LEGAL AND REGULATORY FRAMEWORKS FOR BENEFICIAL OWNERSHIP DISCLOSURE

On 25th July 2023, the Corporate Affairs Commission ("the Commission") in partnership with the NBA-SBL organised a training workshop on the use of the Beneficial Ownership Register ("BOR"). The BOR is focused on ensuring that the identity and details of ultimate beneficiaries[1] in a company or limited liability partnership are provided on the BOR register and accessible to third parties and competent government agencies.

This paper seeks to summarize the matters highlighted at the training workshop and the use of the Commission's BOR online portal. We will also analyse the legal and regulatory frameworks which impact on the requirement for disclosure by beneficial owners.

Requirement for Disclosure

Sections 119 and 791 of the Companies and Allied Matters Act, 2020 ("CAMA") make provisions for disclosure by persons with significant control (PSCs). By the interpretation section of CAMA, a significant control arises where a person:

- Directly or indirectly holds at least 5% of the shares or interest in a company or limited liability partnership;
- Directly or indirectly holds at least 5% of the voting rights in a company or limited liability partnership;
- Directly or indirectly holds the right to appoint or remove a majority of the directors or partners in a company or limited liability partnership;
- Has the right to exercise significant influence or control over a company or limited liability partnership; or
- Has the right to exercise significant influence or control over the activities of a trust or firm whether it is a legal entity but would itself satisfy any of the first four conditions if it were an individual.

A PSC is required to within seven (7) and fourteen (14) days (in the case of a limited liability company and limited partnership respectively) of attaining the status of a PSC, notify the company or limited liability partnership, of such fact and provide particulars of such control.

In a similar vein, the Company is required to within one (1) month of receipt of a PSC's notification, notify the Commission of the information received or changes made in every annual return filed subsequently. The Commission is also required to maintain a register of PSCs in which it shall enter the information received from the company or any change therein.

The rationale for the introduction of the Beneficial Ownership Register

The rationale for the requirement of disclosure by PSCs is to reveal the ultimate beneficiary of certain interests in a company. That is, persons who exercise or have the right to exercise significant control over a company's business operations. As such, PSCs

[1] An ultimate beneficiary is a person with significant over a company or limited liability partnership.

eligible for registration must be natural persons. In respect of state-owned or other government enterprises, the Commission acknowledges that it may not be practicable to disclose the identity of every citizen or indigene who may have an interest in the Company and recommends the registration of the chief operating officer or other key personnel in control of the affairs of the business enterprise.

In view of the principle of a company's corporate personality, the Commission has introduced the beneficial ownership register to ensure that natural persons who are ultimately the beneficial owners of a company, are disclosed when the corporate veil is lifted. As a result, the beneficial ownership register is structured in a manner that ensures that only natural persons can be registered. Where for instance a company holds 5% shares or 5% voting rights of another company, the latter company cannot be registered on the beneficial ownership register. Rather, the individuals who beneficially own shares in the latter company must be registered as PSCs of the earlier company. The BOR also seeks to safeguard against the registration of non-existent persons and persons who have not consented or are incapable of consenting to be shareholders in a company.[2]

Furthermore, the BOR online platform allows for reporting inconsistent or incomplete information.[3] Where the Commission receives a report, it is mandated to carry out an investigation to confirm the authenticity of the report. The Commission would then contact the Company to confirm if inaccurate information was inadvertently entered, in which case the company is given the opportunity to rectify the error. Where the Commission finds that the inaccurate, incomplete, or omitted information was deliberately entered, it acts on the report received by third parties to ensure the BOR is updated to reflect accurate and complete information. Moreso, where a Company defaults in its PSC filing, its status on the BOR online platform[4] will be inactive even if the company has completed its annual return filing.

Use of the BOR Platform

A step-by-step guide on how to use the BOR platform is described below:

Search

Step 1: Access the portal on https://bor.cac.gov.ng/
Step 2: Select the "Search" option.
Step 3: Select a preferred search type which may be (1) Entity Name; (2) Entity Number (i.e., the registration number); or (3) PSC's full name.
Step 4: The search result reveals the PSCs in the Company and the relevant details - specific reference is made to the PSC shares or interest and voting rights[5].
Step 5: Download or print the search result.

Report

Step 1: Access the portal on https://bor.cac.gov.ng/
Step 2: Select the "Report" tab.
Step 3: Complete reporting form detailing the reporting organization/individual, details of the company or limited liability partnership being reported for inconsistency, and particulars of the inconsistent information.
Step 4: Submit form (CAC is notified immediately a form is submitted).

Register (unavailable to individuals or private organizations)

This is accessible to authorized organizations and government agencies that may require bulk

[2] For example, registration of the names unborn children as shareholders of a Company. While the names may correlate upon the child's birth, information relating to the date of birth is usually inaccurate. Another example is complex corporate shareholding structure. The Commission is working towards collaborating with the National Identity Management Commission (NIMC) in this regard to ensure accuracy of the details of PSCs entered in the BOR.

[3] This can be done through the "Report" tab on the BOR portal.

[4] The inactive status may also be reflected on other relevant platforms of the Commission.

[5] The shares and voting rights are subject to a maximum of 100%. Thus, the shares or voting rights of a PSC cannot exceed 100%.

information that spans several years. The Commission reviews an application for registration and if satisfied, notifies the applicant of its approval. The applicant/registered user then receives login details.

Login (unavailable to individuals or private organizations)

Upon receipt of the login details, a registered user may log into its account using its username and password. The registered user can then access the dashboard and bulk data within the indicated date range. The registered user may also print the search result.

