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

BY DHIR KAMAL BHATT

The President of Kenya, H.E Uhuru Kenyatta, in an attempt to battle corruption and other financial crimes, on 5 th July 2019, assented to Statute Law (Miscellaneous Amendments) Act No. 12 of 2019. The changes in the Companies Act, 2015 are related to sections 93 and 611 of the Act, thereby affecting beneficial ownership and take-over bids respectively.

CITY HOUSE, FIRST  
FLOOR, NYERERE AVENUE  
PO BOX 80766-80100 -  
MOMBASA, KENYA

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# Draft Beneficial Ownership

The amendment clarified that every company incorporated or registered in Kenya will now be required to keep two separate registers: (i) a register of members; and (ii) a register of beneficial owners. The two registers are required to be lodged with the Registrar of Companies upon any change in legal or beneficial ownership of a company's shares.

## How is Beneficial Ownership determined

Beneficial owner is defined 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."

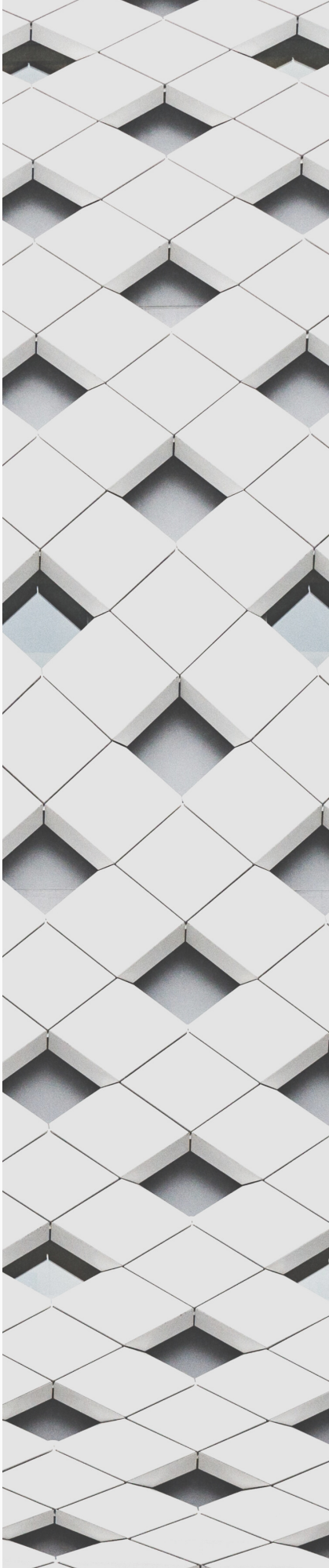
The above mentioned definition is vague as it also includes not only ownership but also includes any person who has effective control over a legal person. Therefore, a beneficial owner is an individual who owns or controls directly or indirectly: (i) more than 10% of the shares; (ii) more than 10% voting rights; (iii) more than 10% ownership interest; or (iv) has the ability to control the company via other means.

In cases where no one meets the above mentioned criteria to qualify as a beneficial owner, then the senior managing officials will be entered into the register of beneficial owners.

## Key issues arising out of the definition of "Beneficial Ownership" under the Companies Act

The most basic of standard nominee relationships would now be subject to disclosures. As such, the registered holder of shares would engage in a nominee agreement as per which it is provided that the registered shareholder holds the shares in trust for its principal. It is now the case that disclosure of the details of the real beneficial owner of the shares will be required, as per section 93A of the Companies Act.





In cases of a partnership, does this extend to both the general partner and the limited partners? This may depend on how the respective partnership agreements address issues of control and ownership between the partners.

More complex structures such as a private equity fund would be nearly impossible to find out, as there can be hundreds of owners, in multiple countries. In such cases determining the beneficial ownership and control of a company's shares would be a very complex procedure, hence, it will be done on a case-by-case basis to ensure complete compliance.

## Official search of Beneficial Owners

The 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:

(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).

## Penalties for failure to disclose

Should a company fail 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 a 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.

# What are the tax implications?

Since the definition of “control” is very wide in the Income Tax Act, therefore, if a Kenyan entity is assumed to be controlled by a non-resident person, there are various tax implications, including thin capitalization rules, deemed interest and transfer pricing rules, which would be applicable and should be considered. Whereas previously it would not be apparent that an entity is foreign controlled, the mandatory disclosure of beneficial ownership information would now make this information publicly available.

## Conclusion

The disclosure of beneficial ownership requirements will have a significant impact on existing trust and shareholder control arrangements and how these arrangements should be structured going forward. For more information please contact us at ; [info@anantbhatt.com](mailto:info@anantbhatt.com) or visit our website [www.anantbhattllp.com](http://www.anantbhattllp.com)





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## **CONTACTS**

### **MANAGING PARTNER**

***CPA KAMAL ANANTROY BHATT***  
***KAMAL@ANANTBHATT.COM***

### **ASSOCIATE PARTNER**

***CPA KINYAE DANIEL MUMO***  
***DANIEL@ANANTBHATT.COM***

### **QUERIES**

***INFO@ANANTBHATT.COM***

## **PUBLICATION**

### **EDITORIAL**

***DHIR KAMAL BHATT***

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