

Beneficial Ownership

Improving Financial Transparency to Combat Crime and Corruption

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Company and trust structures around the world have come under increasing scrutiny by law enforcement agencies globally due to their vulnerability to exploitation by actors seeking to retain control over criminally derived assets. These actors also impede law enforcement agencies from tracing the origin and ownership of assets. Equally concerning is the fact that legitimate businesses in industries traditionally perceived as low risk are acting as intermediaries in the “layering” phase of money laundering for transnational organized crime and other illegal activity, including terrorism financing.¹

The recent revelations in the Panama and Pandora papers, as well as several smaller leaks, have exposed how anonymous shell companies and the use of

secrecy jurisdictions can shield wealth amounting to billions of U.S. dollars and facilitate criminal activity.² The scandals exposed a system that allowed for the shifting of taxable wealth to shell companies in low-tax jurisdictions, as well as the concealment of legitimate and illegitimate assets from authorities. According to the International Consortium of Investigative Journalists, the organization responsible for exposing these networks, “The offshore financial system can drain trillions of dollars from treasuries, worsen wealth disparities and protect those who cheat and steal while depriving their victims of recourse.”³

The Panama Papers scandal came to the fore in April 2016 and exposed an offshore financial system that enables corruption, crime, and inequality. It involved

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- ¹ The money laundering process involves three stages: the placement of dirty money into a legitimate financial institution (e.g., cash deposits into a bank or mobile money account); layering, which involves various financial transactions, such as multiple wire transfers, to disguise the money trail and is the most complex step in the money laundering scheme; and integration, which is the reintroduction of the money into the mainstream economy in a legitimate-looking form, such as establishment of a legitimate business or the purchase of property. Financial Action Task Force (FATF), “What Is Money Laundering?” n.d., <https://www.fatf-gafi.org/faq/moneylaundering> (accessed 1 April 2022). After money is laundered, it can be used to fund criminal acts, such as terrorism. Terrorist groups also engage in criminal activity that generates proceeds that need to be disguised through money laundering. UN Office on Drugs and Crime, “Money Laundering,” n.d., <https://www.unodc.org/unodc/en/money-laundering/overview.html> (accessed 1 April 2022).
 - ² A shell company is any legally structured corporation that hold funds and manages another entity’s financial transactions but has no meaningful assets or business operations itself. Although not all shell companies are illegal, they often are used to take advantage of tax havens or conceal illegal business or the owners of a business from law enforcement or the public. The Tax Justice Network defines a secrecy jurisdiction as a “tax haven that specializes in enabling individuals to hide their wealth and financial affairs from the rule of law, not just for the purpose of underpaying tax but for other financial crimes like money laundering and funding terrorist groups.” Tax Justice Network, “What Is a Secrecy Jurisdiction?” n.d., <https://taxjustice.net/faq/what-is-a-secrecy-jurisdiction/> (accessed 7 December 2021).
 - ³ Dean Starkman et al., “Frequently Asked Questions About the Pandora Papers and ICIJ,” International Consortium of Investigative Journalists (ICIJ), 19 October 2021, <https://www.icij.org/investigations/pandora-papers/frequently-asked-questions-about-the-pandora-papers-and-icij>.

a network of more than 214,000 tax havens and implicated politicians, including 12 current and former world leaders and other public figures in more than 200 nations. The scandal prompted public outrage and formal inquiries that led to the tracing and governmental seizure of assets illegally obtained through corruption, fraud, tax evasion, and other crimes and concealed in anonymous shell companies.⁴ For example, by April 2021, at least 24 countries had recouped almost \$1.4 billion in back taxes and penalties as a result of the Panama Papers, with Australia, France, Germany, Spain, and the United Kingdom all reporting more than \$100 million in recouped revenue.⁵

In October 2021, the release of the Pandora Papers exposed the dealings of 14 offshore firms that enabled politicians and public officials in 91 countries, including 35 current or former world leaders, as well as billionaires, celebrities, and criminals, to shield their wealth from public scrutiny through the acquisition of offshore assets worth billions of dollars.⁶ This was mainly done through the use of business and trust structures incorporated in secrecy jurisdictions, such as Belize, the British Virgin Islands, Hong Kong, Panama, the Seychelles, and South Dakota.⁷

Critically, the scandals underscored a global weakness in business registration processes related to the collection, maintenance, and sharing of information on “beneficial owners”—the individuals who enjoy the benefits of company ownership even though the company’s title is in another name. Concealing the true identity of the person benefiting from a

corporate or trust structure allows these individuals to distance themselves from assets and transactions, shielding their wealth from public scrutiny or disguising illicit proceeds.

In the wake of these scandals, there has been renewed global focus on the collection and maintenance of beneficial ownership information. For example, the United States passed the Corporate Transparency Act, which requires a wider range of U.S.-registered businesses to disclose beneficial ownership and the creation of a beneficial ownership database. The Financial Action Task Force (FATF), the global standard-setting body for anti-money laundering (AML) and countering the financing of terrorism (CFT) issues, has recently amended Recommendation 24 in its *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations*, which provides for measures to address the transparency and beneficial ownership of legal persons.⁸ The amendments, which also include amendments to the interpretive note to Recommendation 24, require countries to ensure that there is adequate, accurate, and up-to-date information on the beneficial ownership and control of legal persons and provide for additional safeguards in the collection and verification of beneficial ownership information.⁹

This brief draws on a review of the practice of obtaining beneficial ownership information in the United States, the United Kingdom, and several countries in Africa and South Asia.¹⁰ It examines the existing

4 Transparency International, “Panama Papers Four Years On: Anonymous Companies and Global Wealth,” 9 April 2020, <https://www.transparency.org/en/news/panama-papers-four-years-on-anonymous-companies-and-global-wealth>.

