

**Honourable J Maswanganyi, MP**  
**Chairperson: Standing Committee on Finance (National Assembly)**  
**Parliament of the Republic of South Africa**

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10 October 2022

Honourable Maswanganyi:

**RE: Comments on General Laws (Anti-Money Laundering and Combatting Terrorism Financing)  
Amendment Bill of 2022 (GLAB, 2022)**

This submission is made by Open Ownership (OO), a not-for-profit organisation which provides support and guidance on all aspects of beneficial ownership transparency reforms. Since 2017, OO has worked with over 40 countries to advance implementation of beneficial ownership reforms, as well as supporting the creation of over 15 new central and sectoral registers. OO has been providing legislative and policy support on beneficial ownership implementation in South Africa since 2021, and has offered policy and legislative support in a variety of jurisdictions including Armenia, Kenya, Liberia, Nigeria, and the United Kingdom, among others.

OO commends the South African government and Inter-departmental Committee on Beneficial Ownership (BO) on the progress made thus far in implementing beneficial ownership transparency. We welcome this legislative process as another milestone for South Africa's progress towards a more comprehensive legislative framework.

The aim of this submission is to provide guidance on beneficial ownership legislative design which enables the use of beneficial ownership data to prevent fraud or corruption; improve service delivery; enhance accountability; improve the ease of doing business; enhance policy effectiveness; as well as support South Africa in meeting the minimum requirements of the Financial Action Task Force and align with emerging international best practice.

Open Ownership colleagues have examined the following proposed amendments to the following legislation through the General Laws Amendment Bill (GLAB):

1. [Trust Property Control Act of 1988:](#)
2. [Financial Intelligence Centre Act of 2001](#) (as amended 2017)
3. [Companies Amendment Act of 2008](#) (as amended 2011)
4. [Financial Sector Regulation Act of 2017:](#)

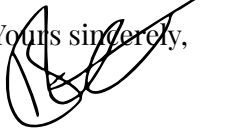
No comments are provided on the Non-profit Organisation sections of the Bill as the proposed amendments have limited relevance to beneficial ownership and OO's expertise.

We hereby provide comments that will help improve information disclosure based on OO's experience developing the [Beneficial Ownership Data Standard](#) and the [Principles for Effective Disclosure](#), that will continue to facilitate achieving South Africa's G20 and Open Government Partnership commitments and international obligations under FATF.

In addition to specific comments in response to the proposed amendments, OO provides general comments on the Bill below for consideration that are critical to strengthening the BO framework and are in line with the revised FATF Recommendation 24 and 25, and emerging international best practice for beneficial ownership implementation.

Thank you for your consideration.

Yours sincerely,



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## General comments on the Bill:

1. **Definition of beneficial ownership.** GLAB proposes that the Financial Intelligence Centre Act contains the primary definition of BO, referenced and used across the other three pieces of legislation proposed for amendment – Trust Property Control Act, Companies Act and the Financial Services Regulation Act. Each of these other sections of the Bill then contains additional clauses specific to each sector and its policy goals. The use of a single and unified definition in primary legislation, with all other laws referring to this definition, is in line with Open Ownership’s guidance.<sup>1</sup>

The amended definition contained in the FIC amendment is in line with the FATF definition.<sup>2</sup> For optimal compliance and to enable the collection of high-quality data, a robust and effective primary definition should be as clear and concise as possible. Some of the provisions in the FIC sections of the Bill are very specific to the AML framework and the responsibilities of accountable institutions rather than of general applicability across legislation, for example, amendments proposed in section 1 (d) (ii). The definition is currently framed with reference to the responsibilities and processes followed by accountable institutions, detailed in their General Risk Management and Compliance Programmes, for which guidance notes have been issued by the FIC. While it is difficult to assess whether this will have a negative impact on the beneficial owners identified – especially without knowing the rationale behind drafting the definition in this way – this is at a minimum ambiguous and convoluted, and risks unnecessarily complicating compliance.

