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REPUBLIC OF KENYA  
OFFICE OF THE ATTORNEY-GENERAL  
&  
DEPARTMENT OF JUSTICE

THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 22 MAR 2022	DAY: TUESDAY
TABLED BY: MAJORITY LEADER	3rd March, 2022
CLERK AT THE TABLE:	

Our Ref: BRS/REG/1

Mr. Michael Sialai, CBS  
Clerk of the National Assembly,  
National Assembly,  
Parliament Building,  
NAIROBI.

**MOST  
URGENT**

RE: THE COMPANIES (BENEFICIAL OWNERSHIP INFORMATION)  
(AMENDMENT) REGULATIONS, 2022

Reference is made to the above subject matter.

Please find forwarded herewith the Companies (Beneficial Ownership Information) Amendment Regulations, 2022 which were published on the 24<sup>th</sup> February 2022 together with an explanatory memorandum for your further kind action.

P. Kihara Kariuki  
ATTORNEY GENERAL  
Encl.

Copy to: Mr. Kennedy Ogeto CBS  
SOLICITOR GENERAL

② Had, take the register, cause tabling of the House and acknowledge receipt.  
04 MAR 2022

③ MM  
Please TNA, register & prepare for tabling.  
WU  
9/3/22

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EXPLANATORY MEMORANDUM TO THE COMPANIES (BENEFICIAL OWNERSHIP  
INFORMATION) (AMENDMENT) REGULATIONS, 2022

**PART I**

Name of the Statutory Instrument: The Companies (Beneficial Ownership Information) (Amendment) Regulations, 2022

Name of the Parent Act: The Companies Act, 2015

Enacted Pursuant to: Section 93A of LN. NO.17 of 2015

Name of the Institution : Business Registration Service

Gazetted on: 24<sup>th</sup> February, 2022

**PART II**

**1. REFORMS BACKGROUND**

Business Registration Service in consultation with the National Treasury and the Public Procurement Regulatory Authority, reviewed the laws relating to the disclosure of beneficial ownership information. The entities were of the view that there is need to ensure that there is a synergy on matters relating to disclosure of beneficial ownership information. The entities reviewed the Executive Order no 2 of 2018, the Companies (Beneficial Ownership Information) Regulations, 2021 as read with the Companies Act, the Public Procurement and Disposal Act and its Regulations and other connected statutes.

The Government is committed towards the growth and transformation of Kenya through *vision 2030*, with firm emphasis on transparency, accountably and public participation and transformation of public procurement in Kenya. Transparency in the space of Public Procurement is vital and its from the foregoing that the public disclosure of information of the people behind the entities that have been awarded tenders by public procuring entities is crucial because it aids in identifying and reducing cases of mismanagement, fraud and corruption.

This background necessitated the formulation of the published Regulations entitled the Companies (Beneficial Ownership Information) (Amendment) Regulations, 2022.

### 1.LEGISLATIVE CONTEXT

The Companies Act, 2015 empowers the Attorney General to make Regulations necessary or convenient for carrying out or giving effect to the Act. The Companies (Beneficial Ownership Information) (Amendment) Regulations, 2022 are therefore issued to give effect to the Act.

### 2.THE PURPOSE OF THE COMPANIES (BENEFICIAL OWNERSHIP INFORMATION) (AMENDMENT) REGULATIONS, 2022

The purpose of these Regulations is to provide for the proper conduct of the business in the registration and disclosure of the Beneficial Ownership Information under Section 93A of the Companies Act, 2015.

These Regulations seek to amend Regulation 13 of the Companies (Beneficial Ownership Information) Regulations, 2020 which restricts the disclosure of beneficial ownership information. The general intention of the proposed amendment is to make the public procurement process transparent as well as enable the government publish important



information about a company in matters of public interest whereas the rest is to streamline some regulations to give better effect to the Act.

The amendments seek to facilitate access to information of Beneficial owners by procuring entities where a company participates in public procurement and assets disposal as well as contracting authority where the company participates in public private partnership arrangement, which contributes to fair and equitable treatment for potential suppliers.

The amendments also seek to allow the publishing and making available information on beneficial owner maintained by the Public Procurement Regulatory Authority in the government portal in relation to entities that have been awarded a tender by the procuring entity. This amendment contributes to the provision of public procurement information to potential domestic and foreign suppliers, civil society and the general public. This provision was adopted in consideration of the legitimate needs for protection of trade secrets and proprietary information and other privacy concerns, as well as the need to avoid information that can be used by interested suppliers to distort competition in the procurement process such as bid-rigging as well as conflicts of interest.

The amendments lastly seek to allow Government to publish and publicise any important information regarding a company where such a matter is of public concern and affects the country. This is inline with article 35 of the constitution noting that the government is mandated to ensure that there is adequate access to information held by the data processor. In balancing the right to access information and right to privacy, the government will ensure that personal data is processed in accordance with the right to privacy of the data subject in line with the Data Protection Act, 2021.

The objectives of the Regulations are in line with the spirit of the ease of doing business and focuses on the Protection of Minority Investors. Protection of Minority Investors is an indicator in the World Bank Doing Business Ranking that to analyzing the extent of corporate transparency on ownership stakes, compensation, audits and financial prospects and the sum of the extent of shareholders rights, extent of ownership and control and extent of corporate transparency indices.

These reforms will boost and strengthen both business and institutions confidence because of the increased transparency which is aimed at reducing the risks associated with doing business and ultimately, Kenya's business environment will improve bringing benefit to the economic growth.

Transparency of information provided to the public in relation to Public Procurement reduces transaction costs and facilitates investment decisions and on the other hand there is a strong association between a transparent in public procurement and higher efficiency as well as a lower incidence of bribery and corruption.

### **3. CONSULTATIONS OUTCOME**

The Companies (Beneficial Ownership Information) (Amendment) Regulations, 2022 have considered the views of the key personnel in the Office of the Attorney General and Department of Justice who are versed with the operational aspects of the companies' Registry. The Attorney General in coming up with the regulations has sought the extensive input of the Ag- Director General who is the accounting officer and administrator of the Business Registration Service.

