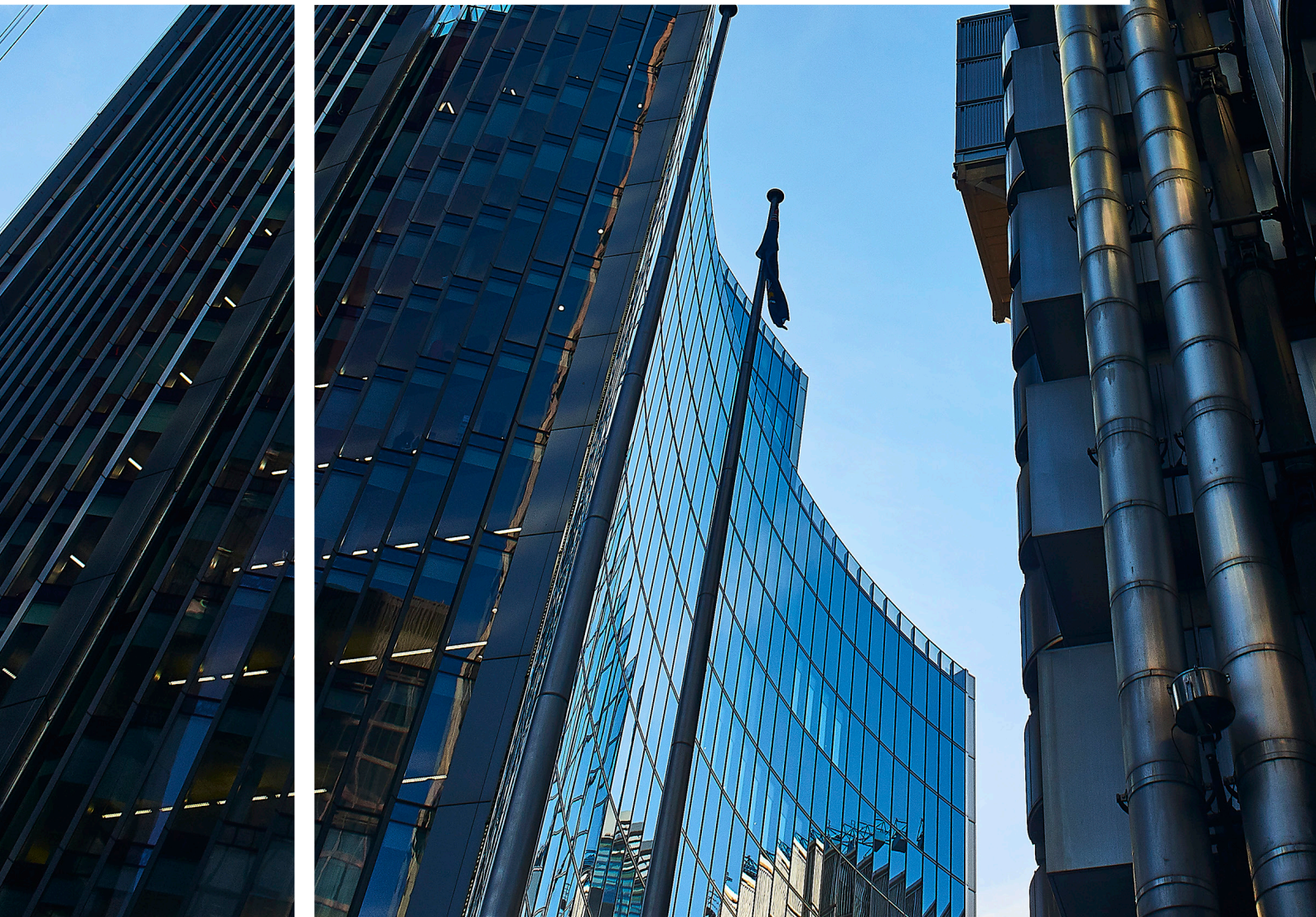




**pwc**

# Highlights of the AML/ CFT (Amendment) Act 2023







## Highlights of the AML/CFT (Amendment) Act 2023

The Anti-Money Laundering and Combating of Terrorism (AML/CFT) Financing Laws (Amendment) Act, 2023 was assented to law by the President on 1 September 2023. This is a necessary milestone in the effort to align Kenya's AML/CFT laws with international standards set by the Financial Action Task Force (FATF). The Act amends key provisions across 16 Acts including:

