

## **GENERAL LAWS (ANTI-MONEY LAUNDERING AND COMBATING TERRORISM FINANCING) AMENDMENT BILL – COMMENTS ON AMENDMENTS TO THE COMPANIES ACT, 2008**

We refer to the proposed changes in the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, which was published on 29 August 2022 for public comments and wish to raise the following comments:

Computershare is supportive of the anti-money laundering and financing of terrorism framework and appreciates the need to implement urgent measures to address the shortcomings identified by the FATF in the Mutual Evaluation Report, 2021. We understand the need for details of Beneficial Owners to be maintained by the Companies and Intellectual Property Commission (CIPC) but believe that proposed amendments are not aligned to developed markets and public companies will not be able to comply with the beneficial ownership requirements – this will discourage listings of companies on exchanges, as disclosure requirements are not practical. The proposed amendment that requires a listed company to disclose beneficial owner information in South Africa, when this is not required in other jurisdictions, will be a deterrent for South African listings.

The proposed changes impose onerous regulatory and administrative burdens on listed companies. It is also important to highlight that there are approximately 330 listed companies, which account for a very small percentage of the 2 million companies registered with CIPC.

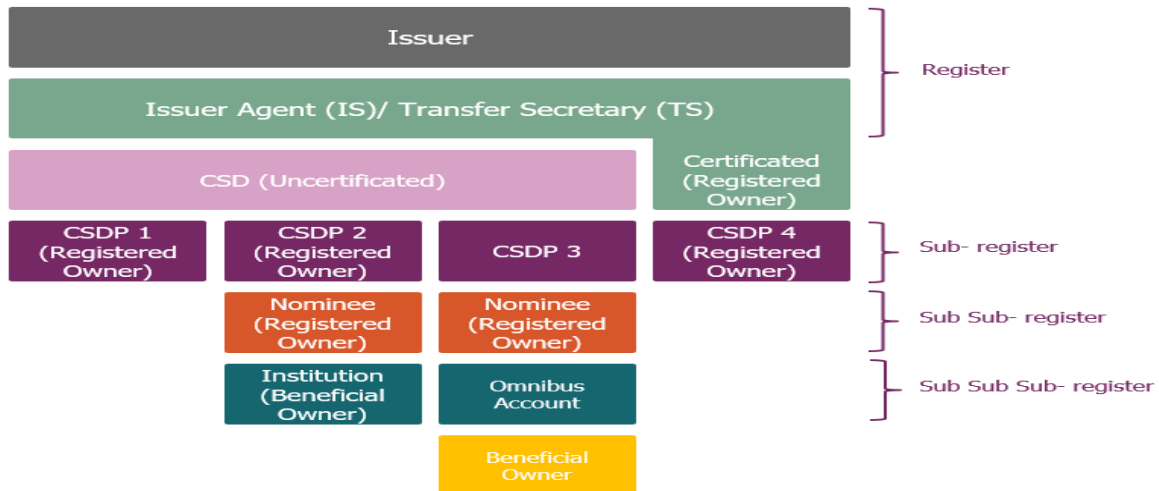
### **Background**

The following diagram represents the structure of a listed company's securities register:

The register of securities of a listed company is fragmented and is composed of the uncertificated (or dematerialised) securities register maintained by the Central Securities Depository (Strate (Pty) Ltd) and certificated register by the Company Secretary or Transfer Secretary/Issuer Agent. The uncertificated register comprises of sub-registers maintained by CSD Participants. Brokers (authorised users) maintain the details of their underlying clients/shareholders.

