrations have taken place since 2013. The Minister of Social Development has, according to media reports, imposed a moratorium on the de-registration of NPOs.

Approved Public Benefit Organizations. The South African Revenue Service has supervisory powers over approved PBOs. It may withdraw the tax exempt status of an organization that is non-compliant or institute proceedings to hold fiduciaries personally liable in the event they have caused a tax exempt organization not to comply with the provisions of the Income Tax Act. Tax matters are by law dealt with on a confidential basis. NPOs have not expressed public dissatisfaction with how the South African Revenue Service has exercised its powers in relation to tax exempt entities.

Reporting. A nonprofit trust is not required to submit reports to the Master of the High Court.

A nonprofit company must prepare and submit to the Companies Commission annual financial statements within six months after the end of its financial year. These reports must fairly present the affairs and the business of the company and explain its transactions and financial position.

An organization registered under the NPO Act must keep accounting records that conform to the standards of generally accepted accounting practice and reflect its income, expenditures, assets, and liabilities. It must prepare financial statements within six months of the end of its financial year. It must also ensure that an accounting officer compiles a written report within eight months of the end of the organization’s financial year, which must be submitted to the Director for NPOs within nine months of the end of the financial year. NPOs registered under the NPO Act must also provide the following information to the Director of NPOs.

- The names and physical, business, and residential addresses of its office holders, within one month after any appointment or election,
- A notice of any change of address one month before a new address for service of documents takes effect, and
- A physical address in the republic for the service of documents to be received from the NPO Directorate.

All taxpayers, including approved PBOs, must submit annual income-tax returns to the South African Revenue Service.

Termination, Dissolution, and Sanctions

Dissolution. An NPO may be dissolved voluntarily through a decision taken under its internal rules. It may also be dissolved involuntarily if it is insolvent or has committed an act of insolvency (such as writing a letter to a creditor stating inability to pay a debt), in which case the procedures of the Insolvency Act must be complied with. These procedures are the same for all NPOs. The High Court may, in exceptional instances, dissolve an NPO if, for example, it has been established for an unlawful purpose.

The Companies Act provides for the winding up and deregistration of companies. The dissolution of solvent companies is voluntary and involves the appointment of a liquidator. Alternatively, the Companies Commission may deregister a company without it having to go through the winding-up procedure. This will happen in the event that the company has not submitted annual returns to the commission. A deregistered company may apply to be reinstated.

Except as stated above, government institutions are not afforded the power to dissolve NPOs. They may, however, file suit in a court of law to prevent an organization from carrying out any unlawful activities.

Distribution of Assets. The manner in which the assets of nonprofit trusts and voluntary associations will be distributed upon dissolution is determined in the founding documents. These documents will usually reflect the requirements listed in the NPO Act and the Income Tax Act, as listed below.

A nonprofit company must, upon winding up or dissolving, distribute the entire net value of the company to one or more nonprofit companies, “registered external nonprofit companies” carrying on activities in South Africa, nonprofit trusts, or voluntary associations having objectives similar to its main objective. The transferee(s) may be identified in its memorandum of incorporation, by members (if any) or directors, or by a court of law if the members or directors fail to make such a determination. No past or present member or director is entitled to any part of the net value of the company after its obligations and liabilities have been satisfied.

A tax exempt external company is required, on the termination of its activities South Africa, to transfer its assets to a South African PBO, a South African body established by law to carry out public benefit activities, or a South African state department, if more than 15 percent of the receipts and accruals attributable to the external company during the period of three years preceding termination are derived from a source within South Africa. If not, the assets of the external company may in principle be withdrawn from South Africa. The external company will usually decide to which organization it will distribute its assets.

NPOs registered under the NPO Act must, upon dissolution, transfer any remaining assets to another NPO with similar objectives. Indeed, the NPO Act requires as a condition of registration that an organization include in its constitution a provision that upon dissolution any remaining

assets will be transferred to an NPO with a similar purpose. The NPO will usually determine to which organization the remaining assets will be transferred. The recipient NPO need not be registered under the NPO Act.

If an organization is an approved PBO, its remaining assets must be transferred to another PBO, a body established by law to carry out public benefit activities, or a state department. The PBO will usually decide to which organization it will distribute its assets.

