GENERAL LAWS (ANTI-MONEY LAUNDERING AND COMBATING TERRORISM FINANCING) AMENDMENT BILL

Corruption Watch and AmaBhungane Joint Submission to Standing Committee on Finance

10 October 2022

Introduction

1. The amaBhungane Centre for Investigative Journalism (amaBhungane) and Corruption Watch welcome the opportunity to make written submissions on the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill (the Bill).

    1.1. AmaBhungane is an independent, non-profit company founded in 2009 to develop investigative journalism so as to promote free, capable and worthy media and open, accountable, just democracy. As amaBhungane practises investigative journalism, we are ideally placed to identify legal, policy and practical threats to the information flows that are the lifeblood of our field. We have worked on information rights matters of direct benefit to investigative journalists and the public at large since 2010.

    1.2. Corruption Watch is a non-profit organisation launched in January 2012. Through public communication, investigation, research and advocacy, Corruption Watch seeks to ensure that the custodians of public resources act responsibly to

advance the interests of the public, and to ensure that opportunities for entering into corrupt relationships are reduced. Corruption Watch is the South African chapter of Transparency International.

2. The submissions are endorsed by the Alternative Information and Development Centre (AIDC), Open Secrets, and Who Owns Whom (WOW).

3. In its efforts to avoid the economic ramifications of grey-listing by the Financial Action Task Force (FATF), South Africa has swiftly prepared the Bill. The Bill proposes a sweeping range of integrated reforms to what were previously disparate pieces of legislation and which regulated vastly different areas of concern: trusts; non-profit organisations (NPOs); companies; and matters concerning the Financial Intelligence Centre. We recognise the importance of responding swiftly and comprehensively to FATF's report on South Africa and of the devastating impact grey-listing would have on our economy. The acts to be amended are: the Trust Property Control Act, 1998 (the Trusts Act); the Non-profit Organisations Act, 1997 (the NPO Act); the Financial Intelligence Centre Act, 2001 (the FIC Act), the Companies Act, 2008, and the Financial Sector Regulation Act, 2017.

4. However, despite the genuine and valid reasons for the urgency in which this Bill was prepared we are concerned at the impact this haste has had on the content of the Bill and on the short time frame for public participation. This Bill does not merely address FATF concerns as it has a significant impact on the entities governed and regulated by the component pieces of legislation. The issues addressed by the Bill are complex and we are disappointed that the Ministry of Finance, Parliament and the public have not been given the time to grapple fully with these issues.

5. Both amaBhungane and Corruption Watch have been involved in processes related to the Companies Act Amendment Bill - particularly around the recording and publication of beneficial ownership data. We take note of the strong emphasis on strengthening beneficial ownership transparency (BO) in the Bill.

6. AmaBhungane also presented submissions on the Non-profit Organisations Amendment Bill last year and has been involved in broad NGO sector engagement on the questions of registration and regulation of NPOs in the country.

Background

7. In its efforts to avoid the economic ramifications of grey-listing by FATF, South Africa has swiftly prepared the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill (the Bill).

8. The Financial Action Task Force (FATF) is an international policy making body established by the Group of Seven (G7). It develops and promotes policies to combat money laundering, terrorist financing and financing of proliferation of weapons of mass destruction. FATF seeks to ensure a coordinated global response to prevent corruption, terrorism and organised crime. Recommendations made by FATF effectively set the global anti-money laundering and counter-terrorist financing standard.

9. FATF's South Africa's Mutual Evaluation Report which was published in October 2021, found that the country is only partially compliant with FATF Recommendations 24 (on the transparency and beneficial ownership of legal persons and 25 (the transparency and beneficial ownership of legal arrangements). The report highlighted that, while South Africa benefits from a *robust legal and regulatory environment*, the challenge of effective beneficial ownership *implementation* remains. FATF also found South Africa non-compliant with Recommendation 8 (non-profit organisations).

10. The purpose of our submission is to flag lacunae that have been identified in the proposed Bill. It is also an opportunity to encourage a more robust and sustainable approach to implementing these reforms in South Africa. This would not only be beneficial for the public, but would also help to ensure that the country's attempts at reform are not seen merely as an exercise in "bandaging" and so demonstrating to the FATF that the country is making progress on the implementation front as well.

11. On 27 July 2022, Corruption Watch submitted a detailed report to the Financial Intelligence Centre (FIC) titled “Beneficial Ownership Transparency of Legal Persons and Arrangements in South Africa”. The report highlights some of the key risks and vulnerabilities within the country’s legal and regulatory framework and proposes a series of recommendations to help address these risks. The report is attached as an annexure to these submissions.

Beneficial ownership

12. This section focuses on those aspects of the Bill that deal with beneficial ownership transparency. Despite welcoming the focus on beneficial ownership in the Bill we have identified several concerns, particularly with regard to definitions. We implore Parliamentarians to consider following a consolidated and simplified approach defining beneficial ownership. This will ensure legal certainty and prevent the ongoing abuse of the system by those who have exploited complex structuring and arrangements in the past.

Consolidated BO definition

The Overarching Definition

13. We have serious concerns around how the definition of a “beneficial owner” has been proposed in the Bill. It is a demonstration of prolixity and fragmentation (i.e. multiple amendments in various pieces of legislation rather than creating a single, universal definition) that subverts the intentions of addressing and properly regulating beneficial ownership. This should be seriously addressed.

14. Clause 15 of the Bill defines “beneficial owner”, as an amendment to the Financial Intelligence Centre Act, 2001 as:

> “. . . [A] natural person who directly or indirectly—
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> (i) ultimately owns or exercises effective control of—
>
> (aa) a client of an accountable institution; or
>
> (bb) a legal person, partnership or trust that owns or exercises effective control of, as the case may be, a client of an

accountable institution; or

(ii) exercises control of a client of an accountable institution on whose behalf a transaction is being conducted; and

(b) includes—

(i) in respect of legal persons, each natural person contemplated in section 21B(2)(a);

(ii) in respect of a partnership, each natural person contemplated in section 21B(3)(b); and

(iii) in respect of a trust, each natural person contemplated in section 21B(4)(c), (d) and (e);''

15. In the framework of this Bill, this definition serves as the primary definition to which definitions in other Acts refer. Proposed amendments to the other Acts in this Bill build upon the definition in the Financial Intelligence Centre Act by adding further detail relevant to their areas of regulation.

16. Our submission is that the Bill should only introduce a single definition of "beneficial owner" within the Financial Intelligence Centre Act. This definition should be sufficiently broad to cater for the various scenarios within which it will be applied. Secondary legislation (such as the Companies Act, Trust Property Control Act, etc.) should not seek to alter or expand the definition as that would introduce regulatory uncertainty and create loopholes that can be exploited. Less is more in this scenario.

17. In July 2021, Open Ownership published guidance to assist states in determining whether their legal definition of beneficial ownership is sufficiently robust. It explains that the following considerations should be taken into account:

a) The definition should state that the beneficial owner must be a natural person.

b) Definitions should cover all relevant forms of ownership and control, specifying that ownership and control can be held both directly and indirectly.

c) A single definition should be provided for in law through primary legislation, with additional secondary legislation referring to this definition.

d) The definition should be sufficiently broad, effectively a “catch-all”, and include a list of different ways in which beneficial ownership can be held.

e) Thresholds should be set sufficiently low so that all relevant people with beneficial ownership and control interests are included in declarations.

f) A risk based approach should be considered to set lower thresholds for particular sectors, industries, or people, depending on the policy objectives set.

g) Definitions should include a clear prohibition of agents, custodians, employees, intermediaries, or nominees acting on behalf of another person qualifying as a beneficial owner.

18. As mentioned above, Corruption Watch and amaBhungane took note of the Companies Act Amendment Bill which the Minister of Trade, Industry and Competition published on 1 October 2021. In terms of that Bill, companies were required to disclose the identities of “true owners”. Corruption Watch’s advice then was to caution that introducing multiple definitions created confusion and risked diluting the efficacy of South Africa’s BO regime. amaBhungane made suggestions on streamlining the definition. The current state of the Bill is not known, with reports suggesting that the Bill has “vanished”.[1] Regardless, it is necessary to address any potential conflicts between the two Bills, and emphasise the need for a single comprehensive definition across all pieces of legislation.

19. Clause 52 of the Bill introduces the following definition of “beneficial owner” into the Companies Act 71 of 2008:

“Section 1 of the Companies Act, 2008, is hereby amended by the insertion after the definition of ‘‘beneficial interest’’ of the following definition:

‘‘‘beneficial owner’—

[1] https://www.businesslive.co.za/fm/features/2022-06-02-why-the-companies-amendment-bill-has-disappeared-again/

(a) has the meaning defined in section 1(1) of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001); and

(b) for the purposes of this Act, in respect of a company, includes, but is not limited to, a natural person who, directly or indirectly, ultimately owns or exercises control of a company, including through—

(i) ownership of the securities of the company;

(ii) the exercise or control of the exercise of the voting rights associated with securities of that company;

(iii) the exercise or control of the exercise of the right to appoint or remove members of the board of directors;

(iv) ownership, or the exercise of control of—

(aa) a holding company of that company;
(bb) a juristic person other than a holding company of that company;
(cc) a body of persons corporate or unincorporate;
(dd) a partnership; or
(ee) any other category or type of entity that may be specified in regulations for this purpose, 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

(v) the ability to otherwise materially influence the decision-making or policy of the company;''."

20. This definition adds a significant degree of content to the overarching definition in the FIC Act. Furthermore, it is extremely convoluted and will create more loopholes rather than fix them.

21. The first concern is that paragraph (b) states that the definition "includes but is not limited to a natural person". By its internationally-accepted definition a beneficial owner should always mean a natural person and nothing else. In addition, in subparagraph (iv)(aa) reference is made to a "holding company of that company". This is a non-sequitur as no number of intermediary legal entities should matter when one is concerned with establishing the identity of the beneficial owner.

22. Under the proposed definition in the Bill, it is not clear what the beneficial ownership disclosure thresholds are, nor are the prohibitions clear.[2] In the section that follows, we propose one such prohibition that should be considered, namely nominee arrangements that have been abused perniciously within the South African context.

Nominee Arrangements

23. Clause 15 of the Bill addresses nominee arrangements through its amendment of the definition of "beneficial owner" in the Financial Intelligence Centre Act 38 of 2001. Specifically, clause 15(d) as emphasised below provides:

> 'beneficial owner'—
>
> (a) means a natural person who directly or indirectly—
>
> (i) ultimately owns or exercises effective control of—
>
> (aa) a client of an accountable institution; or
>
> (bb) a legal person, partnership or trust that owns or exercises effective control of, as the case may be, a client of an accountable institution; or
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> **(ii) exercises control of a client of an accountable institution on whose behalf a transaction is being conducted; and**
>
> (b) includes—
>
> (i) in respect of legal persons, each natural person contemplated in section 21B(2)(a);
>
> (ii) in respect of a partnership, each natural person contemplated in section 21B(3)(b); and

[2] Threshold in this respect relates to the percentage of ownership / shareholding / interest that a natural person is required to hold before he/she is compelled to disclose their status as beneficial owner. Prohibitions relate to certain ownership / control / arrangements that are not legally permissible. An example of this in South Africa would be bearer shares.

(iii) in respect of a trust, each natural person contemplated in section 21B(4)(c), (d) and (e);" (Emphasis added)

24. In respect of nominee arrangements, we also note that while there are jurisdictions, such as Thailand and Indonesia, that outright prohibit the use of nominee arrangements,[3] South Africa has opted instead to attempt to regulate them.

25. The latest revision of the FATF's rule on BO has highlighted that the phenomenon of "nominee beneficial owners" violates FATF rules. The revision also introduces new definitions for nominee directors, nominee shareholders and nominator. These definitions explicitly state that a nominee can never qualify as a beneficial owner.[4]

26. The Bill's approach to nominee arrangements should be seriously reconsidered. In some instances, State Capture was enabled through the use of nominee arrangements (see for instance, the "Regiments post-box scandal" where over R1 billion in consulting contracts was won from Transnet through the use of nominee directors, discussed in Corruption Watch's report, attached as an annexure to these submissions). With the country still reeling in the aftermath of State Capture, it is not clear what the intention of preserving these arrangements is.

27. Furthermore, we foresee significant implementation challenges for South Africa should it choose to follow this course. For one, compliance will be incredibly difficult to enforce and non-compliance will be even harder to detect. Our view is that this will serve to hinder the country's performance in FATF Mutual Evaluations, rather than to improve them - especially since South Africa's greatest weakness was found to be the effectiveness of its implementation.

Data verification

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[3] Article 33 of the Law of the Republic of Indonesia N. 25 of 2007 Concerning Investment provides:
"1) Both domestic and foreign investors in form of Limited Liability Company are prohibited from entering into any agreement and/or making statement confirming share ownership in the limited liability company and on behalf of another party. 2) In the event that both domestic and foreign investors enter into agreement and/or make statement set forth in paragraph (1) above, such agreement and/or statement shall be null and void for the sake of the law."

[4] Krause, The new FATF rules on beneficial ownership and nominee relationships - a step in the right direction 2 May 2022, Stolen Asset Recovery Initiative.