- |   |   |
|---|---|
| 1. Extradition Act (Contiguous and Foreign Countries) Act | 9. Anti-corruption and Economic Crimes Act          |
| 2. Extradition (Commonwealth Countries) Act               | 10. Proceeds of Crime and Anti-Money Laundering Act |
| 3. State Corporations Act                                 | 11. National Police Service Act                     |
| 4. Capital Markets Act                                    | 12. The Mutual Legal Assistance Act                 |
| 5. Insurance Act  | 13. Limited Liability Partnership Act               |
| 6. Banking Act  | 14. Companies Act                                   |
| 7. Central Bank of Kenya Act                              | 15. National Payment Systems Act                    |
| 8. Microfinance Act                                       | 16. Prevention of Terrorism Act                     |

These amendments are tailored to address key AML/CFT deficiencies highlighted in the Mutual Evaluation Report of 2022 (MER, 2022) carried out by Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), a FATF-style body. One of the key deficiencies highlighted by the MER was the lack of a consistent AML/CFT Legal and Institutional Framework across key sectors, a challenge that is addressed by the new amendment act.

Some of the key amendments are highlighted per each act as below:



## Provisions of the Proceeds of Crime and Anti- Money Laundering Act (POCAMLA)

| 1. Definitions   |  |  |
|--|--|--|
| Issue & amended section  | Amendment as per the AML/ CFT Amendment Act 2023   | PwC Comments   |
| Provision for Terrorist Financing and Proliferation Financing (Assorted sections across the act) | Expanding the remit of the POCAMLA and revising the mandate of reporting institutions/ supervisory bodies and the Financial Reporting Centre (FRC) under POCAMLA to include terrorism financing (TF) and proliferation financing (PF) in addition to money laundering. | Previously the act had no elaborate provisions and penalties on TF and PF. The Mutual Evaluation Report, 2022, rated Kenya as partially compliant with FATF recommendation 5 on adequacy of terrorism financing laws and non-compliant with recommendations 6 and 7 on adequacy of targeted financial sanctions related to terrorism, terrorism financing and proliferation financing. The amendment addresses this deficiency.              |
| Financial group defined (Section 2)  | Inserting definition of “financial group” and further expanding the definition of a person to include a “financial group” under the tipping off provisions. (Section 8)  | Penalties of tipping off weren’t applicable to financial groups/ applicability was not clear. The amendment now clarifies this and defines a ‘financial group’ as, “A group that consists of a parent company or of any other type of legal person exercising control and coordinating functions over the rest of the group, together with branches or subsidiaries that are subject to AML/CFT policies and procedures at the group level.” |



## 2. Provisions relating to lawyers, notaries and other independent legal professionals

| Issue & amended section                          | Amendment as per the AML/CFT Amendment Act 2023  | PwC Comments  |
|--|--|---|
| <p>LSK as a self-regulatory body (Section 2)</p> | <p>Inserting “Self-regulatory body” to mean the Law Society of Kenya (LSK) and “competent authority” to include a public authority with AML/CFT/CPF responsibilities excluding a “self-regulatory body”.</p> | <p>The 2021 National Risk Assessment (NRA) identified the legal profession as having a high money-laundering vulnerability due to the abuse of client-attorney privilege and the exclusion of law firms as reporting institutions. Subsequently, in the MER (2022) Kenya was rated non-compliant with FATF recommendation 23 on adequacy of measures on Designated Non-Financial Businesses.</p> <p>FATF recommendation 22 further requires lawyers, notaries and other independent legal professionals to report suspicious transactions when carrying out the following activities for their clients:</p> <ol style="list-style-type: none"> <li>i. Buying and selling of real estate</li> <li>ii. Managing of client assets</li> <li>iii. Management of client accounts</li> <li>iv. Organization of contributions for the creation, operation or management of companies</li> <li>v. Creation, operation or management of legal persons or arrangements, and buying and selling of business entities.</li> </ol> <p>In addition, FATF recommendation 9 states that financial institution secrecy laws should not inhibit implementation of the FATF Recommendations.</p> <p>The inclusion of the LSK as a self-regulatory body, and therefore a reporting institution, is as such a step closer to bridging enduring gaps within Kenya’s AML/CFT regulatory framework while preventing disclosures that might undermine client-attorney privilege.</p> <p>It is also notable that the amended act outlines only a few instances where legal professionals are not obligated to report suspicion as opposed to listing the ones requiring reporting. In so doing, the law broadens the mandate of legal professionals and reduces the risk of non-reporting.</p> |