Sanctions. The Companies Act provides that directors may be held personally liable if they do not comply with the provisions of the Companies Act, publish misleading financial statements, or trade in a reckless manner. Section 77 of the Companies Act provides that a director may, among other things, be held liable for any loss, damages, or costs sustained by the company as a direct or indirect consequence of the director having acted in the name of the company without authority, acquiesced in carrying out the company's business despite knowing that it was conducted in a prohibited manner, been a party to an act knowing that the act aimed to defraud a creditor or employee of the company; or signed, consented to, or authorized the publication of false or misleading financial statements.

Section 20 of the NPO Act empowers the NPO Directorate to refer an NPO to the South African Police Service for criminal investigation if he or she is satisfied that any noncompliance may constitute a criminal offence.

Section 30 (11) of the Income Tax Act provides that any person in a fiduciary capacity who intentionally fails to comply with the provisions in the Income Tax Act as it relates to PBOs may be fined or imprisoned for a period not exceeding 24 months.

Charitable or Public Benefit Status

The Income Tax Act introduced the concept of PBOs in 2001. A PBO is a form of NPO that is eligible for tax exemption. Section 10 of the Income Tax Act grants tax exemption to other forms of NPOs as well, including recreational clubs, mutual loan associations, and trade unions. Section 30 of the Income Tax Act provides that the Commissioner for the South African Revenue Service may approve PBOs only if they comply with the requirements listed in that section. In order to become an approved PBO, a nonprofit company, nonprofit trust, or an association of persons must conduct one or more public benefit activities listed in Part I of the Ninth Schedule to the Income Tax Act. There are more than sixty public benefit activities included on this list, which covers most activities conducted by NPOs. The categories of activities include welfare and humanitarian aid; healthcare; education and development; conservation, environment, and animal welfare; and housing.

An application for approval as a PBO is made to the Tax Exemption Unit at the South African Revenue Service. The applicant organization must submit the required documentation to the Revenue Service, including its founding document, the prescribed application form, and certified identity documents of its board members. It must have at least three board members who are not related to one another whose information must be listed in the application form.

For an NPO to become an approved PBO, its founding document must contain specific clauses stating the following:

- At least three persons who are not related to each other accept fiduciary responsibility for the affairs of the PBO.
- No single person directly or indirectly controls decision-making powers relating to the PBO.
- The funds of the PBO will not be distributed to any person except in the course of carrying on its public benefit activity.
- The PBO will, upon dissolution, transfer its assets to a similar approved PBO, a prescribed statutory body, or a government department.
- The PBO will not accept any donation that may be revoked by the donor for reasons other than a material failure to conform to the designated purposes and conditions of the donation, including any misrepresentation with regard to the tax deductibility thereof under section 18A.
- Any amendment to the PBO's founding document will be submitted to the commissioner.

If these clauses are not contained in the founding document, three fiduciaries of the organization may sign a written notice confirming that the organization will comply with the above conditions.

The organization must also inform the commissioner to its satisfaction that it:

- Has not knowingly been a party to any transaction, operation, or scheme with the sole or main purpose of reducing, postponing, or avoiding liability for any tax, duty, or levy;
- Does not pay employees or office holders excessive remuneration, having regard for what is generally considered reasonable in the sector and in relation to the service rendered;
- Complies with the reporting requirements determined by the commissioner;
- Takes reasonable steps to ensure that funds the organization provides to an association engaged in public benefit activities are used for the purpose for which they are provided;
- Does not use its resources directly or indirectly to support, advance, or oppose any political party; and
- Complies with such conditions as the Minister of Finance may prescribe by way of regulation.

The commissioner issues to the organization a letter of approval reflecting a tax exemption number. There is no public facility to confirm the tax exempt status of an organization.

The main benefits available to PBOs are the following:

- They are completely exempt from income tax if they conduct no or limited trading activities, and partially exempt from income tax if their trading income exceeds defined trading limitations.

- They may receive contributions that are deductible to their donors. Under section 18A of the Income Tax Act, only approved PBOs may issue receipts to their donors for donations received, which allows the donors to take deductions from their taxable incomes. However, approval as a PBO does not automatically mean that the organization may receive donor-deductible contributions. The organization must also be approved under section 18A. In order to access the benefits under section 18A, an approved PBO must, in essence, carry on one or more of the public benefit activities that are listed on the shorter Part II list of the Ninth Schedule to the Income Tax Act and carry out its public benefit activities—for which a tax-deductible receipt has been issued—in South Africa.
- They may receive other tax benefits, including exemptions from transfer duty, estate duty, capital gains tax, donations tax, skills-development levies, and dividends tax.