28. In the Mutual Evaluation report, there were clear issues identified within South Africa's data verification and beneficial ownership data collection processes:

> "Criterion 24.5 – There are some mechanisms to ensure that some of the information referred to in c.24.3 and c.24.4 is accurate and up to date. Companies must file annual returns at the CIPC confirming the status of the information previously provided (s.33). They must also file notices with the CIPC when: the registered office changes (s.23(3)(b)(ii)) as read with s.23(4)(a-b)); directors change (s.70(6) as read with Reg.39); there are changes to the class of shares the company can issue (s.36(4) as read with Reg.15(3)); and changes in the location of where the company's records are accessible (s.25(2)(b)). ***However, there is no time limit for filing the latter. Securities registers on shareholding must also be maintained although there is no requirement for these to be kept up to date*** (s.50(1)(b) as read with Reg. 32). ***The CIPC is not obliged to verify for accuracy any of the information submitted to it but uses the DHA database (which it can access directly) to verify the ID information of company officials at the time of registration.***
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> . . .
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> Criterion 24.7 – ***South Africa does not have a comprehensive mechanism to ensure that all legal persons keep accurate and up-to-date information on BO, including the CIPC. Other mechanisms, like keeping accurate and updated BO information through a BO register are also not available.*** Although, BO information obtained by AIs must be kept up-to-date and accurate (FIC Act, ss. 21C(b) and 21D), these do not cover all FIs and DNFBPs (see c.1.6). Where BO information can be obtained through share registers, any amendments to shareholding are supposed to be entered in the share register within ten days (s.36.4 as read with Reg.15(3))."[5] (Emphasis added)

29. Investigative journalists have found that perpetrators of State Capture were empowered by the fact that business addresses were unverified. In some instances, registered company addresses were "business post-boxes". In other instances, the address would

[5] http://www.treasury.gov.za/publications/other/Mutual-Evaluation-Report-South-Africa.pdf at p 198-199.

lead to an abandoned building or an open field. The lack of verification made it considerably harder to identify accountable individuals. This is discussed in detail in the Corruption Watch report, attached as an annexure to these submissions.

30. In order to address this weakness identified by FATF we propose that the Bill seeks to encourage compliance through the provision of an administrative sanction. Additional verification measures (e.g. updates to a company's business address and other relevant information) may be included in a company's annual return - with the addition of turnover thresholds, imposed through regulation, to ensure that smaller entities are not overburdened. The remainder would come down to implementation: ensuring appropriate budget allocations, resourcing and monitoring of performance / compliance.

Effective implementation and administrative sanctions

31. Clause 17 provides that the implementation of the FIC Act must be reviewed annually and a report must be submitted "that includes information that is necessary to demonstrate the implementation of the Act, to the Minister". However, this in itself will hardly suffice in convincing evaluators that the country is on the right track. The Bill will need to be accompanied by inter-departmental coordination committees, adequate staffing, tools and budget allocations as well as a demonstrable track record in sanctioning non-compliance.

32. A requirement for this form of inter-departmental coordination should be clearly stipulated in the Bill.

33. Furthermore, clause 20 provides for the submission of suspicious transaction reports (STRs) by accountable institutions. The current challenge with STRs is that there is no way of knowing whether accountable institutions are in fact reporting suspicious activities. Nor is there any way of tracking whether the FIC is in fact acting upon the STRs that it receives.

34. At a bare minimum, the number of reports and the actions taken on them should be recorded. To this effect, we submit that Clause 17 should expressly provide for greater transparency and accountability - both to the Minister and to the wider public. This could

be done in the form of the Minister presenting the annual report before the relevant portfolio committee in Parliament and the report itself being made publicly accessible. The following wording is proposed:

> "(e) annually review the implementation of this Act and submit a report [thereon] that includes information that is necessary to demonstrate the implementation of the Act, to the Minister. Upon receiving the report, the Minister is required to publish it and present an implementation update based on the report before Parliament."

35. Clauses 37-42 introduce administrative sanctions for a range of activities related to non-compliance. The FIC Act assigns officials a number of enforcement powers, including issuing directives or a monetary fine. The fine is capped at R10 million for natural persons and R50 million for legal entities.[6]

36. We recommend that a record of companies that have been sanctioned and, where a monetary penalty was imposed, the amount they were fined should be kept and published.

37. In addition, to strengthen these sanctions, as part of the implementation monitoring, the fines should be commensurate taking into account the net worth / value / turnover of the individual / company. This, to ensure that there is no risk of wilful noncompliance. Consequences for non-compliance should be clear and have a deterrent effect. There exists the possibility that the incorporation of an administrative sanction as a cost of doing business will not have the desired effect of preventing/deterring violations.

38. However, there is one element of the application of the administrative sanctions regime that concerns us. The amendment proposed in clause 39, section 52 of the FIC Act detrimentally impacts the practise of journalism. The amended provision would read:

> "An accountable institution, reporting institution or any other person that fails, within the prescribed period, to report to the Centre the prescribed information in respect of a suspicious or unusual transaction or series of transactions or enquiry

[6] Financial Intelligence Centre Act 38 of 2001, section 45C.

in accordance with section 29(1) or (2) is non-compliant and is subject to an administrative sanction"

39. The inclusion of "any other person" would include a journalist reporting on issues relevant to the FIC, and so creates an offence for a journalist to fail to report prescribed information to the FIC. This creates an ethical conflict, and would severely hamper the ability of journalists to investigate and report on instances of financial crime. Given the critical role the media has played in uncovering State Capture and other instances of fraud and corruption in South Africa, this would be extremely detrimental to the country.

40. We propose two possible solutions:

    40.1. "Any other person" could be changed to "accountable person", which could be defined as any person with a relevant fiduciary or legal responsibility.

    40.2. "Any other person" could be qualified by including the phrase "not covered by the exemption for journalistic, literary or artistic purposes under section 7 of the Protection of Personal Information Act."

41. We also suggest that Parliament should consider retaining the wording which creates an offence, as opposed to an administrative sanction, the consequence for which could be a fine and or imprisonment.

Fragmentation of registers: a call for the adoption of BODS

42. In terms of Criterion 24.6 of South Africa's October 2021 Mutual Evaluation Report, the following observation is noted:

> "South Africa addresses the requirements under this criterion through option (c) (FIC Act, s.21B). Refer to c.10.10 and c.22.1 for detailed analysis. In addition, the FIC can obtain information from AIs (FIC Act s.27A) subject to the limitations to the scope of AIs (see Recs 10 and 22). Further, the FIC can request any person with a reporting obligation to provide information, including on BO information (FIC Act, s.27). The FIC then uses this information to determine with which FI,

> DNFBP, or VASP a legal person is a client and provides the information to LEAs who then can apply for a subpoena to compel provision of any BO information held (CPA, s.205). Not all persons with reporting obligations are AIs (including VASPs) and thus must obtain and maintain BO information. ***The above processes do not guarantee timely access to BO information by LEAs***."[7] (Our emphasis)

43. There are two points worth noting. Firstly, the Bill does not attempt to introduce any regulation around the use of virtual assets. This, despite the fact that the National Treasury's Crypto Assets Working Group published a detailed paper on 11 June 2021 containing 25 recommendations on how crypto assets should be regulated within South Africa.[8] Given the work that has been done on this issue, it appears to be a missed opportunity not to use this Bill to ensure that the most recent FATF risks are properly addressed.

44. The second and most critical issue is that the Bill attempts to improve beneficial ownership data access to law enforcement agencies by mandating the creation of various registers: a beneficial ownership register for trusts within the Masters Office (Clause 5); a register must be kept and made available by directors of NPOs (Clause 12); and a beneficial ownership register for companies within the Companies and Intellectual Property Commission (Clause 53).

45. The creation of registers is a vital introduction. However, we have concerns with how the Bill regulates the recording and publication of those registers - primarily because the Bill creates a number of different registers for each type of entity regulated by the component pieces of legislation and the differing obligations on those different entities in maintaining those registers.

46. In the absence of an agreed standard or approach between these various entities, there is a serious risk that beneficial ownership data will be fragmented and will do little to assist law enforcement agencies in accessing the requisite information timeously.

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[7] http://www.treasury.gov.za/publications/other/Mutual-Evaluation-Report-South-Africa.pdf at p 199.

[8] http://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paper%20on%20crypto%20assets_Final.pdf

47. We call for the adoption and inclusion of the Beneficial Ownership Data Standard (BODS) within the Bill. This will ensure that the data is interoperable not just domestically between departments, but internationally with other FATF member states that have implemented BODS.

48. BODS is an open standard that has been designed to provide guidance on how to collect, organise, share and use high-quality beneficial ownership data. It has been developed in an effort to standardise and harmonise beneficial ownership data so that data from different national bodies or international jurisdictions can be combined to better track and understand global chains of ownership or control.

49. The standard is intended to help policy makers design beneficial ownership disclosure systems that balance accountability with data protection and privacy considerations. BODS ensures that data is stored in a structured format which can then be easily analysed and linked to other datasets. Apart from helping to prevent fragmentation of data internally (i.e. between different departments that collect beneficial ownership information), it also enhances data utility internationally, where the beneficial ownership information can be linked to datasets from other jurisdictions that implement BODS. An inclusion of BODS within the Bill will therefore lessen the administrative burden that may occur in the collection of beneficial ownership data, and is therefore an effective way of addressing FATF's concerns over beneficial ownership data.

50. In addition, compelling directors of NPOs to maintain member registers internally will not ameliorate the concerns flagged by FATF regarding data access as it will simply be a recreation of the current companies beneficial ownership compliance regime that the Mutual Evaluation report had found wanting.

51. Clause 5 of the Bill speaks of an amendment to the Trusts Act, in terms of which beneficial ownership data must be kept in the Masters Office. Given the current manual and paper-based nature of the Masters Office, we have considerable concerns around the practical efficacy of this provision. While the Masters Office may be in a position to receive and capture the relevant information, our view is that it should be linked to and / or stored on the CIPC's infrastructure. The latter is publicly accessible and a more

sophisticated system which would be more cost effective and ensure that the fragmentation concerns are better addressed.

Public registers and addressing POPIA

52. FATF acknowledged that South Africa had a robust legal framework. However, it identified South Africa's greatest shortcoming as being its inability to effectively implement Recommendations 24 and 25. Implementation is not simply rooted in legislative provisions, but it relies on the effectiveness of law enforcement to ensure that illicit activities are identified and appropriately sanctioned.

53. We note with extreme disappointment that the Bill does not seek to make beneficial ownership registers publicly available. Currently, there are only two mentions of public registers in the Bill. Both relate to a "register of persons who are disqualified from serving" as a trustee within a trust (Clause 2) or as an office-bearer within an NPO (Clause 13). FATF has listed the requirement of making beneficial ownership information "publicly available" in their *Guidance on Transparency and Beneficial Ownership* as part of understanding the risk associated with legal persons,[9] and particularly in respect of companies' registers.[10]

54. Given the central role that whistleblowers, civil society and investigative journalists played in uncovering the State Capture project in South Africa, government should be making significantly greater strides in effectively implementing its beneficial ownership regime by taking the public into its confidence. Following this approach would also align with pillars 1 and 4 of South Africa's 2020-2030 National Anti-Corruption Strategy which deal with the promotion of active citizenry and improving the integrity and transparency of the public procurement system.[11]

55. A common concern that is raised when one speaks of establishing a public beneficial ownership registry is that of personal data protection and privacy laws. In South Africa,

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[9] FATF, *Guidance on Transparency and Beneficial Ownership*, 2014, page 13.
[10] FATF, *Guidance on Transparency and Beneficial Ownership*, 2014, page 13
[11] https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf at p 10.

privacy and data protection concerns are given legal effect through the Protection of Personal Information Act 4 of 2013 (POPIA). From a legal perspective, concerns around publishing beneficial ownership data (whether within government internally, to a limited list of designated private institutions or even to the wider general public) is a non-starter.

56. Nevertheless, public officials commonly refer to POPIA as being a blocker for publishing beneficial ownership data. Sections 37 and 38 of POPIA list a number of grounds on which processing of personal information is not a breach of processing conditions. Part of those grounds include:

> a) where the public interest outweighs the interference with privacy rights;
> b) national security;
> c) prevention, detection and prosecution of offences;
> d) fostering compliance with legal provisions;
> e) any function carried out by a public body in terms of the law; or
> f) to protect the public against financial loss due to dishonesty, malpractice or other seriously improper conduct.

57. Any one of these listed grounds could be relied upon to substantiate publishing beneficial ownership data in the face of concerns around potential interference with privacy rights and data protection laws.

58. There is great value in opening access to a beneficial ownership register beyond national competent authorities. Given the cross-jurisdictional nature of the issue, allowing authorities from abroad to have easy, direct, and timely access to information about legal entities and their beneficial owners is instrumental in the fight against money laundering and other financial crimes. Without giving international access, lengthy mutual legal assistance requests will frustrate and prolong investigations.

59. Open registers can also be used proactively rather than reactively. Reporting entities such as financial institutions and designated non-financial business and professions (DNFBPs) could benefit tremendously from access to a beneficial ownership registry. While they would still be expected to undertake their own due diligence, a beneficial ownership register is a valuable tool and could help save costs. The same entities can

support in verifying the integrity of the data on the register by reporting any inaccuracies or irregularities that they detect.

60. Civil society, academia, and the wider public would also benefit tremendously from being able to access beneficial ownership information, as they could assist in identifying corruption and tax evasion or expose conflicts of interest.

61. The report Corruption Watch submitted to the FIC provides concrete examples, through case studies, of how a lack of transparency of beneficial ownership hampers accountability. One of the case studies details the difficulties an amaBhungane journalist faced in accessing information about the real beneficiaries of deals involving the Gupta family's businesses relationship with Eskom and Transnet. It was only through the information provided by whistleblowers that information came to light. Had there been a publicly-accessible beneficial ownership register it would have been more challenging for the Gupta family to successfully capture these state-owned entities, as the true nature of the contracts with Eskom and Transnet would have been transparent. In fact, publicly-accessible beneficial ownership registers may have assisted in ameliorating the scale and impact of load-shedding that the country is currently grappling with.

62. It is vital that the information disclosed provides sufficient information to the public while not unjustifiably limiting POPIA. As mentioned elsewhere, POPIA should not - and need not - prevent disclosure of certain personal information. In addition, the disclosure of severely-redacted beneficial ownership data would not serve the purpose of public disclosure. The legislation should stipulate the minimum standards of information to be disclosed. We have suggested that, at a minimum, the full name and contact details of the beneficial owner be disclosed to allow for "unambiguous identification", as characterised by Open Ownership.[12] The legislation should also require that the regulations clearly set out what information has been collected by the accountable institution but any justifications for why that information is not being made publicly available.

