



# BENEFICIAL OWNERSHIP TRANSPARENCY IN KENYA

May 2024

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**Fact Sheet**  
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# ACKNOWLEDGEMENTS

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Dennis Kabia (Communications Associate East & Southern Africa, GFI)





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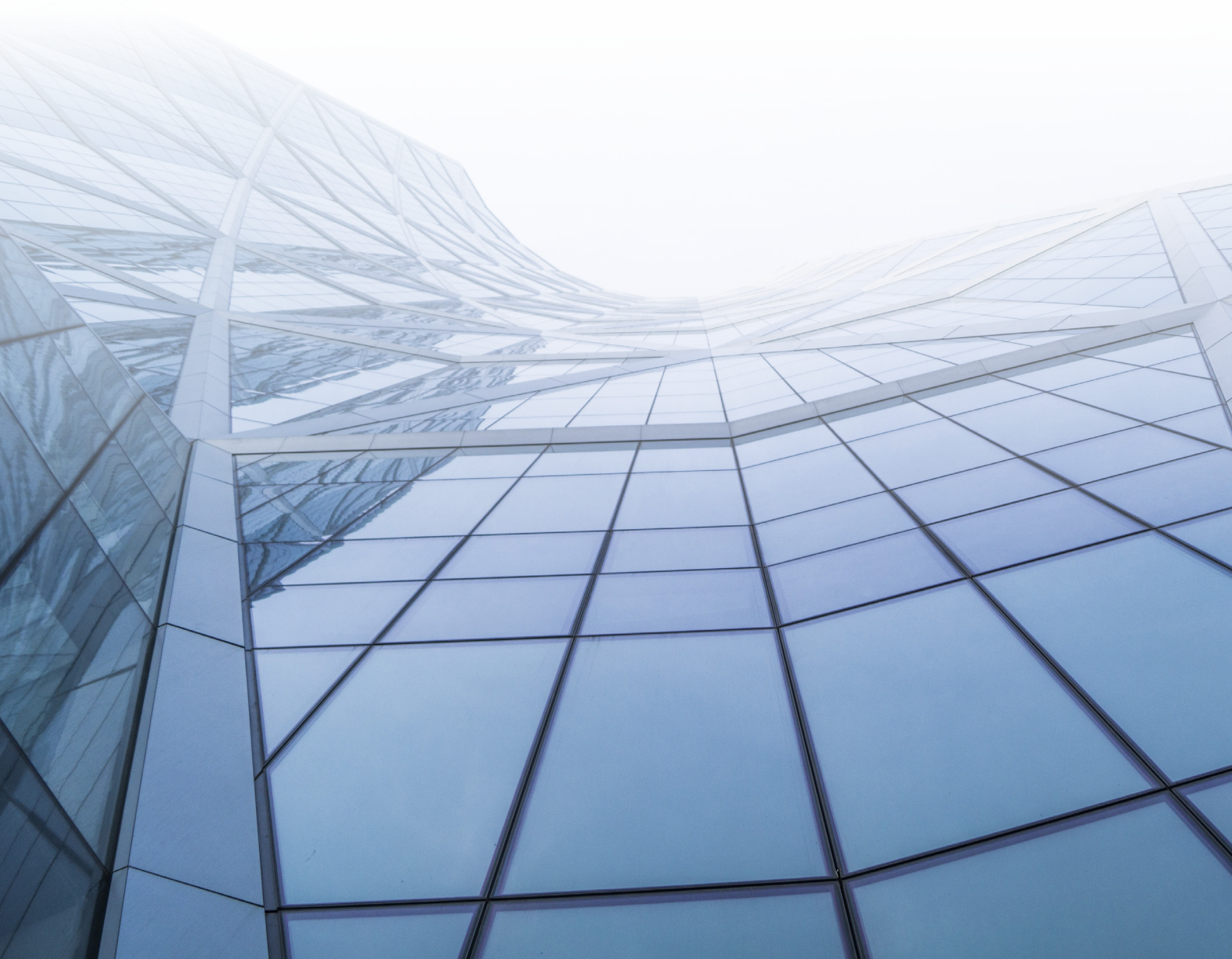
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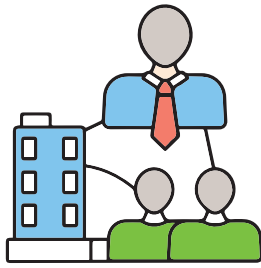
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# 1 | WHAT IS BENEFICIAL OWNERSHIP?