| Issue & amended section  | Amendment as per the AML/CFT Amendment Act 2023  | PwC Comments |
|--|--|--------------|
| Tipping off for the legal profession (Section 8 (4))                                   | Acts of dissuasion of a client from engaging in an illegal activity by a legal professional does not constitute a tipping off offence.   |              |
| Legal professionals to channel reports through LSK (Section 44 (3) & Section 36 (1&2)) | Lawyers, notaries and other independent legal professionals to submit reports on suspicious transactions through LSK.  |              |
| Reporting suspicious transactions (Section 44 (3A & 3 B))                              | Lawyers, notaries and other independent legal professionals are not required to report suspicious transactions if they will interfere with professional secrecy or legal professional privilege. Lawyers are not obligated to report: <ul style="list-style-type: none"> <li>i. Information obtained while ascertaining the legal position of their client.</li> <li>ii. Information obtained in their task of defending or representing their client in proceedings.</li> </ul> |              |
| Cooperation between FRC and LSK (Section 44 (3C))                                      | LSK and FRC shall establish appropriate mechanisms to cooperate for exchange of information relating to suspicious transaction reporting and supervision.  |              |

### 3. Provisions related to reporting

| Issue & amended section                       | Amendment as per the AML/CFT Amendment Act 2023   | PwC Comments   |
|---|---|--|
| Increased penalties (Sections 16(3) & 39 (3)) | Penalty of fine of up to 50% of the amount of monetary instruments or imprisonment for up to 5 years or both for willful failure to report conveyance of monetary instruments outside Kenya that are above the reporting threshold of USD 15,000. | Previously, the penalty was up to 10% of the amount of monetary instruments involved in the offence. |



| Issue & amended section  | Amendment as per the AML/ CFT Amendment Act 2023   | PwC Comments  |
|--|--|---|
|  | <p>Fine of up to KES 5M for an individual and KES 25M for a body corporate for non-compliance of a reporting institution with the provisions of the Act.</p> | <p>Previously, the fine was KES 1M for individuals and KES 5M for corporates. The ceiling for monetary penalties has therefore been increased fivefold.</p> <p>The increase in penalties for non-compliance will likely and should ideally result in increased compliance and enforcement within the reporting entities.</p>  |
| <p>Reduced reporting timeline for suspicious transactions (Section 44 (2))</p> | <p>Suspicious transactions to be reported within two days after suspicion arose.</p>   | <p>Previously, the Act required that suspicious transactions be reported to the FRC within seven days of their occurrence. Given the subjectivity of suspicion, and as many financial institutions adopt technology to monitor for suspicious transactions, further guidance may be required on when suspicion is considered to be established. Further, reliance on suspicion as opposed to a verifiable date, will likely make verification/audit challenging initially, before there is industry consensus and regulatory guidelines on this definition.</p> <p>Nevertheless, this amendment remedies a critical challenge previously experienced by reporting institutions in cases where suspicion on a transaction arises over 7 days after its occurrence (e.g., where a customer transaction raises doubt on the legitimacy of a previous transaction).</p> |



| Issue & amended section   | Amendment as per the AML/ CFT Amendment Act 2023         | PwC Comments   |
|---|--|--|
| Increased reporting threshold (Fourth Schedule and Section 44(6)) | Reporting threshold on transactions raised to USD 15,000 | <p>The previous threshold was USD 10,000. USD 15,000 is in alignment with FATF's guidance for the maximum threshold for which reporting entities should be required to report.</p> <p>The reporting threshold amount has been a persisting and controversial issue in the public domain, with many arguing that the requirements to provide documentary evidence for transactions of USD 10,000 is too onerous. However, Kenya's development partners, such as the International Monetary Fund (IMF) have raised concern over this amendment stating that it would increase the risk of money laundering in the country. The Kenya Bankers' Association (KBA) echoed the same sentiments appearing before the parliamentary committee during the public participation before the amendment bill was enacted. They raised further concerns that other established jurisdictions had either barred enactment of such provisions or had reduced their threshold.</p> <p>It is important to keep in mind that the reporting threshold is provided as material transactions are more likely to be suspicious. As such, for as long as reporting entities have effective suspicious transactions monitoring mechanisms for cash transactions, this change will result in less paperwork and effort while not adversely impacting management of ML/ FT.</p> |