Furthermore, the definition does not sufficiently cover all relevant forms of ownership and control, and does not specify that ownership and control can be held both directly and indirectly. The definition should comprise a broad catch-all definition of what constitutes beneficial ownership, including a non-exhaustive list of example ways in which beneficial ownership can be held. The definition should specify a threshold and include a clear prohibition of agents, custodians, employees, intermediaries, or nominees acting on behalf of another person qualifying as a beneficial owner. Clearer consideration for the treatment of nominee ownership arrangements would be beneficial, particularly in the amendments to the Companies Act.

2. **Comprehensive coverage of legal entities and arrangements.** In approaching the legislative deficiencies on beneficial ownership through an omnibus approach, South Africa is at an advantage promoting transparency of legal entities and arrangements in a single, harmonised legislative process. This is commendable. Nevertheless, there are critical gaps which could be a loophole to addressing risks related to BO. The amendments to the Trust Property Control Act are not explicit in bringing foreign-owned trusts firmly within the disclosure framework. While South Africa is at advantage in already requiring the mandatory registration of trusts, the lack of requirements on foreign trusts is not in line with FATF requirements and may pose risks related to money-laundering where complex multi-jurisdictional corporate structures are used.

The Bill currently does not contain provisions for exemptions, for example, for publicly listed companies which may have adequate alternative disclosure requirements. Open Ownership’s

<sup>1</sup> Kiepe, T and Low, P, “Beneficial ownership in law: Definitions and thresholds”, Open Ownership, October 2020. Available at: <https://www.openownership.org/en/publications/beneficial-ownership-in-law-definitions-and-thresholds/recommendations-for-a-robust-definition>.

<sup>2</sup> FATF states that a *beneficial owner* refers to 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 arrangement. Financial Action Task Force, “Glossary”, n.d. Available at: <https://www.fatf-gafi.org/glossary>.

guidance on [comprehensive coverage](#) notes that in instances where an exemption to disclosure is applied, there should be clear provisions to guide the criteria for and grant of such exemptions. By specifying requirements around any exemptions to be included, the Bill would avoid potential loopholes.

3. **Sufficient data should be timeously accessible to competent authorities (and public authorities), as well as publicly available.** A key recommendation from South Africa’s October FATF Mutual Evaluation Report (FATF MER) is the importance for competent authorities to have timely and direct access to information held in a BO register by a public authority. While much of the detail of the implementation of timely and direct access can be prescribed in secondary legislation or guidance notes, it would strengthen the legislation to include wording related to timeous and direct access. FATF Recommendation 24 urges countries to consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking customer due diligence to prevent money-laundering. We note that the [revised FATF Recommendation 24](#) additionally requires the timely access to BO information in the course of public procurement. In designing a legislative framework which is in line with revised FATF requirements, the risk of the legislation becoming quickly outdated is reduced.

On public access, various sections of the Bill refer to secondary legislation to define whether or not this will include public access to ‘*prescribed persons*.’ Open Ownership’s research and experience in implementation support points to the value which can only be delivered through publicly accessible registers. FATF, in its report on best practices on beneficial ownership, recognises that “the trend of openly accessible information on beneficial ownership is on the rise among countries”.<sup>3</sup> In addition to the well documented use of data by journalists and civil society organisations to uncover and expose money-laundering, public registers also make it more efficient for foreign law enforcement bodies to access and use beneficial ownership data within their investigations. Identified associated risks of public access can be mitigated by designing a framework which considers data minimisation at the point of data collection, a layered access to published data, and a protection regime for individuals facing high risks of personal harm as a result of the publication of information. A combination of these approaches globally has been shown to also be in line with data protection laws.

