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COMPANIES (BENEFICIAL OWNERSHIP INFORMATION) REGULATIONS, 2020

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→ Introduction

The Companies Act, 2015 (the “Companies Act”) now requires every company to keep a register of its beneficial owners. This is pursuant to an amendment by the Statute Law (Miscellaneous Amendment) Act, 2019 followed by enactment of the Companies (Beneficial Ownership Information) Regulations, 2020 (the “Regulations”).

This change in law stemmed from the Financial Action Task Force, this is the global standard setting body for Anti-money laundering compliance, recommendations on transparency and beneficial ownership of legal persons.

Legal persons are potentially at risk of being misused to facilitate criminal activity such as money laundering, financing of terrorism and other criminal activities. by persons who wish to retain

anonymity or otherwise to retain control over criminally derived assets while creating impediments to law enforcement agencies in tracing the origin and ownership of assets. It is therefore critical to ensure transparency in the corporate structures.

The Registrar of Companies recently operationalized the beneficial ownership e-register and is now requiring all companies to file their register of beneficial owners within a period of 30 days after preparation of the same.

However, companies registered prior to the enactment of the Regulations will be required to file their register of beneficial owners on or before **31 January 2021**.

→ Application of the regulations

The Regulations apply to all companies registered under the Companies Act, that is, companies limited by shares and companies limited by guarantee (whether public or private).

The Regulations also apply to the below entities to the extent that they are shareholders in the aforementioned companies:

- Foreign Companies
- Limited Liability Partnerships
- Limited Partnerships
- Trusts
- Co-operative Societies

→ Who is a beneficial owner?

The Regulations define a beneficial owner as:

“a 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”.

For a person to be regarded as a beneficial owner they must meet any of the below requirements:

- Directly or indirectly hold at least 10 per cent of the issued shares of the company: This refers to any individual who directly, in their own name, or indirectly, either through a nominee or another

entity holds at least 10 per cent of the issued shares of the company.

- Directly or indirectly exercise at least 10 per cent of the voting rights in the company: This refers to any individual who directly, in their own name, or indirectly, either through a nominee or another entity exercises at least 10 per cent of the voting rights in the company.
- Directly or indirectly hold a right to appoint or remove a director of the company: This refers to any individual who may directly or indirectly appoint or remove a director of a company. They should be considered by the company as having significant influence or ultimate control over the company.

- Directly or indirectly exercise “significant influence or control” over the company: This refers to any individual with the ability to participate in decision making when it comes to matters relating to finances and financial policies of a company without necessarily having full control over them.

Therefore, any shareholder who holds less than 10 per cent of the issued shares and voting rights and does not have a right to appoint a director or have significant influence/control over a company shall be disregarded for beneficial ownership disclosure purposes.

→ What is the compliance process?

Every company is required to take reasonable steps to identify its beneficial owners and enter their details in its register of members. The particulars of its beneficial owners to be included in the register include:

- the full name;
- birth certificate number, national identity card number or passport number;
- personal identification number;
- nationality;
- date of birth;
- postal address;
- business address;
- residential address;
- telephone number;
- email address;
- occupation or profession;
- nature of ownership or control;
- the date on which any person became and/or ceased to be a beneficial owner; and
- any other relevant detail that the Registrar of Companies may from time to time require.

The company is then required to lodge a copy of the register of beneficial owners, in the prescribed format, within a period of 30 days after its preparation.

Where a company has reason to believe that a person is a beneficial owner of the company, it is obliged to issue the said person with a notice

to provide their particulars, as detailed out herein above, within a period of 21 days from the date of the notice. Where the person fails to respond to the notice, the company is required to issue that person with a warning notice. Should the person fail to respond to the warning notice within a period of 14 days, the company shall be obliged to restrict the relevant interest that the person holds in the company and thereafter notify the Registrar of Companies of the restriction.

The effect of the restriction shall be as follows:

- Any transfer of the interest is void;
- No rights are exercisable in respect of the interest
- No shares may be issued in right of the interest or in pursuance of an offer made to the interest-holder
- No payment may be made of sums due from the company in respect of the interest

Should the person subsequently comply with the notice, the company shall be required to withdraw the restriction and thereafter notify the Registrar of Companies of the withdrawal.

Where a company is unable to trace a beneficial owner, it is required to state in its register of beneficial owners that it has not identified the beneficial owner and therefore it has not been able to obtain his or her particulars.

→ Consequences for non-compliance

If a company fails to comply with the aforementioned requirements, the company, and each officer of the company who is in default, commit an offence and on conviction are each liable to a fine not exceeding five hundred thousand shillings.

Where the company fails to comply even after conviction, the company, and each

officer of the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding fifty thousand shillings for each such offence.

→ Restrictions on disclosure of beneficial ownership details

The Regulations restrict disclosure of the beneficial ownership information to the public. They only permit disclosure in the following instances:

- where it is for communication purposes with the beneficial owner;
- for compliance with the Regulations;
- in compliance with a court order;

- upon the request by a competent authority to the Registrar; or
- with the written consent of the beneficial owner.

The Regulations make it an offence punishable by a fine not exceeding KES 20,000 or imprisonment for a term not exceeding 6 months, for the company to unreasonably disclose beneficial owners' information.

→ Conclusion

The impact of the beneficial ownership disclosure requirement is that companies with shareholders who have nominee shareholding will be required to disclose details of the ultimate shareholders and investigate nominee structures that not only depict ownership arrangements but also control arrangements.

In order to comply with the requirements under the Companies Act and the Regulations, companies will be required to review their corporate structures as well as any supporting documentation, for example, shareholder agreements, joint venture agreements, articles of association etc. so as to determine whether there exists any beneficial owners within their structure.

We advise all companies to seek legal advice on the impact of the disclosure and ultimately seek support in the compliance process and statutory filings. It is worthy of note that such compliance would have varying effects on various companies and therefore there is need to evaluate the regulatory and tax effects of such disclosure. For example, it remains to be seen how the regulators will implement this amendment noting that it has been common practice to appoint nominee shareholders to support with local content shareholding qualification. We advise that in any event all companies must comply with the disclosure requirement within the set deadline of 31st January 2021 so as not to be in contravention of the Companies Act and the Regulations.

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This is a general guideline legal alert and should not be a substitute for proper advice. For queries and clarification, kindly get in touch with Rödl & Partner.

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