Kenyan law defines the Beneficial Owner as the individual that ultimately owns or controls a legal entity. Beneficial Ownership Regulations 2020 and Beneficial Ownership Information (BOI) amendment regulations, 2022, a person qualifies as a Beneficial Owner if the person falls under any of these categories:

- ⊕ Holds at least ten percent (10%) of the issued shares in a Company either directly or indirectly;
- ⊕ Exercises at least ten percent (10%) of the voting rights in a Company either directly or indirectly;
- ⊕ Holds a right, directly or indirectly, to appoint or remove a Director of the Company; and
- ⊕ Exercises significant influence or control; directly or indirectly, over the company. This includes person(s) responsible for making strategic decisions that ultimately affect the business or determines the itinerary of the legal person.

The concept of beneficial ownership is different from legal ownership and requires an in-depth understanding of the notions related to both “ownership” and “control.”

A common misconception is that knowing the shareholders of a company is sufficient to determine who the beneficial owners are. However, shareholders can include other legal persons. In addition, even if the shareholder information refers to natural persons, it still does not always consider natural persons who may exercise control over the legal structure without necessarily being shareholders. It also does not reflect those shareholders who may have control over the legal person because of the type of shares they hold, in contrast to ownership thresholds.

Adequate information is information that is sufficient to identify the natural person(s) who are the beneficial owner(s) and the means and mechanisms through which they exercise beneficial ownership or control.





## 2 | WHY IS BENEFICIAL OWNERSHIP DISCLOSURE IMPORTANT?

Identifying the person that beneficially owns a company can help fight corruption, tax evasion, terrorist financing and money laundering. Further, more often than not, public funds are lost through tenders awarded to companies whose ownership is unclear or unknown. The effect of which results in challenges in identifying and prosecuting the true perpetrators of the vice and challenges in tracing, freezing and recovery of the lost assets. Further, allowing entities whose ownership is opaque to operate in the country opens it up for wider issues relating to the financing of terrorism, proliferation of arms and money laundering. The embezzlement and loss of public funds ultimately undermine the provision of various public services such as health and security to Kenyan citizens.

Corruption scandals in Kenya, such as the KES 55 billion (US\$770 million) Anglo Leasing scheme in the early 2000s, and the KES 10.5 billion (US\$78 million) National Youth Service scandal in 2015, took place because criminals were able to hide their identity behind companies and other legal entities where their interests could not be detected. Beneficial ownership regulations therefore help law enforcement agencies with investigations by ensuring that the Kenyan government has access to the necessary information at times.





# 3 | WHICH LEGAL FRAMEWORKS PROVIDE FOR BENEFICIAL OWNERSHIP?

## *Key international and regional frameworks for beneficial ownership*

Globally, there is a push for countries to enact robust legislation obligating legal entities and arrangements to report information on their beneficial owners. The international and regional frameworks that support beneficial ownership legislation include the following:

- i. **The United Nations Convention Against Corruption (UNCAC):** Article 14 and 52 of the UNCAC require state parties to put in place Measures to prevent money-laundering as well as Prevent and detect transfers of proceeds of crime. Those measures include identification of beneficial owners.
- ii. **Financial Action Task Force (FATF):** FATF Recommendation 24 aims to strengthen the international standards on beneficial ownership by requiring countries to ensure that competent authorities have access to adequate, accurate and up-to-date information on the true owners of legal entities while FAFT Recommendation 25 aims at ensuring transparency and beneficial ownership (BO) of legal arrangements.

## **BENEFICIAL OWNERSHIP LEGAL FRAMEWORK IN KENYA**

In Kenya, the Beneficial Ownership transparency requirements are covered primarily under the Companies Act, 2015 and attendant regulations as well as the Limited Liability Partnership Act, 2011 section 93, A. The companies Act provides a definition of a beneficial owners and has provisions that require different types of companies that should identify and disclose their beneficial owners.