63. We make the following recommendations to allow for proactive disclosure of the registers and ensuring public access to updated registers:

[12] https://www.openownership.org/en/principles/sufficient-detail/

63.1. Section 5 inserts a definition of beneficial ownership into the Trusts and stipulates a series of obligations on a trustee and the Master.

Section 11A(1) A trustee must—

(a) establish and record the beneficial ownership of the trust;

(b) keep a record of the prescribed information relating to the beneficial

owners of the trust;

(c) lodge a register of the prescribed information on the beneficial 45

owners of the trust with the Master's Office; and

(d) ensure that the prescribed information referred to in paragraphs (a)

to (c) is kept up to date.

(2) The Master must keep a register in the prescribed form containing prescribed information about the beneficial ownership of trusts.

(3) A trustee must make the information contained in the register referred to in subsection (1)(c), and the Master must make the information in the register referred to in subsection (2), available to any person as prescribed.

(4) The prescribed requirements referred to in this section 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).'

(5) The prescribed requirements referred to in this section must give effect to ensuring public access to the register.

64. This amendment creates strong obligations on trustees and the Master to establish and keep records of the beneficial ownership of any trust. This is laudable. However, because it limits the availability of the information in the register to "any person as prescribed" this provision restricts the categories of people who could access the information. For a beneficial ownership disclosure regime to be effective, transparency of that information is imperative. We therefore recommend that this Bill provide for either

proactive disclosure of those records or facilitate strong access to information mechanisms in respect of trusts' beneficial ownership registers.

65. We recommend an inclusion in this provision to allow for proactive disclosure of the register of all trusts' beneficial ownership by the Master.

66. One way to do this would be through the inclusion of additional subsections between subsections (2) and (3) in the existing proposed amendment, reading:

> *"(3) The Master must annually disclose in the prescribed manner the full register of all trusts' beneficial ownership within its jurisdiction.*
>
> *(4) The prescribed requirements referred to in this section 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). The requirements must include, at a minimum, the full name and contact details of the beneficial owner to ensure unambiguous identification, a disclosure of any additional information recorded but not available for public access and a justification as to why such information has been withheld, and must provide for access for members of the public to the register."*

66.1. Clause 53 of the Bill proposes amendments to section 33 of the Companies Act. In order to required proactive disclosure in respect of annual returns, we recommend section 1A be amended so that it reads:

> *"(a) The Commission must annually publish all annual returns on a publicly accessible platform and make the annual return contemplated in subsection (1) available electronically to any person as prescribed.*"

66.2. We also recommend an inclusion in subsection (b) to ensure public access to the information governed by this provision. so that it reads:

> *"(b) The prescribed requirements referred to in this section 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). The requirements must include, at a minimum, the full name and contact details of the beneficial owner to ensure unambiguous identification, a disclosure of any additional information recorded but not available for public access and a justification as to why such information has been withheld, and must provide for access for members of the public to the register."

67. In respect of the proposed amendments to section 33 of the Companies Act, we recommend including an obligation on non-profit companies to disclose its members' register in their annual return. Members of a non-profit company are analogous to beneficial owners in a for-profit company. This would also require a change of the provision to which is referred in the subsection: the existing section 50 only relates to companies' securities registers, while section 24(4) of the Companies Act refers to both a securities register and members' register. We recommend an inclusion to subsection (1)(aA) so that it reads:

> *"A copy of the company's securities register, or in the case of a non-profit company that has members its members' register, as required in terms of section [50] 24(4)."*

68. Section 33 also addresses external companies and their obligation to file an annual return. However, the amendments proposed in this Bill do not subject external companies to the beneficial ownership regime. This is problematic.

69. Although not addressed in the Bill, we also proposed an amendment to section 52(2) of the Companies Act. This section addresses the inspection of uncertificated securities registers. To ensure public access to up-to-date details of companies securities registers, we recommend including a provision requiring the proactive publication of this data. This is not unprecedented: in the past, the central securities depository provided third-party access to uncertificated securities register data. An amendment to section 52(2) would make that disclosure mandatory and would ensure that such disclosure is not prohibited by POPIA. This proactive disclosure would relieve companies of the administrative burden of fielding direct requests under section 26 of the Act and does not go further than the right of access provided for in section 26(2) in respect of the content of

information to which the access is permitted: it merely makes the access more immediate and effective. We proposed an amendment to section 52(2), so that it reads:

> *"A person who wishes to inspect an uncertificated securities register may do so [only] -*
>
> *(a) Through the relevant company in terms of section 26; [and] or*
>
> *(b) [in accordance with the rules of] through the central securities depository in accordance with its rules."*

70. The Bill proposes the addition of two subsections to section 56 of the Companies Act. The position of these subsections is curious as the proposed additions address beneficial *ownership* while section 56 as a whole addresses beneficial *interest*. Nevertheless, these proposed additions introduce important reporting obligations for companies in respect of their beneficial ownership information. However, these provisions do not provide for the disclosure of or access to this information. What is important about the filing of a record under subsection 12 is that it creates a real-time, updated record of a company's beneficial ownership. This Bill has introduced the requirements for annual disclosure of beneficial ownership through the filing of annual returns under section 33, but subsection 12 of section 56 would require the filing of additional notices within a "prescribed period". While we cannot know what that prescribed period will be until it is prescribed in terms of the Act, it seems clear that it will be more regular than annual (because of the annual requirements elsewhere in the legislation). This is commendable and will enable the CIPC to collect information on beneficial ownership throughout the year without having to wait for the annual returns. However, there is no provision for disclosure of this information or for access to that information. We therefore recommend an additional provision be added, and that the provisions be amended to read:

> *"(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.*

(13) The Commission must make any updates received in subsection 12 available on a publicly-accessible platform in the prescribed form and containing the prescribed information for publication.

(14) The prescribed requirements referred to in subsections (12) and (13) 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). The requirements must include, at a minimum, the full name and contact details of the beneficial owner to ensure unambiguous identification, a disclosure of any additional information recorded but not available for public access and a justification as to why such information has been withheld. and must provide for access for members of the public to the register."

71. The amendments we have proposed above create a two track-system for access to information about companies' beneficial ownership: through the publication by the Commission of companies' *annual* returns; and through the publication by the Commission of updated information as and when it is received. This does not remove the rights of individuals to apply for access to additional information, which we propose be regulated through these provisions directly (without removing the application of the Promotion of Access to Information Act, 2000). This system therefore creates a proactive and up-to-date record which will be accessible to any interested person with the opportunity for individuals to request further access.

Information sharing between "organs of state" substituted by "national departments"

72. We note the substituted definition of "authorised officer" as described in section 15 which provides as follows:

> Section 1(1) of the Financial Intelligence Centre Act, 2001, is hereby amended—
> (a) by the deletion in paragraph (h) of the definition of ''authorised officer'' of ''or'';
> (b) by substitution in the definition of ''authorised officer'' for paragraph (i) of the following paragraph: ''(i) an investigative division in [an organ of state] a national

department authorised by the head of [the organ of state] that national department to act under this Act; or'';

73. The substitution of "organ of state" with "national department" does not eliminate confusion as the Bill suggests. Instead, it introduces a far narrower definition and excludes certain critical state functionaries from being able to participate in critical information sharing. National departments are listed in Schedule 1 of the Public Service Act,[13] and include bodies such as the South African Police Service (SAPS), the Independent Police Investigative Directorate (IPID) and the South African Revenue Service (SARS).

74. We note with concern that the definition of "national department" is unnecessarily restrictive and that the "organ of state" definition should be preferred. Our view is that use of the term "national department" will create ambiguity, as there will be confusion around the inclusion of provincial and local government divisions of national bodies (e.g. provincial treasuries or regional SAPs offices). The "organ of state" definition is well-established in our law and should be used.

Amendments to the Financial Sector Regulation Act

75. Clause 59 of the Bill proposes an amendment to the Financial Sector Regulation Act in terms of the Regulator's directives in relation to beneficial owners. Section 159C within the proposed amendment, in relevant part, will provide:

> "(2) A beneficial owner of a financial institution must comply with a directive issued in terms of subsection (1)." (Our Emphasis)

76. The section fails to impose any sanction to encourage adherence. Our suggestion would be to consider expressly stating that failure to comply constitutes an offence in terms of section 265 of the same Act. The corresponding amendment to section 265 of that Act would be:

> "A person who contravenes sections 46(1) or (2), 52, 69(1) or (2) or 74 **or 159C** commits an offence and is liable on conviction to a fine not exceeding R5 000

[13] https://www.naptosa.org.za/2014-05-07-14-31-25/relevant-acts/2561-publicserviceact/file

000 or imprisonment for a period not exceeding five years, or to both a fine and such imprisonment." (Our addition)

Amendments to the Trust Property Control Act

77. Clause 2 of the Bill (which amends section 6 of the Trust Property Control Act) disqualifies individuals from holding the position of trustee on various grounds. Subsection (1B)(a) limits this disqualification to 5 years. This disqualification is too short. Grounds for disqualification include acts of dishonesty like fraud.

78. Comparable offences, such as those imposed for delinquent directors in terms of section 162 of the Companies Act, prescribe a minimum ban of 7 years. At the very least the provision as proposed in the Bill should match this standard - given the severity of the acts that form the basis of the grounds for disqualification. The same holds true for disqualification in terms of the NPO Act as proposed by the Bill.

Public Participation in Drafting of the Regulations

79. There are numerous instances where the Bill confers responsibility to prescribe reporting requirements, time periods and people to whom information can be disclosed in regulations. The regulations are to be determined in consultation with the FIC, but there is no mention of public participation in the drafting process. The sheer volume of material to be determined in regulations means that much of the content of these amendments to the Acts has not been determined in the legislation. Without public participation in the regulation drafting process there will therefore be no opportunity for concerned organisations and individuals to provide input on this important content. It is therefore imperative that public participation be written into the Acts through this Bill.

80. We recommend the following inclusion in all the provisions in which content is to be prescribed (the example is from clause 2 of the Bill):

"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), and after a full period of public consultation, including opportunity for the public to make written and oral submissions."

81. The Clauses in the Bill which would require such amendment are: 2, 4, 5, 11, 12, 13, 53, 54, and 55.

Non-profit organisations

Proposed Amendments to the Nonprofit Organisations Act, 1997

82. FATF rated South Africa as non-compliant with recommendation 8 on nonprofit organisations. The two main reasons for the non-compliance was that South Africa had not assessed the NPO sector to identify which organisations "based on their characteristics or activities" are at risk of terrorism funding and that the country "has no capacity to monitor or investigate NPOs identified to be at risk of TF abuse".[14]

83. It is concerning that it appears that no effective assessment to identify those organisations at risk has been conducted prior to the drafting of these amendments. We understand that a NPO Task Team had been appointed, but there has been no indication of what assessments it conducted or of its findings. Without understanding the nature of the threat of terrorism financing to NPOs and the subset of NPOs which are particularly vulnerable it is irresponsible to implement measures which purport to respond to those vulnerabilities. And without having access to the Task Team's findings, it is impossible for the public to understand what threats the amendments in this Bill are addressing.

84. South African non-profit organisations receive an estimated R17.2 billion in funding annually and use these resources to provide crucial services that government is not capable of (or neglecting in) providing. The risks to the sector of increased administrative burdens to ensure this continued funding will be significant and will have a devastating effect on the socioeconomic lives of countless vulnerable people.

85. Section 10 of the Amendment Bill amends section(1)(a) of the NPO Act and imposes a requirement on all NPOs - including foreign NPOs - to register in terms of the Act. The

[14] FATF South Africa Report, page ?.

amendment therefore has the effect of dramatically changing the voluntary nature of registration for NPOs into a compulsory registration regime, within the same NPO Directorate in the Department of Social Development.

86. The purpose of compulsory registration of NPOs in this Bill appears to be to enable monitoring of NPOs as stipulated by FATF in its report. However, this is an overly-broad response and the measures implemented in the Bill will not achieve the standards established by FATF.

86.1. Although FATF does mention that South Africa had identified the lack of compulsory registration for NPOs as one of the risk factors for terrorism financing to the NPO sector, merely implementing a compulsory registration system will not ameliorate that risk.

86.2. First, compelling *all* NPOs to register may be unnecessary as monitoring is only required for NPOs "identified to be at risk of TF abuse". It is impossible to know whether a compulsory registration regime is the most appropriate way to monitor those NPOs without knowledge of the findings of the assessment of the NPO sector's risk factors.

86.3. Second, the regime proposed in the Bill simply converts the current, voluntary registration regime into a compulsory one, without creating any measures specific to monitoring and investigating *terrorism financing*. The objectives of voluntary registration under the existing NPO Act are dramatically different to the objectives of compulsory registration to give effect to the FATF requirement for monitoring and investigation of terrorism financing.

86.4. Third, the amendments would continue housing the NPO Directorate - now with compulsory registration - within the Department of Social Development (DSD). This is not the appropriate entity to house such a directorate which has the purpose of monitoring and investigating terrorism financing. In fact, FATF reports that "South Africa has identified the following risks of TF abuse to its NPO sector [including that] 'the DSD, the main NPO regulator, does not have the monitoring

nor investigative capacity as it relates to national security. It is not a security cluster department and it does not consider national security risks'".[15]

86.5. Finally, compulsory registration for all NPOs will result in the DSD receiving large amounts of information from applicant NPOs. This will create an administrative nightmare as the department is under-capacitated and is unable to deal with the current volume of information and administrative work from *voluntary* registration. However, more fundamentally, given that the FATF objective of creating a monitoring and investigative system it is incredibly unlikely that the NPO Directorate will be able to examine all the information it receives and assess it for possible terrorism financing abuse.

