

# NONPROFIT LAW IN KENYA

Current as of June 2019

*This section describes the legal framework of nonprofit organizations (also known as non-governmental organizations or NGOs) in Kenya, along with translations of legislative provisions relevant for a foundation or advisor undertaking an equivalency determination of a foreign grantee under IRS Revenue Procedure 92-94.*

*These reports have been prepared by the [International Center for Not-for-Profit Law](#) (ICNL). Please direct corrections and comments to [Lily Liu](#).*

*We include hyperlinks to the following information, to the extent available:*

- *Longer country reports analyzing various aspects of local legislation; and*
- *Texts of local laws that affect the decision whether or not to qualify a grantee (generally in translation, although ICNL and the Council cannot warrant the accuracy of any translation; in addition, legislative excerpts were selected by in-country contacts, and ICNL and the Council cannot warrant that all relevant provisions have been translated).*

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## I. SUMMARY

### A. TYPES OF ORGANIZATIONS

Kenya is a Commonwealth country with a common law system. There are various types of not-for-profit organizations (“NPOs”):

- Non-Governmental Organizations (NGOs) (soon to be Public Benefit Organizations (PBOs)).
- Companies Limited by Guarantee;
- Societies; and
- Trusts.

Other not-for-profit legal forms, which are outside the scope of this Note due to their limited interaction with U.S. grant makers, include churches, political parties, and trade unions.

### B. TAX LAWS

Kenya exempts from corporate income tax, the income of certain NPOs that carry out specific types of activities. Unrelated business income is subject to tax under certain circumstances. Kenya also subjects certain sales of goods and services to VAT, with a fairly broad range of exempt activities. The tax laws confer only limited tax benefits on corporate donors and on individual donors.

## II. APPLICABLE LAWS [1]

- [The Constitution of Kenya \[2010\]](#)
- [Constitution of Kenya \(Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual\) High Court Practice and Procedure Rules \[2006\] \[2\]](#)
- [The Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules \[2013\]](#)
- [The Non-Governmental Organizations Coordination Act \[1990\] \[3\]](#)
- [The Non-Governmental Organizations Coordination Regulations \[1992\]](#)
- [The Non-Governmental Organizations Council Code of Conduct \[1995\]](#)
- [The Public Benefit Organizations Act \[2013\] \(not officially commenced\)](#)
- [The Companies Act \[2015\]](#)
- [The Insolvency Act \[2015\]](#)
- [The Societies Act, Chapter 108 of the Laws of Kenya \[1998\]](#)
- [The Trustees \(Perpetual Succession\) Act, Chapter 164 of the Laws of Kenya \[1981\]](#)
- [The Trustee Act, Chapter 167 of the Laws of Kenya \[1929\]](#)
- [The Value Added Tax Act \(Act No. 35 of 2013\)](#)
- [The Income Tax Act, Chapter 470 of the Laws of Kenya \[1989\]](#)

- *East African Customs Management Act [2004]*
- *Excise Duty Act (Act No. 23 of 2015)*
- *The Employment Act, Chapter 226 of the Laws of Kenya [2007]*
- *The Education Act, Chapter 211 of the Laws of Kenya [1980]*
- *The HIV and AIDS Prevention and Control Act, Chapter 246A of the Laws of Kenya [2006]*
- *The Political Parties Act, Chapter 7B of the Laws of Kenya [2011]*
- *The Universities Act, Act No. 42 [2012]*

### III. RELEVANT LEGAL FORMS

#### A. GENERAL LEGAL FORMS

*Kenyan law provides for various types of NPOs, including public benefit organizations (PBOs), non-governmental organizations (NGOs), companies limited by guarantee, societies, and trusts.*

#### PBOS

*A significant change with regard to the legal framework for NGOs has come in the form of the Public Benefit Organizations Act 2013 (“PBO Act”), which upon commencement will repeal the Non-Governmental Organizations Coordination Act (“NGO Act”). The PBO Act aims to create a new legal, regulatory, and institutional framework for non-profit organizations doing public benefit work in Kenya, under a single law. Kenya’s Parliament passed the PBO Act in December 2012 and the President approved it in January 2013, but a date for its implementation has not yet been set. [4] Civil society sought judicial recourse for the failure to implement the law and a judgment was delivered on October 31, 2016, ordering the Government to gazette the implementation date within fourteen days of the judgment. The Government failed to comply and a second order was issued on May 12, 2017, giving the Government thirty days to comply; it again failed to do so. [5] The failure to set a commencement date for the Act, along with the ongoing possibility of its amendment, poses considerable challenges in determining the applicable law. [6] With two reported High Court decisions having relied on the provisions of the PBO Act, this matter becomes even more complicated. [7]*