The Service involved key stakeholders in preparation of the regulation and the team comprised of the National Treasury, the Public Procurement Authority, the Financial Reporting Center, Capital Markets Authority, Central Bank of Kenya, Transparency

International Kenya, Kenya Revenue Authority, GIZ, the Solicitor General and some key members of the Joint Liaison Committee (which comprises of members of the Law Society of Kenya and the Institute of Certified Secretaries) to review a draft proposed amendment before subjecting it for Public Participation.

The public participation implementation strategy and plan was revised to suit the COVID 19 times to ensure the public's safety while still bringing the regulations to their attention. The Service sought for comments from various stakeholders by writing to them directly and by advertisement in MyGov issue titled "in the matter of the Companies (Beneficial Ownership Information) (Amendment) Regulations 2021" was published on MyGov on Tuesday, 30th November 2021 on Page. 13.

The Service also through the [www.bis.go.ke](http://www.bis.go.ke) published the Regulations for comments by the users of the Companies' Registry.

The Companies (Beneficial Ownership Information) (Amendment) Regulations, 2022 have considered the views of other key stakeholders are the Board of Directors BRS, Public Sector Agencies, Private Sector Institutions, Strategic Donor, General Public, Media and Professional Bodies. Of the above the Public Procurements Regulatory Authority, Strategic Donors and practitioners gave their invaluable input on the same.

A validation meeting was held on the 8<sup>th</sup> December, 2021 to review and adopt the comments received. Attached is a matrix of the feedback from the validation meeting.

The Regulations are expected to streamline and give clarity to the operation of the Registry as contemplated under the Companies Act, 2015.

#### 4.Guidance

The Business Registration Service will sensitize its officers for adherence to the objectives of accountability and efficiency in the management of the Registry. The Service will also continuously engage key stakeholders whose participation and cooperation remains

instrumental in the successful implementation of the key aspects of the Companies Act and the regulations.

#### **5. Review of the Regulations**

The Ag. Director General shall monitor the application of the Companies (Beneficial Ownership Information) (Amendment) Regulations, 2022. This will be done through the reports prepared at regular intervals. In addition, the implementers of the regulations will carry out regular monitoring and evaluation of the specific provisions of these regulations with the aim of initiating any legislative amendments as may be necessary on an annual basis.

#### **6. Contact Person**

The contact person at the Office of the Attorney General is Mr. Kenneth Gathuma, Ag-Director General, Business Registration Service and Ms. Joyce Koech, the Registrar of Companies.





*(Legislative Supplement No. 15)*

## LEGAL NOTICE NO. 32

## THE COMPANIES ACT

(No. 17 of 2015)

IN EXERCISE of the powers conferred by section 1022 of the Companies Act, 2015, the Attorney-General makes the following Regulations—

THE COMPANIES (BENEFICIAL OWNERSHIP INFORMATION)  
(AMENDMENT) REGULATIONS, 2022

- |  |  |
|--|--|
| 1. These Regulations may be cited as the Companies (Beneficial Ownership Information) (Amendment) Regulations, 2022.   | Short title.                                       |
| 2. The Companies (Beneficial Ownership Information) Regulations, 2020, in these Regulations referred to as the “principal Regulations” are amended in section 2 by inserting the following new definitions in proper alphabetical sequence — | Amendment of regulation 2 of L.N. No. 12 of 2020.  |
| “public procurement” has the meaning assigned to it under the Public Procurement and Asset Disposal Act, 2015;   | No. 33 of 2015.                                    |
| “procuring entity” has the meaning assigned to it under the Public Procurement and Asset Disposal Act, 2015;   | No. 33 of 2015.                                    |
| “public private partnership” has the meaning assigned to it under the Public Private Partnership Act, 2013; and  | No. 15 of 2013.                                    |
| “contracting authority” has the meaning assigned to it under the Public Private Partnership Act, 2013.   | No. 15 of 2013.                                    |
| 3. Regulation 3 of the principal Regulations is amended in sub-regulation (2) by inserting the words “whether individually or jointly” immediately after the words “the following conditions”.   | Amendment of regulation 3 of L.N. No. 12 of 2020.  |
| 4. Regulation 13 of the principal Regulations is amended—  | Amendment of regulation 13 of L.N. No. 12 of 2020. |
| (a) by inserting the following new sub-regulation immediately after sub regulation (2)—  |  |
| (2A) Notwithstanding sub-regulation (1), a company shall disclose its beneficial ownership information to —  |  |
| (a) the procuring entity, where the company participates in public procurement and assets disposal under the Public Procurement and Asset Disposal Act, 2015; or   | No. 33 of 2015.                                    |



- (b) the contracting authority, where the company participates in a public private partnership arrangement under the Public Private Partnership Act, 2013. No. 15 of 2013

- (b) by deleting sub regulation (5) and substituting therefor the following new sub regulation—

(5) Notwithstanding sub regulation (4), beneficial ownership information maintained by the Public Procurement Regulatory Authority in the Government Portal, in relation to entities that have been awarded a tender by the procuring entity as part of contract award, shall be published and made publicly available.

- (c) by inserting the following new sub regulations immediately after sub regulation (5)—

(6) Information relating to a beneficial owner shall only be made available to a competent authority, the Public Procurement Regulatory Authority or the Public Private Partnership Committee upon a written request by the competent authority, the Public Procurement Regulatory Authority or the Public Private Partnership Committee to the Registrar.

(7) Notwithstanding the provisions of this regulation, the Government may seek, publish and publicise any important information regarding a company if such information affects the country.

5. The First Schedule to the principal Regulations is amended by deleting Form BOF1 and substituting therefor the following new Form—

Amendment of  
the First Schedule  
to L.N. No. 12 of  
2020.





FORM BOF1

(r.3(3))

REGISTER OF BENEFICIAL OWNERS\*

[Section 93A of the Companies Act, 2015]

Name of company: .....