Separately, the Proceeds of Crime and Anti Money Laundering Act, 2009 puts in place requirements for financial institutions and Designated Non-Financial Businesses and Professions (DNFBPs) to take reasonable measures to identify beneficial owners of their customers or clients as part of their customer due diligence obligations to combat money laundering, terrorism financing and financing of proliferation of arms.

The Business Registration Service(BRS), a State Corporation established to administer policies, laws and other matters relating to the registration of Companies, partnerships and firms, and corporations carrying on business under a business name, bankruptcy, hire-purchase, and security rights has developed an online platform where Companies and entities are required to lodge the Beneficial Ownership (BO) information. The Regulations developed reiterate on the need for transparency and disclosure on BO information to promote good governance and help mitigate cases of corruption and money laundering.



## Disclosure by the company

A Company is not required to disclose BO information to:

- i. **The Registrar of Companies.**
- ii. **A procurement entity where the Company participates in public procurement:**  
This is in efforts to promote transparency in awarding public contracts to companies in Kenya, where the respective public bodies would seek to know the ownership structures of companies before engaging them. Once a tender is awarded to a company by a procuring entity, the Public Procurement Regulatory Authority (PPRA) will publicize the beneficial ownership information of the company on their website and government portals.
- iii. **A contracting authority where the Company participates in Public Private Partnerships:**  
The B.O information shall not be made available to the public except for publishing the information related to entities that have participated in the tendering process undertaken by a Contract Authority pursuant to the Public Private Partnership Act, No.15, Of 2013;
- iv. **The court (if need be); and**
- v. **A third party, by written consent.**

## Disclosure by the Registrar

The Registrar may disclose BO information to:

- i. Public Procurement Regulatory Authority;
- ii. A Competent Authority;
- iii. Public Private Partnership Committee; and
- iv. The Court.



### Disclosure by Public Procurement Regulatory Authority

PPRA shall publish in its public portal the BO information of the entities that have been awarded tender by a procuring entity or a contracting authority.

### Disclosure by the Government

The Government may disclose to the public BO information of any entity if such information affects the country.

### Steps of Filing Beneficial Ownership Information of a Company with the Registrar of Companies:

1. The Company should identify who their beneficial owners are.
2. The company should give notice to the person it has identified as being a beneficial owner of the Company requiring the person to provide the following information within twenty-one (21 days) from the date of the notice;
  - a. Full name ;
  - b. copy of his/her National Identification Cards, Passports or Birth Certificate;
  - c. Postal Address;
  - d. Residential Address;
  - e. copy of his/her PIN Certificate;
  - f. his/her telephone number and occupation;
  - g. the nature of ownership or control the beneficial owner has in the company;
  - h. the name of shareholder (if any) holding shares on behalf of the beneficial owner;
  - i. The date on which any person became a Beneficial Owner; and
  - j. The date which any person ceased to be a Beneficial Owner.

The company should prepare Form BOF1 which contains the information set out and lodge the same with the Registrar of Companies within thirty (30) days of preparing the said Form BOF1.

**When a B.O fails to provide the details required to lodge a BOF1**, the Company should issue a warning notice stating that it is proposing to restrict the relevant interest of the Beneficial Owner.

The effect of the said restriction is:

- i. Any transfer of the beneficial owner's interest is void.
- ii. No rights are exercisable in respect to the beneficial owner's interest.
- iii. No shares may be issued in right of the beneficial owner's interest; and
- iv. No payment may be made of sums due from the company in respect to the beneficial owner's interest.
- v. A Company is further required to keep a register of its beneficial owners separate from the register of members: The BO information can be kept either in a manual register or in an electronic Register.

Once the register is prepared, the company must lodge the register with the Registrar of Companies within thirty (30) days.

These requirements refer to the first time the BO Register is submitted by a newly registered company or by an existing company in compliance with the BO regulations, failure to which the company may be liable for committing an offence which attracts a maximum fine of Kenya Shillings Five Hundred Thousand (KShs.500,000).

An individual who illegally discloses beneficial ownership information for other purposes which are different from what is provided by the regulations commits an offence and upon conviction will be liable to pay a fine not exceeding KShs 20,000/- or to be imprisoned for a period not exceeding six months or to both.