*The PBO Act defines a PBO as a voluntary membership or non-membership grouping of individuals or organizations, which is autonomous, non-partisan, and non-profit. It is locally, nationally or internationally organized and engages in public benefit activities. The Act defines a “public benefit activity” as one that supports or promotes the public benefit by: enhancing or promoting legitimate economic, environmental, social, or cultural development; protecting the environment; or lobbying or advocating on issues of general public interest or the well-being of a group of individuals or organizations (PBO Act Sections 5(1) and 2(1)). PBOs do not include:*

- *A trade union within the meaning of the Labour Relations Act of 2007;*
- *A public body established by or under any written law;*
- *A political party within the meaning of the Political Parties Act of 2007;*
- *A religious organization which is primarily devoted to religious worship or propagation of religious beliefs;*
- *A society within the meaning of the Societies Act;*
- *A co-operative society within the meaning of the Co-operative Societies Act;*
- *A Sacco society within the meaning of the Sacco Societies Act;*

- A micro-finance institution within the meaning of the Micro-Finance Act, 2006 (No. 19 of 2006); or
- A community-based organization whose objectives include the direct benefit of its members.

The PBO Act establishes a new regulatory body for non-profit organizations engaging in public benefit activities: the PBO Authority. The board of the PBO Authority includes the Principal Secretary in the government ministry responsible for PBOs, the Finance Ministry, the Foreign Affairs Ministry, and key civil society representatives. The functions of the PBO Authority include: registering and de-registering PBOs; advising the Government on the activities of PBOs and their role in Kenya's development; maintaining the Register; and monitoring whether PBOs are complying with their statutory obligations under the law.

The PBO Act provides a clear timeline for processing an organization's application for registration, according to which the PBO Authority must consider the application provided by the applicant and issue a certificate of registration within 60 days of receiving the application (PBO Act Section 9(1)). Unlike the NGO Act, the PBO Act gives very little discretion to administrative officials in deciding whether to reject a registration application. The PBO Act also provides straightforward criteria for registration of international NGOs. [8]

Organizations registered under the PBO Act have access to a number of benefits. These include an income tax exemption on income received from membership subscriptions and any donations or grants; preferential treatment for value-added tax (VAT); an exemption on customs duties in relation to imported goods or services that are used to further their public benefit purposes; and other exemptions provided in the PBO Act.

The PBO Act also includes new provisions related to the self-regulation of PBOs. For instance, the Act allows for the formation of independent, self-regulating PBO forums. These self-regulating forums are encouraged to design, adopt, and enforce standards of conduct in order to promote self-regulation within the sector. The Act also encourages collaboration between the PBO Authority and the self-regulating forums to support efforts by the latter towards self-regulation. The Act provides for a federation of registered public benefit organizations, as well, to be known as the National Federation of Public Benefits Organizations; the Federation will be an umbrella entity made up of all of the public benefit organizations registered under the Act and the self-regulating forums of public benefit organizations recognized by the Authority (PBO Act, Section 21).

The PBO Act provides for the creation of a PBO Disputes Tribunal – an independent mechanism to address disputes concerning PBOs. Through the tribunal, aggrieved PBOs or members of the public with complaints regarding PBOs or seeking review of PBO Authority decisions may find redress outside the standard judicial process.

## NGOS

The NGO Act, which will remain in effect until the PBO Act's official commencement, defines an "NGO" as "a private voluntary grouping of individuals or associations, not operated for profit or for other commercial purposes but which have organized themselves nationally or internationally for the benefit of the public at large and for the promotion of social welfare, development, charity, or research in the areas inclusive of – but not restricted to – health, relief, agriculture, education, industry, and the supply of amenities and services" (NGO Act Section 2, as amended by Act No. 11 of 1992).