Number of company: .....

*To the Registrar of Companies:*

The above company hereby lodges the register of beneficial owners in accordance with section 93A of the Companies Act, 2015 indicating that the following person is a beneficial owner of the company.

Date that the person became a beneficial owner: \_\_\_\_/\_\_\_\_/\_\_\_\_ [dd/mm/yyyy]



## BENEFICIAL OWNER

Full Name	
Birth Certificate Number, National identity card number or Passport number:	
Personal identification number:	
Nationality:	
Date of birth [dd/mm/yyyy]	
Postal address:	
Business address:	
Residential address:	
Telephone number:	
Email address:	
Occupation or profession:	



## NATURE OF OWNERSHIP OR CONTROL

Nature of ownership or control the beneficial owner has in the company, whether individually or jointly	<p>The percentage of shares a person holds in the company</p> <p>Directly .....% of shares;</p> <p>Indirectly .....% of shares.</p> <p>The percentage of voting rights a person holds in the company</p> <p>Directly .....% of voting rights</p> <p>Indirectly .....% of voting rights</p> <p>A person holds a right to appoint or remove a member of the board of directors of the company; and/or</p> <p>Directly</p> <p>Indirectly</p> <p>A person exercises significant influence or control over the company.</p> <p>Directly</p> <p>Indirectly</p>
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[Note: Please enter particulars of every beneficial owner in a separate form]





**LINK OF BENEFICIAL OWNER WITH THE COMPANY IN INDIRECT OWNERSHIP**

Specify—
(a) Name of shareholder holding shares on behalf of the beneficial owner of the company;
(b) Name of director appointed by the beneficial owner.

Lodged on behalf of the company by:

Name:	
National identity card number/Passport number:	
Address:	
Telephone number:	
Email address	
Signature:	
Capacity**:	
Source***:	
Date:	

**NOTES**

- \* This form is used to notify the Registry of the particulars of a company's beneficial owners.
- \*\* Please indicate whether director, certified secretary or advocate of the company.
- \*\*\* Please indicate whether the information obtained was—
  - (a) provided by the beneficial owner or their authorised representative;
  - (b) taken from an official register; or
  - (c) provided by a third party not directly related to the beneficial owner.

Dated the 10th February, 2022.

**P. KIHARA KARIUKI**  
*Attorney-General.*



Proposed Changes to The Companies (Beneficial Ownership Information) Regulations, 2020:  
Comments:

3b. “except for publishing the information relating to entities that have been awarded a tender by a procuring entity” immediately after the words “to the public”.

3c. “....made available to a Competent Authority and the Public Procurement Regulatory Authority upon written authority to the competent authority by the Registrar”





THE COMPANIES (BENEFICIAL OWNERSHIP INFORMATION) (AMENDMENT) REGULATIONS, 2021

REGULATION	PROPOSED AMENDMENTS	COMMENT (S)	RECOMMENDATIONS
1	Provides definitions for the State agencies to be introduced in the Regulations.	We support this change.	-
2	Regulation 3 (2) is amended by inserting the words "whether individually or jointly" immediately after the words "in relation to the company".	We support this change.	"This will require the BO Workflow to be adjusted to account for shares held jointly."
3 (a)	Replacing Regulation 13 (2) with a paragraph to allow for the disclosure of BO Information where a company participates in public procurement (PPRA) or public private partnership (PPPC).	We support this change.	-
3 (b)	Paragraph 4 of Regulation 13 is amended to allow for PPRA and PPC to publish the BO Information for Companies qualifying under the new Regulation 13 (2), above.	We support this change, However, see our proposed adjustment by adding the word "successfully" for the publication to only apply to those entities who have won the tender.	(b) in paragraph (4) by inserting the words "except for publishing the information relating to entities that have successfully participated in a tendering process undertaken by a procuring entity or contracting authority pursuant to the Public Procurement and Asset Disposal Act, No. 33 of 2015 or the Public Private Partnership Act, No. 15 of 2013, respectively." immediately after the word "public".
3 (c)	Paragraph 5 is amended to extend the list of those to whom the Registrar may disclose BOI to include PPRA and PPC.	We support this change, However, see our proposed adjustment for clarity, as the words "Competent Authority" appears in two instances in the paragraph. Replace the word "and" with "or".	(c) in paragraph (5) by inserting the words "the Public Procurement Regulatory Authority and/or the Public Private Partnership Committee" immediately after the words "by the Competent Authority".
3 (d)	To add a new Paragraph 6	We do not support this change.	Our considered view is that the State, acting through the Registrar of Companies,





**Liroja Services**  
corporate governance consultants

REGULATION	PROPOSED AMENDMENTS	COMMENT (S)	RECOMMENDATIONS
4	Amending Form BOF1 to add the "individually or jointly" aspect of BO nature of control.	We support this change.	<p>Competent Authorities, PPRA and PPPC will be able to publish and publicise any important information affecting the nation. On this basis, it is not clear exactly what the new paragraph seeks to cure, while at the same time adding ambiguity on which organs of the State would be dealing with the BO information.</p> <p>We recommend that the new Paragraph (6) be deleted.</p> <p>"The BO Workflow would need to be adjusted to capture the "Name of director appointed by the BO", as required in the Form BOF1."</p>

Prepared by:

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# Revisions to Draft Companies (Beneficial Ownership Information) (Amendment) Regulations 2021 – Public Consultation

Open Ownership (OO) provides technical assistance to countries implementing beneficial ownership (BO) transparency reforms, to help generate accurate data on BO that complies with international standards and meets the needs of data users across government, obliged entities, civil society and the private sector.

Since 2017, OO has worked with over 40 countries to advance implementation of beneficial ownership reforms, as well as supporting the creation of over 15 new central and sectoral registers. OO has developed the world's leading data standard for beneficial ownership information, co-founded the international Beneficial Ownership Leadership Group, and built the world's first transnational public beneficial ownership register.

