

BENEFICIAL OWNERSHIP AND THE REGISTRAR OF LEGAL PERSONS

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INTRODUCTION

- ▶ Corporate vehicles such as companies and trusts play an essential and legitimate role in any economy, However their unique legal status also lends them to be used in schemes.
- ▶ The misuse of legal vehicles can be significantly reduced if information regarding both the legal owner and the beneficial owner is made available.
- ▶ In general, the lack of adequate, accurate and up-to-date BO information facilitates Money Laundering and Terrorist funding.

THE CONCEPT OF BENEFICIAL OWNERSHIP

➤ Beneficial ownership was introduced in Namibia via the Financial Intelligence Act and via recommendation 24 of the Financial Action Task Force (FATF)

➤ Recommendation 24 of FATF defines a Beneficial Owner as:

A natural person who;

- a) Ultimately owns or controls a customer or on whose behalf a transaction is being concluded; or
- b) Exercises ultimate effective control over a legal person in which such ultimate ownership or ultimate effective control may be exercised directly or indirectly or through a chain of ownership or control other than direct control

Continuation.....

 Section 1 of the FIA defines a Beneficial owner as:

- a) A natural person who owns or effectively controls a client, including the natural person on whose behalf a transaction is conducted; or
- b) A natural person who exercise effective control over a legal person or trust and a natural person is deemed to own or exercises effective control over a client when the person-
 - i. Owns or controls, directly or indirectly, including through trusts or bearer shares holding for any legal person, 20% or more of the shares or voting rights of the entity
 - ii. Together with a connected person owns or controls directly or indirectly, including through trusts or bearer shares holdings for any legal person, 20% or more of the shares or voting rights of the entity
 - iii. Despite a less than 20% shareholding or voting rights, receive a large percentage of the persons' declared dividends or
 - iv. Otherwise exercises control over the management of the person in his capacity as executive officer, non-executive director, independent non-executive director, manager or partner.

Stop-Gap amendment of the business law and amendment of FIA

➤ The stop-gap amendments of the business law and the FIA aimed to address a number of the deficiencies that were raised in the Mutual Evaluation Report (MER) which includes but not limited to:

- The shortcomings of the current definition of BO in the FIA
- Lack of BO provisions in the business laws
- Lack of administrative sanctions for the Registrar to impose on non complying entities or individuals

➤ In addressing the shortcomings; the definition of the BO has been aligned to that of recommendation 24 in the FI Amendment Bill;

➤ The requirement for companies and CC to collect and keep accurate and up to date BO information is now in the companies and CC's amendment bill;

➤ The Companies and CC's amendment bills provide for the Registrar to impose administrative sanctions

Definition of BO in the Amendment BILLS

➤ BO is defined in the FI Amendment Bill and is also referenced in the Companies and Close Corporation Amendment Bills as:

a natural person who

- a) Ultimately owns or controls a customer or on whose behalf a transaction is being conducted or
- b) Exercises ultimate effective control over a legal person in which such ultimate ownership or ultimate effective control may be exercised directly or indirectly or through a chain of ownership or control other than direct control

➤ Schedule 5 of the FI Amendment Bill lists the categories of natural persons regarded as Beneficial Owners as it relates to legal persons:

1. A natural person on whose behalf a transaction is conducted
2. A natural person who directly or indirectly or through a trust, other legal persons or other legal arrangements holds 25 percent or more of the shares, voting rights or other ownership interest in the legal person
3. A natural person who holds the position of a senior managing in the legal position
4. A natural person or through a trust, other legal person or other legal arrangements who jointly exercise direct or indirect control over the legal person

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5. A natural person who has the right, directly or indirectly, to appoint or remove majority of the board of directors of the legal person
6. A natural person who has the power to materially influence the decision-making or policy of the legal person
7. A natural person who derives economic benefits, including dividends, right to profit, enjoyment of assets of legal person or able to use significant assets of the legal person, even if the person has no other formal link to the legal person
8. A natural person who influence or ultimate control over the legal person through any other means

What is the distinction between Basic company information and BO information?