Under the NGO Act, it is an offence for any person to operate an NGO in Kenya for welfare, research, health relief, agriculture, education, industry, the supply of amenities, or any other similar purposes without being duly registered as an NGO. Once an NGO is registered, by virtue of such registration it will be a body corporate with perpetual succession capable in its own name of: suing and being sued; taking, purchasing, or otherwise acquiring, holding, charging, or disposing of moveable and immovable property;

entering into contracts; and doing or performing all such other things or acts necessary for the proper performance of its functions under the NGO Act, which may lawfully be done or performed by a body corporate. Designation as an NGO confers certain tax benefits and imposes a series of regulations that are relevant to an equivalency determination.

## **COMPANIES LIMITED BY GUARANTEE**

A number of NPOs are registered as companies whose liability is limited by the guarantee of the members. [9] A company limited by guarantee under the Kenyan Companies Act [2015] (i) must be incorporated without a share capital; (ii) the liability of its members must be limited by the company's articles to a specific amount (usually a nominal amount) that the members undertake to contribute to the assets of the company in the event of a liquidation; and (iii) its certificate of incorporation must state that it is a company limited by guarantee. It is not clear under the new Companies Act [2015] whether a company limited by guarantee may be a private company or a public company.

There is no prescribed organizational structure for a company limited by guarantee. Nor are there any particular restrictions as to who may be appointed a director; there is no requirement that a director be a resident or citizen of Kenya, for example. Companies may also act as directors; however, the company must have at least one director who is a natural person or a corporation sole.

Under the Companies Act [2015], a group or association of persons can incorporate as a private or public company. For companies limited by shares, the current Companies Act [2015] provides for one-member private and public companies. The Act also requires that a company limited by guarantee must attach a statement of guarantee containing the prescribed information to enable the memorandum of association's subscribers to be identified (Companies Act, Section 15).

## **SOCIETIES**

Under the Societies Act, a society is "any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya" (Societies Act Section 2). A branch of a society also qualifies as a society. The definition specifically excludes: companies; trade unions and their branches; cooperatives; corporations; firms, associations, or partnerships carrying on business for profit; schools; building societies; banks or international organizations of which Kenya is a member. A society's governing documents are called the constitution or rules of the society (Societies Act Section 2). Societies are registered and regulated by the Registrar of Societies.

## **TRUSTS**

A trust is an entity created to hold and manage assets for the benefit of others. Under the Trustees Act Chapter 164 ("Trustees Act Cap. 164"), trusts can be registered as body corporates and established only for religious, educational, literary, scientific, social, athletic, or charitable purposes (Trustees Act Cap. 164 Section 3(i)). Charitable purposes may also be affected by forming a trust by way of a trust deed. (The trustees of a pension fund or provident fund may also apply to be registered as a body corporate).

## **B. PUBLIC BENEFIT STATUS**

"Public Benefit Activity" is defined in Section 2 of the PBO Act as "an activity that supports or promotes public benefit by enhancing or promoting the economic, environmental, social or cultural development or protecting the environment, or lobbying or advocating on issues of general public interest or the interest or well-being of the general public or a category of individual or organizations."

An organization may be registered as a PBO by the Public Benefit Organizations Regulatory Authority if it has as its objective the promotion of public benefit in any of the following areas:

(a) legal aid; (b) agriculture; (c) children; (d) culture; (e) disability; (f) energy; (g) education; (h) environment and conservation generally; (i) gender; (j) governance; (k) poverty eradication; (l) health; (m) housing and settlement; (n) human rights; (o) HIV/AIDS; (p) information; (q) informal sector; (r) old age; (s) peace building; (t) population and reproductive health; (u) refugees; (v) disaster prevention, preparedness and mitigation; (w) relief; (x) pastoralism and the marginalized communities; (y) sports; (z) water and sanitation; (aa) animal welfare; and (bb) youth (PBO Act Sixth Schedule).

The PBO Act permits an organization to register under any of a variety of legal forms, but if an organization registers as a “Public Benefit Organization” in order to receive tax exemptions and other benefits derived from this status, it will cease to be registered under any other law (PBO Act Section 6; see also PBO Act Second Schedule, setting forth in detail some of the “Benefits of Registration” as a PBO).