An approved PBO must annually submit its income tax return in the prescribed format within twelve months after the end of its fiscal year. In certain instances, PBOs are required to submit audited financial statements to the South African Revenue Service. For example, PBOs that carry out public benefit activities on both Part I and II of the Ninth Schedule must submit an audit report confirming that donations for which a tax-deductible receipt was issued were used only for tax-deductible activities.

Local and Cross-Border Funding

South Africa has no specific laws governing fundraising activities from local sources. The Fundraising Act 1978 criminalized the receipt of donations from the public unless such receipt was authorized by the Director of Fundraising. The draconian provisions of the Fundraising Act were repealed with the introduction of the NPO Act. Since then, no specific provision has been made to regulate fundraising activities. Only common law and laws of general application may be applicable to fundraising activities. In terms of common law, a person may, for example, not fraudulently raise funds from the public. Similarly, South Africa has no specific laws governing donors who provide funding to domestic NPOs.

The transfer of funds from South African donors to foreign NPOs is subject to exchange control regulations. Under this system, the South African Reserve Bank oversees all capital inflows and outflows, which are executed through the appointment of authorized dealers who oversee the market on behalf of the Reserve Bank. Very few countries still implement this type of control.

The exchange control regulations are applicable to all transactions involving inflows and outflows. All South African residents and legal entities must obtain prior approval to perform a transfer, which is executed by authorized dealers. The restrictions imposed by these regulations have generally been relaxed in recent years, but the situation remains complex. In summary, a South African resident over 18 years of age is allowed a single discretionary allowance of ZAR 1,000,000 (approximately \$66,500) per calendar year. This allowance may be used for donations, gifts, study allowance, alimony, and foreign capital allowance, among other expenses. Approval must be obtained to execute the transfer, however. The same exceptions and allowance apply to South African legal entities. Applications by official or recognized charitable, religious, and educational

bodies for the transfer of funds to such bodies in countries outside the Common Monetary Area (Namibia, Lesotho, South Africa, and Swaziland) are submitted to the Financial Surveillance Department with full particulars of the underlying request. The South African Reserve Bank specifically provides that “Visitors to South Africa and South African residents are not permitted to import or export South African Reserve Bank notes or any bank notes of other member countries of the Common Monetary Area [i.e., Lesotho, Namibia, and Swaziland] in excess of a total value of ZAR 25,000 [approximately \$1,600] per person. Visitors to South Africa are entitled to bring foreign currency in any format into South Africa, which foreign currency is convertible into rand at any bank. Confirmation of this conversion should be retained should the visitor want to convert the rand back into foreign currency.”

Although the exchange control regulations are, in theory, also applicable to inflows, an individual or legal entity is not restricted from receiving money into South Africa.

A domestic NPO is permitted to operate in other countries, but the same exchange control restrictions are applicable if the NPO uses domestically sourced funding to carry out activities abroad.

In contrast, there are no special rules for NPOs to receive funding from outside of South Africa. An NPO that receives foreign funding is not required to report such funding or obtain an audit of it outside of ordinary reporting requirements. Foreign donors to South African NPOs are not required to register in South Africa and are not limited in the types of activities they may support. NPOs are not subject to limitations on affiliations with foreign persons or organizations.

The Prevention of Organized Crime Act of 1998, which introduces measures to combat organized crime, money laundering, and criminal gang activities, applies to NPOs as to other legal entities. The act has particular significance for NPOs that receive gifts and donations. If a person knows or reasonably ought to have known that property is or forms part of the proceeds of any unlawful activities and enters into an agreement or transaction in connection with that property, that person is guilty of an offense. The act does not list specific duties on the part of the recipient of such proceeds and each case will have to be considered on its own merits. The act also creates a number of other offenses, including money laundering, assisting another to benefit from proceeds of unlawful activities, and possession or use of proceeds of unlawful activities, some of which allow for the confiscation of property used for criminal activity.

Tax Law

All persons (individual and institutional) are required to register as taxpayers with the South African Revenue Service. An application for tax exemption on the prescribed form must be submitted to the South African Revenue Service. All applications for tax exemption, whether as recreational club, political party, mutual-benefit organization, or PBO, must be submitted using the same prescribed form.