5 Sean McGoey, “Panama Papers Revenue Recovery Reaches \$1.36 Billion as Investigations Continue,” ICIJ, 6 April 2021, <https://www.icij.org/investigations/panama-papers/panama-papers-revenue-recovery-reaches-1-36-billion-as-investigations-continue>.

6 ICIJ, “Pandora Papers,” n.d., <https://www.icij.org/investigations/pandora-papers> (accessed 1 April 2022).

7 For example, the politicians and public officials identified in the Pandora Papers had companies in 24 different secrecy jurisdictions.

8 FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations*, March 2022, Recommendation 24, <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> (hereafter *FATF Recommendations*).

9 FATF, “Public Statement on Revisions to R.24,” 4 March 2022, <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/r24-statement-march-2022.html>.

10 The author undertook a comparative analysis of the practice of obtaining beneficial ownership information in Ghana, India, Kenya, Malaysia, Nigeria, South Africa, Tanzania, Uganda, the United Kingdom, and the United States as part of a GIZ Kenya-sponsored project aimed at producing beneficial ownership information guidelines for the Kenyan Business Registration Service to aid companies and practitioners in complying with the Beneficial Ownership Information Regulations (2020).

approaches to collecting beneficial ownership information and the related challenges that practitioners experience. It concludes with recommendations for policymakers and regulators on strengthening the collection and maintenance of beneficial ownership information as a primary tool for the detection and prevention of money laundering, tax evasion, corruption, fraud, and other criminal activity.

BENEFICIAL OWNERSHIP

FATF defines a beneficial owner as the “the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or legal arrangement.”¹¹

Put simply, determining beneficial ownership often requires untangling a web of interrelated entities to discover the person who controls or benefits from a corporation, trust, or other legal arrangement. Beneficial ownership is distinct from legal ownership or control.

Per FATF, the criteria for beneficial ownership can include

- directly or indirectly holding a minimum percentage of ownership interest;
- shareholders exercising control as shareholders, either alone or together with other shareholders, directly or indirectly;
- exerting control through other means, such as personal connections to shareholders or individuals with a minimum percentage of ownership interest;

- exerting control without ownership by participating in financing or as a result of close personal, historical, or contractual associations;
- being responsible for strategic decisions that fundamentally affect business practices or general direction; and
- exercising executive control over the day-to-day matters of a legal person through a senior management position.¹²

FATF Recommendations 24 and 25 provide measures that address the transparency and beneficial ownership of legal persons and legal arrangements. Current standards call for jurisdictions to understand the legal persons in their jurisdiction and associated risks; take measures to prevent the misuse of legal persons for money laundering and terrorism financing purposes; ensure there is “adequate, accurate, and timely information” that can be obtained or accessed by competent authorities; and “consider measures to facilitate access to beneficial ownership and control information by financial institutions” and designated nonfinancial businesses and professions (DNFBPs).¹³ FATF Recommendations 10 and 22 impose further measures and call for financial institutions and DNFBPs to conduct due diligence on their customers, which includes establishing the beneficial ownership of corporate customers.

Following a white paper consultation process in July–August 2021, FATF amended Recommendation 24 on beneficial ownership by legal persons and its interpretive note in March 2022, to require countries to ensure that there is adequate, accurate, and up-to-date information on the beneficial ownership and control of legal persons.¹⁴ The amendments provide

11 FATF, glossary, n.d., <https://www.fatf-gafi.org/glossary/> (accessed 7 December 2021).

12 FATF, “FATF Guidance: Transparency and Beneficial Ownership,” October 2014, pp. 15–16, <https://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf> (hereafter FATF beneficial ownership guidance). For example, Company A is legally owned by Company B per its corporate registration. Company B is legally controlled by its chief executive officer (CEO). The beneficial owner of Company A would be the natural person who benefits from Company B or the natural person on whose behalf Company B conducts transactions. This may not be the CEO of Company B, who may, for example, conduct transactions at the bequest of Company B’s shareholders, board, or investors. In that case, those persons could be considered the beneficial owners of Company A.

13 *FATF Recommendations*, Recommendation 24.

14 FATF, “Revisions to Recommendation 24 and the Interpretive Note—Public Consultation,” n.d., https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/Pdf-file_R24-Beneficial-Ownership-Public-Consultation.pdf.

for additional safeguards in the collection and verification of beneficial ownership information. They call for countries to impose some form of beneficial ownership registry, stronger controls to prevent the misuse of bearer shares or share warrants, more robust transparency requirements for nominee arrangements, the application of a risk-based approach to foreign-created legal persons, and timely access to beneficial ownership information by competent authorities including public authorities.¹⁵ The supporting interpretive note to Recommendation 24 underscores, among other things, a multipronged approach to ensure that beneficial ownership information can be determined in a timely manner and that information is adequate, accurate, and up to date. Countries should apply any additional supplementary measures that are necessary to ensure the determination of beneficial ownership of a company, including holding beneficial ownership information obtained by regulated financial institutions and professionals or held by regulators or in stock exchanges.

The 2014 FATF guidance on transparency and beneficial ownership provides three mechanisms through which beneficial ownership information can be obtained.