| 4. Risk-based approach   |   |  |
|--|---|--|
| Issue & amended section  | Amendment as per the AML/ CFT Amendment Act 2023  | PwC Comments   |
| Risk-based approach (FRC and Supervisory bodies) (Section 36 D)                | FRC and its supervisory bodies shall adopt a risk-based approach in fulfilling their obligation to effectively monitor reporting institutions. This requires them to have adequate understanding of ML/TF/PF risks in specific sectors and base the frequency of their supervision on the risks identified and any new sectoral developments. | <p>This is a new provision, in step with global leading practices and FATF's guidance that money laundering risk should be managed through a risk-based approach, where resources are provided in proportion to assessed risk. Whereas the Act is silent on whether reporting entities should employ the same approach, a risk-based approach supervisory framework would necessitate a risk-based approach program management for the reporting entities.</p> <p>A risk-based approach also implies the undertaking of a risk assessment so as to establish the extent of risk the organization faces in different geographies, portfolios, channels etc.</p> <p>The CBK's Prudential Guideline Part V, Guideline 5.5, requires regulated institutions to undertake a risk assessment every two years. The Amendment therefore presents a challenge for other supervisory authorities to issue guidance notes where this has not been done.</p> |
| Increased scope of due diligence for higher risk countries (Section 45(A) (2)) | Reporting Institutions authorized to independently adopt countermeasures over and above Customer Due Diligence proportionate to the risk presented by countries.  | <p>The Act previously only authorized FATF and the National Treasury Cabinet Secretary to establish guidelines for counter measures to be adopted when dealing with high-risk countries. Reporting institutions can now exercise their discretion and adopt additional due diligence measures over and above the ordinary due diligence procedures taking into account the level of risk associated with that country. This places an increased obligation on reporting institutions to regularly assess the risk posed by institutions in high-risk countries before transacting with them.</p>   |





| Issue & amended section   | Amendment as per the AML / CFT Amendment Act 2023  | PwC Comments  |
|---|--|---|
| FRC obligations on risk-based approach 45 (A) (4)   | <p>FRC now has an obligation to disseminate information relating to:</p> <ul style="list-style-type: none"> <li>i. Any high-risk country and countermeasures applicable to that country.</li> <li>ii. ML/TF/PF risk of that country</li> <li>iii. Publicly available information published by FATF on the country's AML deficiencies.</li> </ul> | <p>This is a new provision. Although ordinarily reporting institutions would need to have this information in order to comply with other provisions of the Act, this requirement will ensure there is standardization of the information available to the reporting entities. It will also ensure reporting entities leverage on insights gathered by the FRC in the course of executing their mandate. On the other hand, a higher obligation is imposed on the FRC to develop and implement a system or means to collate and disseminate the information.</p> |
| Increased scope of due diligence by reporting institutions to include "materiality and risk" (Section 45 (2)) | <p>Increased scope on due diligence requirements of a reporting institution, on existing customers, to extend to assessment on the basis of materiality and risk taking into account whether due diligence measures have previously been undertaken and the adequacy of the data obtained.</p>   | <p>This is an enhancement of the pre-existing 'enhanced due diligence' procedures. Reporting institutions now have a greater obligation to consider the nature of entity/ individual they are transacting with and the level of risk they pose, as part of due diligence on their existing customers.</p>   |
| <b>5. Other key amendments</b>  |  |   |
| Cooperation and collaboration (Section 36 B)  | <p>Cooperation and collaboration of supervisory bodies with foreign counterparts in sharing information and conducting inquiries for purposes of combating ML/TF/PF.</p>   | <p>This is a new provision to allow for the collaboration of supervisory bodies (such as Central Banks). Whereas previously the law only provided for cooperation and mutual legal assistance between intelligence authorities (such as FRC), this expansion will allow for closer collaboration and potentially faster reviews and investigations.</p>   |