OO welcomes the Kenyan Business Registration Service (BRS)'s amendments to make BO information available to procurement and contracting authorities over the course of procurement. OO has highlighted in detail how BO information can help prevent fraud and corruption in procurement, thereby preventing the loss of funds through illicit financial flows. The use of BO data in procurement also supports the FATF Standard's aim to ensure a coordinated global response to prevent organised crime, corruption and terrorism, as well as the proposed requirement to make BO data available to public authorities in the course of public procurement.

OO is pleased to contribute to the public consultation on revisions to the Companies (Beneficial Ownership Information) (Amendment) Regulations. OO provided comments to an earlier draft of the regulations in 2018. We welcome the opportunity to engage in this latest review to update and strengthen the regulations.

Our contribution aims to address practical and technical considerations which need to be taken into account to enable BO data use for public procurement. Our contribution focuses on the rationale and methods for enabling timely access to adequate, accurate, and up-to-date BO information. We also provide a review of Form BOF1.

For further information or to discuss these responses in further detail, please contact [karabo@openownership.org](mailto:karabo@openownership.org).





## Timely access

*13 (5) Notwithstanding sub regulation (4), information relating to a beneficial owner shall only be made available to a competent authority upon written request by the competent authority to the Registrar*

OO welcomes the dedicated mechanisms to provide efficient access through amendments to section 13 of the regulations. However, in addition to the ability for competent authorities and procurement authorities to be given access to BO information on a per record basis, OO would recommend that the BRS considers mechanisms by which multiple records could be shared in bulk based on contractual agreements with relevant authorities.

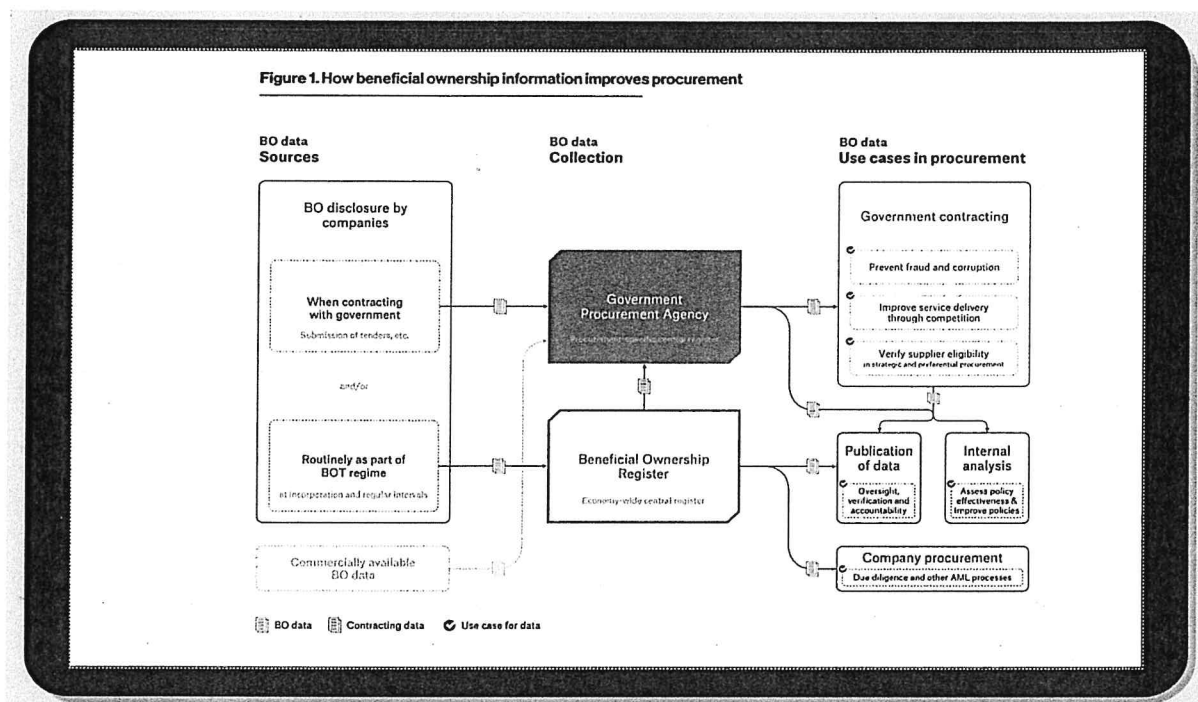
This would help reduce the time required for BRS staff to process individual requests if there are particular authorities which make multiple regular requests. The mechanisms for sharing such information could include sharing a monthly download of BO data or creating an application programming interface (API) through which the BRS technical team could provide data access to approved external users. While OO notes that this may introduce concerns on **data privacy and confidentiality**, these can be addressed and mitigated (see detailed section on this point further down in this submission).

Operationalising the use of BO data in procurement is more easily done through integrated digital technologies rather than through paper based systems. In order to maximise the potential benefit of using BO data in procurement, it should be collected and stored as structured, interoperable and machine-readable data, which can be analysed easily and cheaply. When BO data is combined with other open and structured datasets, such as open contracting or spending data, analysis can provide powerful insights into procurement practices, consumption models, and supplier transactions. OO provides a diagram below which represents the system for data sharing, analysis and publication once data is adequately structured.

OO further notes that subregulation 13 (5) does not explicitly include procuring authorities. To remove any further doubt, the clause should be expanded to include **procuring entities and contracting authorities**.







This diagram represents the different methods data can be collected as part of a procurement process, and used for internal analysis and publication by procurement authorities. Where data is collected through an existing central registry, as is the case with the Kenyan BRS, this is a useful reference dataset for procurement agencies and is a source of potentially higher quality data (compared to other sources of data). This diagram also shows the various uses of BO data in procurement.

## Access to up-to-date information

*A company shall lodge with the Registrar the particulars of change of its beneficial owners in Form BOF2 set out in the First Schedule and shall pay the fees set out in the Second Schedule.*

The current regulations provide for a process where the BRS is notified of changes to beneficial ownership data. The ability of competent authorities and procurement authorities to also be updated on changes to ownership and control of companies is equally important, particularly where an investigation or analysis requires information on changes of ownership over time.