1. *Registry approach.* This involves the establishment of a company registry that acts as a repository of basic information about companies, such as the company name, legal form and status, registered office address, memorandum and articles of association, and directors and shareholder information.
2. *Company approach.* This requires companies to take reasonable measures to obtain and keep an accurate record of basic information and maintain an up-to-date shareholder register.
3. *Existing information approach.* This entails utilizing existing information collected on beneficial ownership, including by companies and registries, such as land, motor vehicle, and moveable properties; financial institutions and DNFBPs, including customer due diligence (CDD) information; and other competent authorities, such as supervisors, tax authorities, stock exchanges, and commercial databases.¹⁶

REVIEW OF COUNTRY APPROACHES

In line with FATF Recommendations 10 and 22, most jurisdictions have imposed CDD obligations on financial institutions and DNFBPs, including establishing the beneficial ownership of corporate clients under AML legislation, financial services regulation, or corresponding guidelines. FATF Recommendations 24 and 25 related to beneficial ownership typically fall under companies and trust laws. Presently, most jurisdictions require companies to submit basic ownership information at the incorporation stage.

According to a 2019 FATF study, countries have employed a multipronged approach that uses some or all of the three mechanisms for obtaining beneficial ownership information as outlined in the 2014 guidance.¹⁷

According to the FATF study,

[U]sing a single approach is less effective in making sure that competent authority can obtain accurate and up-to-date [beneficial ownership] information ... in a timely manner. Instead, a multi-pronged approach using several sources of information is often more effective in preventing the misuse of legal persons for criminal purposes and implementing measures that make the beneficial ownership

15 Bearer shares are “negotiable instruments that accord ownership in a legal person to the person who possesses the bearer share certificate.” FATF, glossary.

16 FATF beneficial ownership guidance, pp. 19–25.

17 FATF, “Best Practices on Beneficial Ownership for Legal Persons,” October 2019, <https://www.fatf-gafi.org/media/fatf/documents/Best-Practices-Beneficial-Ownership-Legal-Persons.pdf>. This paper draws on countries’ experiences based on adopted Mutual Evaluation Reports and “aims to provide suggested solutions, supported by cases studies and examples of best practices that are correspondent to each challenge.” The case studies cover Belgium, Denmark, France, Hong Kong, Ireland, the Netherlands, Sweden, Switzerland, and the United Kingdom.

of legal persons sufficiently transparent. The variety and availability of sources increase[] transparency and access to information and help[] mitigate accuracy problems with particular sources.”¹⁸

An additional review of approaches in the United States, United Kingdom, and specific countries in Africa and South Asia reveals that most jurisdictions have put in place provisions in their companies legislation defining and providing for the mandatory submission of beneficial ownership information, in addition to existing provisions requiring the submission of basic information at the time of incorporation as outlined in the FATF Recommendations.¹⁹ Six jurisdictions also had specific regulations requiring the submission of beneficial ownership information, with provisions on obtaining and verifying this information as well as stipulating the criteria for identifying a beneficial owner using the benchmarks under FATF Recommendations 24 and 25.²⁰

In terms of the three-mechanism approach, most of the reviewed countries have a dedicated registry of companies for the submission of basic information and beneficial ownership information and require companies to keep and regularly update this information as part of the company records (table 1). Yet, although access to basic information may be made available to the public (e.g., by payment of a minimal search fee), beneficial ownership information is not

readily available in most jurisdictions due to inadequate regulation or poor enforcement of laws covering this information. Likewise, public registries for this information have yet to be implemented in most of the reviewed countries.²¹

Responsibility for collecting and maintaining updated beneficial ownership information in the relevant registry is usually assigned to the company, which typically must submit such information to the registrar within a specified time frame. Companies are required to identify beneficial ownership using the criteria of shareholding and voter thresholds and the ultimate control test mentioned above. Following identification, companies are required to contact the beneficial owner and collect the mandatory information, which should be documented in the company’s internal register. A copy should be submitted to the registrar within the specified time frame. In the event that a beneficial owner fails to submit the information by the deadline, the company is usually required to serve the individual with a notice to submit. If they fail to do so, the company is required to take action against the beneficial owner, which usually entails restricting the owner’s rights to deal with their shares until the information is submitted. All reviewed countries indicated that they use existing information mechanisms, with legal provisions that provide for the verification of beneficial ownership through information held by other registries, such as the national registration bureau, land registry, and tax registry.

18 Ibid., p. 5.

19 Basic information refers to the information that companies must submit to the registrar at the incorporation stage, such as the memorandum and articles of association, information on directors, and registered office.

20 The six were India, Kenya, Malaysia, Mauritius, the United Kingdom, and the United States.

21 India, the United Kingdom, and the United States have registries while Ghana, Kenya, Malaysia, and Nigeria are establishing registries.

Table 1. Country Compliance Under the FATF Three-Mechanism Approach

	Beneficial Ownership Regulations in Place	FATF Three Mechanisms		
		Registry Approach	Company Approach	Existing Information Approach
Kenya	✓	In progress	✓	✓
Tanzania	✓	No	✓	✓
Uganda	No; definition of beneficial owner in Anti-Money Laundering Act	No	✓	✓
South Africa	No; definition of beneficial owner in Financial Intelligence Centre Act	No	✓	✓
Ghana	✓	In progress	✓	✓
Nigeria	✓	In progress	✓	✓
United Kingdom	✓	✓	✓	✓
United States	✓	✓	✓	✓
India	✓	✓	✓	✓
Malaysia	✓	In progress	✓	✓

Source: GIZ/BRS Kenya Project 2020.

