

South Africa's Companies Amendment Bill: Public Consultation

*submission by the Centre for the Study of Corruption at the University of
Sussex*

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1. This submission by the Centre for the Study of Corruption is directed at addressing the beneficial ownership provisions of the Companies Amendment Bill, 2021. The introduction of beneficial ownership registers is a policy increasingly supported around the world with many countries and international organisations committed to introducing these reforms. South Africa's proposals to introduce a similar register are a welcome development.
2. Like many countries, corruption in procurement, tax evasion and illicit financial flows remain a challenge in South Africa and the introduction of a beneficial ownership register can significantly improve legal oversight of companies and other entities. It can also help prevent collusive tendering or bid rigging by companies and help manage conflicts of interest. The efficacy of this policy, however, hinges on the capacity of law enforcement and regulators to effectively enforce and verify compliance while prosecuting violations. It is therefore essential to the effectiveness of the new policy that the resources of these entities are increased accordingly.
3. Clause 4 (e) – This clause limits the right of individuals to request certain company records, including annual financial statements: to companies with a public interest score¹ above 100, for companies with internally prepared financial statements; or a score of 350, for companies with independently prepared financial statements. We believe that this is an overly high threshold that will diminish the capacity for scrutiny of many companies. Most importantly, it is problematic that some companies tendering for government contracts may fall below this threshold. Any company that engages in tendering should be considered to have sufficient public interest and should be required by law to disclose these documents to interested parties – including civil society and the media, which often play an important role in uncovering corrupt practices and conflicts of interest. As a general principle of transparency, access to the documents discussed in section 26 of the Companies Act, 2008, should be easily accessible to the public.
4. Clauses 8 and 13 – These clauses propose that companies be compelled to maintain a register of beneficial owners and share this information with the Companies and Intellectual Property Commission. In clause 13 (e), companies are required to confirm beneficial ownership on a quarterly basis. In turn, clause (g) stipulates that companies

¹ Companies and Intellectual Property Commission. (2021). Public Interest Score.
<http://www.cipc.co.za/index.php/manage-your-business/compliance-and-recourse>

should disclose beneficial ownership over 5% in annual financial statements. It is, however, unclear whether companies are required to disclose the beneficial ownership at each quarter in annual financial statements or whether disclosure in annual statements will only provide a snapshot of beneficial ownership at the point in which the statements are prepared. Requiring companies to disclose quarterly changes in beneficial ownership in annual financial statements would increase transparency.

5. We believe that the 5% threshold for disclosure proposed in the Bill is set at an appropriate level to balance the benefits of transparency and the costs of the regulatory burden placed on companies. However, lawmakers should consider whether a differential approach to disclosure thresholds could be advantageous in certain sectors. Globally, extractive sectors are known to be prone to corruption and this is true in South Africa as well. Consequently, several countries have adopted a lower threshold for extractive industries including Liberia², which imposes a 5% threshold for mining, oil and gas industries compared to 10% for the forestry sector, and Ghana, which has no threshold for domestically owned companies in the extractive industry compared to 5% for foreign-owned companies and 25% for companies outside of the extractive sector.³
6. Corrupt actors often engage in elaborate efforts to “game” the system and it is likely that some may engage in splitting up shareholdings so that they fall just below the disclosure threshold, to avoid disclosure requirements. This can be accomplished by owning shares through multiple entities which may obscure companies’ understanding of the true beneficial ownership or allow them to deny deliberate obfuscation. Requiring companies to only request beneficial ownership information from shareholders with 5% or more shareholding poses the risk that companies may be unaware that beneficial owners are over this threshold if a beneficial owner holds shares through different entities. To address this, attempts to “game” the system by deliberately engaging in efforts to obstruct the disclosure of beneficial ownership should be criminalised.
7. Further, lawmakers should consider mandatory disclosure of beneficial ownership for politically exposed persons. Companies requesting information on beneficial ownership should additionally be required to enquire whether beneficial owners are politically exposed persons and should disclose and indicate all known beneficial owners with political exposure in annual financial statements and in the beneficial

² Liberia Extractive Industries Transparency Initiative. (2016). Beneficial Ownership Roadmap.

https://eiti.org/files/documents/leiti_bo_roadmap.pdf

³Rajuili, K. (2020). Beneficial Ownership reform in Africa: analysing progress in Ghana, Kenya, and Nigeria.

<https://www.openownership.org/blogs/beneficial-ownership-reform-in-africa-progress-in-ghana-kenya-and-nigeria/>

ownership register. This will help identify potential conflicts of interest and corruption risks.

8. The success of disclosure policies, such as beneficial ownership registers, hinges on the capacity of regulators to effectively enforce disclosure and penalise violations. This includes the ability to verify and conduct checks on disclosures of beneficial ownership. For the beneficial ownership register to successfully combat corruption and illicit financial flows in South Africa, capacity and training should be increased for entities such as the Financial and Asset Forfeiture Investigation (FAFI) Unit of the Directorate for Priority Crime Investigation, the Asset Forfeiture Unit of the National Prosecuting Authority, and the Financial Intelligence Centre. Increased capacity and training are particularly necessary for law enforcement entities such as the FAFI Unit which has a low conviction rate⁴ and lacks the skills and resources necessary to pursue complex financial crimes.⁵ Achieving the desired goals of a beneficial ownership register will require a significant increase in resources for these enforcement entities considering that South Africa is a major financial hub for the rest of Africa and has an advanced banking and finance sector.

⁴ Baloyi, Rhulani Portia. (2020). An evaluation of money laundering investigation at the Financial and Asset Forfeiture Investigation Unit of the South African Police Service in Pretoria. <http://hdl.handle.net/10500/26907>

⁵ FATF. (2021). South Africa's measures to combat money laundering and terrorist financing. <https://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html>