In public procurement this may be important for on-going contract monitoring to ensure loopholes aren't created where ownership changes are used to conceal interests once a contract is awarded or where procuring entities requires up-to-date information for analysis. OO would therefore recommend a provision be included which allows for procurement and competent authorities to access up-to-date records, as well as historical records.



## Sanctions and penalties for non-compliance

*5. A company shall issue a warning notice to a person who fails to comply with the provisions of regulation 4 and keep a copy of the warning notice in its register of beneficial owners....A company shall restrict the relevant interest of a person if the person has not complied with the warning notice within fourteen days from the date of the notice.*

*12. A person who discloses beneficial ownership information in any manner other than for the purpose for which such information is obtained commits an offence and shall be liable upon conviction to a fine not exceeding twenty thousand shillings or to imprisonment for a period not exceeding six months, or to both.*

The current regulations have important provisions empowering companies to penalise beneficial owners for non-disclosure (regulations 5– 11). The BRS having sufficient powers to enforce compliance is essential to improve the quality of data for use, consistent with international standards. In line with best practice, we recommend that the BRS consider including sanctions – administrative and criminal – for non-compliance as an addition to regulation 12, which currently only penalises unlawful disclosure of BO data.

OO research shows that where governments use BO data in procurement, they can drive up compliance to a BOT regime by imposing sanctions relating specifically to procurement. A number of countries have implemented sanctions for the failure to provide correct BO data. These sanctions range from preventing companies and their beneficial owners from signing contracts, or debarring them from being involved in procurement for a specific period of time. We recommend that these additional sanctions be created and enforced in a coordinated fashion with the procuring and contracting authorities.

## Verification

*A company shall take reasonable steps to identify its beneficial owners and shall enter in its register of beneficial owners the following particulars in respect of its beneficial owner*

Centralised BO registers can help with simplifying and automating the verification process. The current regulations place an onus on companies to undertake this task, which is commendable. However, a dual system where the BRS is also able to verify data independently from the declarations made by companies would also support driving up the quality of data and data use.

To maximise the impact of BO data, it is important that data users and authorities can trust that the data contained in a register broadly reflects the true and up-to-date reality of who owns or controls a particular company. OO recommends that data should be verified on submission and updated – or confirmed that it still holds true – on a regular basis. Procurement officers want to be confident that the data is correct at the time of decision making, so data should at a minimum be (re)verified at that point in time (see OO guidance on [verification](#)).



## Data privacy and confidentiality

*13(4) Beneficial ownership information shall not be made available to the public except for publishing the information relating to entities that have participated in a tendering process undertaken by a procuring entity or contracting authority pursuant to the Public Procurement and Asset Disposal Act, No. 33 of 2015 or the Public Private Partnership Act, No. 15 of 2013, respectively.*

Through amendments to regulation 13, sub-regulation 4, an exemption to the bar on publication of BO data is created. This is a significant step. Publishing BO data for procurement or otherwise has the wider benefit of driving up the quality of data in addition to furthering the public policy aims.

Going further to create 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. OO'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 the publication of BO data may raise, OO recommends that the BRS considers:

- (1) minimising the data collected and shared with procuring entities and contracting authorities to what is strictly necessary to achieve the policy aims (see OO's further guidance on [data minimisation](#); Section 4 of the Form BOF1 review below provides further discussion and recommendations).
- (2) allow for narrowly defined exceptions to the publication of BO data. The regulations and amendments do not currently provide 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. In exceptional circumstances, the regulations may provide for an exemption from publication. This may be addressed through an additional sub-regulation at regulation 13. Where an exemption is permitted, this should be clearly reflected in the published contract.
- (3) if data is made public, making a smaller subset available to the public than to competent and procurement authorities, omitting data fields that are particularly sensitive and unnecessary to public data use and oversight (also known as layered access).



## Amendments to Form BOF1

*The First Schedule of the principal Regulations is amended by amending by deleting Form BOF1 and substituting therefore the following new Form BOF1*

Below OO provides comments on the new Form BOF1. However note that preferably the form review should include all relevant forms to ensure each is complementary. Should the BRS require, OO is available to review BOF2 and BOF3.

Well-designed beneficial ownership declaration forms will generally meet all of the following criteria:

- It is clear who (people as well as companies) will fall under the scope of the disclosure process (it may be necessary to provide detailed guidance alongside the form and referenced from the form in order to achieve this)
- The form is easy to understand and navigate
- It is easy for people to supply good quality data for each field
- It is easy for companies with simple BO structures to make their declarations
- The full range of BO structures, declarable by law, can be disclosed via the form(s)
- Form submissions can be linked to data in other official databases, so that companies do not have to submit the same information multiple time

Although Form BOF1 seeks to gather much of the information OO recommends collecting in order to allow full disclosure of beneficial ownership, the form could be adjusted in several ways to support more streamlined data entry, reduce accidental errors and facilitate easier data use. These recommendations are informed by guidance provided in OO's Beneficial ownership declaration forms: guide for regulators and designers:

### 1) Include definitions of BO terminology at the point where they are needed

BOF1 calls on people to declare they are a beneficial owner without providing an explanation of how a beneficial owner is defined in Kenyan law. If the form may be shared with individuals or companies in a paper form without accompanying guidance, it may be prudent to include this definition prominently in Form BOF1 to raise awareness of some of the key BO definitions and concepts.

Similarly information is requested on any beneficial owners linked to the declaring company via an indirect beneficial ownership relationship or structure. However the definition of indirect ownership is not provided in the form.