## **SPECIFIC QUESTIONS REGARDING LOCAL LAW**

The regulatory scheme for NPOs in Kenya is complex, combining substantive and procedural statutes, common law rules embodied in case law, and administrative practices. [\[10\]](#) In addition, Kenyan legislation provides for organizations to be substantially regulated through enforcement of their founding documents. Within this context, the Note examines issues of local law relevant to equivalency determinations.

### **A. INUREMENT**

#### **PBOS**

The definition of “public benefit organization” includes the term “non-profit making.” Strictly speaking, the PBO Act permits organizations to raise “profits” (earnings, less expenses) through donations of cash, securities, and in-kind contributions; bequests; membership fees; gifts; grants; real or personal property; and income generated from any lawful activities undertaken by the public benefit organization with its property and resources which must be used solely for the public benefit purposes of the organization (PBO Act Section 65).

#### **NGOS**

An NGO's constitution must prohibit the organization from distributing funds to members and officials other than for legitimate reimbursement of expenses incurred in carrying out the organization's objectives (NGO Coordination Regulations Second Schedule, Section 4(a) and 4(b)). The documents must also stipulate rules for awarding contracts to members or officials ([NGO Coordination Regulations Second Schedule](#) Section 4(c)). However, the law does not specify any particular language for these clauses. When the constitution of any proposed organization is drafted in a language other than English, an English language translation will be included with a copy of the constitution in its original language and attached to the application for registration or exemption (NGO Regulations Part III, Rule 16).

#### **OTHER NPOS**

The rules of a society must stipulate the purpose for which funds can be used, and must prohibit distribution of funds to members (Societies Act First Schedule Para. 11). However, Kenyan law does not specify particular language for these clauses.

Kenyan law does not require trusts or companies to prohibit inurement.

### **B. PROPRIETARY INTEREST**

#### **PBOS**

A PBO's constitution must state that "the organization's income and property are not distributable to any person, except as reimbursement of reasonable expenses or payment of reasonable compensation for services rendered" (PBO Act Section 8(4)(a)(iv)).

## **NGOS**

An NGO's constitution must prohibit distribution of assets to members and officials ([NGO Coordination Regulations 1992 Second Schedule](#) Paras. 4(a)-(b)). However, the law does not otherwise address whether donors can retain a proprietary interest in their donations.

## **OTHER NPOS**

Kenyan law does not explicitly require companies, societies, or trusts to prohibit proprietary interest.

## **C. DISSOLUTION**

### **PBOS**

Under the PBO Act, when an organization is deregistered, wound up, or dissolved, any assets remaining after all its liabilities have been met shall be transferred to another PBO having similar objectives, which shall be identified through a resolution of the governing body of the organization being deregistered, wound up, or dissolved; otherwise, the PBO Authority shall determine the recipient PBO (PBO Act Section 8(4)(m)).

### **NGOS**

In the event of dissolution, whether voluntary or involuntary, the NGO constitution must provide for the manner of dissolution of the NGO and disposal of its property upon dissolution ([NGO Coordination Regulations 1992 Second Schedule](#) paragraph 12).

### **COMPANIES LIMITED BY GUARANTEE**

The Insolvency Act 2015 has repealed the provisions of Chapter 486, the Companies Act chapter on insolvency. The Insolvency Act amends and consolidates the laws relating to the insolvency of incorporated and unincorporated bodies which were previously provided for under Chapter 486.

Under the Insolvency Act, companies limited by guarantee may be liquidated either voluntarily or by order of the High Court. At liquidation, according to the Act, the following debts must be paid out in priority to all unsecured debts ([Insolvency Act, Second Schedule](#)):

1. First, all the expenses of the liquidation including the remuneration of the liquidator and the reasonable costs incurred by the person who applied to the Court to place the company into liquidation. In the case of a creditor who protects or preserves assets of the company for the benefit of the company's creditors by payment of money or giving an indemnity, expenses are to include the amount received by the liquidator by the realization of those assets up to the value of that creditor's unsecured debt and the amount of the costs incurred by that creditor in protecting, preserving the value of, or recovering those assets;
2. Second, (1) any employees' (excluding directors or their nominees, relatives, or trustees) wages or salary in respect of the four months prior to the commencement of the liquidation; any holiday pay; any compensation for redundancy that accrues before or because of the commencement of the liquidation; any amounts deducted from wages or salaries by the company to satisfy obligations to other persons (including tax); and any reimbursement or payment provided for or ordered by the Employment and Labour Relations Court, together not exceeding KES 200,000 per individual claimant or such other amount as may be prescribed from time to time; and (2) all amounts that