87. It is therefore clear that the NPO Directorate has neither the capacity nor the expertise to adequately provide the monitoring and investigative functions that FATF would require.

88. We therefore recommend that the provisions amending the NPO Act to incorporate compulsory registration be removed in their entirety from this Bill.

89. If our recommendations to not remove the compulsory registration be accepted, at the minimum the sanctions for failure to comply with the requirements should be reduced. At present, Section 14 of the Bill includes failure to comply with section 12 and 18(1)(bA) of the NPO Act (concerning the requirements for registering an NPO) to be an offence, with a penalty of a fine and or imprisonment (unspecified). We accept that, if there is a regime of compulsory registration compliance should be mandatory for registering an NPO, but the sanctions of an unspecified fine or term of imprisonment is disproportionate to the offence. Given the capacity constraints affecting the regulation of NPOs at present, it is highly likely that there will be little capacity to assist NPOs in registering. The sanctions therefore could be used against under-resourced and vulnerable NPOs who simply do not have the resources or knowledge of the legislative requirements to comply.

90. We do recognise the urgency of remedying the weaknesses in our legislative framework to ensure compliance with FATF standards. We recommend, however, that as the existing amendments are inappropriate and insufficient there are alternatives measures

[15] FATF South Africa Report, page 95.

which South Africa could adopt to more effectively create a system for monitoring and investigation of terrorism financing abuse. The choice of measures must be informed by the assessment of the NPO sector required by FATF.

91. We recommend that the Task Team develop a list of characteristics and activities that will assist in identifying NPOs that are at risk of terrorism financing. These should be included or outlined in a report by the Task Team, which should be made publicly accessible.

92. The United Kingdom - long a model country in respect of FATF compliance - has a compulsory registration regime, but the regulator, the Charities Commission is apolitical. The Charities Commission is a governmental department without a ministerial head and the enabling legislation states that "[i]n the exercise of its functions, the Commission shall not be subject to the direction or control of any Minister of the Crown or other government department".[16] If the assessment of South Africa's NPO sector leads to a recommendation that compulsory registration for all NPOs be implemented, an independent and fully capacitated NPO regulator would be a preferable alternative to the existing NPO Directorate within the DSD.

93. There are other examples from around the world which provide a system that is more appropriate to South Africa. In the Isle of Man, after attempts were made to adopt a compulsory registration system the government engaged with the NPO sector and resolved to implement a narrow registration system. The chosen system requires *only* those NPOs identified as being at the greatest risk of terrorism financing - designated as Specified Non-Profit Organisations - register. FATF has described the Isle of Man's system as being an "efficient use of its efforts and resources while protecting low risk NPOs from the unnecessary burden associated with meeting the requirements of the registration and oversight regime".[17]

94. Many NPOs in South Africa are already subject to oversight mechanisms. Foreign NPOs are required, under section 23(1)(a) of the Companies Act, to register with the CIPC; the

[16] Section 13(4) of the United Kingdom's Charities Act
[17] FATF, Combating the Abuse of Non-Profit Organisations (Recommendation 8): Best Practices, June 2015. Available at: https://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf.

Companies Act applies to domestic nonprofit companies who register as public benefit organisations; and trusts are subject to the Trust Property Control Act.. The CIPC, SARS and the Masters of the High Court are much better placed that the DSD to monitor the flow of money and identify suspicious transactions that may represent terrorism financing.

95. We recommend that those, existing, structures be utilised and built upon. There are two, existing mechanisms that NPOs voluntarily use: either, registration under the Companies Act as a nonprofit company, or with SARS as a public benefit organisation.

96. One solution could be that a threshold of annual income for NPOs be developed above which all NPOs must register as NPCs or as public benefit organisations, and therefore be subject to the Companies Act and oversight by the CIPC, or by SARS. The threshold should be determined after consultation with the NPO sector.

97. The Ministry of Finance, in consultation with the DSD and being guided by the NPOTT findings, should determine whether registration as an NPC or as a PBO (for NPOs above the prescribed threshold) would most effectively respond to FATF's concerns.

98. We recognise that the existing systems were in place for the FATF evaluation and that FATF found South Africa to be noncompliant with its NPO requirements with those systems. However, these entities are far more capacitated - from a financial, personnel and financial expertise perspective - than the DSD to monitor for terrorism financing abuse. Our suggestion is to amend the responsibilities of those entities rather than of the NPO Directorate under the DSD.

99. Rather than imposing additional responsibilities on the NPO Directorate and the DSD - which are already severely underfunded and under-capacitated and do not have a national security mandate or expertise - the existing structures should be strengthened. This could be done through comprehensive training on terrorism financing the its abuse through the NPO sector would provide an intermediate solution to the problem. Obligations on these entities to share information with other accountable institutions could also be contemplated to greater facilitate inter-agency cooperation in monitoring and investigating the abuse of NPOs for terrorism financing.

100. We call on Parliament to ensure there is greater consultation with the NPO sector on measures that will have a fundamental impact on their operations.

CONCLUSION

101. While we recognise the critical need to implement measures to respond to FATF's concerns urgently, we submit that there are weaknesses in this Bill which will both fail to adequately address FATF's concerns and will create severe negative consequences on various entities regulated under the Bill's component pieces of legislation.

102. The summary of our main recommendations is:

102.1. A simplified and consolidated definition of "beneficial owner" which applies across all relevant legislation.

102.2. The removal of the possibility of a non-natural person falling under the definition of "beneficial owner".

102.3. A consolidation of beneficial ownership register information and the inclusion of the BODS.

102.4. The prohibition of nominee arrangements.

102.5. The strengthening of administrative sanctions to improve compliance.

102.6. The inclusion of an exemption for journalists from reporting obligations which would constitute the commission of an offence.

102.7. The creation of a proactive disclosure regime for all registers of beneficial ownership information, and a legislative confirmation of the right of access to this information.

102.8. A requirement for full public participation in the drafting of regulations under the Bill's composite pieces of legislation be included in any relevant amendments.

102.9. That the offences for trustees be increased in line with other relevant legislation.

102.10. In respect of information sharing between state entities, the use of "government department" be replaced with "organ of state".

102.11. A full assessment of the NPO sector and its vulnerability to terrorism financing be conducted, and (including if such an assessment has been conducted) shared with the public.

102.12. A removal of the compulsory registration requirement for NPOs with the DSD, and a system implemented where all NPOs above a certain annual turnover threshold be required to register with one of the existing financial oversight entities (the CIPC or SARS).

SUBMISSION ON BENEFICIAL OWNERSHIP TRANSPARENCY OF LEGAL PERSONS AND ARRANGEMENTS IN SOUTH AFRICA

Prepared for

CORRUPTION WATCH

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corruption watch
10 YEARS PUSHING FOR CHANGE
2012 2022

DEFINITIONS

BO	-	Beneficial Ownership
BODS	-	Beneficial Ownership Data Standard (created by Open Ownership)
BOT	-	Beneficial Ownership Transparency
Commission	-	The Companies and Intellectual Property Commission
DPSA	-	Department of Public Services and Administration
DNFBP	-	Designated Non-Financial Business and Professions
FATF	-	Financial Action Task Force
G7	-	Group of Seven
G20	-	Group of Twenty
IMF	-	International Monetary Fund
OGCIO	-	Office of the Government Chief Information Officer
PEP	-	Politically Exposed Person
POPIA	-	Protection of Personal Information Act 4 of 2013
UNODC	-	United Nations Office on Drugs and Crime
SITA	-	State Information Technology Agency
StAR	-	Stolen Asset Recovery Initiative

INTRODUCTION

On 25 May 2022, the South African Financial Intelligence Centre invited actors from civil society and the private sector to make submissions on beneficial ownership transparency of legal persons and arrangements in South Africa.

As a member of the Group of Twenty (G20), South Africa committed to the G20's Global Framework for Tracing Beneficial Ownership and had adopted the G20 High-Level Principles on Beneficial Transparency back in 2015. These commitments call on states to prevent the misuse of legal entities and legal arrangements of ownership for illicit purposes.

The Financial Action Task Force (FATF), an international policymaking body established by the Group of Seven (G7), develops and promotes policies to combat money laundering, terrorist financing and financing of proliferation of weapons of mass destruction. FATF seeks to ensure a coordinated global response to prevent corruption, terrorism and organised crime. Recommendations made by FATF effectively set the global anti-money laundering and counter-terrorist financing standard.

South Africa has been a member of FATF since 2003. Its level of compliance is measured through Mutual Evaluation Reports which are conducted periodically. To date, four such evaluations have taken place.

FATF Recommendations 24 and 25 relate to the transparency and beneficial ownership of legal entities and arrangements. Countries are mandated to ensure that competent authorities have prompt access to beneficial ownership information that is up-to-date, adequate and accurate.

South Africa's Mutual Evaluation Report which was published in October 2021, found that the country is only partially compliant with FATF Recommendations 24 and 25. The report highlighted that, while South Africa benefits from a robust legal and regulatory environment, the challenge of effective implementation remains. Effective implementation is a perennial concern - particularly as the public grows increasingly despondent with laggards in law enforcement who fail to hold corrupt individuals to account.

The Deputy Director-General of the National Treasury, Ismail Momoniat, has openly stated that South Africa will need a miracle to escape being greylisted by FATF in early 2023.[1] Recent research by the International Monetary Fund has shown that the economic repercussions of greylisting are severe. The largest impact is on capital inflows, with the study suggesting decreases on average by 7.6% of GDP when a country is greylisted. Foreign Direct Investment declines by 3% of GDP, portfolio inflows by 2.9% of GDP and other investment inflows decline on average by 3.6% of GDP.[2]

In a country that is still reeling from the aftermath of years of endemic corruption, widening inequality, unabating power cuts and unsustainable price increases, South Africa can ill-afford the dire economic consequences that follow greylisting.

Corruption Watch calls for a swift, coordinated and deliberate response from government to introduce an open data beneficial ownership registry in South Africa. This submission seeks to provide context and share experiences, highlight risks, red flags and to offer possible avenues through which South Africa can seek to improve its FATF compliance rating with regards to beneficial ownership recommendations and reduce the risk of opaque corporate structures being used to facilitate fraud and corruption.

BACKGROUND

If you brought up the issue of “beneficial ownership transparency” to an ordinary person on the street, you should not be surprised to find a confused face staring back at you. It is, after all, a policy area that is as complex as it is novel. There are some concepts that should be explained before the importance of beneficial ownership transparency can be fully appreciated.

Perhaps the most important of these is the idea of “separate legal personality” - something which many legal entities possess. Separate legal personality enables a range of entities to purchase, sell and hold assets, enter into a variety of commercial transactions, open bank accounts, pay taxes and even sue or be sued in their own name.

[1] It'll be a miracle if SA escapes global money-laundering watchdog's greylist, says Treasury | Fin24
[2] Kida and Paetzold *The Impact of Gray-Listing on Capital Flows: An Analysis Using Machine Learning* 27 May 2021, IMF Working Paper WP/21/153, International Monetary Fund. The Impact of Gray-Listing on Capital Flows: An Analysis Using Machine Learning

What is the reason for all of this? The idea of a fictional legal entity that exists as a separate juristic person has been around since antiquity.[3] However legislation creating modern companies as we know them first emerged in the mid-1800s.[4] The company provided a perfect vehicle through which to limit one's risk exposure and to prevent being held personally liable in the event that an investment went awry. Given that a company could exist beyond the lifetime of its owner - in perpetuity in fact - also meant that it had far more opportunity for growth over time.

Entities cannot exist without the people that comprise them.[5] In the case of companies, for instance, there are the people who control them (i.e. making day-to-day decisions in terms of what the entity does) and the people who own them (i.e. benefitting from the profits that the entities generate). These people are known as directors and shareholders.

It all seems simple enough. However, imagine a scenario where the shareholder is another company. This company, in turn, has its own directors and shareholders. Imagine repeating this scenario several times. Soon, there is a complex web of interactions between many entities. Identifying all the people involved, especially the ultimate beneficiary, becomes remarkably challenging. The addition of different types of entities and the possibility that an entity is incorporated in a completely different country only serves to add to the complexity. The individual that ultimately benefits from the entire arrangement becomes hidden behind an opaque corporate ownership structure.

The resulting “opaqueness” enables individuals to anonymously engage in a variety of illegal activities: corruption, tax evasion, terrorist financing and other forms of money laundering, to name but a few. Through a series of complex operations and transactions, illicit sources of money are laundered into the legal financial system. For this very reason, FATF included beneficial ownership requirements in their recommendations and countries are assessed through mutual evaluations based on how readily available beneficial ownership data is. It is

[3] The earliest types of recognisable company emerged at the start of the 1600s with the British and Dutch East India Companies. Funding shipping expeditions for trade was an expensive and risky venture at the time.
[4] See the Joint Stock Companies Act 1844.
[5] At least, this is the case for the time being as the world faces an unprecedented level of interest and investment being made in artificial intelligence.

widely accepted that a functional BO framework is an effective tool in combating a whole range of financial crimes - perhaps most notably in South Africa, corruption.

Beneficial ownership transparency is concerned with making it harder for individuals to misuse legal entities for illicit purposes by hiding behind opaque and complex legal ownership and control structures. It does so by identifying the individual(s) who ultimately benefit(s) from the profits and proceeds that legal entities generate or the assets that they hold. Various international bodies such as FATF, the United Nations Office on Drugs and Crime's Stolen Asset Recovery Initiative, and the World Bank have undertaken extensive studies, concluding that the lack of accurate, adequate and timely beneficial ownership information facilitates money laundering and terrorist financing by disguising:

1) The identify of known or suspected criminals as well as politically exposed individuals;
2) The true purpose of an account or property that is held by a legal entity; as well as
3) The way in which funds or property associated with the legal entity are sourced or used.

