

REGISTER OF BENEFICIAL OWNERSHIP

Interview

This week we sit down with Josphat Ochoi. Josphat is the Company Secretarial Manager, at RSM, based in Nairobi.

He holds a Bachelor of Arts Degree from the University of Nairobi. He is a Certified Secretary and a member of the Institute of Certified Secretaries (ICS). He has over 8 years' experience in Company Secretarial Practice.

In this interview we discuss the challenges experienced in complying with the new disclosure requirements introduced by the Companies (Beneficial Owner Information) Regulations, 2020

What is the background that led to the government of Kenya issuing regulations requiring companies to disclose their ultimate beneficial owners?

The journey started in 2016 during the London Anti-Corruption Summit. Kenya participated in the summit and made commitments in fighting corruption which included:

- Implementing measures that are in line with the Companies Regulatory framework to establish public central register of company beneficial ownership information.
- Ensuring that the international and domestic law enforcement agencies have full and effective access to beneficial ownership information for companies.

Therefore, in an attempt to comply with the above commitments, Section 93 of the Kenya Companies Act, 2015 was amended in 2017 to require a company to disclose information relating to beneficial owners of shares recorded in its register of members.

The introduction of these Regulations, will also support the government in the fight against corruption, money laundering and financing of terrorism. Reports by the Open Government Partnership indicated that billions of Kenya Shillings flowed illegally into and out of Kenya leading to the government losing a lot of money in terms of taxes.

Based on the definition of 'beneficial owners', what does it mean for those with complicated relationships or control arrangements?

A beneficial owner is a natural person who meets any of the following conditions in relation to the company:

- holds at least 10% of the issued shares in the company either directly or indirectly;
- exercises at least 10% of the voting rights in the company;
- holds a right to directly or indirectly appoint or remove a director of the company; or
- exercises significant influence or control over the company (whether directly or indirectly).

Based on the above definition, if the first condition is not applicable, you move to the next until all the conditions are exhausted. The conditions are such that at least one or more persons would ideally meet the stipulated criteria.

Careful analysis of the control rights for example for trusts or where there are shareholders agreements will have to be considered. P/E Funds are not exempted from disclosing their beneficial owners as they would be shareholders in various investee companies. One would need to understand the structure and determine the person or persons among the Fund investors who control the Fund.

For trusts, the ultimate beneficial owner is the person for whom the shares are held in trust. Where the beneficiaries of the trust are the public, then the beneficial owners would be the trustees.

Where there are joint shareholders, both would qualify as beneficial owners.

Given that the complex structures above are mainly formed as part of tax planning, what would be the tax implications to the owners?

Well there are various tax implications, including thin capitalization, deemed interest and transfer pricing rules, which would be applicable and should be considered if an entity is foreign controlled. As such, arrangements which would result in control being deemed to vest in non-resident persons should be analysed carefully to determine the potential tax implications which might arise.

Again given the fact that ownership will be disclosed, one of the key concerns is on confidentiality and data protection requirements for the individuals. Will information disclosed be made public?

It is actually an offence to disclose beneficial ownership details to the Public. The Regulations states that the fine is upon conviction. The fine shall not exceed KShs 20,000 or imprisonment for a period not exceeding six months or both.

The Companies Beneficial Ownership Regulations (2020) provides the following instances under which beneficial ownership details are supposed be disclosed to the third parties:

- Disclosure to the registrar
- Communications by the company to the beneficial owner
- With written consent of the beneficial owner
- Upon a written request from a competent authority
- If required by the Regulations or a Court Order

The deadline set is a few days away, what is the progress on this and is it possible to meet the deadline?

From our experience, the Companies Registry is not processing applications made in a timely manner resulting to delays.

Secondly, a lot of clients have been reluctant and slow in providing the necessary information to enable us as company secretaries to process the applications in a timely manner.

Also not all companies have been fully set up on the E-Citizen platform partly also due to delays on the part of the Companies Registry. Also, there is challenge of linking companies for example Company B is a shareholder in Company A. This means that you will not be able to update the Register of Beneficial Owners of Company A until the beneficial ownership details of Company B have been processed.

So I foresee a lot of companies that are likely to be in default by 31 January 2021.

Having said that, what is the likelihood that the deadline will be postponed?

There is currently a lobbying going on by members of the Institute of Certified Secretaries for an extension of the deadline owing to the challenges that exist currently.

There is a feeling that the Business Registration Service has not sensitized the public enough on the regulations and many people are not aware about it.

Any idea whether the disclosure of beneficial ownership has been or will be implemented in Uganda and Tanzania or any other country?

A number of African countries have adopted the concept of disclosing the ultimate beneficial owners of companies such as Egypt, Nigeria, and Senegal amongst others.

In Tanzania the beneficial ownership regulations are awaiting approval by the Minister and therefore expected anytime soon. However, every beneficial owner in Tanzania will be required to take an oath or affirm that he or she is not a politically exposed person. In addition, the Annual return filed by the company shall contain the records of beneficial owners.

Uganda is yet to introduce regulations on beneficial ownership.

Any parting shot?

These regulations were developed to promote transparency in the ownership of Kenyan companies and in compliance with the international standards on transparency. I would want to encourage all companies to make efforts to obtain and update the beneficial ownership details in order to comply with the Regulations

Caveat

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