*are by any law required to be paid in accordance with this priority by a buyer to a seller on account of the purchase price of goods;*

*3. Third, unpaid tax deductions under the pay-as-you-earn rules of the Income Tax Act; unpaid non-resident and resident withholding tax deducted under the Income Tax Act; and unpaid duty payable under the Customs and Excise Act;*

*In the following circumstances, the following debts must be paid out in priority to certain secured debts:*

*1. The expenses of liquidating a company (including the remuneration of the liquidator) have priority over any claim to assets comprised in or subject to any floating charge so far as the assets of the company available for payment of general creditors are insufficient (Insolvency Act, Section 473).*

*2. In the event of a company under liquidation or administration or if a provisional liquidator is appointed in respect of the company, the liquidator, administrator or provisional liquidator must set aside 20 percent of the assets of the company available to satisfy the claims of any floating charge holders (net assets) for the satisfaction of unsecured debts unless the net assets are less than KES 500,000 and the liquidator administrator or provisional liquidator (as applicable) believes that the cost of making a distribution to unsecured creditors would be disproportionate to the benefits (Insolvency Act Section 474).*

## **SOCIETIES**

*Under the Societies Act, a receiver is appointed to handle the dissolution of a society (Societies Act Section 33(a)). According to the society's constitution, the receiver proposes a scheme for distributing any surplus assets, which must be approved by the Cabinet Secretary (Societies Act Section 34(1)). The Societies Act does not explicitly prohibit distribution of assets to members upon the society's dissolution. The priority in which debts are to be paid is the same as the priority of payment of debts for companies being dissolved, as provided under the Insolvency Act.*

## **TRUSTS**

*The Cabinet Secretary can order an incorporated trust to be dissolved if it has ceased to exist or if its objectives have become incapable of fulfillment. Upon dissolution and where land was vested in it, the trust's land shall be transferred to the county council in the jurisdiction where the land is situated; if the land is not the trust's land, it shall be transferred to the government. The law does not provide for distribution of other assets ([Trustees \(Perpetual Succession\) Act Cap. 164 Section 16\(2\)](#)).*

*Trusts not incorporated under the Trustees (Perpetual Succession) Act Cap. 164 are dissolved in accordance with the law of equity.*

## **D. ACTIVITIES**

### **1. GENERAL ACTIVITIES**

*Generally, a legal entity, upon its establishment and (where required) registration, can undertake any legal activity.*

### **2. ECONOMIC ACTIVITIES**

*The PBO Act allows PBOs to engage in lawful economic activities, either directly or through subsidiary entities, as long as the income is used solely to support the public benefit purposes for which the organization was established (PBO Act Section 65(1)). The income of a PBO may include donations of cash, securities, and in-kind contributions; bequests; membership fees; gifts; grants; real or personal property; and*

income generated from any lawful activities undertaken by the public benefit organization with its property and resources (PBO Act Section 65(2)(a)-(g)). A PBO may own and manage property and assets for the accomplishment of its not-for-profit purposes (PBO Act Section 65(3)).

NGOs by definition are “not operated for profit or other commercial purposes” ([NGO Act Section 2](#)). However, the Act and accompanying regulations do not bar an NGO from undertaking substantial economic activities in pursuit of its purposes.

Other NPOs can engage in economic activities consistent with their governing documents.

## **E. POLITICAL ACTIVITIES**

### **PBOS**

A PBO may not engage in fundraising or campaigning to support or oppose any political party or candidate for appointed or elected public office, nor may it propose or register candidates for elected public office (PBO Act Section 66(3)).

### **NGOS**

An NGO cannot become a branch of, or be affiliated with, or be connected to any organization or group of a political nature established outside Kenya. It shall not dissolve itself except with the prior consent in writing of the board obtained upon written application addressed to the director and signed by three officers of the organization ([NGO Coordination Regulations 1992 Paras. 2I\(1\)\(b\)-\(c\)](#)). An NGO can affiliate with a political organization *inside* Kenya, though the Government discourages this practice.