CHALLENGES IN IMPLEMENTING EFFECTIVE COMPLIANCE STANDARDS

An analysis of the practice of obtaining beneficial ownership information in the countries reviewed highlights various challenges in the effective implementation of reporting standards.²²

LACK OF AWARENESS AND KNOWLEDGE OF THE LAW

Many sectors affected by beneficial ownership information regulations indicate a lack of awareness of beneficial ownership law and low capacity for its application. Beneficial ownership provisions are often introduced and made mandatory with set compliance deadlines but without appropriate stakeholder participation. In many instances, the requirements are

not well received by compliance practitioners because they can be particularly onerous for small firms and affect these entities' ease of doing business. Inadequate awareness programs that would otherwise sensitize key stakeholders and members of the public about the beneficial ownership requirements, compliance measures, and best practices also negatively affect the implementation of beneficial ownership information provisions.

LOW REPORTING THRESHOLDS FOR SHARES AND VOTING RIGHTS

Countries such as India, Kenya, and Nigeria have set considerably low reporting thresholds for share ownership and voting rights (e.g., 5 to 10 percent), making it difficult to enforce compliance, especially in cases of multiple shareholdings and complex shareholding structures. Low reporting thresholds can also lead to the disclosure of beneficial owners who are not in a

²² The challenges were identified from the country studies undertaken by the author, as well as from feedback gained from stakeholder forums held in Kenya during the launch of the beneficial ownership information regulations and the guidelines. The list is not exhaustive or relevant to every country or context.

position of influence in a company, despite holding the required minimum percentage of shares. A best-case scenario would be a threshold of 20 percent, or 25 percent, as suggested by FATF,²³ which would enable the capture of shareholders wielding significant influence over the operations of the company.

DEFINITION OF ULTIMATE CONTROL, SIGNIFICANT INFLUENCE, OR CONTROL OVER THE COMPANY

Persons who have ultimate control over a company or wield significant influence over a company's affairs may be considered beneficial owners even though they may not necessarily be shareholders or meet the minimum threshold. This definition of ultimate control poses challenges in differentiating between ownership based on shareholding and ownership based on control and the parameters of that control. As a result, the definition may be too widely construed, affecting all senior officers who exercise some level of control over a company's policies without them necessarily being ultimate beneficial owners.²⁴

DIFFICULTIES IN OBTAINING BENEFICIAL OWNERSHIP INFORMATION

Beneficial ownership information regulations usually provide for the submission of various details pertaining to the beneficial owner, such as name, ID/passport, postal address, phone number, email address, and residential address. In some cases, the required information may not be possible to collect (e.g., residential data may be unavailable due to the lack of robust

mapping systems and precise location data). In other cases, the information required may be inaccessible to the company or out of date, or the company may not be able to verify its accuracy or update it regularly as required by law.²⁵ Companies may face additional challenges arising from the failure or unwillingness of identified beneficial owners to provide the relevant information themselves.

Equally challenging is the ability to identify the shareholding of each relevant individual, because company registries and other data sources may be able to establish ownership but are unable to specify precise percentages (e.g., shareholders owning 9.97 percent in jurisdictions where the reporting threshold is 10 percent). Additionally, some ownership links may be undisclosed, while others may simply state that the company is "majority owned."²⁶

MAINTAINING UPDATED INFORMATION ON SHAREHOLDERS WITH COMPLEX STRUCTURES

Most jurisdictions were found to have requirements in place for the updating of the beneficial ownership register and submission of the information within a certain period. This can be difficult for entities that have frequent changes in shareholding or complex shareholding structures, including corporations with multiple shareholders, foreign shareholders, or shareholders who are legal entities with their own complex ownership structures.²⁷ Maintaining updated information is particularly challenging in countries that have

23 FATF beneficial ownership guidance.

24 For example, Kenya's beneficial ownership information regulations define significant influence or control as "participation in the finances and financial policies of a company without necessarily having full control over them." The United Kingdom defines significant influence in relation to "the ability to ensure that the company or trust adopts those policies or activities which are desired by the holder of the significant influence." UK Companies House and UK Department for Business, Energy & Industrial Strategy, "PSC Requirements for Companies and Limited Liability Partnerships," 15 February 2018, <https://www.gov.uk/government/publications/guidance-to-the-people-with-significant-control-requirements-for-companies-and-limited-liability-partnerships>. In the United States, the Financial Crimes Enforcement Network makes reference to "significant responsibility for managing the legal entity customer." U.S. Department of the Treasury, "Customer Due Diligence Requirements for Financial Institutions," 81 Fed. Reg. 29398, 11 May 2016, <https://www.govinfo.gov/content/pkg/FR-2016-05-11/pdf/2016-10567.pdf>.

25 In this event, requirements for the submission of beneficial ownership information will stipulate that the company take a number of steps to secure the information, including sending warning notices to identified beneficial owners who fail to submit the information on time and restricting shareholder rights to transfer shares or otherwise deal with them. In situations where the information is unavailable despite companies' best efforts, they are required to enter the details in the register, including the actions taken to obtain the information.

26 Koby Bambilia, "Beneficial Ownership: Current Challenges Met With Opportunity," 6 May 2020, <https://www.lexology.com/library/detail.aspx?g=ba467ac3-91f1-49c2-9677-41977eea54e7>.

27 Examples include publicly listed companies, trust and other legal arrangements, pension schemes, and private equity funds.

duplicate beneficial ownership requirements under company and capital market legislation, as detailed below.