# Register structures

## Certificated vs uncertificated registers

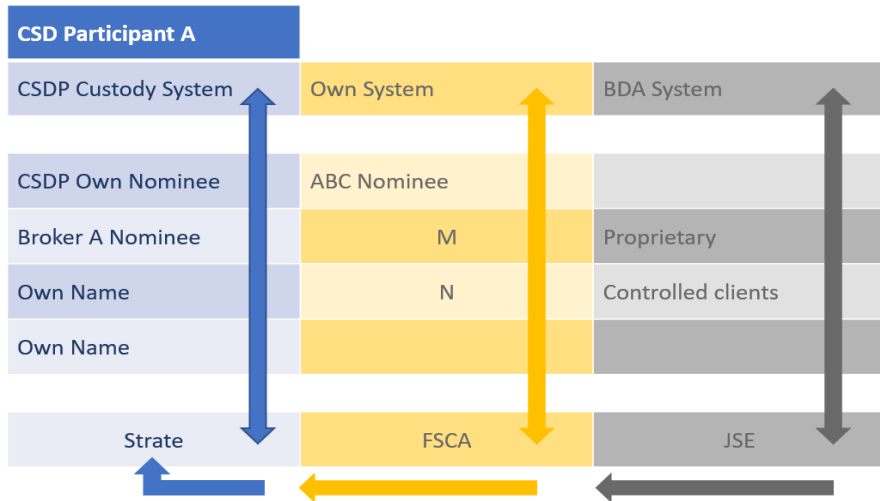


CSD Participants (CSDPs) are approved by the Central Securities Depository (CSD) – Strate (Pty) Ltd to hold uncertificated (dematerialised) securities in custody and settle trades in the Strate environment.

- There are six bank and two non-bank Strate-approved CSDPs for equities trades: The bank approved CSDPs are Citibank, Nedbank, RMB (a division of First Rand Ltd), Standard Bank and Standard Chartered. ABSA Bank Ltd recently entered as a sixth bank CSDP through the acquisition of Société Générale.
- The non-bank approved CSDPs are Computershare and JSE Investor Services (JIS). Both Computershare and JIS are authorised Financial Services Providers (FSPs).
- **All CSDPs (i.e. banks and FSPs) are therefore also Accountable Institutions in terms of FICA.**

All Authorised users (stockbrokers) are required to appoint a CSDP in the uncertificated environment. The CSDP can, however, only see the Broker Nominee as the registered shareholder in its records. Authorised users (stockbrokers) maintain the details of their underlying shareholders/clients, usually in the name of an approved nominee and details of beneficial owners are maintained on the JSE's Broker Dealer Accounting system (BDA). **All authorised users are also Accountable Institutions in terms of FICA.**

## Custody and the broker sub-sub-register



The CSDPs sub register comprises of its Own Nominee, any Broker Nominee that has appointed the CSDP as its custodian and Own Name clients, where shares are registered in the name of the shareholder directly as opposed to being held under a nominee. There may also be other FSCA approved nominees, where one of the requirements for approval is that the nominee is able to provide a beneficial owner download (BND) to Strate.

All authorized users (brokers) client accounts are held by the broker on the JSE BDA system, as mentioned above, in the name of a JSE approved nominee.

	Proposal	Computershare comments
1	<p><b>DEFINITION OF "BENEFICIAL OWNER"</b></p> <p>Amendment of section 1 of Act 71 of 2008, as amended by section 1(1) of Act 3 of 2011 and section 111 of Act 19 of 2012</p> <p>52. Section 1 of the Companies Act, 2008, is hereby amended by the insertion after 50 the definition of "beneficial interest" of the following definition:</p> <p>"beneficial owner"—</p> <p>(a) has the meaning defined in section 1(1) of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001); and</p> <p>(b) for the purposes of this Act, in respect of a company, includes, but is not 55 limited to, a natural person who, directly or indirectly, ultimately owns or exercises control of a company, including through—</p> <p>(i) ownership of the securities of the company;</p> <p>(ii) the exercise or control of the exercise of the voting rights associated 60 with securities of that company;</p> <hr/> <p>26</p> <p>(iii) the exercise or control of the exercise of the right to appoint or remove members of the board of directors;</p> <p>(iv) ownership, or the exercise of control of—</p> <p>(aa) a holding company of that company;</p> <p>(bb) a juristic person other than a holding company of that 5 company;</p> <p>(cc) a body of persons corporate or unincorporate;</p> <p>(dd) a partnership; or</p> <p>(ee) any other category or type of entity that may be specified in 10 regulations for this purpose,</p> <p>that owns or is able to exercise control of, as the case may be, that company, including through a chain or network of ownership; or</p> <p>(v) the ability to otherwise materially influence the decision-making or 5 policy of the company;".</p>	<p>In our view, it is not appropriate to have exactly the same definition of "beneficial owner" in the Companies Act as the FIC Act.</p> <p>There is no definition of "control" in the new proposed definition and no provision for a threshold to be set. Currently section 2(2) of the Companies Act defines "control" as a person able to exercise or control the voting rights associated with securities of that company or to control the appointment of directors who control the majority of the votes at a meeting of the board, in other words 50%+1.</p> <p>While the FIC Act does not mention a threshold, Guidance Note 7 refers to a 25% threshold.</p> <p>This may lead to confusion regarding application of the requirements.</p>