### **What are the obligations of the different stakeholders?**

- a. The Business registration service- to keep a register of beneficial owners.
- b. Public procurement regulatory Authority - to maintain beneficial ownership information maintained in the Public Procurement Information Portal (PPIP) in relation to entities that have been awarded a tender by the procuring entity as part of contract award.
- c. DNFBPs and Financial Institutions – to identify and verify the beneficial owner(s) of their clients (if it appears they are acting on behalf of another person).



# 4 | COMPLIANCE PROCESS: ROLES, RESPONSIBILITIES AND SANCTIONS

As a general rule, a company has a duty to obtain the BO information and to keep the information together with the supporting documents relating to the BO information. In addition, the company must ensure that the BO information is adequate, accurate and up-to-date and is lodged with the Registrar in a timely manner. Companies should incorporate Beneficial Ownership Information Disclosure in their compliance processes and ensure any changes are updated regularly. The roles and responsibilities of the various parties with regards to the BO information disclosure and maintenance are as follows:

## 1. Officers of the Company



The Officers of the Company, being the Directors and where applicable, the Company Secretary, are ultimately responsible in ensuring that the company has exercised its powers under section 93A of the CA2015 in obtaining the BO information. The obligation also extends to ensuring that the information is entered into the Register of Beneficial Owners and that such information is duly submitted to the Registrar as required under section 93A within 30 days of preparation and thereafter any updates are submitted to the Registrar within 14 days of a change.

## 2. Members of the company (Shareholders)



If a member of a company has received a notice issued under regulation 4 (notice to submit BO Information) or regulation 5 (warning notice) of the BO Regulations, the member has an obligation to inform the company whether he is the BO as defined by the CA2015. The obligations of a member under the BO Regulations also extends to the need to provide the particulars of the persons for whom the member holds the shares as a nominee, voting rights or the parties to the agreements or arrangements.

## 3. Persons who are not members of the Company (non-shareholders)



If a person who is not a member of a company (e.g. a Trustee, or a nominee shareholder, a Director, persons with significant influence) receives a notice from the company, notice issued under regulation 4 (notice to submit BO Information) or regulation 5 (warning notice) of the BO Regulations, the person has the obligation to inform the company whether he is the BO of the company as defined under the CA2015. Similarly, the obligations of such person also extend to the need to provide the identity of the beneficial owner if they know him/her and/or to provide the BO's prescribed particulars.

#### 4. Authorized Persons



Where a company has not appointed a Company Secretary, the Board of Directors may appoint an authorized person, usually a Lawyer, to properly keep and regularly maintain the Register of BOs. The Authorized Person must ensure that the BO information is entered into the Register and lodged with the Registrar in accordance with the requirements set out under the BO Regulations. The appointment instrument will be required to be filed with the Registrar.

#### 5. Failure to comply with BO Regulations



A company and each officer that fails to comply with the requirement to submit the beneficial ownership information as required under Section 93A of the Act commits an offence as stipulated under Section 93A.



## 5 | COMMON PRACTICAL CHALLENGES UNDER BENEFICIAL OWNERSHIP LAW

Various practical issues can be encountered in dealing with different types of legal persons, including the nature of shares and the way that ownership and/or control is exerted on the legal person. The following is a non-exhaustive overview of some of the common practical challenges that may be encountered when trying to identify ownership and/or control of a legal person.

### Complex ownership and control structures

Complex legal structures can be created and exist for legitimate purposes, but the more complex they are (for example, multiple layers of ownership, spread across jurisdictions), the more difficult it is for competent authorities to identify who owns and/or controls the structure. However, even the most complex structure exists for a reason, and that reason should be understood (for example, by a bank taking on a legal person as a customer, or by a trust and company service provider [TCSP] forming the legal person). If there is no adequate explanation for the use of a complex legal structure, this could indicate that the company structure is deliberately complex to disguise the beneficial owner, or it may have been created to facilitate or commit a crime—and the relevant authority should treat this as a red flag.

### Ownership thresholds

For practical purposes related to carrying out customer due diligence (CDD), countries often put thresholds in place for identifying beneficial owners regarding ownership levels (for example, 10 percent or 25 percent shareholdings). Share ownership above these thresholds can sometimes indicate beneficial ownership but is not necessarily the only determining factor in ascertaining the beneficial owner.