DATA PRIVACY CONCERNS

Disclosure of beneficial ownership requirements raises confidentiality and data protection concerns with regard to the information submitted to a company's registrar, the use of such information by the registrar, and its safe processing and storage. Beneficial ownership data incorporate identifying information about individuals, and regulators will need to balance the objectives of disclosure with growing obligations to protect personal data.²⁸ In countries with high crime rates, providing such information may pose a personal security risk to the beneficial owner. These concerns extend to legal professionals and advocate-client privilege,²⁹ and requirements to disclose beneficial ownership information to designated competent authorities and to applications for official searches involve basic ownership information.³⁰

COMPLIANCE RISK

Notwithstanding the challenges in obtaining beneficial ownership information, which may lead to delays in submitting the required information, companies that do not submit the information within specified

timelines run the risk of fines and other penalties, which may be quite steep depending on the jurisdiction. Additionally, restrictions on dealings in shares and other securities may have serious repercussions for business dealings and may affect stock market positions.

PROFESSIONAL RISK

Due to the onerous responsibility placed on companies to collect beneficial ownership information, there are concerns that the stringent reporting requirements under beneficial ownership information regulations have put company secretaries, legal practitioners, and other compliance professionals charged with this responsibility in the unenviable position of being required to assume the role of investigative agencies. In certain cases, these individuals may even be treated as persons who exercise significant influence over the company, and hence as beneficial owners, with the attendant risks of liability and exposure to penalties for failure to comply with the law.³¹

CONFLICTING LEGAL AND REGULATORY PROVISIONS

There have been cases of regulatory conflict or inconsistency. For example, entities might be subject to multiple regulations that all have mandatory requirements

28 Alexandra Habershon, Solvej Krause, and Zosia Szykowski, "Beneficial Ownership Transparency," in *Enhancing Government Effectiveness and Transparency: The Fight Against Corruption*, World Bank, 3 October 2020, <https://documents1.worldbank.org/curated/en/235541600116631094/pdf/Enhancing-Government-Effectiveness-and-Transparency-The-Fight-Against-Corruption.pdf>.

29 Legal professional and advocate-client privilege is recognized in the *FATF Recommendations*, which exclude information covered by legal professional privilege or professional secrecy from the obligation to file a suspicious activity report. See FATE, "Guidance for a Risk-Based Approach: Legal Professionals," June 2019, <https://www.fatf-gafi.org/media/fatf/documents/reports/Risk-Based-Approach-Legal-Professionals.pdf>. In this regard, most jurisdictions include lawyers as reporting entities. In countries where they are not, such as Australia, Kenya, and the United States, the bar associations have issued appropriate guidelines that enable lawyers to comply with the AML law, including the provision of beneficial ownership information; with the duty to report suspicious activity for certain types of transactions that include company formation and real estate transactions; and with conditions as to what information is exempt from client privilege, for example, where the privileged communication is made in furtherance of an illegal purpose or commission of a crime or where disclosure is necessary to safeguard against the use of the advocate's client account for money laundering or other unlawful financial transactions. An example of such provisions can be found in the UK Proceeds of Crime Act 2002 and the Law Society of Kenya Code of Conduct 2017 section 117-120. In addition, FATF Recommendation 22 requires all lawyers, notaries, other independent legal professionals, and accountants to be subject to record-keeping requirements when they are creating, operating, or managing a legal arrangement.

30 "Beneficial ownership information may, as required by the FATF standards, be available only to selected competent authorities (including law enforcement), and possibly to financial institutions and DNFBS. Consideration should be given to how technological advances may allow registries to provide public access (although this may raise and need to be balanced against privacy issues." FATF beneficial ownership guidance, para. 45g.

31 One approach is to specifically exempt professionals who provide advice or make recommendations or proposals in a professional capacity, such as a company secretary, lawyer, or external auditor, from being considered as a person with the right to exercise significant influence or ultimate control over a company. Additionally, they would qualify for protection under relevant provisions if they can show that they have taken all the steps necessary to obtain the beneficial ownership information, including restricting relevant shareholding interests.

for the reporting of beneficial ownership information. In some jurisdictions, the requirement to submit beneficial ownership information to the companies registrar extends to all companies, including publicly listed companies, securities firms, and pension funds that are already subject to corresponding beneficial ownership information reporting requirements under the relevant capital markets and other laws.³² This is especially relevant to financial institutions and listed companies, which are already heavily regulated and thus should be considered to be low risk and exempt from dual reporting requirements.³³ In this regard, the adoption of a blanket beneficial ownership information reporting requirement can result in duplicative reporting that imposes an onerous burden on companies. It can also result in wasted resources and negatively affect annual compliance reviews (e.g., by correspondent banks) and the customer/shareholder experience. Furthermore, entities may be required under other aspects of AML laws to ensure that they understand the nature of the business, ownership, and control structure when performing CDD measures in relation to a customer that is a legal person or legal arrangement, adding another level of duplication.

Variations between companies and AML laws in defining a beneficial owner,³⁴ as well as different reporting thresholds for obtaining beneficial ownership information, also create compliance challenges. In addition, countries such as South Africa and Uganda have

definitions of a beneficial owner under their AML law but no corresponding definitions or requirements to obtain beneficial ownership information under their companies law.³⁵ These conflicts leave reporting entities in a quandary about which criteria and definitions they should adopt and comply with.

LACK OF PROVISIONS FOR LEGAL ARRANGEMENTS

Most jurisdictions under review have detailed provisions on the disclosure requirements for legal persons but are silent on the treatment of legal arrangements, unless such arrangements are registered as corporates or are shareholders of corporates registered under the relevant companies law.³⁶ The lack of regulation leads to a lack of awareness about legal arrangements and creates opportunities for them to be used to conceal the true identity of the parties to a legal arrangement set up in furtherance of a crime.