➤ Basic information is information as it relates to the business entity as a legal person

having its own legal personality, this information includes:

- i. The entity name
- ii. Registration number
- iii. Legal form and status
- iv. The address of the registered office
- v. Basic regulating powers (Memorandum and Articles of Associations)
- vi. Directors information
- vii. Shareholders information

➤ Beneficial Ownership information is the information on the identities and extent of the control exercised over a legal person by the natural person (s) who ultimately have a controlling ownership interest in the legal person and the natural person exercising ultimate effective control over the legal person through other means than ownership interest, if any.

- I. First name and surname and any other former first name and surname
- II. ID Number/ Passport number
- III. Date of Birth

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IV. Full Residential address

v. Business address

VI. Contact details (cell phone and email)

VII. Nationality

Distinction between Legal ownership and Beneficial Ownership

➤ A beneficial owner in simple terms refers to individuals ultimately enjoying the rights and benefits of the legal person. The legal ownership on the other hand is the individual or entity legally registered with the Registrar as having ownership in the legal person

➤ While legal ownership and beneficial ownership can overlap, the legal title of a company may be in the name of an individual or a legal person other than the BO who ultimately controls or benefits from the entity

➤ Legal ownership in a legal person can be held by either a natural or legal persons whilst beneficial ownership can only be held by a natural body

Why must entities disclose BO information?

➤ It is a legal requirement under section 4 of FIA that;

- a) All companies and CC's must collect and keep accurate and up to date BO information
- b) All companies and CC's must upon registration and thereafter annually submit accurate and up to date BO information to the Registrar of Companies and CC

➤ Furthermore, the disclosure of BO information is beneficial in the following ways:

- i. The misuse of legal persons can be significantly reduced if information regarding both the legal ownership and BO information is made available
- ii. The source of the legal persons assets and its activities become available to competent authorities in a timely manner
- iii. Identifying the true purpose of an account or property held by a legal person

Who will have access to the BO information?

➤ Beneficial ownership information will be fully available to competent authorities and only the name and extent of beneficial ownership will be available to the public

When should BO information be disclosed to the Registrar?

- The Financial Intelligence Act provides that entities must lodge the BO information upon registration and annually thereafter.
- The Companies and Close Corporations Amendment Bill provides for BO information to be lodged:
 - i. At Registrations
 - ii. Submission of Annual return
 - iii. Within seven days after there has been any change to the BO information

The BO information will also be required at the point of amendment or any update if the company has not lodged its BO information with the Registrar.

What are the sanctions/ penalties of failure to keep and disclose BO information?

- The Financial Intelligence Act provides that the Registrar may not register an entity that fails to provide BO information
- The Registrar may deregister an entity that fails to provide the BO information in the prescribed time
- For failing or refusing to provide BO information, the company may be liable fine not exceeding N\$ 10 million or a period not exceeding 10 years or both to such fines or period

The Companies and Close Corporations amendment bills provides for the following sanctions

Failing to keep a BO registry

- The Registrar will issue a written directive instructing the entity to keep a BO registry
- If an entity or person fails to comply with the directive, the Registrar shall impose a financial penalty not exceeding N\$ 50 000 and a financial penalty not exceeding N\$ 1000 for every day during the contravention continues
- The Registrar shall list the entity that fails to comply on an inactive list and thereafter deregister the entity six months after the date the entity was listed.

Late submission or non-submission of BO

- The Registrar will issue a written directive instructing the entity to submit the BO information
- If an entity or person fails to comply with the directive, the Registrar shall impose a financial penalty not exceeding N\$ 50 000 and a financial penalty not exceeding N\$ 1000 for every day during the contravention continues
- The Registrar shall list the entity that fails to comply on an inactive list and thereafter deregister the entity six months after the date the entity was listed.

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Providing false or misleading information

- 👉 conviction to a fine not exceeding N\$ 10 000 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment

How should the BO information be submitted to BIPA?

- 👉 BIPA has developed a beneficial ownership declaration form (BO1). This form must be accurately and completed in full before it is submitted to BIPA.



Thank You.