Legal persons can be vastly different from one another, and applying one threshold does not adequately capture the different ownership structures of these different legal entities. If thresholds are imposed, they should be set proportionate to the risk posed by the type of legal person. For example, a legal person that presents no particular risk factors might justify a maximum of 25 percent threshold (the FATF standards' suggested maximum threshold), whereas higher-risk situations might warrant a lower threshold or even no threshold. Lower thresholds mean that more potential beneficial owners will be found. Lower thresholds are particularly relevant in relation to fit and proper requirements for ownership of financial institutions.

Furthermore, any threshold—regardless of how low it has been set—can be circumvented through exercising control of the legal person. Countries should clarify this in the legal framework and issue appropriate guidance to ensure that countries adopt a comprehensive definition of beneficial ownership that includes both concepts of ownership and control. At some point, the number of shareholders might also dilute ownership enough that identifying each separate beneficial owner would not be possible and would create too heavy an administrative burden. The standards recognize that if ownership is so diversified that there are no natural persons (whether acting alone or together) exercising control of the legal person through ownership, then control through "other means" should be examined. Other means might include holding a significant influence function or being closely related to a shareholder and/or being able to exert influence on them. This may be the case for certain publicly traded companies.



## Voting rights

Shareholder voting rights might be an indication of beneficial ownership because in theory, the power to direct the affairs of the legal person should lie ultimately in the hands of the voting shareholders. However, not all legal persons issue shares with voting rights or with equal voting rights. For example, a company might allow shareholders one vote per share, thus giving those with higher equity in the company more votes. Other companies might allocate one vote per shareholder, thus giving minority shareholders or groups of minority shareholders a bigger say in the company's affairs than their equity stake would otherwise suggest.

## Golden shares

Golden shares traditionally give the holder a majority of the voting rights, which means that the holder can outvote all other shareholders, and this often results in giving their holders effective control over the company. Although many such shares were originally given to governments after privatization of state-owned companies, their wider use could give a distorted view of control if the simple value of shares was viewed as the basis for ascertaining beneficial ownership information.

## Nominee shareholders and directors

Legal persons that allow nominees to represent shareholders and directors can be misused by those trying to hide beneficial ownership information. Some nominee arrangements are legitimate and formal in nature (for example, governed by a written contract and disclosed to the legal person), but others can involve less formal or more opaque arrangements, in which the nominee is used primarily to conceal the beneficial owner's identity. (See this chapter's "Nominee Shareholders and Directors" section for a broader discussion of relevant issues.)

## Undisclosed agent arrangements

Those seeking beneficial ownership information should be conscious of business and other relationships that may suggest that a director or shareholder is acting as an agent for another person. For example, a person may hold shares or a directorship in a company, but also be an employee of another person or company. It may be that the director or shareholder is acting at the behest of the controller of the company in which he is employed. This could also be a type of nominee arrangement.