4. **Data should be structured and interoperable.** Through amending these five key pieces of legislation, the Bill seeks to better align standards and definitions relating to beneficial ownership in South Africa. But equally important is that once these changes are made, the relevant authorities are empowered to collect beneficial ownership data in a standardised way so that it can best be combined across different registers to connect the ownership or control of companies, trusts, non-profit organisations, and other arrangements back to individual beneficial owners, or indeed with other data sources such as public contracting or asset data. This would be in line with evolving FATF standards, but also critical to the response to state capture highlighted in the FATF MER.

We would advise adopting language or amendments which empower technical standards – as well as standardised definitions – to be used to best achieve the policy aim of collecting beneficial ownership information which can most easily be put to use by authorities. In particular, we would advocate for the use of the [Beneficial Ownership Data Standard](#) developed by OO and the Open Data Services Cooperative (ODSC), the world’s leading open standard for collecting, using, and

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<sup>3</sup> Financial Action Task Force, “Best Practices on Beneficial Ownership for Legal Persons”, October 2019. Available at: <https://www.fatf-gafi.org/publications/methodsandtrends/documents/best-practices-beneficial-ownership-legal-persons.html>.

exchanging beneficial ownership information.

5. **Verification.** FATF’s Recommendation 24 requires countries to ensure that beneficial ownership information is accurate, based on verification. To ensure accuracy of BO information and to comply with FATF Recommendation 24, a provision that provides for a verification mechanism across each amended legislation, particularly companies and trusts, should be included. In the October 2021 FATF MER, the assessors noted that “while basic information is available publicly, it may not always be accurate and reliable in the case of trusts. Of the basic information publicly available, only the trustee’s identity is verified.”<sup>4</sup> While the detail of the mechanism and process to verify may be spelt out in regulation, it would create certainty on the intent of the drafters if the legal responsibility and mandate to verify beneficial ownership data were included in primary legislation with the detail being determined in subsidiary legislation. We note that the FIC amendment Bill has useful provisions around the process to verify data.
  
6. **Sanctions and enforcement.** The October 2021 FATF MER found that South Africa could make improvements to ensure sanctions are proportionate, dissuasive, and enforceable. While the sections in relation to trusts in the Trust Property Control section of the Bill have robust provisions, this is not carried through to other sections, particularly the proposed amendments to the Companies Act. Open Ownership, noting that each jurisdiction must effect sanctions which are in line with domestic legal frameworks, provides guidance for effective, proportionate, dissuasive, and enforceable sanctions which includes considerations for sanctions for noncompliance with disclosure requirements, including for non-submission, late submission, incomplete submission, or false submission. Based on experience on emerging best practice, we also advise that:
  - Sanctions that cover the person making the declaration, the beneficial owner, registered officers of the company, and the declaring company should be considered.
  - Sanctions should include both monetary and non-monetary penalties.
  - Relevant agencies should be empowered and resourced to enforce the sanctions that exist for noncompliance.
  - Data on noncompliance should be made available.

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<sup>4</sup> Financial Action Task Force, “South Africa's measures to combat money laundering and terrorist financing”, October 2021. Available at: <https://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html>.

## Trust Property Control Act: Clause 1 - 8

SECTION	COMMENT(S)	RECOMMENDATIONS
1	The current definition only applies to beneficiaries listed in the trust deed, and not new or discretionary beneficiaries.	The definition of beneficial owners should include protectors, administrators, <b>discretionary</b> beneficiaries, and any other natural person exercising ultimate effective control over the trust (including through a chain of control/ownership or through a nominee arrangement).
1	As this definition should be applicable to foreign trusts covered under the regime, certain terms like “founder” may not always be clear.	Add “or equivalent role” to all trust roles.
11A	It is unclear who will have access to the trust register and under what conditions, as this is “as prescribed”.	
11A	The information to be collected is currently “prescribed information” which needs to be specified to be sufficient to unambiguously identify.	
11A	There are no provisions for: <ul style="list-style-type: none"> <li>• which information (of the prescribed information) will be made available to users;</li> <li>• a requirement for the Master to verify information (e.g. identities);</li> <li>• a requirement to keep information up to date if e.g. a new beneficiary is born or a new discretionary beneficiary is added;</li> <li>• structured data;</li> <li>• how the data will interact with the company register.</li> </ul>	
11A	There are no provisions for a public consultation period.	Insert: the Minister must—