Framing beneficial ownership transparency and evaluating South Africa's approach

As mentioned above, the beneficial owner is an individual, or multiple individuals, who effectively owns or controls a legal entity. Ownership or control can be exercised in numerous ways, such as holding a controlling ownership interest of a legal person (i.e. holding a significant portion of a company's shares), controlling voting rights or having the ability to appoint or remove individuals from an entity's board of directors.

Effective control can be exercised in other ways. For example, having family links or other relationships with decision makers, being able to veto or otherwise influence a decision that an entity makes, having agreements between shareholders or members, or by holding negotiable shares or an entity's convertible stock.

Because of the various ways in which an individual can be a beneficial owner, identifying one can be a complicated process. Each scenario may present a unique combination of structures / arrangements that require an individual assessment. The criteria for identifying a beneficial owner will usually be provided for in terms of a country's legal and regulatory framework. An

effective BOT regime ensures that a BO can be identified regardless of whether the individual is a national of or resides within that particular country.

The FATF created the following definition of "beneficial owner":

> "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."

Following the Financial Intelligence Centre Amendment Act (FICA) being introduced back in 2017, South Africa has had a legal definition for "beneficial owner". The Act defines it as follows:

> "'Beneficial owner' in respect of a legal person, means a natural person who, independently or together with another person, directly or indirectly, -
>
> (a) owns the legal person; or
>
> (b) exercises effective control of the legal person;"

Last updated in July 2021, Open Ownership has published guidance to assist states in determining whether their legal definition of beneficial ownership is sufficiently robust. It explains that the following considerations should be taken into account:

1) The definition should state that the beneficial owner must be a **natural person**.
2) Definitions should cover all relevant forms of **ownership and control**, specifying that ownership and control can be held both **directly and indirectly**.
3) A **single definition** should be provided for in law through primary legislation, with additional secondary legislation referring to this definition.
4) The definition should be **sufficiently broad**, effectively a "catch-all", and include a list of different ways in which beneficial ownership can be held.
5) **Thresholds** should be set sufficiently low so that all relevant people with beneficial ownership and control interests are included in declarations.

6) A **risk based approach** should be considered to set lower thresholds for particular sectors, industries, or people, depending on the policy objectives set.

7) Definitions should include a **clear prohibition** of agents, custodians, employees, intermediaries, or nominees acting on behalf of another person qualifying as a beneficial owner.

A very clear definition of beneficial ownership or control reduces the risk that workarounds or strategies can be developed to abuse the system and avoid actually disclosing the identity of the individual who ultimately benefits from the arrangement.

The table below seeks to provide a simple benchmark for South Africa's current "beneficial owner" definition in the FICA:

Guideline requirement	
Beneficial owner must be a natural person	✔
Definitions should cover all forms of ownership and control (including that ownership can be held directly or indirectly)	✔
A single definition in primary law	✔
The definition should be broad	✔
Low thresholds	✘
Risk-based approach with a sectoral focus	✘
Clear prohibitions	✘

The table above reflects the current state of South African law at the time of writing. South Africa checks four of the seven recommendations - which would arguably align with its mutual evaluation outcome of partial compliance. However, this evaluation does not take into account the effect of the Companies Amendment Bill which the Minister of Trade, Industry and Competition published on 1 October 2021.

In its October 2021 draft, the Bill requires companies to establish who the "true owners" of companies are. The meaning of "true owner", according to the Bill, is in line with the definition of

"beneficial owner" contained within the amended FICA as well as FATF's recommended definition.

It is unclear why there was a need to create a separate definition for "true owner" when the existing definition contained within FICA could have been incorporated through reference. While the Bill provides assurances that the definitions are aligned, the guideline is clear that a single definition should be preferred. Practically, a single definition also ensures that, when the Court decisions eventually begin to give effect to and interpret the meaning of "beneficial owner", there is no risk that the BOT regime is undermined through fragmentation.

Some of the other sweeping reforms that the Bill proposes are:

1) Companies will be required to ascertain the identity of true owners where the identity of those persons are unknown. Companies must then request registered security holders to provide details of beneficial interest holders on a quarterly basis.

2) In terms of thresholds for ownership or control, companies will be required to register interests in instances where the threshold exceeds 5% or more. This is in line with current trends across jurisdictions following criticisms that the 25% threshold used by early adopters of BOT was insufficient.

3) The establishment and maintenance of a register of disclosure by the company for beneficial interests. A copy of the register will need to be filed with the Companies and Intellectual Property Commission (Commission).

The real impact of these reforms will largely depend on the competent authority's capacity and capability to effectively coordinate and actively ensure compliance. Beyond the need to have the necessary resources to coordinate and scrutinise large volumes of BO reports that will be submitted, which will be considerable, authorities also need to be empowered to impose sanctions for non-compliance. This could potentially take the form of administrative penalties - which could be used to provide additional funding for the compliance regime. This, together with other possibilities is explored in greater detail in the recommendations section below.

The 5% threshold requirement would appear to comply with the guideline recommendation of having a low threshold. Having a threshold assists in striking a balance between reducing the

administrative burden against the need to tackle the abuse of corporate structures. However, having a threshold in the first place does beg the question whether the BOT reform is seeking to address the issue of opaque ownership and its associated criminality or just to make it more challenging for nefarious individuals to disguise their interests. An investigative journalist interviewed in preparing this submission pointed out that many scenarios involving corruption were uncovered when looking at the identities of individuals who hold minor stakes in companies such as 1 or 2%.

Finally, the Bill calls for companies to establish a beneficial ownership register internally and to file a copy of that register with the Commission. This falls worryingly short of the preferred international approach of South Africa establishing its own BO registry within government. Transparency International has highlighted that countries that tend to perform best in terms of compliance ratings with FATF recommendations on BO tend to have their own internal registries. Countries that seek to find alternative approaches to having registries tend to perform worse.

While there may be concerns regarding the amount of coordination and financial investment that is required to establish a BO registry, one need only look at the success of the Commission's Company Registry to see that it can be a viable avenue. Without any sort of investment in digital infrastructure, we fear that the submission of BO register copies on a quarterly basis will bring with it an inordinate administrative burden and also do very little to address concerns regarding effective and prompt access to information.

Types of entities and arrangements in South Africa

In this section we briefly outline the various types of entities and arrangements that exist in South Africa. In an attempt at brevity, Closed Corporations[6] and Cooperatives[7] are not discussed - however their existence should be noted.

[6] Following the Companies Act amendment in 2011, new Closed Corporations can not be registered. However, those registered prior continue to exist. Shareholding is recorded in the form of "members interest" and that information must be disclosed to the Commission.
[7] Cooperatives are regulated in terms of the Co-Operatives Act No 14 of 2005. Registration with the Commission is required. Members of the cooperative are also its shareholders.

a) Companies

There are five types of companies in South Africa:

1) Private Companies (Pty) Ltd
2) Public Companies Ltd
3) State-Owned Companies (SOC)
4) Personal Liability Companies (INC)
5) Non-profit Organisations (NPO)

The minimum number of natural persons required for formation of each type of legal entity are as follows:

Private Company (Pty) Ltd	Public Company Ltd	Stated-owned companies (SOC)	Personal Liability Companies (NIC)	Non-profit Company (NPC)
1	3	3	1	3

Private Company (Pty) Ltd

Private companies are registered in terms of the Companies Act 71 of 2008. Incorporation involves the following four steps:

1) Reserving a name (optional);
2) Filing a notice of incorporation;
3) Filing a Memorandum of Incorporation;
4) Paying a Prescribed Fee.

Directors of the company make the day-to-day decisions that affect the life of the company and are effectively in control of the business. Shareholders have shares in the company which are a representation of ownership. While companies are legally required to keep an internal share register, there is no requirement that this register be shared with the Commission. Furthermore,

there is no requirement that companies undertake enquiries to determine their beneficial owners.

The Commission is responsible for regulating all entities registered with it, keeping a record of all entities and monitoring compliance and enforcing the Companies Act.

Public Company Ltd

Public companies are companies whose shares are traded on listed stock exchanges within the country. As a result, they are subjected to more stringent regulatory requirements. Beneficial ownership is a relevant concern.

For example, for companies listed on the Johannesburg Stock Exchange (JSE), listing requirements define beneficial owner in relation to a security, and means the person or entity holding any one or more of the following: (i) the de facto right or entitlement to receive any dividend, interest or other income payable in respect of that security; and/or (ii) the de facto right or entitlement to exercise or cause to be exercised, in the ordinary course of events, any or all of the voting, conversion, redemption or other rights attached to such security; and/or (iii) the de facto right or entitlement to dispose or cause the disposal of the company's securities or any part of a distribution in respect of the securities.

State-Owned Companies (SOC)

A State-Owned Company / Enterprise (SOC) is an entity that is established by the government. It is empowered to undertake commercial activities and does so on behalf of the state.[8]

There are 128 State Owned / public entities in South Africa and seven legal deposit libraries.[9] The Department of Public Enterprises is the government shareholder representative for most SOCs but not all.[10] SOCs played a central role in the widespread abuse of public funds that transpired during State Capture. The Zondo Commission findings have provided a glimpse into the incompetency and gross mismanagement that is pervasive within these entities.[11]

[8] State Owned Enterprise (SOE) - Overview, Purpose, and Examples
[9] State-Owned Enterprises and other public institutions | South African Government
[10] For example, the Department of Digital Communication and Technologies is the government shareholder representative for the South African Broadcasting Commission (SABC) and the State Information Technology Agency (SITA), amongst others.
[11] Final Reports - Commission of Inquiry into Allegations of State Capture

Personal Liability Companies (Inc)

These sorts of companies are usually utilised by professionals, such as law firms, where directors of the company are legally required to be jointly and severally liable for the company's debts. As the name implies, these entities are not entirely separate from their owners. However, there is a possibility that silent partners are involved in these entities. Apart from what the name implies, a "silent" partner is not a secret one, but rather one that is protected from being held personally liable. It is important that the BO information regarding silent partners in these circumstances is properly captured within a BO registry.

Non-Profit Company (NPC)

Non Profit Companies occupy a unique position within the legal framework. Their existence is governed by the Non-Profit Organisations Act 71 of 1997 and they are registered with the Department of Social Development. As opposed to any other company, and as the name suggests, the aim of these entities is not to generate profits. As a result, these entities do not have shareholders.

Instead, an NPC has an objective or stated purpose outlined in its founding document. An executive director manages the NPC's operations and the NPC's performance is overseen by board members who act as fiduciaries.

However, this does not mean that NPCs are immune from potential abuse. Having an external party exercise effective control over the NPC is still a possibility that needs to be accounted for. Furthermore, NPCs frequently engage in dealings with the private sector as they carry out their work - leaving open the possibility that donations or state grants received by these entities can be redirected to the private sector for nefarious purposes.

Foreign companies

A foreign or external company is one which has been incorporated outside of South Africa. There is no distinction between for-profit or non-profit companies. All that matters is that they

are conducting business within South Africa.[12] Currently, all that is needed when registering a foreign company is:

1) a principal business / service addresses within and outside the Republic;
2) the names of the company directors / persons registering the company within South Africa; and
3) the company's incorporation documents.

Importantly, registration for a foreign company does not require any beneficial ownership disclosure. In fact, a foreign company can undertake a series of activities within South Africa for a period of up to six months without having to register at all.[13] This current state of affairs poses considerable risk. Even accountable institutions such as banks that need to comply with FICA would be able to simply record the name of the individual / natural person that is representing the company within South Africa and conclude that there is a natural person exercising control over the company under the current definition of "beneficial owner".

Transparency International has recommended that, where foreign companies invest in a country, it should be mandatory for those companies to disclose BO information, just as domestic companies should, before any investment takes place. This requirement should apply equally to activities such as opening a bank account or purchasing real estate.[14]

[12] Section 23(2) of the Companies Act explains that an external company will be regarded as "conducting business, or non-profit activities, as the case may be, within the Republic" if it engages in any of the following activities:

"(a) Holding a meeting or meetings of the shareholders or board of the foreign company, or otherwise conducting the internal affairs of the company;
(b) establishing or maintaining any bank or other financial accounts;
(c) establishing or maintaining offices or agencies for the transfer, exchange or registration of the foreign company's own securities;
(d) creating or acquiring any debts, mortgages or security interests in any property;
(e) securing or collecting any debt, or enforcing any mortgage or security interest.
(f) acquiring any interest in any property; and
(g) entering into contracts of employment."

[13] See section 23(2A) of the Companies Act.

[14] https://www.corruptionwatch.org.za/beneficial-ownership-register-and-accessible-information-is-a-must-says-ti/

b) Partnerships

Partnerships can be entered into between two or more natural or legal persons in terms of an agreement. These agreements are entered into for purposes of engaging in a profitable business venture. Each partner is expected to make a contribution to the business (whether providing capital, skill or otherwise).

Unlike companies, partnerships do not have separate legal personality and each partner may be held jointly and severally liable for any business debts. However, as mentioned above, there is the possibility of a silent partner (this is normally someone who provides capital and does not wish to be exposed to personal liability). No registration is required to establish a partnership, however it would be helpful for competent authorities to ensure that the identities of all partners are captured by DNFBPs and financial institutions when they are engaged in due diligence exercises.

c) Trusts

A trust is a structure in which a person (the settlor) transfers assets to another person (the trustee) who manages the entrusted assets following the settlor's instructions, but for the benefit of the beneficiaries. The beneficiaries are either persons named by the settlor to receive income or the entrusted assets at some point, or a defined class of unnamed persons.

Recommendation 25 requires that trustees of trusts keep adequate, accurate, and current information on the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust.