OO understands that the indirect ownership declaration section of Form BOF1 is intended to capture nominee arrangements (nominee shareholdership and nominee directorship) but indirect ownership as a concept extends beyond just these types of arrangements. Where BO of a registered private company is exercised indirectly (via intermediaries, including legal owners), OO advises that sufficient information about intermediaries should be collected to reveal full ownership/control chains. Questions about how best to capture and understand the full range of indirect beneficial ownership arrangements and structures are explored in OO's Beneficial ownership in law: Definitions and thresholds briefing.







The concept of legal ownership is not the same as the concept of beneficial ownership, but they are related. Providing a definition of legal ownership to explain how it is different from beneficial ownership could be a useful addition to Form BOF1.

## 2) Be clear about the format in which answers are expected

OO is pleased to see in Form BOF1 that some fields provide guidance on the format that individuals or companies should follow when filling out the form. For example, the dd/mm/yyyy format is clearly provided for the Date that the person became a beneficial owner and Date of birth fields in recognition of the multiple formats that people may otherwise use to write dates.

This approach should be extended to additional fields from the form in order to ensure that the BRS is able to collect more standardised, well-formatted BO data which can more easily be used or shared with the relevant authorities without the need for cleaning the data.

For example, the Form BOF1 asks for a full name but doesn't explain whether an individual's first name, middle name(s) and family name should be provided or just the first name and family name. To resolve this, OO would recommend either explaining the format required or separating out any name fields to avoid any confusion by creating separate fields for the first name and family name. Separating out the fields would be in line with the best practices for high-quality BO data collection that OO has documented as part of our [Beneficial Ownership Data Standard](#).

Where an individual is required to provide a birth certificate number, national identity card number or passport number, OO would advise creating one field or tick box where the individual can indicate which type of ID they will provide followed by a separate field for the number. This will support better quality data collection and would support easier automated checks of the IDs provided via the online version of Form BOF1 as the ID numbers could be checked for correct length and formatting. [Good-quality, well-structured identifiers](#) for individuals or companies are essential to be able to combine datasets from multiple systems.

Where the company number is requested at the top of Form BOF1, it would be good to clearly indicate that this should be the company number from the BRS Company Registry in case there is any chance of misunderstandings where perhaps a tax ID might be mistakenly provided by an individual or company. From the BRS Company Registry, it seems like valid company numbers can be of varying length and formatting including examples like C.140512, CPR/2011/41483 and PVT/2016/025014. Additional text guidance could be useful here to explain whether or not - for example - companies should enter the full stops or backslashes in their company numbers or just the letters and numbers. Again, this will improve the quality of the company identifier data which will make it easier to connect the collected BO data to other data like that collected during public procurement processes.

In the nationality field, it should be clear what users should do if they hold dual or multiple nationalities. If people with dual nationality need to fill out this form, it may be prudent to provide multiple nationality fields in line with the best practice for BO data collection set out in [OO's example beneficial ownership declaration form](#).

To allow for high-quality data collection, OO would recommend that the postal address, business address and residential address fields are split out into different fields to allow for the capturing of a postal code and country details alongside a full address where each part of the address should be on a different line or separated by commas.



Data management systems often use a diversity of address formats and data is often inconsistently entered across data fields in these source systems. This is why OO recommends the use of a very simple address format to improve data quality, allow easier analysis of structured data and enhance the ability of the BRS to connect BO data with other datasets via linking by address data.

### 3) State clearly which fields are required and which are optional

Form BOF1 currently provides no indication next to fields as to whether they are required or optional for individuals or companies to fill in. Adding these indications is a useful signal to individuals and companies required to fill out the form and will help ensure compliance with more complete data collection.

In certain cases, BO forms should provide a way for the individual or company filling out the form to declare that they have tried and failed to collect the required information. The legal basis for this is set out in regulation 11 of the Companies (Beneficial Ownership Information) Regulations, 2020.

For instance, a beneficial owner whose details are unknown could be flagged as an “unknown person”. OO’s Beneficial Ownership Data Standard provides guidance on best practices for the capturing of data on such unspecified or unknown beneficial owners via the unspecified field in an ownership or control statement, unspecifiedEntityDetails field in a entity or company statement and the unspecifiedPersonDetails field in a person statement.

If Form BOF1 could be updated to collect information on unknown persons or unknown ownership or control relationships, additional guidance should be provided to explain how a field should be correctly filled in as unknown.

OO would recommend the inclusion of an additional field allowing people to choose from a list of the reasons set out in the 2020 regulations for why full BO information cannot be provided:

- The company has not identified the beneficial owner
- The company has not been able to identify the beneficial owner particulars
- The company has issued a warning notice which has not been complied with
- The company has issued a restriction notice
- There is a matter pending before court in relation to beneficial ownership

Many of these explanations can easily be mapped to the range of reasons for unknown information laid out in the Beneficial Ownership Data Standard except for additional provisions in the data standard covering situations where subjects may be exempt from disclosure rules:

- No beneficial owners
- Subject unable to confirm or identify beneficial owner
- Interested party has not provided information
- Subject exempt from disclosure
- Interested party exempt from disclosure
- Unknown
- Information unknown to publisher

If the BRS considers OO’s recommendation to add an additional sub-regulation at regulation 13 to provide exemption from publication in limited cases, the publicly available data should note that beneficial ownership information is held by authorities but has been exempt from publication, this



could be done, for example, by including a field to the Form BOF1 where the individual or company can declare this exemption

**4) State which information is for internal use only and will not be openly published**

There will be information collected about individual beneficial owners and other people which should not be published widely. Some private addresses, private contact details and identification details may be disclosable but not widely shareable due to limits in the legal mandate for publishing or sharing data, or reasons of personal privacy or security.

OO recommends that Form BOF1 should make it clear what information is being collected for agency and state use only and will not be made public. For example, such information could be annotated with a message "This will not be made public".

**5) State which additional documentation or information must be provided with the form**

The process for submitting BO information via the BRS eRegister as set out in the [user manual](#) requires an individual to upload a colour passport photo as part of the BO registration process. Is this also a requirement for any individuals filling out Form BOF1? If so, OO would recommend guidance be added setting out any additional documentation or proof of identity which is required to be submitted along with the form as well as explaining what format it should be submitted in.