SECTION	COMMENT(S)	RECOMMENDATIONS
		<p>(a) in the Gazette, give notice where a draft of the amendments will be available and invite submissions; and (b) consider submissions received.</p> <p>before publication in the Gazette be submitted to Parliament for its approval.”.</p>
<p><b>11A</b></p>	<p>Include provisions for foreign trusts, either through amendments to the Trust Property Control Act or an alternate appropriate legislative framework.</p>	<p>In addition to trusts being formed under the laws of the jurisdiction, the law should include trusts for which:</p> <ul style="list-style-type: none"> <li>• any party to the trust is resident in the jurisdiction, including nominees or anybody else who administrates the trust;</li> <li>• any trust asset(s) (e.g. bank account(s)) is located in the jurisdiction;</li> <li>• any service providers to the trust are based in the jurisdiction.</li> </ul> <p>The law should also include provisions for parties to a trust which may not exist under South African law, such as protectors.</p>

## Financial Intelligence Centre Act: Clause 15 - 51

SECTION	COMMENT(S)	RECOMMENDATIONS
1	There are broader concerns with the definition, both in terms of missing some key components to constitute a robust definition, and the approach taken to rely on an AML-framing of a definition which multiple acts refer to.	Revise the definition in line with the concerns specified under the general comments on the bill above.
1	“Person” should be plural to account for scenarios where more than one person is a beneficial owner (this comment stands for other instances in the draft Bill person appears).	Replace “person” with “person(s)”.
1	The FATF Standard does not recommend any particular percentage threshold. However, the revised Recommendation 24 (March 2022) recommends that such a threshold should “be based on a jurisdiction’s assessment of risk, with a <b>maximum of 25%</b> ”.	The absence of a specific threshold or reference to this being specified in regulation could be interpreted to mean all beneficial owners should be reported, which may create undue administrative burdens and collection of irrelevant data. A specific threshold for reporting should be prescribed based on a risk-based approach.
21B	The legislation appears not to contain provisions for instances where there is no identifiable beneficial owner.	The legislation should include provisions on what to do in instances where there is no identifiable beneficial owner.
41A	There are no references in the text to data protection legislation and enabling sharing of data between accountable institutions, nor reference to further guidance being given through prescribed requirements.  Please see Open Ownership policy briefing on <a href="#">BOT and data privacy</a> for further guidance	Open Ownership guidance on applying data protection provisions includes considerations for data minimisation at the point of collecting data, and layered access for data publication.
49A	The FIC amendment Bill only includes administrative fines.	Best practices point to a combination of administrative, criminal, financial and non-financial sanctions. We advise consideration of inclusion of more robust provisions, or mechanisms to refer matters for further prosecution.



## Companies Act: Clause 52 - 58

SECTION	COMMENT(S)	RECOMMENDATIONS
1	<p>Emerging best practice shows benefits of including forms of control which also includes right to profits or distribution of assets or other economic benefits as additional criteria for the BO definition.</p> <p>In addition, having a manner to capture only significant forms of control would strengthen provision and remove noise around collection of data.</p>	<p>Broaden types of specific control beyond voting rights, noting that regulations or guidance notes may be used to have a more comprehensive list of forms of control (for example, control can be exercised directly and indirectly through an entity, contract, arrangement, nominee arrangement, or relationship).</p> <p>Consider the inclusion of a prescribed threshold or capture of only instances of significant control either individually or where multiple individuals act together to exercise beneficial ownership.</p>
1	<p>The catch-all clause is useful to have and is in line with emerging best practice of having an open-ended list of ways ownership and control can be exercised. However, it is limited to decision-making or influencing policy of the company.</p> <p>The definition should also capture indirect ultimate ownership or control through any entity, contract, arrangement, or relationship.</p> <p>Please see <a href="#">OO's policy briefing on definitions</a> for further guidance.</p>	<p>Consider expanding the catch-all at (v) to be more generally applicable.</p>
33	<p>There is no explicit mention of a register of beneficial ownership, while section 50 requires that the company securities include such information. To avoid all doubt, a mention of beneficial ownership should be included in this clause.</p>	<p>Register of beneficial ownership included in 33(aB).</p>
33	<p>Regulations could specify “any person as prescribed” as the general public access provision, and it would be in line with best practice to be explicit in mentioning that access is public.</p> <p>In line with best practice, it would also be useful to specify that prescribed persons should be able to access the historical records from the Commission. This will be particularly</p>	<p>Include access provisions for the public in primary legislation.</p>