### **COMPANIES LIMITED BY GUARANTEE**

According to Kenyan common law, companies are free to engage in political or legislative activities if their governing documents permit it.

### **SOCIETIES**

Most political parties are registered as societies. Other types of societies can engage in political activities if their governing documents permit it. However, a society cannot function as a political party until it is registered in accordance with the provisions of the Political Parties Act and meets the requirements set out under Article 91 of the Constitution (Political Parties Act 2011 Section 4). [\[11\]](#)

### **TRUSTS**

The trust deed stipulates the activities that the trust can engage in.

## **F. DISCRIMINATION**

Kenya’s Constitution guarantees freedom of expression, association, assembly, and movement, and bars discrimination on the grounds of gender, race, sex, pregnancy, marital status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth (Constitution of Kenya Articles 26-51). Furthermore, an NGO’s activities must “ensure equality of opportunity for all regardless of nationality, ethnic background, gender, religion or creed” (NGO Council Code of Conduct Section 10(c)). [\[12\]](#)

In June 2013, Kenya’s Chief Justice enacted the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Part II of the Rules addresses the procedures for instituting court proceedings in order to enforce an individual’s fundamental rights and freedoms. Rule 4(1) provides that where any right or freedom provided for in Kenya’s Constitution is allegedly denied,

violated or infringed or threatened, an application may be made directly to the High Court. These rules strengthen the ability of individuals to enforce fundamental rights and freedoms by clarifying the procedure to apply to the High Court under Article 22 of the Constitution. [13] However, the Constitution notes that the absence of rules does not limit the right of any person to commence court proceedings to enforce the Bill of Rights and to have the matter heard and determined (Constitution of Kenya Article 22(4)).

With regard to institutions of higher education, Kenyan public and private universities are established under Section 13 of the Universities Act 2012 and individual university charters. Section 3(2)(f) of the Universities Act 2012 aims to institutionalize non-discriminatory practices. Discrimination on the basis of religion when admitting students is also prohibited (Constitution of Kenya Article 32(3)).

Private universities are authorized to offer degrees, post graduate diplomas, and certificates under the Universities Act 2012 and the Universities Rules of 1989. [14] While the Universities Act and Rules may not expressly bar acts of discrimination in private universities as well as public universities or colleges established other than by a charter, protection from discrimination is extended by virtue of the Constitution.

Likewise, the Basic Education Act 2013 prohibits discriminatory practices in primary and secondary educational institutions (Section 4(e)).

The Employment Act of 2007 seeks to address discrimination in employment by espousing (i) the promotion of equality of opportunity in employment; (ii) the elimination of discrimination in any employment policy or practice (including against prospective employees: race, color, sex, ethnic origin, HIV status, disability, pregnancy); (iii) equality in recruitment, training, promotion, terms and conditions of employment, termination of employment, or other matters arising out of the employment and (iv) the payment of equal remuneration for work of equal value (Employment Act 2007 Section 5).

The HIV and AIDS Prevention and Control Act prohibits discrimination on the grounds of actual, perceived, or suspected HIV status of a person in the workplace or in schools or accessibility to loans and credit facilities (HIV and AIDS Prevention and Control Act Section 31-32).

## **G. CONTROL OF ORGANIZATION**

Kenyan law does not restrict other organizations or persons from controlling a Kenyan not-for-profit organization beyond stating that an NGO must be private and voluntary. Accordingly, a for-profit entity might establish an NPO and continue to control it. Likewise, a Kenyan NPO could be controlled or owned by an American grantor charity, which would have to be disclosed in the affidavit.

## **V. TAX LAWS**

### **A. TAX EXEMPTIONS**

#### **PBOS**

PBOs are exempt from: (i) income tax on income received from membership subscriptions and any donations or grants; (ii) income tax on income acquired from the active conduct of income-producing activities if the income is wholly used to support the public benefit purposes for which the organization was established; (iii) tax on interest and dividends on investments and gains earned on assets or the sale of assets; (iv) stamp duty; and (v) court fees (PBO Act Second Schedule Para 1(a)).

#### **OTHER NPOS**

For its income to be exempt from income tax, an organization must have been established solely to relieve poverty or distress of the public, or to advance religion or education. In addition, the Commissioner of Income Tax (“Commissioner”) must conclude that the income is expended either wholly within Kenya or in ways that benefit the residents of Kenya ([Income Tax Act First Schedule, Cap 470, Para. 10 as amended by Finance Act, No. 6 of 2001](#)).

