



Legal Alert | August 23, 2022

BENEFICIAL OWNERSHIP DISCLOSURE FRAMEWORK

Current Provisions on Beneficial Ownership

The Companies Act, No. 17 of 2015 (the **Act**) requires a company to disclose its beneficial owners to the Registrar of Companies (the **Registrar**). A Beneficial Owner under the Act is a natural person who owns or substantively controls a company either directly or indirectly through ownership interests, voting rights or positions of influence within the company to the extent that they can act without the Board's approval. The threshold for a natural person to qualify as a beneficial owner is placed at 10% of the company's ownership interest or voting rights.

A company is required to maintain a beneficial owners register (the **BO Register**) and lodge it with the Registrar within 30 days of preparation. Companies that are yet to file their BO Register may have received a notice from the Registrar to do so. Any amendments to the BO Register should also be lodged with the Registrar within 14 days. Currently, listed companies are exempt from the requirement. This may change if the regulations we discuss below come into effect.

Proposed Changes on Beneficial Ownership

The Business Registration Service (**BRS**) has now published draft regulations and called for public participation on the draft Business Laws (Amendment) Bill, 2022; the Companies (Beneficial Ownership Information) Regulations, 2022; the Partnership (Beneficial Ownership Information) Regulations, 2022; and the Registrar of Companies (Forms) Rules, 2022. We discuss the key proposed amendments below.

The Business Laws (Amendment) Bill, 2022 (the "Bill")

The Bill proposes amendments to the Act and the Limited Liability Partnerships Act, No. 42 of 2011 (the **LLP Act**) in so far as disclosures of beneficial ownership is concerned.

Disclosure under the LLP Act

The proposed amendments will now require Limited Liability Partnerships (**LLPs**) to lodge their BO Register with the Registrar within 30 days of preparing it. Although the Bill does not set out mandatory timelines, we expect the Registrar to prescribe timelines like it did for Companies.

Disclosure under the Act

The Bill provides that a company should file its BO Register at incorporation, a practice already in place having been combined with the application for registration. This provision also applies to foreign companies pursuing registration as foreign companies doing business in Kenya.

If a company is struck off, its officers i.e. its Directors and Company Secretary for Kenyan incorporated companies, or local representatives for foreign companies registered in Kenya, will be required to keep the company's BO Register for at least 10 years after the date of striking off.

The Companies (Beneficial Ownership Information) Regulations, 2022 (the "Companies Regulations")

The draft Companies Regulations state that where two or more persons hold shares jointly, they shall be individually considered as

August 15, 2022

beneficial owners. The Regulations also place an obligation on a nominee or trustee shareholder to not only disclose their nominee or trustee status to the company but to also maintain shareholder information and keep it up to date. This does not in any way imply that the Company recognises the existence of the trusts. Matters to do with share transfer, receipt of company notices and voting rights will still be exercised by the person noted on the Register of Members. The purpose of the BO register is limited to ensuring transparency in the persons who control the Company.

The Regulations also expand instances where a company may make disclosures on beneficial owners to include where a company does business with a Reporting Institution under the Proceeds of Crime and Anti-Money Laundering Act, or to the Procurement Regulatory Authority after a tender has been awarded to the company.

The Companies Regulations also give the promoters or officers of a company the right to issue notices to any individual who they think might be a beneficial owner, requiring them to provide their particulars.

The Partnership (Beneficial Ownership Information) Regulations, 2022 (the "Partnership Regulations")

The proposed Partnership Regulations provide that LLPs shall also lodge the BO Register and any changes with the Registrar. The requirements for qualification as a Beneficial Owner of an LLP are similar to those for a company incorporated under the Act.

LLPs also have the right, where they believe that an individual is a beneficial owner, to send

a notice requiring them to provide their particulars within 21 days. An individual who fails to provide their particulars may be restricted from enjoying any rights attached to their ownership interests.

What do the proposed changes mean?

The upshot of the proposed amendments is, that:

1. if a company is struck off by the Register either on its own application or the Registrar's motion, its officers will be required to maintain its BO Register for 10 years after the date of striking off. With the advancement of technology and the use of the cloud storage this should not be burdensome;
2. companies will now take notice of trust arrangements with respect to shares;
3. listed companies will be obligated to update their BO Register with the Registrar within 14 days of amendment; and
4. LLPs will now be required to maintain a BO Register.

Conclusion

The Bill and proposed regulations increase the compliance obligations of incorporated entities. Where a Company or LLP does not intend to continue its business it may file an application to be struck off the Register or for an LLP to be wound up to avoid the risk of fines. Our team can assist you with this.

If the entity intends to continue its operations, we can assist you with preparing the BO Register and ensure compliance with your continuing obligations under the Act. While it is common practice for investment funds organised as LLPs to have clauses requiring



info@qwasha.co.ke



@qwasha_ke



Qwasha Corporate Services LLP

The Pavilion, 5th Floor
Lower Kabete Road, Nairobi
+254 20 386 1305

August 15, 2022

disclosure of a beneficial owner in their constitutional documents including the right to place restrictions pending receipt of this information, this is not the case for most companies incorporated under the Act. We can assist you with amending your Articles of Association to provide for the procedural requirements under the Act and proposed Regulations.

The changes to the BO Register are in line with efforts to position Nairobi as an International Financial Centre for which a compliant ranking by the Financial Action Taskforce is critical.

The BRS has just taken public comments on the draft laws. We will track their progress and keep you updated.

DISCLAIMER:

This briefing is a highlight of legislative and policy changes and is intended to be of general use only. It is not intended to create an advocate-client relationship between the sender and the receiver. It does not constitute legal advice or a legal opinion. You should not act or rely on any information contained in this legal update without first seeking the advice of an advocate



info@qwasha.co.ke



@qwasha_ke



Qwasha Corporate Services LLP

The Pavilion, 5th Floor
Lower Kabete Road, Nairobi
+254 20 386 1305