The Income Tax Act does not treat all tax exempt organizations in the same way. Mutual-benefit or membership organizations and recreational clubs may, for example, not obtain donor-deductible status. This status is available only to PBOs that carry on specified public benefit activities. The conditions for tax exemption for mutual-benefit organizations and recreational clubs are slightly different than those for PBOs. For example, the activities of the former are not necessarily accessible to the public in general, as is the case with approved PBOs. Recreational clubs are subject to similar trading restrictions as public benefit organizations.

An individual or company is allowed to deduct from taxable income a donation (in cash or in kind) to a PBO carrying out specified public benefit activities. The donation must be supported by a receipt issued by the PBO to the donor, and the deductible part of the donation may not, for any financial year, exceed 10 percent of the taxable income of the donor.

The tax deduction benefits offered under section 18A of the Income Tax Act are used by corporations when conducting corporate social responsibility programs. Corporations will often gear their funding towards activities that are on the Part II (donor deductible) list and obtain a receipt pursuant to section 18A.

A foreign NPO may apply for tax exemption in South Africa. To qualify, it must have a tax exemption in its country of origin and conduct one or more public benefit activities. Foreign NPOs follow the same application process as other PBOs to gain tax exemption.

The law does not provide for the imposition of fees or payments in lieu of taxes on NPOs.

There is no limit to the amount that a philanthropist may designate to an NPO under South Africa's inheritance laws. If the recipient is an approved PBO, the donor will be eligible for a tax deduction.

There are differing viewpoints as to whether South Africa's tax laws are clear and simple regarding the benefits provided to NPOs and the ease of accessing those benefits. Some observers consider the tax law and access to benefits fairly clear and easy going. To others, however, the law seems fairly simple but in practice can be quite complicated. For example, the South African Revenue Service has in recent years introduced a number of requirements for an organization to become an approved PBO. It must present a number of supporting documents and information to ensure that the process proceeds smoothly, such as proof of bank accounts, identity documents of the office holders, proof of residential addresses of one the office holders, and proof of physical address of the organization. For smaller CBOs, this can be a daunting task. Many smaller organizations cannot access tax benefits without the assistance of professional advisors. Applications are sometimes declined as a result of an over-reliance on technical terms or concepts, raising additional difficulties for organizations without professional help.

News and Events

Cropley, Ed. "President Jacob Zuma sends money-laundering bill back to parliament." Mail and Guardian. December 1, 2016. <http://mg.co.za/article/2016-12-01-president-jacob-zuma-sends-money-laundering-bill-back-to-parliament>.

Davis, Gaye. "Whistle-blower Bill One Step Closer to Becoming Law." Eyewitness News. November 23, 2016. <http://ewn.co.za/2016/11/23/whistle-blower-bill-one-step-closer-to-becoming-law>.

Gqirana, Thulani. "Some NGOs are security agents of foreign forces—Mahlobo." News 24. April 26, 2016. <http://www.news24.com/SouthAfrica/News/some-ngos-are-security-agents-of-foreign-forces-mahlobo-20160426>.

"There are South Africans and NGOs who are collaborating with foreign forces to destabilize the country," State Security Minister David Mahlobo said on Tuesday. "Not everybody is our friend. The forces that are opposed to us are hard at work. Our NGOs play an important part in South Africa, but there are those who work to destabilize the state," he told MPs during his department's budget vote speech.

Khoza, Amanda. "NGOs are 'devils in a sheep skin'—Edward Zuma." News 24. April 27, 2016. <http://www.news24.com/SouthAfrica/News/ngos-are-devils-in-a-sheep-skin-edward-zuma-20160427>.

President Jacob Zuma's son on Wednesday warned South Africans to guard against non-governmental organizations which were "devils in a sheep skin." In a statement, Zuma's eldest son, Edward, echoed sentiments made by State Security Minister David Mahlobo in his budget vote speech on Tuesday.

This Philanthropy Law Report was prepared by the International Center for Not-for-Profit Law in partnership with Ricardo Wyngaard and issued in March 2017. It was updated again to reflect changes as of December 2017. The views expressed herein are those of the authors and information in this report reflects the authors' understanding of laws and regulations currently in effect in South Africa, as well as best international practice, and does not constitute a legal opinion or advice.