Legal and Regulatory Frameworks for Beneficial Ownership Disclosure

Nigerian Financial Intelligence Unit ("NFIU")

The Nigerian Financial Intelligence Unit (NFIU) requires beneficial ownership disclosure as provided under the applicable Financial Action Task Force (FATF) recommendations[6] and Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) framework. Legal persons and trusts have been made a subject of abuse for money laundering, terrorism financing and criminal activities. In a bid to enjoy the proceeds of a criminal act, criminals utilize several vehicles in the form of legal persons, and body corporate to carry out criminal activities. These tools are also used to integrate the proceeds of crime into the financial system. The NFIU as a repository of financial intelligence, receives, analyses, and disseminates financial intelligence and data to competent law enforcement authorities.[7]

A beneficial owner is the natural person who ultimately owns or controls the customer of any financial institution or on whose behalf a transaction is being carried out and exercises ultimate effective control over those transactions. A beneficial owner can be obscured through the use of shell companies, complex ownership structures, informal nominee shareholders, unscrupulous use of legal persons as directors, trust or a combination of any of these tools. In view of this, the NFIU emphasizes the need for adequate, accurate, and up to date beneficial ownership data which forms a useful source of information to its mandate. Some relevant FATF Recommendations are Recommendations 10, 22 and 24, 25 and 31 which deals with; customer due diligence, DNFBPs customer due diligence, transparency and beneficial ownership of legal persons[8], transparency and beneficial ownership of legal arrangements and powers of law enforcement and investigative authorities respectively.

Special Control Unit on Money Laundering ("SCMUL")

The Money Laundering (Prevention and Prohibition) Act 2022, ("the MLA") vests some compliance obligations on financial institutions and Designated Non-Financial Business and Professions (DNFBPs), prescribes adequate penalty for non-compliance and strengthens the existing framework for combating money laundering and other related offences.

Section 2 (1) of the MLA prohibits individuals and corporate bodies from making or accepting cash payments in excess of N5 million for individuals and N10 million for corporate bodies except where the transaction is carried out through a financial institution. The MLA further prohibits structuring targeted at avoiding DFNBPs duty to report transactions that ought to be reported[9]. Section 4 of the MLA requires financial institutions and DNFBs to identify and verify the identity of customers, using reliable, independent source documents, data, or information. The coverage of the identification spans legal persons and arrangement, beneficial owners, and

[6] 2012 – 2023.

[7] The NFIU also receives reports from financial institutions and designated non-financial businesses to analyse and disseminate financial reports which enhances the prosecution of financial crimes.

[8] This extends to the sources of beneficiary ownership information.

[9] Section 2 (1) MLA.

third-party intermediaries.[10]

The Securities and Exchange Commission ("SEC")

In addition to the Investment and Securities Act, 2007 and the SEC Consolidated Rules and Regulations, 2013, SEC provides a risk-based framework through the Capital Market Operators Anti-Money Laundering and Combating the Financing of Terrorism and Proliferation) Regulations, 2022 ("the Regulation"). The Regulation is aimed at combatting money laundering, terrorism, and proliferation financing activities in the capital market, and minimizing the risk faced by the capital market from the proceeds of crime, amongst other objectives.

It is trite that SEC sets out filing requirements for registration[11] of capital market operators and conducts due diligence on the information received before granting licenses to applicants seeking to be registered as capital market operators in Nigeria. Furthermore, SEC requires additional disclosure by persons who are promoters, directors, or persons who form part of the senior management of an applicant, where these persons are also beneficial owners of the applicant.[12]

By Regulation 16 of the Regulations, a Capital Market Operator is required to take reasonable steps to verify the identity of its clients' beneficial owners before or during the course of establishing a business relationship or conducting transactions for them. Regulations 11 and 17 require a capital market operator to conduct due diligence on new and existing clients. This due diligence is aimed at scrutinizing the client's business and risk profiles and the source of funds. Certain post -registration screenings[13] are also carried out to ensure that data provided at the time of registration are accurate and are up to date.[14]

Conclusion

The introduction of the BOR by the Commission is a commendable initiative aimed at providing accurate and reliable data required by public and competent government agencies for combating fraud, money laundering, terrorism financing and other related offences. It therefore enhances the investigative and enforcement powers of regulatory agencies by revealing the natural persons who truly own and control companies and limited liability partnerships, especially in circumstances where these legal entities are used as a tool for perpetrating unscrupulous and illegal business transactions.

We expect that the Commission in collaboration with other regulatory agencies would through the use of BOR amongst other corporate governance measures, eliminate or reduce to the barest minimum, the perpetration of money laundering and other financial crimes, and improve investors protection in the Nigerian capital market.

[10] By section 4 (1) (c) of the MLA, the financial institution or DNFBPs identifying beneficial owners, is required to resort to relevant information or data obtained from a reliable source such that the financial institution or the DNFBP is satisfied that it knows who the beneficial owner is.

[11] The applicable documents and information are determined by the category under which the applicant seeks to be registered. However, beneficial ownership assessment applies to all capital market operators. Sequel to the identification of beneficial owners, requirements such as duly completed beneficial ownership declaration form, details of the shareholding structure of the applicant seeking SEC's license to operate as a capital market operator and other post-incorporation documents must be furnished by the applicant.

[12] SEC would usually conduct due diligence to confirm the veracity of the information provided. SEC collaborates with other agencies including the Commission and the Federal Inland Revenue Service for the purpose of the due diligence.

[13] Notice may or may not be given before the screening. Thus, post registration screenings by SEC may take the form of spot checks or prescheduled checks.

[14] A capital market operator requires the SEC's approval before making changes to certain information provided at the time of registration, for example, changes that impact on beneficial ownership.

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