| Issue & amended section   | Amendment as per the AML/CFT Amendment Act 2023  | PwC Comments  |
|---|--|---|
| Increased AML/CFT mandate for supervisory bodies (Section 36 C) | Provision for a comprehensive list of powers of supervisory bodies including but not limited to conducting inspections, imposing sanctions for failure to comply with AML/CFT provisions, compel production of information and issue AML/CFT sector specific guidelines. | <p>Previously, AML/CFT mandate of supervisory bodies was not elaborated in the POCAMLA and sectoral acts. The provisions were general, requiring supervisory authorities to adopt appropriate measures to ensure compliance with the act.</p> <p>This amendment was triggered by the findings of MER, 2022 where Kenya was found to be non-compliant with FATF recommendation 27 on adequacy of powers of supervisory bodies. The MER concluded that while FRC has specific powers to conduct inspections and compel production of records and information, the same powers are not extended to the financial sector supervisors.</p> <p>Although these supervisory authorities had certain powers such as conducting inspections, and compelling production of documents, this did not extend to AML/CFT. Additionally, the supervisory authorities did not have express authority to impose sanctions on supervisees for non-compliance with POCAMLA provisions.</p> <p>There is need for supervisory bodies to develop and implement systems to meet their new obligations, especially with regard to risk-based supervision and issuance of AML/CFT sector specific guidelines.</p> |







## Central Bank of Kenya Act, Microfinance Act, Banking Act, National Payment Systems Act, Insurance Act and Capital Markets Authority Act

| Issue  | Amendment  | PwC Comments  |
|--|--|---|
| Increased AML/CFT/CPF supervisory mandate for the Central Bank of Kenya, Insurance Regulatory Authority and Capital Markets Authority. | <p>CBK, CMA and IRA now have AML/CFT/CPF supervisory mandate over the entities they supervise including but not limited to:</p> <ol style="list-style-type: none"> <li>1. Vetting proposed significant shareholders, beneficial owners, proposed directors and senior officers of a reporting institution.</li> <li>2. Conducting on-site inspections and offsite surveillance.</li> <li>3. Compelling production of information/documents.</li> <li>4. Imposing sanctions for any AML/CFT/CPF violations.</li> <li>5. Cooperation and information sharing.</li> </ol> | These amendments are consistent with those specified in the previous section and aim to align the provisions of the POCAMLA across all sectoral Acts for uniform application of AML/CFT laws. |

## State Corporations Act

| Issue  | Amendment   | PwC Comments   |
|--|---|--|
| FRC not a State Corporation (Section 2 (b) (viii)) | Excludes application of the Act to FRC to facilitate operational Independence | The exclusion of FRC from the State Corporations Act is a critical step to according it independence from state interference, actual or perceived. |

## Anti-Corruption and Economic Crimes Act

| Issue   | Amendment  | PwC Comments  |
|---|--|---|
| <p>Money Laundering now an economic crime (Section 2)</p> | <p>Expansion of the definition of economic crime to include “an offence involving the laundering of proceeds of corruption.”</p> | <p>Previously, economic crimes as defined under the Anti-Corruption and Economic Crimes Act were limited to fraudulent dealings in public property.</p> <p>This meant that the Ethics and Anti-Corruption Commission (EACC) could not investigate money laundering as a separate offence from corruption, leaving it under the purview of the Department of Criminal Investigations (DCI). Given corruption is one of the most significant predicate offences for money laundering, this was a major handicap on the EACC. This amendment now allows the EACC to investigate money laundering as a stand-alone offence.</p> <p>Successful investigation (and ultimately prosecution) of money laundering cases pertaining to corruption may require close collaboration between the DCI and the EACC.</p> |