## **BRS Call for Submission of Comments: The Companies (Beneficial Ownership information) (Amendment) Regulations, 2021**

Organization: Global Financial Integrity

Contact details: For further questions or more information, please reach out to:

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On behalf of Global Financial Integrity, we write to respond to the Business Registration Service's (BRS) call for submission of comments on 'The Companies (Beneficial Ownership Information) (Amendment) Regulations, 2021 (the Amendment Regulations). GFI appreciates the opportunity to comment on the regulations and commends the BRS for reaching out to hear views from stakeholders.

GFI supports the initiative to lift some of the restrictions on disclosure of BO information in the Amendment Regulations and encourages the BRS to allow for this information to be as widely available to the public as possible.

In line with this, GFI provides comments on the following provisions of the Amendment Regulations:

1. ***Regulation 3(a) – "Regulation 13 of the principal Regulations is amended – (a) by deleting paragraph (2) and substituting therefor the following new paragraph (2) – "(2) Notwithstanding sub-regulation (1) information relating to a beneficial owner may be disclosed – (a) with written consent of the beneficial owner; or 2 (b) where the company participates in public procurement and assets disposal under the Public Procurement and Asset Disposal Act, No. 33 of 2015; or (c) where the company participates in a public private partnership arrangement under the Public Private Partnership Act, No. 15 of 2013."***

The disclosure of beneficial ownership (BO) information of companies participating in public procurement processes is critically important in the fight against corruption and for curtailing illicit financial flows in Kenya. Public access to this information would allow for the private sector, civil society, and the public at large to check for both accidental mistakes and deliberate falsehoods in the data. This broad access to the data by a wide range of actors simultaneously increases the likelihood of identifying inconsistencies or potential wrongdoing. As such, publishing BO data provides for a low-cost and non-technically intensive verification mechanism which has the potential of improving BO data quality, and accordingly increasing the impact of the beneficial ownership register.

However, the proposed amendment leaves some room for uncertainty and/or abuse in two areas: (a) the intent behind regulation 13(2) is unclear and creates room for





regulatory confusion when read in comparison to regulation 13(5); (b) it does not create a mandatory requirement for disclosure; and (c) it does not specify to whom such disclosure should be made. We expound on these three points below:

- A. 13(2), when read together with 13(1), appears to place the mandate of disclosure on the company. 13(5), on the other hand, places this mandate to disclose on the BRS. These two provisions read together create confusion as to the pathways for accessing BO information. This is because:
- (i) the necessity behind regulation 13(2) is unclear, assuming that the BRS already possesses the BO information of all Kenyan companies, which can then be accessed by competent authorities under regulation 13(5);
  - (ii) regulation 13(2) does not specify to whom this information should be disclosed. 13(5) limits the agencies that have access to BO information through BRS. But 13(2) does not appear to limit who may have access to this information through the company.
  - (iii) Finally, when looking at 13(2) and 13 (5), 13 (5) permits a disclosure by BRS only upon a written request. 13(2) is unclear as to the how the request must be submitted before a company can disclose its beneficial owner

Our recommendation therefore is to specify more clearly the intent behind regulation 13(2) to prevent a situation where it undermines the provision under regulation 13(5).

- B. The wording of the proposed amendment lends itself to the interpretation that companies have the option to voluntarily disclose the BO information if they are involved in public procurement. This leaves room for uncertainty, which would therefore technically render the amendment ineffective. In order to make the intent behind this provision very clear, we propose that the provision should require mandatory disclosure of information by companies, and thus should be amended to change the language from, “may disclose”, to “shall disclose”.
- C. Secondly, the amendment provision does not specify to whom such disclosure is to be made. For avoidance of doubt, we recommend that this provision should be amended to read as follows:

*“(2) Notwithstanding sub-regulation (1) information relating to a beneficial owner **shall** be disclosed –*

- a) with written consent of the beneficial owner; or*
- b) where the company participates in public procurement and assets disposal under the Public Procurement and Asset Disposal Act, No.*



*33 of 2015, shall be disclosed to the Public Procurement Regulatory Authority; or*

*c) where the company participates in a public private partnership arrangement under the Public Private Partnership Act, No. 15 of 2013, shall be disclosed to the Public Private Partnership Committee.”*

- 2. Regulation 3(b) – “Regulation 13 of the principal Regulations is amended (b) in paragraph (4) by inserting the words “except for publishing the information relating to entities that have participated in a tendering process undertaken by a procuring entity or contracting authority pursuant to the Public Procurement and Asset Disposal Act, No. 33 of 2015 or the Public Private Partnership Act, No. 15 of 2013, respectively.”**

Regulation 3(b) of the Amendment Regulations lifts the restriction on making BO information available to the public when it relates to entities that have participated in a tendering process undertaken by a procuring entity or contracting authority pursuant to the Public Procurement and Asset Disposal Act, No. 33 of 2015 or the Public Private Partnership Act, No. 15 of 2013.

Although this is a positive development, the provision does not indicate whose responsibility it is to make this information available to the public. Because of the high corruption risks in public procurement processes, the Amendment Regulations should ensure that the BO information of companies that have participated in a tendering process shall always be made available to the public.

We therefore propose that 3(b) of the Amendment Regulations should amend regulation 4 of the principal regulations as follows:

*Regulation 13 of the principal Regulations is amended (b) in paragraph (4) by inserting a new paragraph 4A –*

*“Notwithstanding regulation 4, the information relating to entities that have participated in a tendering process undertaken by a procuring entity or contracting authority pursuant to the Public Procurement and Asset Disposal Act, No. 33 of 2015 or the Public Private Partnership Act, No. 15 of 2013, respectively shall always be published and made publicly available”*

- 3. Regulation 3(b) – “Regulation 13 of the principal Regulations is amended (c) in paragraph (5) by inserting the words “the Public Procurement Regulatory Authority and the Public Private Partnership Committee” immediately after the words “Competent Authority”.**

Regulation 13(5) of the principal regulations creates an avenue for competent authorities to access BO information via a written request to the BRS. While this provision is critical to ensuring that competent authorities can carry out their



investigations unhindered, its current phrasing does leave room for potential mischief. Since the regulation does not specify the conditions under which such information may be requested, for example by showing a legitimate interest. We would therefore recommend closing this loophole by expressly stating the conditions under which such information may be disclosed.