Income consisting of profits from a business is subject to an additional restriction. Such income is exempt from tax only if it meets the criteria in the previous paragraph *and* if one of the following is true:

- (a) The business is carried on in the course of advancing the organization's stipulated purposes; or
- (b) The business is conducted mainly by beneficiaries of those purposes; or
- (c) The gains or profits consist of rents (including premiums or similar consideration in the nature of rent) received from leasing land and attendant chattels ([Income Tax Act First Schedule, Cap 470](#)).

Once issued, tax exemption certificates are valid for a period of five years and are subject to renewal. The renewal certificate is to be issued within 60 days of lodging the application. The Cabinet Secretary may also revoke an exemption on the basis of any just cause ([Income Tax Act First Schedule, Para. 10 as amended by Section 23 of Finance Act, 2012](#)). [15]

This affects trusts, NGOs, churches, and other charitable organizations involved in relief, education, and religious activities.

As indicated, the PBO Act has yet to come into force. It is unclear how the various tax benefits will be implemented in light of existing tax laws. In addition, while there are significant tax incentives available to organizations registered as NGOs in Kenya under the NGO Act (as set out below), they tend to be illusory in practice.

## **B. DEDUCTIBILITY OF CHARITABLE CONTRIBUTIONS**

Individuals and corporations generally can deduct any cash donations from their income tax to a charitable organization that is registered or exempt from registration under the Societies Act or the NGO Act 1990 or the PBO Act; and the income of which is exempt from tax under the provisions of Para. 10 of the First Schedule ([Income Tax Act Section 15\(2\)\(w\)](#)). This also applies to any project approved by the Cabinet Secretary of Finance ([Income Tax Act Section 15\(2\)\(w\)](#)).

Expenditures of a capital nature by a person on the construction of a public school, hospital, road, or any similar kind of social infrastructure can be deducted as well, with prior approval of the Cabinet Secretary ([Income Tax Act Section 15\(2\)\(x\)](#)).

Furthermore, deductibility is permitted for expenditures on scientific research to advance a business, including sums paid to approved scientific research institutes or universities, provided that certain conditions are satisfied ([Income Tax Act Section 15\(2\)\(n\)](#)).

## **C. VALUE ADDED TAXES**

Under the PBO Act, there shall be preferential treatment under VAT and customs duties for imported goods or services that are used to further an organization's public benefit purposes (PBO Act Second Schedule Para. (1)(b)).

Under Regulation 30 of the NGO Coordination Regulations 1992, if an organization requires exemption from VAT on goods and services required to meet its objectives; or on income-generating activities; or on income for expatriate employees, an application must be made through the NGO's Board to the Cabinet Secretary of Finance.

“Social welfare services” provided by a charitable organization are exempt from VAT, provided that the organization satisfies two criteria:

- (a) It must be registered under the Societies Act or NGO Act, or exempted from registration by the Registrar of Societies or the NGO Coordination Board; and
- (b) Its income must be exempt from tax under the Income Tax Act and approved by the Commissioner of Social Services.

Such services are not treated as taxable supplies, and no VAT is charged on them (VAT Act First Schedule, Part 2 Para. II(b)).

The VAT Act also exempts the supply of services rendered by educational, political, religious, welfare, and other philanthropic associations to their members, provided that this shall not apply where any such services are rendered by way of business (VAT Act First Schedule, Part 2 Para. II(a)). Certain foods are also VAT exempt (VAT Act First Schedule Part I).

## **D. IMPORT DUTIES**

Customs duties are levied on imported goods. While most industrial plant and machinery is zero-rated, it is necessary to consider each item on a case by case basis. The application and management of customs duties is governed by the East African Customs Management Act.

NGOs are not automatically entitled to exemptions on import custom duties. To obtain such exemptions, an application must be made to the Cabinet Secretary for National Treasury through the NGO Board.