	<p>The current proposal is to include a definition of "beneficial owner" in section 1 of the Companies Act, 2008.</p>	
<p>2</p>	<p><b>SECTION 33 – ANNUAL RETURNS</b></p> <p>Amendment of section 33 of Act 71 of 2008, as amended by section 23 of Act 3 of 2011</p> <p>53. Section 33 of the Companies Act, 2008, is hereby amended—</p> <p>(a) by the deletion in paragraph (a) of subsection (1) of "and";</p> <p>(b) by the insertion after paragraph (a) of subsection (1) of the following paragraphs: 20</p> <p style="padding-left: 40px;">“(aA) a copy of the company’s securities register as required in terms of section 50;</p> <p style="padding-left: 40px;">(aB) a copy of the register of the disclosure of beneficial interest as required in terms of section 56; and”;</p> <p>(c) by the insertion after subsection (1) of the following subsection: 25</p> <p style="padding-left: 40px;">“(1A) (a) The Commission must make the annual return contemplated in subsection (1) available electronically to any person as prescribed.</p> <p style="padding-left: 40px;">(b) The prescribed requirements referred to in paragraph (a) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).” 30</p> <p><b>Section 33 – Annual Returns</b></p> <p>It appears, in terms of <b>section 53 of the Amendment Bill that section 33</b> of the Companies Act (which deals with the requirement for <b>annual returns</b>) is to be amended to include a requirement to submit “(aA) a <b>copy of the company’s securities register</b> as required in terms of section 50” and (aB) <b>a copy of the register of disclosure of beneficial interest</b> as required in terms of section 56” with the Company’s annual return.</p> <p><b>SECTION 50 – SECURITIES REGISTER</b></p> <p>Amendment of section 50 of Act 71 of 2008, as amended by section 34 of Act 3 of 2011</p> <p>54. Section 50 of the Companies Act, 2008, is hereby amended by the insertion after subsection (3) of the following subsection: 35</p> <p style="padding-left: 40px;">“(3A) (a) A company must record in its securities register prescribed information regarding the natural persons who are the beneficial owners of the company, in the prescribed form, and must ensure that this information is updated within the prescribed period after any changes in beneficial ownership have occurred. 40</p> <p style="padding-left: 40px;">(b) The prescribed requirements referred to in paragraph (a) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).”</p>	<p>The purpose of the amendment is to provide a mechanism for CIPC to keep accurate and updated beneficial ownership information.</p> <p>We are concerned about the practical implications of this requirement, especially for listed companies with large registers, which may consist of thousands or even hundreds of thousands of shareholders. Will CIPC’s systems be able to cater for large securities registers?</p> <p>We also question the value added by this requirement, as the annual register will only show who the shareholders are at a particular point in time. For active listed companies, the shareholders constantly change, so this requirement will not achieve the objective of promoting transparency.</p> <p>The amended section 50 of the Act prescribes that the company’s securities register must include beneficial ownership information so we do not understand the requirement in the amended section (aB) to provide “a copy of the register of the disclosure of beneficial interest as required in terms of section 56” as well as a copy of the securities register.</p> <p>From a listed company perspective, transparency already exists as the central securities depository (Strate) collates the sub-registers received from CSDPs and brokers underlying client information received from the JSE and is able to provide the information in the form of a Beneficial Owner download (referred to as a “BND”) to intermediaries/ listed issuers on a monthly basis (or more frequently) for analysis/transparency purposes.</p> <p>Similarly, the proposed amendment to section 50 of the Companies Act poses practical challenges (refer comments above and in point 3 below). Currently for listed companies the securities register is a record of any changes to the registered shareholders (including nominees) and this is recorded in the Strate environment following the settlement of transactions. These share movements are disclosed in the BND provided to the issuer on a monthly basis by Strate.</p>