In many countries, legal persons must be registered in order to have legal existence, and their owners are more easily identifiable as a result. Trusts, however, do not always have to be registered, except with the tax authorities when they have taxable income. The position in South African law is quite different though. Trusts are regulated through the Trust Property Control Act 57 of 1988 and need to be registered with the Master of the High Court. A trustee may only administer the trust once they receive a Letter of Authority from the Master, which is issued pursuant to a list of information being provided. BO disclosure is not currently a requirement in

law. Our understanding is that plans are currently in motion to amend the Trust Property Control Act and make it necessary to disclose BO information at the time of registering the trust, as well as during audits.

d) Nominee arrangements

A nominee is a person or entity that is asked or named to act for another (such as an agent or trustee) and may hold legal ownership of another person's property. In other words, it is an arrangement between two parties where one person consents to acting as a director or shareholder of a company which is actually owned by someone else. The parties are usually bound by an agreement (whether formally or informally) - but to the outside world the nominee appears, for all intents and purposes, as the director or the shareholder of that company. The identity of the actual (beneficial) owner remains a secret.

As one might imagine, nominee arrangements pose a massive risk within a BO disclosure regime. Without knowing or being able to access the internal arrangements that have been made between nominees and their nominators, it is impossible to establish a link between the BO and the entity in question. It is for this reason that the FATF recommendations deal with this issue specifically.

Currently, there is no prohibition against nominee arrangements in South Africa. Nominee shareholders and directors should be licensed and subject to anti-money laundering requirements, including the identification of beneficial owners. Importantly, nominee shareholders and directors should also be obliged to disclose the identity of the beneficial owner who nominated them.

The latest revision of the FATF's rule on BO has highlighted that the phenomenon of "nominee beneficial owners" violates FATF rules. The revision also introduces new definitions for nominee directors, nominee shareholders and nominator. These definitions explicitly state that a nominee can never qualify as a beneficial owner.[15]

[15] Krause The new FATF rules on beneficial ownership and nominee relationships - a step in the right direction 2 May 2022, Stolen Asset Recovery Initiative.

e) Bearer shares

Bearer shares and bearer share warrants provide a simple avenue for a company's BO to avoid being identified. If an entity issues bearer shares, the shareholder or owner of that entity is any person who holds the shares (in physical paper form) at any given time. Upon presentation of paper shares, dividends are paid out, but the identity of the BO would not necessarily be revealed. Transferring ownership is as simple as handing over possession of the bearer shares.

The Companies Act does not recognise bearer shares or bearer share warrants and therefore is compliant with FATF's recommendation 24(11).[16] That said,

EXPERIENCES FROM CIVIL SOCIETY AND THE PRIVATE SECTOR

While the case studies section below will provide a practical account of some of these experiences, it may be worth pointing out some pertinent observations that were made during the interviews.

Access and data integrity

One interviewee was at pains to point out the paucity of information that she is able to access when investigating a matter or looking into a story. For a small fee, the Commission's Company Registry provides some information regarding the identities and known addresses of the directors, but there is no BO information available there.

Most leads were generated by happenstance or because of the thankless efforts of whistle-blowers. The interviewee would diligently send out access to information requests to competent authorities and companies alike, but responses were sporadic. There were instances where companies would allow our interviewee to look at the shareholder register within their offices, but she would not be allowed to take photographs or make copies. The registers themselves were replete with errors - meaning that many investigations would lead to a dead end.

[16] The recommendation provides that countries which have legal persons capable of issuing bearer shares or bearer share warrants should, among other options, consider their outright prohibition.

Accessing court papers was also flagged as a key source of information for investigative journalists, as those would be the only circumstances under which they would be able to access a company's detailed financial transactional information.

COMMON RED FLAGS AND POTENTIAL VULNERABILITIES IN SOUTH AFRICA

Complex legal structures or arrangements

While it may be understandable that large multinational companies have complicated structures or arrangements in place to enable them to conduct their large-scale operations, there is legitimate cause for concern when small or medium enterprises have these sorts of structures or arrangements in place. The absence of a readily discernible and pertinent reason for having a multi-layered or cross-jurisdictional structure within an organisation should be treated with circumspection and investigated further.

This should be of particular concern where one finds companies contracting with the State. In addition, suspicion may be raised where a company has an opaque ownership structure and its shareholding sits either:

a) within a trust; or

b) in an entity incorporated in a foreign jurisdiction.

Under South Africa's current framework, it is not possible to determine the frequency with which arrangements involving nominee directors and shareholders are abused. However, the UNODC's StAR[17] has made the following pertinent observations:

a) Legitimate uses notwithstanding, nominee arrangements are one of the most common devices for hiding the identity of those controlling shell companies.

b) The current lack of attention being given to the potential and actual abuses of nominee arrangements is a serious vulnerability in global efforts to curb the use of untraceable

[17] Nielson and Sharmon *Signatures for Sale: How Nominee Services Shell Companies Are Abused to Conceal Beneficial Owners,* Stolen Asset Recovery Initiative, 19 April 2022. Signatures for Sale: How Nominee Services for Shell Companies Are Abused to Conceal Beneficial Owners

shell companies in financial crime. Creating and enforcing rules around this is imperative.

c) Countries that have attempted to create rules to address the networks of shell companies that pose a threat to corporate transparency focus on their domestic laws and regulations, but the problem is inherently multi-jurisdictional in nature.

d) Effective regulation of corporate service providers and regulation of nominee arrangements is critical to increasing BOT.

Unverified business addresses

Verification is an ongoing challenge when pursuing BOT reforms. Interviewees who had investigated corruption (through the abuse of corporate vehicles) flagged the pervasive use of "business post-boxes". This involves a significant number of companies being registered at the same business address. Companies will then use this as their own registered address. Numerous service-providers in the country offer this post-box service.

In other instances, interviewees stated that some registered company addresses were in abandoned buildings or located in an open field. This indicates that addresses are never checked to verify whether they remain valid or indeed whether they exist. The absence of any verification procedures enables unscrupulous individuals to simply register with a dummy address - frustrating efforts by law enforcement or investigative journalists to identify and hold those individuals to account.

Individuals holding directorship positions in many companies

Interviewees have observed that holding directorship in a company is an onerous task requiring a considerable amount of administration and compliance to ensure that the company can operate. With that being the case, it is worryingly not uncommon to find that a single individual is a director in a large number of companies. It is difficult to comprehend how an individual can manage a responsibility of such magnitude. It is far easier to believe that there are a number of shell companies involved. Scenarios of this nature should raise suspicion where they are identified and should be investigated more closely.

Links to state procurement

Companies involved in doing business with the State should always be closely scrutinised. In South Africa corruption has been pervasive over the years and lucrative state contracts have been the primary target. Currently, National Treasury procurement regulations mandate that companies need to self-disclose any potential relationship with a state employee in terms of the SBD4 form (Standard Bidding Document).

However, once the form is submitted, no verification takes place. The form sits with the procuring entity (which is decentralised in South Africa), it is not digitised, nor has a common data standard been used. Data that is sourced in this manner is of limited use. At best, it can be used after the fact as evidence of non-disclosure - but the damage will have already been done at that point.

In line with the harmonisation and coordination recommendation that is discussed below, National Treasury ought to consider incorporating a BO data field in its supplier registration process. In the optimal scenario where South Africa opts to create a central BO registry, this could serve as low-hanging fruit in providing a powerful mechanism for verification.

Apart from the general precaution that needs to be taken when companies are engaged in business with the State, there are two aspects that should be closely considered.

Public officials and other politically exposed persons (PEPs)

Public officials are prohibited from conducting business with the State or holding a directorship position in a company conducting business with the State in terms of section 8 of the Public Administration Management Act. However, the Act is silent when it comes to shareholding and there are no BO disclosure requirements. Furthermore, employees of State-Owned Companies fall outside the ambit of the Act.

It is critical that public officials and the PEPs that are linked to them can be identified and flagged when they operate through entities - particularly when engaged in business with the State. The data registry on public officials and their interests within the Department of Public

Services and Administration (as well as the Public Service Commission) should follow a single data standard and be capable of being used to verify other sources of BO data.

Deviations and single source procurement

Companies that benefit from procurement deviations or single sourcing should be closely monitored and their BO structures examined. These companies are given lucrative state contracts without having to follow the usual procedures, checks and balances, and oversight that is usually required in procurement.

The recent pandemic saw a significant number of deviations in state procurement, with National Treasury passing regulations that enabled various state organs to swiftly procure various goods and services without having to comply with the ordinary processes set out in legislation such as the Public Finance Management Act 1 of 1999 and the Municipal Finance Management Act 56 of 2003. The risk that entities may be abused to conceal corrupt practices is considerably higher in these circumstances.

PRACTICAL RECOMMENDATIONS ON THE WAY FORWARD

There is an abundance of literature and guidance available that describes how countries should go about implementing FATF recommendations on BO. In general, all of them tend to follow a similar approach:

1) Identify entities and arrangements that require BO disclosure.
2) Harmonise laws and regulations and create a single unified definition of beneficial ownership.
3) Create appropriate committees / coordination structures within government to implement a unified approach to BO reform.
4) Adopt a singular standard and incorporate the necessary data governance.
5) Identify appropriate infrastructure / architecture that can be used to build a central BO register.

6) Effective sanctions and compliance implementation.

7) Curtail the abuse of unverifiable arrangements.

8) Enable public access to BO registries.

There are numerous examples of work that has been done in terms of identifying entities and arrangements. Our submission also contributes to this growing body of research. In this section, the recommendations listed above will be expanded upon and applied to the South African context. As a point of departure, the diagram below proposes a high-level starting point for designing a central BO registry in South Africa.

Department of Public Service & Administration

Oversight of harmonisation and implementation of Beneficial Ownership

Government Communication and Information System, Office of the Government Chief Information Officer and the State Information Technology Agency

Adapts the Beneficial Ownership Data Standard (SA BODS) and sets up the requisite infrastructure

Data Capturers

Collect beneficial ownership information as per the SA BODS from various entities

Companies and Intellectual Property Commission	Master of the High Court	Department of Social Development
Company BO data	Trust BO data	Non-Profit Organisation BO data

Data Users

Access to different categories of BO data gathered by the data capturers depends on user

G2G (Government to Government)

Use the data to verify entities and perform sanctions, as necessary:

FIC (Financial Intelligence Centre)

SARS (South African Revenue Services)

Law enforcement (SAPS/DPCI, NPA, PSC)

Full data access

G2B (Government to Business)

Companies and Civil Society Organisations

Limited data access

G2P (Government to Public)

Ordinary members of the public

Minimal data access

Harmonisation, effective coordination within government, and the adoption of a single, uniform data standard

The Beneficial Ownership Data Standard (BODS) is an open standard that has been designed to provide guidance on how to collect, organise, share and use high-quality beneficial ownership data.[18] It has been developed in an effort to standardise and harmonise BOT data so that data from different national bodies or international jurisdictions can be combined to better track and understand global chains of ownership or control. The standard is intended to help policy makers design BO disclosure systems that balance accountability with data protection and privacy considerations. It is continuously being iterated and improved based on expert guidance and emerging best practices.

BODS ensures that data is stored in a structured format which can be easily analysed and linked to other datasets. Apart from helping to prevent fragmentation of data internally (i.e. between different departments that collect BO information), it also enhances data utility internationally, where the BO information can be linked to datasets from other jurisdictions that implement BODS. As an example, the United Kingdom has already successfully adopted BODS.[19]

BODS can be used to capture beneficial ownership or control information relating to private companies, trusts, arrangements, public listed companies and state-owned enterprises.[20] Over 20 interest types[21] are now built into the standard to capture a wider range of beneficial ownership roles from board members to trustees, beneficiaries to shareholders. Strong guidance on identifiers[22] is provided to ensure the highest data quality and this guidance is shared[23] with the Open Contracting Data Standard to facilitate speedy interoperability between high-quality beneficial ownership and public procurement datasets.

[18] It is currently on v0.3 and is available at: Beneficial Ownership Data Standard
[19] https://github.com/co-cddo/open-standards/issues/76. The United States and the European Union have also committed to collecting BO data.
[20] https://standard.openownership.org/en/0.3.0/schema/reference.html?highlight=codelists#entitytype
[21] https://standard.openownership.org/en/0.3.0/schema/reference.html?highlight=codelists#interesttype
[22] Real world identifiers — Beneficial Ownership Data Standard 0.3 documentation
[23] Beneficial ownership information

Using BODS can assist in describing both direct ownership and control (where Person A has a direct share in Company B), or indirect ownership and control (where Person A is an ultimate beneficial owner of B, but where there may be a number of known or unknown intermediate companies or arrangements separating them).[24] Open Ownership published a *data schema* which describes how and what data should be shared.[25] It also provides an opportunity to inform the design of data collection and management systems.

As far back as 2017, the Department of Public Services and Administration published the Minimum Interoperability Standards (MIOS) Framework For Government Information Systems.[26] MIOS includes a set of interoperability standards regarding data format standards to enable exchange of data between government information systems. The framework applies to heads of national and provincial departments and should be closely considered in any collaborative initiative involving BO reform.

Quantitative research into the economic value of implementing a beneficial ownership register (or an appropriate alternative) in South Africa

Internationally, there is currently a lack of empirical evidence / research that can describe the potential cost savings for the government. The same holds true when considering potential savings for civil society, media, and the private sector should up-to-date and quality open data be made available to the public.

However, when considering the time, resources and effort currently required to perform due diligence exercises, investigations and related checks, anecdotal evidence would suggest that there would be considerable savings and a greater ease in doing business. This is not taking into account the value of reducing the risk of money laundering and related criminality.

Open Ownership, Oxford Insights and Lateral Economics recently published a study in which they sought to measure the economic impact of effective BOT reforms.[27] Their conclusions align

[24] https://standard.openownership.org/en/0.3.0/schema/concepts.html
[25] https://standard.openownership.org/en/0.3.0/
[26] Minimum Interoperability Standards (MIOS) Framework
[27] Kendall *et al, Measuring the economic impact of beneficial ownership transparency* Oxford Insights, Lateral Economics, Open Ownership Summary Report 16 May 2022,

with the observations made above, adding that BOT is understood to be an economically beneficial reform. Its benefits are well documented in a qualitative sense but there is a paucity of research quantifying economic impacts. As custodians of public datasets, the authors suggest, governments themselves are best placed to undertake quantitative research. Their key findings were as follows:

1) Quantifying the economic benefits of BOT is likely to be important to certain interest groups, particularly government treasuries as well as private sector businesses. (*Comment: in South Africa, research to this effect should be used in motivating the case for budgetary allocations that would need to be deployed in implementing a single register*)

2) Existing literature already builds a strong logical case for BOT, which, when combined with the economic evidence available, strongly implies that the economic benefits of effectively implemented BOT significantly outweigh its associated costs.

