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**REGISTRATION OF BENEFICIAL OWNERS OF COMPANIES (AMENDMENTS TO THE COMPANIES ACT NO. 17 OF 2015, BENEFICIAL OWNERSHIP REGULATIONS, 2019)**

*Updates to the Companies Act on beneficial ownership, take-over bids and company registration*

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In what is seemingly an all-out crusade against corruption and other economic crimes, the President of the Republic of Kenya on the 5<sup>th</sup> of July assented to the Statute Law (Miscellaneous Amendments) Act No. 12 of 2019 which commenced on the 23<sup>rd</sup> of July 2019. The key changes the amendments have brought about are the changes on sections 93 and 611 of the Companies Act, 2015 touching on beneficial ownership and take-over bids. We analyze the same below and the impact it has on your business.

**A. BENEFICIAL OWNERSHIP**

Under the new regulations, a beneficial owner is described as the “*natural person who ultimately owns or controls a legal person or arrangements or the natural person on whose behalf a transaction is conducted, and includes those persons who exercise ultimate effective control over a legal person or arrangement*”.

A beneficial owner is an individual who owns or controls directly or indirectly: -

- more than 10% of the shares;
- more than 10% voting rights;
- more than 10% ownership interest; or
- has the ability to control the company via other means.

In cases where no individual meets the thresholds to be a beneficial owner, details of the senior managing officials (e.g. company directors) are entered in the register of beneficial owners.

***Draft Beneficial Ownership Regulations 2019***

Sections 93(1) and 93(8) have consequently been deleted and Section 93A has been introduced which makes it mandatory for companies to maintain a register of beneficial owners with the relevant information relating to the said beneficial owners as will be prescribed by the Companies (Beneficial Ownership Information) Regulations, 2019 (the “Regulations”) that are yet to be gazetted.

The Regulations further require companies within 30 days, to lodge the list of Beneficial owners with the Registrar of companies. In the event of amendments, the time frame given is 14 days. The time frames however do not apply to publicly listed companies.

The amendments are in line with the requirements by the Financial Action Task Force on Money Laundering (FATF) which Kenya belongs to by virtue of its membership to the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG), an associate member of the FATF, whose main purpose is to combat money laundering and terrorism in the region by implementing the FATF recommendations.

***Requirement to register Beneficial Owner***

In support of the new statutory requirement, the Registrar of Companies has prepared draft “The Registrar of Companies (Forms) Rules, 2017” which provides the forms to be used as notification to the Registrar of the beneficial ownership.

The relevant form, BOF 1, requires that a company must indicate the name, postal address, ID/Passport details, nationality, date of birth, telephone number, and email address of the beneficial owner. Most importantly, the form requires that the company disclose the nature of control the beneficial owner has in the company.

Currently, the abovementioned rules have been circulated to the public with the Registrar calling for comments before the final versions are published; they are however, a sign of what is likely to come.

### **Official search of beneficial owners**

Information (names) of beneficial owners of a company can now be easily accessed by third parties as per the provisions of the amendment which states as follows in regulation 4: -

**(1) A person may conduct a basic search on a company from the companies' registry for the purposes of obtaining the name of the beneficial owner of that company.**

**(2) A person who intends to conduct an official search of the registry records on beneficial owner particulars shall apply to the Registrar in Form BOF4 set out in the Second Schedule and pay the prescribed fees set out in the Third Schedule.**

**(3) The Registrar shall issue a beneficial ownership search certificate to the applicant under sub regulation (2).**

### **Impact of disclosing Beneficial Ownership**

The new provisions will make it easier for authorities and the public to identify the actual owners of companies especially those with complex ownership structures. On the other hand, the provisions are likely to be a nightmare to companies and their shareholders as they seek to comply.

### **Penalties for failure to disclose**

If a company fails to comply with this requirement, the company, and each officer of the company who is in default, commit an offence and on conviction each liable to a fine not exceeding Kenya Shillings five hundred thousand (KES 500,000/-). If following conviction, the company remains non-compliant, the company and each of its officers in default commits a further offence on each day of which the failure continues and on conviction are liable to a fine not exceeding Kenya Shillings fifty thousand (KES 50,000/-) for each such offence.

The rationale of this amendment is to strengthen the government's resolve in combating money laundering by requiring companies to reveal personal details of individuals holding at least ten percent (10%) stake or voting rights in the company. On the other hand, this amendment has the potential of undermining confidentiality in the business sphere and discouraging foreign investors who value their privacy from investing in local companies.

### **B. TAKE OVER BIDS**

The amendments to Sections 611(2), 611(4), 615 (3), (4) and (5) of the Companies Act have fundamentally changed the statutory threshold for takeover bids under the Companies Act. The amendments have deleted the ninety percent (90%) threshold and replaced it with fifty percent (50%) threshold. Hence, in case of a takeover offer, the statutory right will now accrue in cases where

- (a) the offeror has already acquired (or has unconditionally contracted to acquire) not less than fifty percent (50%) in the value**
- (b) of share to which the offer relates; and**

**(b) If the shares to which the offer relates are voting shares, the offeror has acquired (or has unconditionally contracted to acquire) not less than fifty percent (50%) of the voting rights conferred by those shares.**

Once the offeror gives a notice pursuant to section 611, the offeror is bound to acquire the shares to which the notice relates on the terms specified in the offer. These amendments will significantly dilute the rights of minority shareholders. On the contrary, it provides ease of doing business in Kenya as it allows any shareholder holding at least fifty percent (50%) to buy out the other shareholders.

### **C. TRADEMARK INFRINGEMENT**

Another quick win for businesses is the fact that the new amendments address the all too common practice by unscrupulous businessmen who register companies under names that are confusingly similar to those of existing companies or which constitute the trademarks of other businesses, particularly foreign companies which have no physical presence in Kenya. Such entities ride on the goodwill of established brands without incurring the cost of research and development in creating brand equity for a new name.

On these and other grounds set out in the statute, the Registrar of Companies is empowered to compel such company to change its name to any other which does not comprise the offending element. If the company fails to comply, the new amendment empowers the Registrar to strike it off the register within 14 days from the date of the order.

### **D. GREY AREAS OF THE AMENDMENTS**

The new provisions will make it easier for authorities and the public to identify the actual owners of companies especially those with complex ownership structures. On the flip side, this may translate into a nightmare for companies with a complex corporate structure such as Private Equity firms.


PE investment structures will be affected by this statutory requirement, as they are now required as shareholders in various Kenyan investee companies to disclose their beneficial owners. A PE firm can run more than one fund at the same time and funds can be registered either as separate limited liability partnerships (LLP) or as private companies limited by shares with a fixed term.


Questions arise as to who the beneficial owners of a fund are given that the statutory definition includes natural persons either owning or controlling the fund. This may include the investment management firm, shareholders and fund investors.

Where it is a partnership, does this extend to both the general partner and the limited partners? This may depend on how the partnership arrangements address issues of control and ownership between the partners. In relation to the fund investors, is the expectation that the natural persons behind say a pension scheme (the pensioners) be disclosed? Where does one stop in identifying the natural person who ultimately owns or controls a legal person?

### **Let's Talk**

For further information on how the proposed tax provisions will affect your business or assistance on any other matter kindly contact your regular Taxwise Africa Analyst or the contacts below.

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