



## Introduction

The availability of beneficial ownership information – that is the natural person behind a legal entity or arrangement – has, over the last few years, become pivotal to the fight against tax evasion and other financial crimes including money laundering and financing of terrorism.

The Companies (Beneficial Ownership Information) Regulations, 2020 (the “Regulations”) were published in February 2020 and seek to clarify the scope of Section 93A of the Companies Act, define key terms, and prescribe relevant forms necessary to give effect to the Companies Act. It is hoped that the Regulations will provide a framework for the promotion of transparency in the ownership of Kenyan companies in line with international standards.

## Description of Beneficial Owner

The Regulations reiterate the definition of a Beneficial Owner that is found in section 3 of the Companies Act, namely *“the natural person who ultimately owns or controls a legal person or arrangements or the natural person on whose behalf a transaction is conducted, and includes those persons who exercise ultimate effective control over a legal person or arrangement.”* A person is deemed to ultimately own or control a company where such ownership is exercised through a chain of ownership or by means of control other than direct control. The notion of “significant influence or control” has been defined to mean the participation in the finances and financial policies of a company without necessarily having full control over them.

A beneficial owner is therefore a natural person who meets any of the following conditions:

1. Holds at least ten percent (10%) of the issued shares in the company either directly or indirectly;
2. Exercises at least ten percent (10%) of the voting rights in the company either directly or indirectly;
3. Holds a right to directly or indirectly appoint or remove a director of the company; or
4. Exercises significant influence or control either directly or indirectly over the company.

Given that beneficial ownership may be exercised in many different ways, the definitions provided in the Regulations are aimed at capturing the various scenarios other than shareholding by extending these to include the influence over the board appointments, multiple layers in the ownership structure, etc. Needless to say, the longer the chain of entities between the company in question and its beneficial owner, and the more jurisdictions the entities span, the harder it will remain to identify the beneficial owners.

Another factor that may continue to make it difficult to identify the beneficial owner is the use of nominees whereby an entity allows its name to appear as a shareholder or owner on behalf of the name of someone else whose identity remains concealed thereby masking the real beneficial owner. Such nominees may be corporate shell entities, trusts and professional

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*The Companies (Beneficial Ownership Information) Regulations, 2020 are intended to supplement the Companies Act, 2015 regarding disclosure of beneficial owners*

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advisers such as lawyers or accountants who then hold legal ownership of the beneficial owner's shares.

### **Requirements of Company Officers, Directors or Shareholders**

The Regulations require a company to:

1. Take reasonable steps to identify Beneficial Owners by investigating the nature of a shareholder's beneficial interest;
2. Notify a person it reasonably believes to be a Beneficial Owner, to provide it with the relevant particulars for registration and if such person fails to respond within the stated period, the company is required to restrict the relevant interest of such person. This would impact on their ability to transfer shares, exercise any rights attached to the shares or even receive dividends;
3. Enter the necessary particulars of such Beneficial Owners into its Register of Members. These include the Identification Number, date of birth, residential address, telephone number, email address, nature of ownership or control, and date one became (or ceased to be) a beneficial owner of the company; and
4. Lodge with the Registrar, in the prescribed form, a Register of Beneficial Owners.

In determining what constitutes a relevant interest, one will have to look at either the shares held by a person in a company, voting rights exercised by a person in the company and the right to appoint to remove any member of the board of directors of the company.

### **Dealing with information of Beneficial Ownership**

The Regulations prohibit the use or disclosure of any information about its beneficial owners, except:

1. for purposes of communicating with the beneficial owner concerned or with the written consent of such beneficial owner;
2. for purposes of complying with any requirement of the Regulations; or
3. in order to comply with a court order.

However, information relating to a beneficial owner is required to be made available to a competent authority

upon a written request by such competent authority to the Registrar.

Finally, the disclosure of beneficial ownership information in any manner other than for the purpose for which such information is obtained attracts a fine of Kes 20,000 (US\$200) or imprisonment for a period not exceeding six months or both, which penalty can hardly be deemed to serve as a deterrent.

### **Potential Benefits to Beneficial Owners**

It is estimated that nearly US\$ 1 Trillion illicitly leaves developing countries due to hidden company ownership associated with political corruption, tax evasion, graft and money laundering. While these Regulations make it possible for regulators to access hitherto unavailable information on beneficial owners, much to the chagrin of such beneficial owners, there may be a silver lining in today's world plagued with COVID-19. Between March 3<sup>rd</sup> and April 3<sup>rd</sup>, 2020, the death toll has risen from 3,202 to over 55,000 cases. The virus is ravaging, at an alarming rate, populations in both developed and emerging economies irrespective of race, social status, colour or creed with no time for proper final rites to be observed, and very likely in many instances, the opportunity to update one's last will and testament.

The risk posed to the estate of a Beneficial Owner who dies intestate or who fails to declare ownership in various entities where such beneficial owner's identity is completely undeterminable through multiple layers of ownership or through nominees such as professional advisors, is that these assets may never find their way to the beneficial owner's designated heirs and beneficiaries. The existence of the shares and any bank accounts associated with the various entities would likely remain unknown to such heirs and intended beneficiaries.

While the client's ownership rights would be set out in the contract with its nominees who are acting on behalf of the beneficial owner, any efficiencies that may have been gained through shrouding the ownership in complete secrecy would likely be lost in circumstances where there is no trail linking the beneficial owner to the shares in question.

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