3) Estimations of particular benefit types are likely to be more robust than large scale complex models at this stage. As such, any attempts to measure the economic benefits of BOT should focus on quantifying specific benefits, rather than the aggregate economic impact of BOT.

4) There are a number of survey-based, correlational and causational approaches that could be used to track the economic benefits of BOT reform.

5) Approaches to measurement, however, often involve trade-offs between how feasible it is to conduct an approach in the short term, and its methodological robustness.

6) Currently, the most readily feasible approaches for measuring the value of beneficial ownership transparency interventions are survey-based. These methods could be employed both in jurisdictions where BOT has been implemented, and jurisdictions without a BOT regime in place.

7) Correlational and causal studies could also be possible in the longer term across countries with BOT regimes already in place. Findings generated by causal studies have

https://openownershiporgprod-1b54.kxcdn.com/media/documents/oo-summary-report-measuring-the-economic-impact-of-BOT-2022-05_B1kFD1N.pdf

the potential to be particularly robust, but these approaches would be both timely and costly to conduct and would only be possible where groundwork has been laid in terms of early data collection.

In light of these findings, the study makes the following recommendations:

1) While for many jurisdictions the available economic evidence already justifies the associated costs of beneficial ownership transparency, some of the methodologies that the report outlines would strengthen the understanding of the economic impacts of BOT in the short term. Governments in particular should consider strategically employing the most cost-effective of these approaches to fill in the gaps in the existing evidence base.

2) Focusing on particular benefit types in relation to specific policy goals is likely to be the most practical approach to studying the economic benefits of BOT.

3) Governments conducting quantitative impact assessments in this space should publish their findings to help build the evidence base for the economic impact of BOT across jurisdictions.

4) In order to support more robust research to quantify the impacts of BOT in the future, and for their own monitoring and evaluation purposes, governments need to start tracking baseline data points now.

5) As the BOT policy area matures, further work should consider how specific design elements may lead to specific economic benefits. Future research is needed to understand the evidence not just for BOT in its broadest sense, but for the specific aspects of BOT implementation which amount to effective disclosure.

6) The report also calls for the Financial Action Task Force to play a role in supporting countries seeking to track the impact of BOT reform, by publishing guidance around collecting and analysing statistical evidence for BOT.

Coordination mechanisms

Coordination underpins the usefulness of an integrated BO data function. South African state organs responsible for collecting and storing various types of BO data should closely and

effectively coordinate between one another. The already established Inter–Departmental Committee could play a central role in this respect. For practical purposes, a distinction is made between “data capturers” (i.e. those who are responsible for collecting BO data) and “data users” (i.e. those who will make use of the BO data that is gathered).

A further distinction is made in terms of Government to Government (G2G) data users (i.e. competent authorities that are situated within government), Government to Business (G2B) data users (i.e. private sector and civil society) and Government to Citizen (G2C) data users (i.e. ordinary members of the public). Creating different categories / classifications of users at the outset will ensure that iterative improvements can be made to the BOT regime further down the line. For example, this could include further classifying BO data into different datasets. Different types of datasets can be made available to individual user groups depending on their practical needs and taking into account concerns around privacy and data protection.

The diagram at the start of this section visualises how coordination between competent authorities within government might be able to function. The Companies and Intellectual Property Commission (companies), the Department of Social Development (NPOs), the Master of the High Court (trusts), and Financial Intelligence Centre (arrangements and suspicious transactions), all have a central role to play in terms of capturing and verifying BO data. Under the DPSA’s guidance, a singular standard for BO data in South Africa can be agreed upon and implemented within all departments.

It is important to note that whether a decision is made to create a register (preferable) or not, effective implementation of any BO reforms will entirely depend on the availability of personnel, the creation of shared key performance indicators between departments and funding. For this reason, the quantitative research described in the previous section should be used to build a business case and motivate for the creation of a dedicated programme within government to pursue this activity. Anything less would mean that the challenges highlighted in the mutual evaluation report regarding implementation would persist.

Data sharing arrangements

As far back as November 2017, South Africa's e-government strategy and roadmap policy explained that there are a number of government departments who make use of diverse applications, platforms, software and databases. Most of the ICT systems were not designed to share information across departments. To wit, this challenge presently persists.

The policy explains that cross-departmental information sharing is essential to the success of e-government, thus there is a need for government to standardise the interchange requirements for the delivery and management of data. Traditionally, data sharing agreements are reached between departments through the creation of Memorandums of Understanding. However, with the current frameworks and policies in place (read with MIOS above), these can be relied upon to expedite the bureaucratic processes.

A frequent concern that is raised when one speaks of BO reform or the idea of establishing public BO registries is that of personal data protection and privacy laws. Transparency International points out that legal entities are needed to operate complex businesses or collect capital while limiting the liability of individuals. Entities were never designed to hide ownership and incorporating one does not cloak its incorporator in privacy rights. Should an individual have privacy concerns in this respect, they are free to trade in their own name. That said, there is a need to strike a balance between privacy and the public interest in preventing the rampant abuse of corporate vehicles.

In South Africa, privacy and data protection concerns are given legal effect through the Protection of Personal Information Act 4 of 2013 (POPIA). From a legal perspective, concerns around publishing BO data (whether within government internally, to a limited list of designated private institutions or even to the wider general public) is a non-starter. This is so despite public officials commonly referring to POPIA as being a blocker for publishing BO data. Sections 37 and 38 of POPIA list a number of grounds on which processing of personal information is not a breach of processing conditions. Part of those grounds include:

1) where the public interest outweighs the interference with privacy rights;

2) national security;

3) prevention, detection and prosecution of offences;

4) fostering compliance with legal provisions;

5) any function carried out by a public body in terms of the law; or

6) to protect the public against financial loss due to dishonesty, malpractice or other seriously improper conduct.

Arguably, any one of these listed grounds could be relied upon to substantiate publishing BO data in the face of concerns around potential interference with privacy rights and data protection laws.

That said, and even though there is a legal basis for publishing BO data, there are legitimate concerns that have been flagged regarding the personal safety of individuals in having, for example, their residential addresses published online or shared between departments or in instances where an individual might have a legitimate fear for their personal safety. For this reason, the detailed diagram at the start of this section proposes a tiered data-sharing structure. Data access can be limited depending on who the user is (i.e. G2G, G2B or G2P). This would ensure that no more BO data than what is necessary to achieve the needs of a particular data user group is made available to said group.

Create a central BO register

South Africa already has a companies register that collects some information about companies that have been registered here. The same sort of system should be implemented for BO data (if it is not possible to simply integrate it with the current system).

It should be noted that research conducted by Transparency International in 2019 revealed that the type of infrastructure / mechanism available in a country to ensure that competent authorities have direct access to beneficial ownership information directly impacts the ability of authorities to timeously access adequate and accurate beneficial ownership data. In following an alternative approach and relying on companies, financial institutions and DNFBPs, competent authorities are unlikely to have timely access to adequate, accurate, and up-to-date information. Where information is made available in a register, research suggests that

authorities are more likely to have more timely access to information. Other benefits of making use of a register include:

1) Direct, prompt and unrestricted access by competent authorities;
2) The register can be used proactively for investigations;
3) Greater control over compliance by companies;
4) No risk of tipping off beneficial owners or companies;
5) Greater control over the type of information that is captured;
6) The ability to put data verification mechanisms in place;
7) Ease of doing business for obligated entities to undertake due diligence checks and verify data integrity;
8) Early detection or red-flagging of money laundering risks;
9) Swift and responsive international cooperation;
10) Civil society and journalists can scrutinise the data and assist in enhancing accountability.[28]

Transparency International further explains that there are challenges that need to be mitigated to ensure the register is reliable and useful. Most of these challenges involve the establishment of the register and the regulatory and institutional framework governing it. They include:

1) Technical assistance: Some countries need support to effectively go through a transition from manual recording systems to digitised ones.
2) The role of registers and quality of information: Existing company registers usually function as a repository of information and documents, and the information provided by legal entities upon registration is rarely verified. If registers are to assume a more proactive role in anti-money laundering efforts, their functions and resources must be adapted accordingly.

[28] A New Global Standard on Beneficial Ownership Transparency

3) Beneficial ownership registers should have the mandate and sufficient human, technical and financial resources to collect, verify and maintain relevant information. This should include the power to request information from companies and other authorities and to sanction legal entities for non-compliance.

The UN High Level Panel on International Financial Accountability, Transparency and Integrity has also called for an international anti-money-laundering standard requiring all countries to create a central register of beneficial ownership. Given the global trends leaning towards registers, looking to establish a register in South Africa now will alleviate additional cost and burden further down the line.

Implementable and effective sanctions for non-compliance

A compliant legal framework in and of itself is not sufficient - the laws and regulations must also be effectively implemented and enforced by the authorities. This concern was prominently highlighted in South Africa's most recent mutual evaluation. Appropriate compliance, monitoring and enforcement processes are critical in ensuring that a BO disclosure regime is effective.

Effective enforcement provisions need to be in place, including adequate monitoring and compulsory powers. The goal is to ensure that BO information maintained by entities, institutions, or regulators is not only stored / archived, but is also adequate, accurate, and up-to-date. Considerations for designing an effective sanctions and enforcements regime could include:

1) Sanctions that cover the person making the declaration, the beneficial owner, registered officers of the company, and the declaring company should be considered.

2) Sanctions should include both monetary and non-monetary penalties.

3) Relevant agencies should be empowered and resourced to enforce the sanctions that exist for non-compliance.

4) Data on non-compliance should be made available.[29]

[29] Designing sanctions and their enforcement for beneficial ownership disclosure | openownership.org

It is accepted that enforcement has effects beyond just influencing the behaviour of individual wrongdoers, and helps create a regulatory system that maintains its integrity. Effective enforcement requires the capacity to impose sanctions in the event of non-compliance by the entities, but also non-compliance by the shareholders or BOs who have not disclosed the requisite information to the entity. A track record of effective enforcement is likely to increase the overall deterrent effect in South Africa.

Where non-compliance is discovered, a jurisdiction should have effective, proportionate, and dissuasive sanctions that result in action(s) to successfully bring the person or entity into compliance, or else result in appropriate limitations on further activity.

Prohibition or stricter regulatory controls around the use of nominee arrangements

In line with Transparency International's position for all countries,[30] South Africa should consider a complete prohibition on the use of nominee shareholders or directors. In the event that the preference is to allow them, regulatory measures should be taken to prevent and mitigate the risk of nominee shareholding or directorship being abused by considering one of the following mechanisms:

a) Require that nominee shareholders or directors disclose their status as nominees and that this be recorded in a register, financial institution or DNFBP which holds basic or beneficial ownership information. Importantly, the nominator's identity should also be included.

b) Require that the nominee shareholders and directors be licensed; and

c) That nominee shareholders and directors maintain information that identifies their nominator and the natural person on whose behalf the nominee is ultimately acting. This information should be made available upon request and recorded in the public section of the BO register.

[30] Martini *Strengthening the Future Global Standard: Response to FATF's proposals on beneficial ownership transparency*, December 2021, Transparency International, https://images.transparencycdn.org/images/Response-to-FATF-proposals-on-Recommendation-24-Global-standard-on-beneficial-ownership-December-2021.pdf

South African lawmakers should also consider the experiences of foreign jurisdictions in devising its own regulatory framework. Several jurisdictions have attempted to impose certain restrictions around the use of nominee arrangements.[31] For instance, Thailand prohibits the use of nominee arrangements for purposes of avoiding requirements under the Foreign Business Act. The purpose of the legislation is to regulate how foreigners conduct business activities in Thailand. Weaknesses in Thailand's approach have included its focus on foreign shareholding percentage and the amount of capital contributions made by foreigners, without considering voting powers or other indirect control mechanisms. More practically, enforcement has proven challenging - with many reports of the provisions being violated but few prosecutions resulting.[32]

Indonesia is another example of how jurisdictions have gone about regulating nominee arrangements. Article 33 of the Indonesian Capital Investment Law outright prohibits direct nominee arrangements.[33] Despite the restriction, there are examples of parties and law firms having developed workarounds - entering into separate agreements allowing an investor to remain in legal control of a company.[34] *Kairupan* argues that Article 33 needs to be amended to prohibit not only agreements or statements expressly referring to nominee shareholding, but rather to refer to any and all nominee shareholding arrangements.[35]

Enhancing accountability through verification and public access

Jurisdictions around the world that have adopted a BO registry have been engaged in an ongoing discussion around whether the information should only be made available to specific competent authorities or whether it should be made public. The privacy concerns have been

[31] For example: Finland does not allow nominee directors, Norway prohibits the appointment of nominee shareholders in public Limited Liability Companies.
[32] Saypan, *Legal Problems Concerning Nominee Arrangements in Relation to Foreign Business Under Thai Laws*, 10 Thamm. Bus. L. J. 80, 94, (2020).
[33] Article 33 of the Law of the Republic of Indonesia N. 25 of 2007 Concerning Investment provides:

> "1) Both domestic and foreign investors in form of Limited Liability Company are prohibited from entering into any agreement and/or making statement confirming share ownership in the limited liability company and on behalf of another party.
> 2) In the event that both domestic and foreign investors enter into agreement and/or make statement set forth in paragraph (1) above, such agreement and/or statement shall be null and void for the sake of the law."