		<p>Significant system development would be required to record beneficial owner information in the Strate BND and company securities register for each registered shareholder.</p>
<p>3</p>	<p><b>SECTION 56 – REGISTER OF DISCLOSURE OF BENEFICIAL INTERESTS</b></p> <p>Amendment of section 56 of Act 71 of 2008, as amended by section 36 of Act 3 of 2011 45</p> <p>55. Section 56 of the Companies Act, 2008, is hereby amended—</p> <p>(a) by the substitution for the heading of the section of the following heading: 50  “Beneficial interest in securities and beneficial ownership of company”; and</p> <p>(b) by the addition of the following subsections: 55  “(12) A company must file a record with the Commission, in the prescribed form and containing the prescribed information, regarding the natural persons who are the beneficial owners of the company, and must ensure that this information is updated by filing Notices with the Commission within the prescribed period after any changes in beneficial ownership have occurred.”</p> <hr/> <p>27</p> <p>(13) The prescribed requirements referred to in subsection (12) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).”.</p> <p><b>Section 56 – Register of disclosure of beneficial interests</b></p> <p>Section 55 of the Amendment Bill proposes amendments to section 56 of the Companies Act by providing for the establishment and maintaining of a register of disclosure <b>by the company</b> of beneficial ownership.</p> <p>The Companies Amendment Bill, 2021 imposed an obligation on the company, where the identity of persons who hold a beneficial interest, including the true owner, is unknown, to request from the registered security holder each quarter to provide details of beneficial interest holders.</p>	<p>As explained in the background above, the register of securities of a listed company is fragmented and is maintained by the Central Securities Depository (Strate) and certificated register by the Company Secretary or Transfer Secretary/Issuer Agent. The uncertificated register comprises of sub-registers maintained by CSD Participants. Brokers (authorised users) maintain the details of their underlying clients/shareholders.</p> <p>Most uncertificated securities are held in the name of nominees, namely the CSD Participants nominees and JSE or exchange member nominees (i.e. broker nominees) and Financial Service Provider nominees (e.g. Asset Managers). A BND is provided to issuers on a monthly basis (however, in practice is provided to Strate on a weekly basis so could be available on a more regular basis). Information provided is beneficial interest holder information not beneficial owner holder information in a FATF sense.</p> <p>For listed companies, details of beneficial interest are already included in the beneficial owner download (BND) received from Strate. Brokers (authorised users) and banks/FSPs (who are also CSD Participants of Strate) are accountable institutions in terms of the FIC Act and already have to comply with client due diligence/verification requirements and to record beneficial ownership information in their records.</p> <p>Details of registered shareholders (individuals and institutional clients such as companies, trusts, asset managers) are disclosed in the weekly BND provided to the central securities depository (Strate) and the CSD holds the sacrosanct record of ownership in the central register of uncertificated securities. CSD Participants/brokers who hold shares in the name of a foreign nominee will not know who the underlying beneficial owners are and there is no requirement to disclose this information in the Strate BND.</p> <p>The Issuer Agent/Transfer Secretary combines the uncertificated securities register with the certificated securities register and is able to provide a combined register to the issuer/listed company. Public inspection of the securities register is catered for by the Issuer Agent/Transfer Secretary.</p>

It is proposed that the Companies Act, 2008 be aligned with the requirements of the Promotion of Personal Information Act, 2013 and that the Information Regulator give approval for the Strate BND to be disclosed to the market, as this will improve transparency.