We would also recommend that the definition of “competent authorities” under regulation 2 of the principal regulations be amended to include: *the Public Procurement Regulatory Authority; the Public Private Partnership Committee; and the Office of the Auditor General.*

In addition to the recommendations on the Amendment Regulations, GFI recommends the BSR to address the following loopholes in the BO framework:

4. *Regulation 11(a) and (b) of the principal Regulations – “The company shall note in its register of beneficial owners that it knows or has reasonable cause to believe that there is a beneficial owner in relation to the company but – (a) has not identified the beneficial owner; (b) has not been able to obtain the beneficial owner particulars.”*

Section 93A(5) of the Companies Act makes companies that fail to comply with the beneficial ownership requirements within the required timeframe liable to a fine up to KES 500,000. However, if a company, despite trying, is unable to identify a beneficial owner or to obtain their particulars, section 11(a) and (b) of the principal Regulations offers companies the option of simply making a note of this in their register. Neither the Companies Act nor the Regulations specify a time limit for how long this declaration may stand. This creates the risk of companies abusing this provision to evade beneficial ownership disclosure and subsequent penalties for non-disclosure. To effectively close this loophole, the principal Regulations need to be amended to specify the time limit for a section 11 declaration and clarify what this means for incurring penalties.

5. *Trusts in the ownership chain and Regulation 3(2) – “For the purpose of these Regulations, a beneficial owner of a company shall be the natural person who meets any of the following conditions in relation to the company (a) holds at least ten percent of the issued shares in the company either directly or indirectly; (b) exercises at least ten percent of the voting rights in the company either directly or indirectly; (c) holds a right, directly or indirectly, to appoint or remove a director of the company; or’ (d) exercises significant influence or control, directly or indirectly, over the company.”*

The definition of ‘beneficial owner’ under the Companies Act and Regulations includes the person ultimately owning or controlling a ‘legal arrangement’, which generally refers to trusts. Although trusts are not directly covered by the beneficial ownership



provisions of the Companies Act, and are therefore not required to identify their beneficial owners, record their particulars and submit these records to a central register, trusts can nevertheless form part of the ownership chain of a company as a holding company or through a subsidiary relationship (see section 108 – 110 Companies Act). As such, the beneficiaries of a trust should be identified as the beneficial owners of a company that is covered by the BO law, if they indirectly hold 10% of that company's shares.

However, section 3(2) of the Regulations merely stipulates how to identify the individual who beneficially owns a company, without providing guidance on how to pierce through a trust structure to get to an individual. The only indication given by the beneficial owner definition is to look at the natural person who 'owns or controls' the legal entity or arrangement. In the case of a trust, however, this role could be played by any of the three parties of a trust: the settlor, the trustee, or the legally indicated beneficiary. Without further guidance for companies to decide who is to be identified as the beneficial owner of a trust in its ownership chain, there is a significant chance of them incorrectly identifying the real beneficial owner. To address this, further regulations and/or guidance should be published to educate companies on how to identify the beneficial owner of a trust in their ownership chain.





THE COMPANIES (BENEFICIAL OWNERSHIP INFORMATION) (AMENDMENT) REGULATIONS, 2021

REGULATION	PROPOSED AMENDMENTS	COMMENT (S)	RECOMMENDATIONS
1	Provides definitions for the State agencies to be introduced in the Regulations.	We support this change.	-
2	Regulation 3 (2) is amended by inserting the words "whether individually or jointly" immediately after the words "in relation to the company".	We support this change.	"This will require the BO Workflow to be adjusted to account for shares held jointly."
3 (a)	Replacing Regulation 13 (2) with a paragraph to allow for the disclosure of BO Information where a company participates in public procurement (PPRA) or public private partnership (PPPC).	We support this change.	-
3 (b)	Paragraph 4 of Regulation 13 is amended to allow for PPRA and PPC to publish the BO Information for Companies qualifying under the new Regulation 13 (2), above.	We support this change, <i>However, see our proposed adjustment by adding the word "successfully" for the publication to only apply to those entities who have won the tender.</i>	(b) in paragraph (4) by inserting the words "except for publishing the information relating to entities that have successfully participated in a tendering process undertaken by a procuring entity or contracting authority pursuant to the Public Procurement and Asset Disposal Act, No. 33 of 2015 or the Public Private Partnership Act, No. 15 of 2013, respectively." immediately after the word "public".
3 (c)	Paragraph 5 is amended to extend the list of those to whom the Registrar may disclose BOI to include PPRA and PPC.	We support this change, <i>However, see our proposed adjustment for clarity, as the words "Competent Authority" appears in two instances in the paragraph. Replace the word "and" with "or".</i>	(c) in paragraph (5) by inserting the words "the Public Procurement Regulatory Authority and/or the Public Private Partnership Committee" immediately after the words "by the Competent Authority".
3 (d)	To add a new Paragraph 6	We do not support this change.	Our considered view is that the State, acting through the Registrar of Companies,



REGULATION	PROPOSED AMENDMENTS	COMMENT (S)	RECOMMENDATIONS
			Competent Authorities, PPRA and PPPC will be able to publish and publicise any important information affecting the nation. On this basis, it is not clear exactly what the new paragraph seeks to cure, while at the same time adding ambiguity on which organs of the State would be dealing with the BO information.  We recommend that the new Paragraph (6) be deleted.
4	Amending Form BOF1 to add the "individually or jointly" aspect of BO nature of control.	We support this change.	"The BO Workflow would need to be adjusted to capture the "Name of director appointed by the BO", as required in the Form BOF-1."

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