A remission of duty may be granted for certain goods, if they are donated or purchased for donation to registered homes for poor and needy persons. The remission is subject to approval by the Cabinet Secretary. Remissions also may be granted when the goods are imported during periods of civil strife, national calamity, or disaster as declared by law or where intended for use in officially recognized refugee camps in Kenya (The Customs and Excise (Remission) (Charitable Organisations) Order 1999 as amended by Legal Notice 46 of 2004).

## **E. DOUBLE TAX TREATIES**

There are no double tax treaties between the United States and Kenya.

## **VII. KNOWLEDGEABLE CONTACTS KNOWLEDGEABLE CONTACTS**

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## **FOOTNOTES**

[1] As discussed further below, the commencement of the PBO Act and its potential amendment, as well as the status of several other bills pending in the Kenyan Parliament, remain uncertain as of the writing of this Note. We recommend that readers check the status of the PBO Act and other pending legislation to determine if there are any pertinent changes in the current legal framework for NPOs in Kenya.

[2] The status of these rules is yet to be determined in the light of the 2010 Constitution. However, Part III of this statute is revoked by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2013 under Rule 33. Parts I and II of this statute have not been specifically revoked but may not be functional from a practical standpoint, because some provisions still reference sections of the repealed Constitution.

[3] The Non-Governmental Organizations Coordination Act 1990 will be repealed by the PBO Act once the commencement date for the PBO Act is set. See note 5, *infra*.

[4] An Act is not considered in force until such a date is set and published in the Kenya Gazette. Accordingly, the PBO Act (Section 70) will repeal the NGO Act once the former's commencement date is published; until then, however, the NGO Act remains the applicable law governing the registration of NGOs.

In addition, since the passage of the PBO Act, the Government has made several unsuccessful attempts to amend it, including by proposing new restrictions on PBOs' access to foreign funding. As such, the provisions of the PBO Act may be subject to change before its commencement.

In October 2016, a High Court Judge ordered the Cabinet Secretary to set a commencement date for the PBO Act. However, as of July 2017, commencement of the PBO Act is still pending.

[5] *Trusted Society of Human Rights Alliance v. Cabinet Secretary Devolution and Planning & 3 others* [2016] eKLR and *Trusted Society of Human Rights Alliance v. Cabinet Secretary for Devolution and Planning & 3 others* [2017] eKLR.

[6] The NGO Board is continuing to register NGOs under the NGO Act, on the grounds that a commencement date for the PBO Act has not yet been published. If indeed the PBO Act has commenced (even though no commencement date has been announced) and therefore repealed the NGO Act, then the current registration of NGOs under the NGO Act may be subject to challenge. The PBO Act is meant to repeal the NGO Act so that, among other changes, all NGOs which are on the appointed day registered in Kenya under the NGO Act shall be deemed to be provisionally registered as PBOs and have up to one year from the appointed date to seek registration as a PBO under the new Act.

[7] *Republic v. Non-Governmental Organisations Co-ordinations Board & 4 others Ex-parte International NGO Safety Organisation (INSO)* [2017] eKLR and *Republic v. County Government of Nairobi & 3 others Ex parte Complimentary Schools Association of Kenya (Dagoretti Sub-County Branch)* [2017] eKLR.

[8] The PBO Act defines an international NGO as an NGO originally registered outside of Kenya which operates within Kenya, under a certificate of registration issued under Section 10 of the Act.

[9] It is also possible in Kenya to establish a company limited by shares; however, this is typically established to carry out for-profit trading activities.

[10] See Sihanya, *The Regulatory Regime Governing NGOs in Kenya* (1996).

[11] However, no society in Kenya can affiliate with any political organization or group outside Kenya (Societies Act Section 11(1)(a)).

[12] This code is written and enforced by a statutorily established council of voluntary agencies (NGO Act Sections 23-24). The council can recommend the suspension or cancellation of an NGO's registration certificate (Code of Conduct Section 20(4)(b); NGO Act Section 16 (1)(c)).

*[13] The Constitution now provides under Article 22(1) that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.*

*[14] Universities Act (Cap 210B of 1986) has been repealed by Universities Act 2012.*

*[15] The amendment of the Income Tax Act, under the Finance Act 2012, also appears to provide for measures to ensure that the Kenya Revenue Authority (KRA) can monitor and review the activities of charitable organizations not only to determine whether they should continue to enjoy exemptions, but also to follow up on their compliance with other taxes such as income (PAYE) and withholding tax.*