A practical challenge in the certificated environment (where shares are held in paper form), is that there is minimum information available on the register (often only name, address and holding). Historically, prior to the Companies Act, 2008, there was no requirement to record the identity number of a shareholder and there are also "lost" shareholders, who have not notified the Issuer Agent/Issuer of updates or changes to their contact details. How would an issuer be able to identify if the registered shareholder is not the beneficial owner of the securities (unless this is apparent from the name of the registered shareholder) and if the issuer was then obliged to send a communication to obtain confirmation from the shareholder as proposed in the Companies Amendment Bill, 2021, it is unlikely that shareholders will respond? This will result in additional costs to the issuer without any benefit. It may be relevant to point out that certificated shareholders cannot trade on an exchange, unless their securities have been dematerialised into uncertificated form and this is the point at which we obtain a custody and settlement agreement/mandate, as well as FICA verification documentation to verify the beneficial owner. Shareholders who continue to hold their securities in paper/ certificated form are typically your retail clients/natural persons, who hold small amounts of shares, do not trade frequently and make up a small percentage of the securities register.

In view of the current securities register structure and because there is no obligation on a natural person to notify a company if they are a beneficial owner of the company, means it will be impossible for a listed company to be in a position to file a record with CIPC.

Although the company receives a combined register from its Issuer Agent, containing BND uncertificated holders and certificated holders, the company will not know whether there are natural persons who meet the definition of a "beneficial owner".

If the company was required to pierce the corporate veil of all beneficial interest holders that are legal

persons, to determine the beneficial owners, this would result in significant costs and a duplication of effort where it relates to uncertificated shareholders as the CSDPs (i.e. banks and FSPs) and authorised users (brokers) already record this information in their records.

If you consider the regulatory framework in other countries, particularly those that had high scores following the FATF Mutual evaluation (e.g. UK, EU, Israel, Japan, Switzerland and the US), many have established a beneficial owner registry but provide an exemption from the requirement for a beneficial owner registry to public companies, provided that there are other mechanisms in place that provide transparency of information.

In the United Kingdom and EU, the onus is on the shareholder to disclose their status when a trade will result in the shareholder exceeding certain thresholds of voting rights (5%, 10% etc.) and not on the listed company. This is considered to be the equivalent means of disclosure. Section 122 of the SA Companies Act imposes a similar obligation on a shareholder who acquires a beneficial interest in sufficient securities amounting to 5%, 10%, 15% or any further whole multiple of 5%.

As stated previously, the Company receives a BND and will not know if there are more natural persons/underlying beneficial owners.

It is therefore recommended that South Africa should align with international practice and amend section 56 to allow an exemption for listed companies from having to provide a beneficial ownership register to CIPC.

We are aware that the JSE has proposed an amendment to its Listing Requirements that listed companies publish the register of disclosure of beneficial interest in terms of section 122 of the Companies Act on its website on a continual basis. Those beneficial owners holding more than 5% of the voting rights would be disclosed. Listed companies (or their Issuer Agents) could provide regulators or enforcement agencies a full copy of the securities register/beneficial interest disclosure on request. This information could be used to pierce the corporate veil through the central register of beneficial owners of legal persons. Computershare supports this proposal.

4	<b>SUMMARY OF PROPOSALS</b>	<ul style="list-style-type: none"><li>• The definition of “beneficial interest holder” and “beneficial owner” should be revised to clarify what constitutes “control” and determine the threshold that applies.</li><li>• That listed companies be exempted from the requirements in section 50 to record beneficial ownership information in its securities register.</li><li>• It is recommended that section 56 of the Companies Act align to international practice and provide an exemption for listed companies providing beneficial owner information to CIPC, where there are equivalent disclosure requirements in place to ensure transparency of beneficial ownership information.</li><li>• We support the JSE’s proposal that it amends its Listing Requirements to require that listed companies, publish the register of disclosures of beneficial interest (as required in section 122) on its website on a continual basis (i.e., securities holdings above the 5% threshold) and to provide law enforcement or regulators with an updated copy of the full register of the disclosure of beneficial interest, on request.</li><li>• The obligation should be on a beneficial interest holder (shareholder) to disclose to the company any underlying shareholders/ultimate beneficial owner/true owner to ensure that the register of the disclosure of beneficial interest is complete.</li></ul>
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