LIMITED ACCESS TO BENEFICIAL OWNERSHIP INFORMATION

Access to basic information may be made available to the public, such as through payment of a minimal search fee, but beneficial ownership information is not readily available in most jurisdictions. Public registries for this information have not been implemented in many countries, mainly due to inadequate regulation, poor enforcement of beneficial ownership information provisions, technical challenges in setting up

32 Examples of jurisdictions with duplicated reporting requirements are Kenya, Nigeria, and Tanzania. In Kenya, however, publicly listed companies are exempt from the requirement to submit changes to beneficial ownership information within 14 days.

33 This is the case in Ghana, Kenya, Nigeria, Tanzania, and Uganda. In India, Malaysia, Mauritius, the United Kingdom, and the United States, publicly listed companies, financial institutions, and investment banks licensed under the relevant securities laws are exempt from the requirements under the companies law, thereby avoiding duplicate reporting requirements.

34 For example, terms such as “controlling interest,” “substantial shareholding,” “significant shareholding,” “significant influence,” and “ultimate and effective control” are used interchangeably to refer to a beneficial owner.

35 Additionally, timely access to beneficial ownership information by competent authorities in South Africa is extremely restricted.

36 For example, Kenya refers to a beneficial owner in the context of a legal person and arrangement and defines an arrangement as an “artificial entity, without legal personality.” An example of an arrangement would be a trust or a contractual arrangement such as a voting rights agreement between shareholders. There is no specific criteria for determining the beneficial owner of a trust. This has now been covered in the draft beneficial ownership information guidelines. This definition has been replicated in Tanzanian legislation. Ghana and Nigeria use the term “legal arrangement” in connection with trusts, and Nigeria sets a separate minimum threshold of a 25 percent interest for determining the beneficial ownership of a trust. In India, the 2019 Significant Beneficial Ownership (Amendment) Rules specifically set out the criteria for determining the beneficial owner, where such a beneficial owner is a trust.

such registries,³⁷ and, more significantly, data privacy considerations.

SUPERVISORY BEST PRACTICES AND POLICY RECOMMENDATIONS FOR THE DISCLOSURE OF BENEFICIAL OWNERSHIP INFORMATION

The Pandora and Panama papers underscore how critical it is for jurisdictions to put in place comprehensive mechanisms to collect, update, and make available beneficial ownership information in order to mitigate the risk of company and trust structures being misused to facilitate criminal activity such as money laundering and terrorism financing.

To improve overall transparency, supervisory policy should seek to implement regulations with appropriate mechanisms to facilitate the identification of beneficial ownership of corporate structures at the formation stage. Beneficial ownership information regulations should also reflect the global approach of various governments to addressing these risks, as required by the FATF Recommendations and other international protocols. In this regard, regulatory policy on beneficial ownership information should address at a minimum several key issues.

DETERMINATION OF APPROACH TO OBTAINING BENEFICIAL OWNERSHIP INFORMATION

As a primary step, countries should first determine which approach to take for obtaining beneficial ownership information: the registry, company, or existing information approach.³⁸ Per FATF, a multipronged approach employing some or all of the tactics is preferable.³⁹ Mechanisms for a combined or multipronged approach would include AML/CFT requirements for financial institutions to establish beneficial ownership information as part of their CDD process. They would also include the holding of basic ownership information by the companies registry and relevant beneficial ownership information by the tax authorities and asset registries such as for land, property, vehicles, or shares.

ESTABLISHMENT OF A CENTRAL REGISTRY

In establishing a central registry, countries should determine where the registry, usually the companies registry, will be housed; how the beneficial ownership information will be submitted to the registry; and the information technology requirements necessary to create the registry and make the information accessible to the competent authorities that will oversee the record holders and ensure that supervision is robust.⁴⁰

Other considerations include ensuring that the registry's statutory objectives cover the role of collecting, verifying, and maintaining beneficial ownership information; addressing staffing and funding; training on applicable laws; operational issues such as the verification and updating of information; timelines for the submission of information and sanctions for

37 Setting up an effective beneficial ownership disclosure system has its challenges, mainly due to the complex legal and technical requirements involved. Effective mechanisms for disclosing and verifying beneficial ownership information require adequate regulation of registries, a mechanism for reporting discrepancies, and enforceable sanctions for misreporting. Further, effective beneficial ownership transparency reforms rely on technologies that enable a range of users and stakeholders to engage with the resulting data. Habershon, Krause, and Szytkowski, "Beneficial Ownership Transparency."

38 FATF beneficial ownership guidance.

39 The proposed amendments to Recommendation 24 seek to provide a multipronged approach to the collection of beneficial ownership information, which includes alternative mechanisms and supplementary measures, in addition to the three-mechanism approach. FATF, "Revisions to Recommendation 24 and the Interpretive Note."

40 Secretariat of the Global Forum on Transparency and Exchange of Information for Tax Purposes and Inter-American Development Bank, "A Beneficial Ownership Implementation Toolkit," March 2019, <https://www.oecd.org/tax/transparency/beneficial-ownership-toolkit.pdf> (hereafter beneficial ownership implementation toolkit).

nonsubmission; public or limited accessibility of information; and any legal impediments to implementing an effective registry of beneficial ownership such as data privacy conflicts.⁴¹ Countries facing these jurisdictional challenges must still ensure that their company registries hold basic information but may need to combine this with other measures to ensure the timely availability of adequate, accurate beneficial ownership information.

DEVELOPMENT AND IMPLEMENTATION OF BENEFICIAL OWNERSHIP REGULATIONS

Beneficial ownership information regulation should at a minimum achieve several objectives.