SECTION	COMMENT(S)	RECOMMENDATIONS
	<p>important for law enforcement agencies and other investigatory bodies.</p> <p>Not specific on how information will be made available to prescribed persons where there are changes to the BO information.</p>	
33	<p>The insertion of clauses at section 33 make this applicable to all companies, regardless of whether an alternate adequate mechanism for companies to disclose information exists - for example, in the case of publicly listed companies.</p>	<p>Consider applying a limited and disclosable exemption where an adequate alternative mechanism exists.</p>
50	<p>It is unclear if or how this clause will also apply to companies at the point of incorporation; the Bill should provide clarity on this point.</p> <p>On updating changes to beneficial ownership, there could be a case for placing some obligation on beneficial owners to report these changes to a declaring entity and the declaring entity in turn reports to the Commission.</p>	<p>Include provisions that make the disclosure of BO information part of the requirements for the registration or incorporation of a new company.</p> <p>To spread the burden of identifying and reporting BO information, consider placing a reporting obligation on beneficial owners to disclose their ownership or control interest to a declaring entity. This could be particularly relevant for beneficial owners with indirect interests which may not be immediately or easily identifiable to a reporting entity.</p>
56	<p>Amended section 50 would suggest that these changes are already captured in the companies securities which in turn must be filed with the Commission per amended section 33.</p> <p>Unclear if this is a duplication in effort and if so, for what purpose.</p>	
<p><b>No specific section in the Bill provided – general comment</b></p>	<p>The FATF MER notes that “overall, it cannot be said that effective, proportionate, and dissuasive sanctions have been applied against persons who failed to comply with information requirements”. Additionally: “Failure to file annual returns was highlighted by the CIPC as a main compliance violation. Therefore, it does not look like deregistration alone is dissuasive enough and the period of two years prescribed by</p>	<p>It would be prudent to consider whether the legislation should include more appropriate sanctions that are enforceable by the Commission.</p>

SECTION	COMMENT(S)	RECOMMENDATIONS
	<p>the law is rather too long to strike off delinquent companies. The CIPC cannot impose administrative fines for Companies Act violations but must refer such cases to court which seems a cumbersome process.”</p>	

## Financial Sector Regulation Act, 2017: 59 – 61

SECTION	COMMENT(S)	RECOMMENDATIONS
159A	The proposed definition contains useful exclusions of who can be considered a beneficial owner in line with OO’s recommendation that exclude agents, custodians, employees, intermediaries, or nominees acting on behalf of another person qualifying as a beneficial owner	As with other sections of the Bill, the definition could be expanded to give further clarity on reporting obligations by defining the circumstances under which owners or control may apply.
159B	<p>Given the centrality of these standards, we suggest the <i>may</i> be changed to <i>must</i> and include a prescribed period for issuing of these standards</p> <p>Section 159 does not specify how prescribed persons, in particular law enforcement, may have access to BO information held by the financial sector regulator.</p>	Provide certainty on the creation of standards for critical areas of implementation, and consider mechanism for access for (at minimum) law enforcement and competent authorities