

## NEW LAW REQUIRES COMPANIES TO DISCLOSE THEIR BENEFICIAL OWNERS



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*'...if a particular company has reason to believe that an individual meets the threshold of being categorised as a beneficial owner, the corporation is required to issue a notice to the person requiring him to give confirmation of the beneficial ownership, as well as provide the specified particulars.'*

Companies registered in Kenya are, by virtue of new Regulations published by the Attorney General in February 2020, required to disclose their beneficial owners. Referred to as the Companies (Beneficial Ownership Information) Regulations of 2020, they stipulate the companies duty to maintain a register of beneficial owners in accordance with the Companies Act, and proceed to provide guidance on compliance.

The publication of the Regulations is a further attempt by the Kenyan law on corporate governance to conform to international standards on company transparency regarding shareholding and ownership. In some cases, such high level disclosure of beneficial ownership of corporations can provide information in diverse state crime busting initiatives, such as in the investigation and prosecution of individuals for corruption, tax evasion, money laundering, among other financial crimes.

### DISCLOSURE THRESHOLD

It is imperative to note that non-disclosure of the beneficial owners is an offence under the Companies Act that attracts a penalty on each liable officer of the subject corporation. Since the Companies Act does not provide any threshold for determining who a beneficial owner is, the Regulations have set the threshold at 10%. Under

the Regulations, a beneficial owner is defined as constituting a natural person who benefits from a company by directly or indirectly:

- Holding at least 10% of the issued shares in the company;
- Exercising at least 10% of the voting rights in the company;
- Holding a right to appoint or remove a director;
- Exercising significant influence or control over a company.

### COMPANIES OBLIGATIONS

Companies are now required to maintain a register of the beneficial owners who meet the highlighted threshold. The register is to be lodged at the State Registry, and the Registrar of Companies is to be notified in the event of a change in the composition of beneficial owners of a particular corporation.

Companies are particularly required to obtain the specified particulars from individuals it knows, or has reasonable basis to believe, that they are its beneficial owners. In that context, if a particular company has reason to believe that an individual meets the threshold of being categorised as a beneficial owner, the corporation is required to issue a notice to the person requiring him to give

confirmation of the beneficial ownership, as well as provide the specified particulars. If the person fails to comply with the notice, the company is required to issue a subsequent warning notice to the subject individual, which should caution him that restrictions shall be placed on the interest that the person holds in the corporation.

### **INTEREST RESTRICTIONS**

Companies are required to restrict the interest of a person who fails to comply with the highlighted subsequent warning notice that has been issued to him. The restriction is to be noted in the register and lodged at the State Registry. The subject person is also to be notified of the effect of the restriction, which is to:

- Void any transfer of the interest;
- Stop the exercise of any rights in respect of the interest;
- Restrict issuance of shares in right of the interest, or in pursuance of an offer made to the subject person;
- Restrict payment of sums due from the company in respect of the relevant interest.

Companies are to remove restrictions upon compliance by the beneficial owner, by issuing a withdrawal which is to be noted in the register and lodged with the Registrar of Companies.

### **INFORMATION CONFIDENTIALITY**

Beneficial ownership data is not public information, and should not be made available to the general public. Companies are obligated to maintain strict confidentiality on such information. The information can only be disclosed for purposes of compliance with the stated Regulations, or to a competent authority after written authorisation by the Registrar of Companies, or in order to comply with a court order, or upon the consent of the beneficial owner. The competent authorities that may be provided with the information, after approval by the Registrar of Companies pursuant to their written request, may include the Kenya Revenue Authority, the Financial Reporting Centre, the Attorney General and investigating agencies. It is noteworthy that a person who makes an unlawful or unauthorised disclosure of the information on beneficial ownership commits an offence.

### **OUR SERVICES**

At Lesinko, Njoroge and Gathogo (LNG) Advocates, we are committed to assisting our clients understand, comply with and benefit from the legal and regulatory requirements relating to companies, and other business and investment entities, including those on beneficial ownership information.

*This information does not constitute legal advice and is for general information only. For specific information regarding companies compliance with the Beneficial Ownership Information Regulations, please get in touch with Chege Njoroge at: [njoroge@lesinkonjoroge.com](mailto:njoroge@lesinkonjoroge.com) or Dr Tom Kabau at: [tomkabau@lesinkonjoroge.com](mailto:tomkabau@lesinkonjoroge.com)*