- **Provide a clear definition of how to identify a beneficial owner**, with specific steps to determine the identity of beneficial owners using the criteria outlined in the FATF Recommendations (shareholding and voting arrangement thresholds, ultimate control, and significant influence).
- **Provide for the adoption of a risk-based approach to obtaining beneficial ownership information.** To address the challenges noted in obtaining beneficial ownership information, regulations may allow for the adoption of a risk-based approach. Examples of a risk-based approach would include the adoption of reasonable disclosure thresholds to better facilitate compliance and the identification of beneficial owners, noting that FATF suggests a threshold of 25 percent as an acceptable determinant of ultimate control, which ensures that relevant interests are captured.⁴²

Alternatively, for banks and financial institutions, the adoption of a risk-based approach would facilitate the process of identifying the beneficial owners (e.g., a 10 percent threshold can be adopted for high-risk customers and 20 or 25 percent for low-risk customers). Under FATF standards, however, the procedures applied to obtain and verify beneficial ownership information through CDD should reflect the risk profile of a particular customer or transaction.⁴³ A risk-based approach may also be applied to the supervision of entities required by law to maintain beneficial ownership information records. In this regard, a jurisdiction can perform on-site inspections or other risk-based review procedures of companies, agents, or service providers that maintain beneficial ownership information to verify that the information is accurate and adequately maintained, whether through commercial law, AML, or tax mechanisms. Such inspections will also enable a country to identify the use of corporate vehicles for money laundering, terrorism financing, and the concealment of beneficial ownership information.⁴⁴

- **Outline the processes for collecting beneficial ownership information**, including the criteria and process for identifying beneficial owners, transmission of notices to identified shareholders requesting such information, issuance of warning notices in the event that such information is not received by the stipulated deadlines, and issuance of notices restricting relevant interests such as dividend and share transfer rights.

41 FATF beneficial ownership guidance. Beneficial ownership information may, as required by the FATF standards, be available only to selected competent authorities (including law enforcement), and possibly to financial institutions and DNFBBs. Consideration should be given to the ways technological advances may allow registries to provide public access, although this may need to be balanced against privacy issues (e.g., through a searchable online database that would increase transparency, with the right to timely access to the information extended to financial institutions, DNFBBs, and overseas authorities).

42 FATF beneficial ownership guidance, p. 15.

43 Beneficial ownership implementation toolkit. For example, different levels of verification of the beneficial ownership or enhanced CDD may be applied to higher-risk clients, such as nonresidents, or transactions from other jurisdictions based on factors related to those jurisdictions.

44 FATF, "Best Practices on Beneficial Ownership for Legal Persons." For example, the United Kingdom implemented the Relevant Legal Entity (RLE) exemption for the People With Significant Control register, and the UK Companies House undertakes periodic reviews to check each RLE registered, prioritizing a risk-based approach by focusing on those registered in financial centers or in countries with weaker transparency laws. Similar reports in the United Kingdom are *The Use of Corporate Vehicles to Hide Beneficial Ownership* and the UK National Crime Agency intelligence report *The Use of Corporate Entities to Enable International Money Laundering Networks*. Additionally, Indonesia in 2017 carried out a sectoral risk assessment of legal persons for money laundering and terrorism financing purposes, which enabled it to identify companies being used to facilitate the transfer of illicit funds.

- **Outline the processes for maintaining beneficial ownership information.** Regulations should clearly define and articulate the scope of reasonable measures that companies should undertake to obtain and hold up-to-date information on beneficial ownership. As with CDD, such measures should be proportionate to the level of money laundering or terrorism financing risk or complexity induced by the ownership structure of the company or the nature of the controlling shareholders.⁴⁵
- **Provide clarity on the applicability or exemption from disclosure requirements.** Regulations should specify the type of companies, including local or foreign companies, that are required to maintain a register of beneficial ownership and those that are exempt.⁴⁶ A clear distinction should be made between companies limited by shares, companies limited by guarantee, and private and publicly listed companies. In this regard, regulators should consider exempting entities that are already required to disclose their beneficial owners under other laws. Examples include banks and other financial institutions, brokers, investment advisers, insurance companies, pension schemes, and private equity funds registered under the relevant securities and financial services sector regulations, as well as public accounting firms, public utility providers, churches, charities, and nonprofit entities.⁴⁷ Additionally, regulators should aim at harmonizing all beneficial ownership information-related regulation to remove duplication and reduce compliance challenges arising from conflicting provisions in AML and companies laws.
- **Specify the information required for non-company structures.** Regulations should put in place alternative disclosure requirements for legal arrangements and structures such as trusts; retirement benefit schemes, such as pension schemes; decedents' estates; or other complex ownership structures. In this regard, countries should review and amend the relevant laws such as the trust and trustee and retirement benefits laws to ensure that there are no gaps that criminals can exploit to defeat the system. Countries should also consider setting up a registry for trusts to enforce beneficial ownership information requirements. The approach in the FATF Recommendations and the guidance note should be incorporated into the relevant trust laws in the form of specific provisions for the disclosure of beneficial ownership information.⁴⁸
- **Provide clarity on the minimum documentation required to establish beneficial information using a risk-based approach.** In this case, particularly in developing economies where residential information may not be easy to obtain, the relevant personal identification, tax information, employment details, and applicable references should suffice.
- **Address data protection concerns.** The regulations should provide for the safeguarding of beneficial ownership information by specifying who is authorized to receive the information, for example, the registrar, the beneficial owner, and competent authorities, and the circumstances under which authorized persons can request the information. The regulations should also incorporate appropriate

45 Under FATF Recommendations 1 and 24, countries should identify and assess the money laundering and terrorism financing risks associated with legal persons to enable the implementation of a risk-based approach. Based on the countries' understanding of these risks through a comprehensive risk assessment, they should establish a legal, enforceable framework setting forth a mechanism governing how companies should take reasonable measures to obtain and hold up-to-date beneficial ownership information.