## Companies Act

| Issue  | Amendment  | PwC Comments   |
|--|--|--|
| Particulars of beneficial owners required upon registration (Section 13(4))  | A person who wishes to register a company is now required to provide a statement of particulars of beneficial owners of the proposed company alongside other registration documents.   | FATF has issued a number of guidelines on the management of Ultimate Beneficial Ownership, which forms recommendation 24 of its 40 recommendations. Most recently, FATF in March 2023 issued an updated guideline requiring countries to ensure that competent authorities (public entities with mandate to fight ML/TF) have access to accurate and up to date information on beneficial ownership.   |
| Existing Companies to lodge with the registrar a copy of register of beneficial owners within sixty days. (Section 93 A (3)) | Existing companies to lodge a copy of a register of beneficial owners within sixty days from when the section came into force i.e.: (by 31 October 2023).  | It also encourages countries to take effective measures to ensure that nominee shareholders and directors of legal entities are not misused for money laundering or terrorist financing.   |
| Period for keeping beneficial ownership information (Section 93A) (8))   | Companies including foreign companies are now required to keep records of beneficial owners' information for at least ten years from the date on which a person ceases to be a beneficial owner.   | The MER, 2022 rated Kenya partially compliant with FATF recommendation 23 hence the new provisions seek to ensure alignment with leading practices.  |
| Public Listed Companies beneficial ownership information amendment (Section 93A) (6))  | Public listed companies are now required to lodge with the Registrar a copy of any amendment to its register of beneficial owners within thirty days after making the amendment.   | While companies were required to file beneficial ownership information with the registrar, the same was not a requirement when registering a company, there was no time limit placed on the submission of the UBO register and there was no prescribed punishment for non-compliance. Non-compliance with beneficial ownership requirements is now considered an offence. The amendments seek to create more stringent controls around beneficial ownership to align with leading practices. |
| Penalties for non-compliance with beneficial ownership provisions (93 A (Sections 9-11)                                      | <ul style="list-style-type: none"> <li>i. Failure to file a list of amendment of beneficial owners with the registrar- administrative penalty of KES 2000 failure to which the company shall pay KES 100 for each day of default.</li> <li>ii. Failure for existing companies to file a register of beneficial owners within sixty days from the time the section came into force- commits an offence and is liable on conviction to a fine of up to KES 500,000.</li> <li>iii. If the company fails to comply after conviction, the company commits a further offence and is liable to a fine of Up to KES 50,000 for each such offence.</li> </ul> |  |
| Register of nominee directors (Section 138A)   | Companies are now required to keep a register of nominee directors and lodge it with the registrar within sixty days from when the section came into force (i.e., by 31 October 2023.) Failure to comply attracts an administrative penalty of KES 2000 by the company and each officer in default.  |  |

## Limited Liability Partnership Act

| Issue  | Amendment  | PwC Comments   |
|--|--|--|
| Particulars of beneficial owners required upon registration (Section 17 (2)) | A person who wishes to register a Limited Liability Partnership (LLP) is now required to provide a statement of particulars of beneficial owners of the proposed partnership alongside other registration documents.   | These amendments are consistent with those on the Companies Act discussed above, with similar implications with regards to compliance with FATF standards, global leading practices and Kenya's regulatory changes on ultimate beneficial ownership enacted in 2020. |
| LLPs now required to keep a register of beneficial owners (Section 31 B)     | <ul style="list-style-type: none"> <li>i. LLPs including (foreign LLPs) are now required to keep register of beneficial owners and lodge with the registrar upon registration or for existing LLPs within sixty days from the date the section came into force (31 October 2023).</li> <li>ii. Any amendments to the register shall be filed with the registrar within 14 days.</li> <li>iii. LLPs are now required to keep records of their beneficial owners' information for at least ten years from the date which a person ceases to be a beneficial owner.</li> <li>iv. Failure to comply amounts to an offence and penalties are applicable.</li> </ul> |  |
| LLPs now required to keep a register of nominee partners                     | <ul style="list-style-type: none"> <li>i. LLPs are now required to keep a register of nominee directors and lodge it with the registrar upon registration or for existing LLPs, within sixty days from when the section came into force (i.e. by 31st October 2023.)</li> <li>ii. Failure to comply attracts an administrative penalty of KES 2000 by the LLP and each officer in default.</li> </ul>  |  |