[34] https://www.pnblawfirm.com/services/company-secretarial-services/nominee-shareholder/
[35] Kairupan *Regulation of Foreign Investment Restrictions and Nominee Practice* Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada, v25 n2 2014 313-326.

highlighted above and will not be repeated here. However, there is also the risk that DNFBPs skirt their compliance / due diligence obligations because the information is readily accessible on the BO registry.

In April 2021, the Minister of the Department of Communications and Digital Technologies published a draft national data and cloud policy.[36] The policy describes a need for South Africa to develop an open data strategy / framework that will enable the sharing of data, informed by the “Data for Good" principles. This, in turn, should enable access to relevant data for all South Africans including NGOs as well as large and small enterprises. The policy also recommends that NGOs are able to access this data for free. It lists three reasons for doing so:

1) Opening of data paves the way for societal benefits;
2) Open data has the potential to contribute to social and economic growth whilst ensuring inclusion; and
3) Open data fosters transparency, trust and accountability between citizens and their governments.[37]

Commentators observe that there is great value in opening access to a BO register beyond national competent authorities. Given the cross-jurisdictional nature of the issue, allowing authorities from abroad to have easy, direct, and timely access to information about legal entities and their beneficial owners is instrumental in the fight against money laundering and other financial crimes. Without giving international access, lengthy mutual legal assistance requests will frustrate and prolong investigations. Open registers can also be used proactively rather than reactively.

Reporting entities such as financial institutions and DNFBPs could also benefit tremendously from access to a BO registry. While they are still expected to conduct their own checks and due diligence exercises, a BO register is a valuable tool. The same entities can also support in verifying the integrity of the data on the register by reporting any inaccuracies or irregularities that they detect.

[36] Electronic Communications Act: National Data and Cloud Policy: Comments invited
[37] Department of Communications and Digital Technologies. 2021. Electronic Communications Act, 2005 (Act 36 of 2005) Draft National Policy on Data and Cloud (Notice 306). *Government Gazette*: 44389:3, 1 April.

Needless to say, civil society, academia, and the wider public would also benefit tremendously from being able to access BO information, as they could help identify corruption and tax evasion or expose conflicts of interest.

A fully public BO register would have additional indirect benefits for public procurement including allowing companies to use this data to manage and reduce risk in their own due diligence processes. Open Ownership's briefing explores the benefits of making central beneficial ownership registers public as well as issues authorities should consider before taking this step.

To address legitimate concerns that publication of BO data may raise, Open Ownership recommends considering:

1) Minimising the data collected and shared to what is strictly necessary to achieve the policy aims (see Open Ownership's further guidance on data minimisation).[38]

2) Allowing for narrowly defined exceptions to the publication of BO data, for example catering for a narrowly defined set of circumstances where a credible threat to an individual may be reasonable grounds for non-publication of one or more fields. As a safeguard, where an exemption is granted, this should be clearly reflected in the published data.

3) If data is made public, making a smaller subset available to the public than to competent authorities such as law enforcement or procurement officials, omitting data fields that are particularly sensitive and unnecessary for public data use and oversight (also known as layered access or tiered access as described in the diagram above).

[38] See, for example, Open Ownership's Guide to Implementing Beneficial Ownership Transparency and its observations on making BO data publicly available: Public access | openownership.org

REFERENCES AND SOURCES OF INFORMATION USED

REPORTS, WORKING PAPERS, GUIDANCE AND TOOLKITS

The Secretariat of the Global Forum on Transparency and Exchange of Information for Tax Purposes Inter-American Development Bank *Beneficial Ownership Toolkit,* OECD, March 2019
A Beneficial Ownership Implementation Toolkit

Kendall *et al, Measuring the economic impact of beneficial ownership transparency* Oxford Insights, Lateral Economics, Open Ownership Summary Report 16 May 2022
https://openownershiporgprod-1b54.kxcdn.com/media/documents/oo-summary-report-measuring-the-economic-impact-of-BOT-2022-05_B1kFD1N.pdf

Martini, *A New Global Standard on Beneficial Ownership Transparency* Transparency International, August 2021
A New Global Standard on Beneficial Ownership Transparency

Martini, *Strengthening the Future Global Standard: Response to FATF proposals on beneficial ownership transparency* Transparency International, December 2021
https://images.transparencycdn.org/images/Response-to-FATF-proposals-on-Recommendation-24-Global-standard-on-beneficial-ownership-December-2021.pdf

Transparency and Beneficial Ownership Financial Action Task Force, October 2014
FATF Guidance: Transparency and Beneficial Ownership

Mutual Evaluation Report: South Africa Financial Action Task Force, October 2021
https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-South-Africa.pdf

Krause, *The new FATF rules on beneficial ownership and nominee relationships - a step in the right direction*, Stolen Asset Recovery Initiative, 2 May 2022.
https://star.worldbank.org/blog/new-fatf-rules-beneficial-ownership-and-nominee-relationships-step-right-direction

Guide to Beneficial Ownership Information: Legal Entities and Legal Arrangements Group of 20 Anti-Corruption Working Group

https://star.worldbank.org/sites/star/files/g20_bo_country_guide_south_africa.pdf

Best Practices on Beneficial Ownership for Legal Persons Financial Action Task Force, October 2019

Best Practices on Beneficial Ownership for Legal Persons

Zondo *State Capture Commission Reports 2021-2022*

Final Reports - Commission of Inquiry into Allegations of State Capture

Nielson and Sharmon *Signatures for Sale: How Nominee Services Shell Companies Are Abused to Conceal Beneficial Owners,* Stolen Asset Recovery Initiative, 19 April 2022

Signatures for Sale: How Nominee Services for Shell Companies Are Abused to Conceal Beneficial Owners

Kida and Paetzold *The Impact of Gray-Listing on Capital Flows: An Analysis Using Machine Learning* 27 May 2021, IMF Working Paper WP/21/153, International Monetary Fund.

The Impact of Gray-Listing on Capital Flows: An Analysis Using Machine Learning

Chhina and Kiep *Designing sanctions and their enforcement and their enforcement for beneficial ownership disclosure*, Open Ownership (28 April 2022).

https://www.openownership.org/en/publications/designing-sanctions-and-their-enforcement-for-beneficial-ownership-disclosure/

Collecting Beneficial Ownership Data (12 March 2021)
https://github.com/co-cddo/open-standards/issues/76

Open Ownership, *Guide to implementing beneficial ownership transparency*

https://www.openownership.org/en/publications/guide-to-implementing-beneficial-ownership-transparency/publishing-beneficial-ownership-information/

Open Ownership, *Principles on public access* (updated July 2021)

https://www.openownership.org/en/principles/public-access/

Open Ownership, *Beneficial Ownership Data Standard* and Schema

https://standard.openownership.org/en/0.3.0/about/index.html (last visited July, 2022)

https://standard.openownership.org/en/0.3.0/schema/reference.html?highlight=codelists#entitytype (last visited July, 2022)

https://standard.openownership.org/en/0.3.0/schema/reference.html?highlight=codelists#interesttype (last visited July, 2022)

Open Ownership, *Real world identifiers - Beneficial Ownership Data Standard* https://standard.openownership.org/en/0.3.0/schema/guidance/identifiers.html (last visited July, 2022)

Open Ownership, *Beneficial ownership information* https://standard.open-contracting.org/latest/en/guidance/map/beneficial_ownership/ (last visited July, 2022)

LEGISLATION AND BILLS

1) Companies Act 71 of 2008
2) Co-operatives Act 14 of 2005
3) Trust Property Control Act 57 of 1988
4) Financial Intelligence Centre Act 38 of 2001
5) Non Profit Organisations Act 71 of 1997
6) Public Finance Management Act 1 of 1999
7) Municipal Finance Management Act 56 of 2003
8) Companies Amendment Bill: Draft
9) Indonesia: Law of Capital Investment 25 of 2007

STATE POLICY DOCUMENTS

Electronic Communications Act: National Data and Cloud Policy: Comments invited

Minimum Interoperability Standards (MIOS) Framework

JOURNAL ARTICLES, WEBSITES AND MEDIA PUBLICATIONS

Williston *History of the Law of Business Corporations before 1800. I* Harvard Law Review, Vol 2 No. 3 1888, 105-124.

Pillay, *Corporate Investigations Alert 10 November 2021*, Cliffe Dekker Hofmeyr https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2021/Dispute/Downloads/Corporate-Investigations-Alert-10-November-2021.pdf

Supasit Saypan, *Legal Problems Concerning Nominee Arrangements in Relation to Foreign Business Under Thai Laws*, 10 Thamm. Bus. L. J. 2020 80, 94.

Kairupan *Regulation of Foreign Investment Restrictions and Nominee Practice* Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada, v25 n2 2014 313-326.

It'll be a miracle if SA escapes global money-laundering watchdog's greylist, says Treasury | Fin24

https://www.gov.za/about-government/contact-directory/soe-s

CFI Team, *State Owned Enterprise* Corporate Finance Institute, 6 September 2021 https://corporatefinanceinstitute.com/resources/careers/companies/state-owned-enterprise-soe/

CASE STUDIES

Contributor	AmaBhungane
Contact person	Susan Comrie
Type of Case Study	Exploitation of legal persons, legal arrangements “The Nkonki Arrangement”
Overview	The Gupta family had gone to Eskom and sought to replicate the system they had implemented with Transnet. At Transnet there was a lucrative set up where they would partner with McKinsey through Regiments Capital. They would get sizable payments as a partner consultancy despite contributing very little work. Regiments Capital was paying large amounts of money out the back door to entities associated with the Guptas. Trillian was used for the Eskom deals (it was a consulting arm for Regiments Capital and had spun off into a new company). McKinsey had gotten cold feet because of its work with Trillian. They had both been red-flagged. The consulting projects were split up and parcelled off into the different large consulting firms: Deloitte, PWC and KPMG. Salim Essa started looking for a new vehicle for Trillian. He identified Nkonki Incorporated because they were black owned and they had a consulting function as well. There was a slight complication with Nkonki because it was an auditing firm - so Essa could not directly own a limited liability company. Journalists were starting to use the normal BO routes to identify who was behind the Gupta companies and Trillian had refused to disclose its registers for a very long time. Essa started looking at ways in which to acquire Nkonki. Leaked emails revealed that three possibilities were considered: 1) Essa buys a stake but it would be a nominee arrangement with a young black CA that would hold the interest in his place. 2) Mitesh Patel, a partner at the firm, would hold the stake on Essa’s behalf. 3) The structure that they came up with and ended up opting for

	was a bifurcated loan. One loan was given to help Mitesh acquire a stake in Nkonki. The second loan was equivalent to acquiring 60% of Nkonki. The arrangement was that Patel would acquire that in his own name. However, Patel would not have to pay the capital back - rather the interest rate of the loan was set at 65% of the company value. The interest would be paid to an offshore company. Essa never had to hold the shares in his own name.
Means, mechanisms and channels of flows of funds detected	Nominee arrangements contemplated but a loan interest agreement pursued.
Was South Africa primarily used as a source, transit or destination for the flow of funds generated	South Africa was used as a source for the illicit funds.
Source of illegal funds	Consulting contracts from a state-owned company, Eskom.
Movement of illegal funds	Offshore interest payments. Nkonki was receiving public sector contracts of up to R450 million annually.
Use and laundering of funds	Nkonki was specifically acquired / targeted for purposes of using it to win consulting contracts from the state. This only happened once Trillian had begun to raise suspicions.
Financial Risk Indicators	State contracts awarded to companies that did not even appear on the panel
Challenges, good practices identified and lessons learned	Accessing information was incredibly difficult and progressing the investigation was largely enabled thanks to the efforts of whistleblowers.
Extent of impact and harm caused by the case	Eskom is currently in dire financial straits. It is in frequent need of state bailouts to manage its debts. These contracts were syphoned directly out of an already ailing entity which has been struggling to provide a stable electricity supply to the public. Untold economic damage has been caused due to the power disruptions.
Any further comment	N/A

Contributor	AmaBhungane
Contact person	Susan Comrie
Type of Case Study	Exploitation of legal persons, legal arrangements (nominee directors) “The Regiments post-box”
Overview	Regiments had been paying a collection of letterbox companies based on the contracts that it had received from Transnet. The terms of the contract allowed Salim Essa to nominate different companies to take over the arrangement. There was a business development fee taking up to 30% of the contract value. Regiments had obtained R1-billion worth of consulting contracts from Transet. The people used as directors of the letterbox companies could never be tracked down. They were young men who had recently immigrated to South Africa. The impression was that their identity numbers were being used for a fee. An investigator managed to interview one of the directors. The director explained that he simply needed a loan and it was offered to him, provided he brought his identity document. He appeared to be unaware that he was serving as a director of a company involved in contracts with the state that were worth millions. Whenever one of the letterbox companies would get red-flagged, Essa would just nominate another company to take over the contract as the new business development partner. The addresses for these companies were non-existent half the time. Some would lead to an open plot of land or a storeroom above a warehouse. Some would lead to a non-existent flat in Hillbrow. These were already picked up as red-flags. It was difficult to comprehend how these young men with absolutely no track record of any type of employment became directors of five different companies engaged in large state contracts in a single day.
Means, mechanisms and channels of flows of funds detected	Nominee director arrangements
Was South Africa	South Africa was used as a source for the illicit funds.

primarily used as a source, transit or destination for the flow of funds generated	
Source of illegal funds	Consulting contracts from a state-owned company, Transnet.
Movement of illegal funds	Business development partner payments. Contracts received from Transnet totalled over R1-billion
Use and laundering of funds	Funds were channelled through the use of a contractual clause enabling nomination of different companies
Financial Risk Indicators	Whistle-blowers helped to uncover what had been transpiring
Challenges, good practices identified and lessons learned	Data quality available from the Commission was poor. The information led to non-existent addresses and names were inaccurate. This suggests that data verification is in dire need of improvement
Extent of impact and harm caused by the case	One of the many instances of grand corruption that transpired during the period known as State Capture
Any further comment	N/A