46 For example, for foreign companies the requirements can specify that the disclosure requirement applies to foreign companies that are shareholders of a company registered under the relevant companies law.

47 A good benchmark is the 2019 U.S. Corporate Transparency Act and the Malaysian Guideline for the Reporting Framework for Beneficial Ownership of Legal Persons, issued under the Malaysian Companies Act 2016. The U.S. Corporate Transparency Act also provides the secretary of the treasury and attorney general with discretion to exempt additional entities if they jointly determine that requiring beneficial ownership information from such entities would not serve the public interest and would not assist law enforcement efforts to detect, prevent, or prosecute terrorism, money laundering, tax evasion, or other criminal activity.

48 FATF beneficial ownership guidance.

data protection and confidentiality provisions or require compliance with existing data protection laws. The company registry should also put in place adequate mechanisms to safeguard the information, such as placing restrictions on user access rights in the online information repository. Additionally, to address the technical challenges stakeholders may experience in the submission and maintenance of their electronic beneficial ownership information, regulators will need to get stakeholders engaged in developing a “data-driven” approach to the design of policies and information platforms.⁴⁹

- **Provide specific compliance timelines and penalties for noncompliance.** The regulations should set clear compliance timelines with the various provisions for registry creation and submission, as well as the issuance of notices to identified shareholders to submit the required information.⁵⁰ The regulations should also specify various non-compliance offenses and provide for appropriate penalties.

IMPLEMENTATION OF BENEFICIAL OWNERSHIP INFORMATION GUIDANCE

Regulators should also consider developing guidelines or guidance notes to assist stakeholders in the identification, receipt, and verification of beneficial ownership information.⁵¹ Such guidelines should address several issues.

- Reasonable measures to be adopted by the company to identify beneficial owners, including appropriate examples for identifying complex entities and legal arrangements. Such measures should highlight the steps a company should take, such as sending notices to identified shareholders to provide beneficial ownership information and warning notices in the event that such information is not received by the stipulated deadlines. Notices

restricting relevant interests such as dividend and share transfer rights should also be an option, with appropriate templates that practitioners or compliance officers can use for this purpose.

- A clear scope of the term “significant influence or control,” including scenarios and examples of what would be considered significant influence and participation in finances/financial policies, and the other terms used in the regulations.
- How to deal with those exercising control in a professional or acting capacity, such as lawyers, auditors, and accountants. In this regard, such professionals should not be considered to be beneficial owners unless they exercise significant influence or ultimate control over a company.
- How to verify beneficial ownership information before submitting it to the registrar, for example, through independent and reliable data sources such as copies of relevant identity and tax documents, which can be verified against independent and reliable data sources such as national identity registration and revenue databases.
- The process of logging beneficial ownership information with the registrar, for example, through an online system or portal.
- How the information is to be captured, manually or through an online portal; maintained; reported; and updated for existing and new entities and the formats and forms used and the contact persons at the registry.
- Roles and responsibilities for submission of beneficial ownership information. The guidelines should assign clear responsibilities for the filing of this information and address the role of the companies registrar, for example, on the use of the information and recourse channels for companies.

49 Habershon, Krause, and Szytkowski, “Beneficial Ownership Transparency”

50 For example, submission of the beneficial ownership information to the company within 21 days, submission to the registrar within 30 days, and submission of any changes within 14–21 days.

51 Examples of countries that have issued guidelines or consultation papers to facilitate the implementation of beneficial ownership information legal provisions are Australia, Kenya, Malaysia, Mauritius, New Zealand, and the Philippines. See Commonwealth of Australia, “Increasing Transparency of the Beneficial Ownership of Companies,” February 2017, https://treasury.gov.au/sites/default/files/2019-03/C2017-004_CP_Increasing_Transparency_of_the_Beneficial_Ownership_of_Companies.pdf.

- The guidelines can also require companies to take out professional indemnity coverage for the responsible officers in the event that the shareholders fail to provide the required information or provide inaccurate information.

HARMONIZATION OF LAWS, REGULATIONS, AND GUIDELINES

Where beneficial ownership information requirements are incorporated into AML regulations or other guidelines (e.g., for the insurance, capital markets, or real estate sectors), the documentation requirements should be harmonized with the requirements under the companies regulations to avoid companies being subject to dual or conflicting regulatory requirements. Threshold reporting requirements should also be standardized, for example, where the companies law sets the limit at 20 percent, all legislation should adopt this standard. This would pave the way for allowing exemptions to disclosure requirements in cases where a reporting entity has already submitted the relevant information to one regulator.

CONCLUSION

The disclosure of beneficial ownership information in corporate structures and financial and legal

transactions is a crucial tool for the detection and prevention of money laundering, terrorism financing, and other financial crimes because it ensures that corporate structures are not being used to hide the identity of the source and ownership of assets. It is therefore critical for countries to put in place appropriate regulatory frameworks to ensure the timely disclosure of the beneficial ownership of such structures at the formation stage and on an ongoing basis. Such regulations should provide clarity with regard to the provisions that apply to various entities and the processes for obtaining and disclosing beneficial ownership information to the relevant authority.

In developing economies, however, beneficial ownership is a new concept, and regulators need to put in place appropriate measures to create awareness of the risks associated with corporate structures and guide stakeholders so they remain in compliance with the law. Such measures should ideally take the form of guidelines or guidance notes, as well as sensitization forums to equip these actors with the necessary tools, knowledge, and guidance to enable them to comply successfully with the laws governing beneficial ownership information.

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