## Prevention of Terrorism Act

| Issue   | Amendment  | PwC Comments   |
|---|--|--|
| Provision for the offence of “proliferation act” (Section 2, 4A)                                  | Proliferation act means dealing in weapons of mass destruction and attracts a fine of up to KES 20M or imprisonment for up to 20 years or both, upon conviction.   | <p>The Act previously had no elaborate provisions and penalties on TF and PF. The Mutual Evaluation Report, 2022, rated Kenya partially compliant with FATF on recommendation 5 regarding adequacy of terrorism financing laws and non-compliant with recommendations 6 and 7 on adequacy of targeted financial sanctions related to terrorism, terrorist financing and proliferation financing. The amendment addresses this deficiency.</p> <p>With this amendment, TF and PF can now be investigated, tried and punished as independent offences from Money Laundering.</p> |
| Provision for the offence of “financing of proliferation act” (Section 4B)                        | It is an offence to provide financial support to a proliferation act and it attracts a fine of up to KES 20M or imprisonment for up to 20 years or both, upon conviction.  |  |
| Financing travel for terrorism purposes (Section 5A)  | It is now an offence to finance travel into another state for purposes of committing a terrorist act.  |  |
| Prohibition from making funds available to designated person/entities (Section 30G)               | <ul style="list-style-type: none"> <li>i. It is an offence to make funds available to designated persons and entities unless authorized by the UN Security Council.</li> <li>ii. Contravening this provision attracts imprisonment for up to 20 years for individuals or a fine of up to KES 20M for legal persons.</li> </ul> |  |
| Introduction of penalties for legal persons for contravening provisions of the act (Section 30 H) | Fine of up to KES 30M for contravening provisions of the Act.  |  |
| Establishment of CFT Inter-Ministerial Committee  | The purpose of this committee is to formulate and supervise the implementation of the National Strategy and Action Plan on Counter Financing of Terrorism.   |  |



## Considerations

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1. The expanded scope of the offence of money laundering to terrorism and proliferation financing means that all sanctions and penalties against ML apply to PF and TF and there is increased mandate of reporting institutions and supervisory bodies to report instances of PF and TF.
2. Supervisory bodies' increased AML/CFT/CPF mandates means that all reporting institutions are placed under greater scrutiny by their regulators on AML/CFT/CPF compliance.
3. Emphasis on risk-based approach to ML/TF and PF by FRC and supervisors means that reporting institutions need to prioritize unique ML/PF/TF risks associated with their sectors and allocate resources accordingly.
4. Increased due diligence scope to include materiality and risk for both individuals and countries places an increased obligation on reporting institutions when conducting due diligence.
5. The Law Society of Kenya is now considered a self-regulatory body with an obligation to receive suspicious transactions reports from law firms and channel the same to the FRC. While the client-attorney privilege is protected, the scope of protection is limited only to matters of representation and giving a legal opinion to a client. As a self-regulatory body, LSK will need to implement a reporting framework through which law firms can file suspicious reports.
6. FRC now has operational independence from the State and can make independent decisions without interference by the State or any entity/individual.
7. Companies and LLPs now have increased beneficial ownership compliance requirements and are required to comply by 31 October 2023.



## How can PwC help you comply with the Act?

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- We support clients in developing and updating AML/CFT policies in keeping up with regulatory changes.
- The amendment act emphasizes on the need for a risk-based approach in addressing money laundering risks. PwC specializes in undertaking risk assessments as well as training risk teams on how to carry them out.
- The amendment act is quite vast and imposes more AML/CFT obligations to reporting institutions, organizations and supervisory bodies. PwC conducts AML/CFT trainings to build capacity and raise awareness on key AML/CFT developments.
- PwC has extensive experience conducting AML/CFT program reviews to assess compliance with regulatory frameworks and global leading practices.
- We undertake Know Your Customer (KYC) data assessments against regulatory requirements to highlight data and document requirements that are either missing or incomplete. Within the PwC global network, we have supported a wide range of Institutions KYC gaps as a managed service i.e., where PwC reaches out to customers directly to obtain required information, undertakes remediation and harnesses that information to derive insights, e.g., risk scoring.



# Contact Us

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This newsletter is a summary of the key amendments of the Act and is not meant to be exhaustive. It is not a legal opinion, nor does it constitute legal advice. PwC accepts no liability for decisions made on the basis of this alert.

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