## Family members and other strawmen

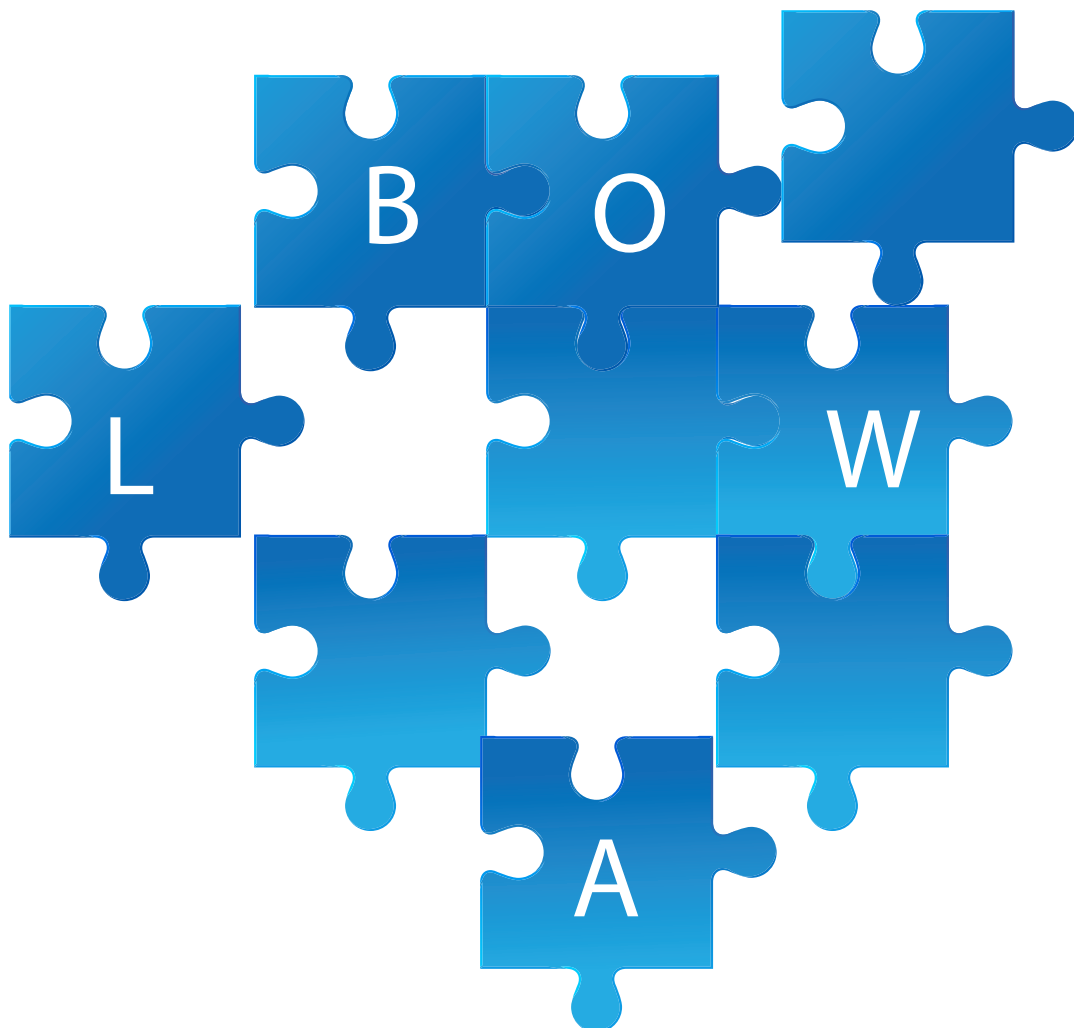
The use of strawmen in such arrangements can be particularly challenging and can be a nominee arrangement. In such cases, the ownership and formal control of a legal person will be with a person that is (closely) related to or associated with another person. The fact that the true control may be with another person may be evident by the nature of the relationship between the legal owner and the actual beneficial owner, such as an (unequal) family relationship (for example, parent-child), an (unequal) professional relationship (for example, former employee-employer), or another link (for example, former colleagues). Another clue is the fact that the legal owner seems to have had no means to acquire the legal entity or has little (professional) experience to justify owning a company. This type of relationship between the legal and beneficial owner is especially prevalent in relation to politically exposed persons (PEPs), and FATF's guidance provides more details in this area.

## Publicly traded companies

The international standards acknowledge that being listed on a stock exchange already imposes sufficient transparency requirements that would enable a financial institution or designated nonfinancial business and profession (DNFBP) to accept information that is in a public register or available from the customer or from another reliable source. However, this provision's usefulness will depend partly on the completeness and reliability of the relevant country's company listing process, which would need to be enforced robustly.

## Foreign legal persons

Where foreign legal persons are part of the chain of ownership of a legal person, challenges in accessing beneficial ownership information from host countries arise if countries do not have beneficial ownership information publicly available, do not register beneficial ownership information at all, or have a track record of not sharing accurate beneficial ownership information with other countries promptly. In addition, when relying on the information that can be accessed on a beneficial ownership register in another jurisdiction, consideration should be given to this information's reliability (for example, whether the country has a weak regime for anti-money laundering and combating the financing of terrorism [AML/CFT]). Related to this, countries should consider additional measures where foreign legal persons have significant control/ownership of a legal person, such as requiring that beneficial ownership information of that foreign legal person be held in the country.



# BENEFICIAL OWNERSHIP TRANSPARENCY IN KENYA



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