



IDENTIFICATION OF BENEFICIAL OWNERS OF LEGAL PERSONS AND ARRANGEMENTS

AML/CFT/P Guidance Note 2 for Non-Bank Financial Institutions

October 1, 2023

Disclaimer

This Guidance Note is issued by the NBFIRA in line with section 49(1)c of the Financial Intelligence Act and Regulations 2022 ("FI Legislation") of the Republic of Botswana for comprehensive use by the NBFIs. The note is indicative and while due care was exercised to ensure that its contents are accurate and consistent with the FI Legislation, the latter shall prevail in the unfortunate case of ambiguity and the NBFIRA does not guarantee or take any liability whatsoever.

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Authority, Purpose & Scope

Authority

1. This *Guidance Note* is issued by the Non-Bank Financial Institution Regulatory Authority (NBFIRA), pursuant to its authority provided for in Section 49 (1) (c) of the Financial Intelligence Act, 2022 (FI Act), which empowers the Authority to issue instructions or guidelines to help non-bank financial institutions (NBFIs) comply with the FI Act. They are also issued pursuant to its authority as provided for in Section 4 of the Non-Bank Financial Institution Regulatory Authority Act (NBFIRA Act).

Purpose

2. The purpose of this *Guidance Note* is to lay out the procedure for identifying beneficial owners of legal entities and arrangements in line with the requirements of Section 20 of the FI Act. The section requires NBFIs to establish and verify the identity of beneficial owners when establishing a business relationship or carrying out a transaction with a customer.

Scope

3. This *Guidance Note* applies to institutions licensed, exempted, and supervised by the NBFIRA through various primary and secondary legislations. These include but are not limited to the NBFIRA Act, Insurance Industry Act, Retirement Funds Act, Botswana Stock Exchange Act, Collective Investment Undertakings Act, the Securities Act, Virtual Assets Service Providers Act.
4. The *Guidance Note* specifies procedures and minimum conditions that must be fulfilled in identifying beneficial ownership (BO) information for customers who are legal persons and legal arrangements, to enable NBFIs to understand the ownership and control structure of their customers.

Accountability & Responsibility

5. Boards of directors [or most senior management in the absence of the former] of NBFIs are accountable and responsible for their entity's compliance with provisions of the Financial Intelligence legislations including those on maintenance of beneficial ownership information. The responsibility may be delegated to executive management to ensure compliance during day-to-day business activities as conducted by a NBFI.

Introduction

Background on Legal Persons, Arrangements, and Legal Ownership and Beneficial Ownership

6. Legal persons and legal arrangements (often referred to as corporate vehicles) in their many different forms (i.e., companies, foundations, trusts, and partnerships)

have various legitimate roles as economic and social actors in the local and global community. For example, the purpose of a trust may be to hold title to and manage property or assets for the benefit of a third party (i.e., future generations of a family), and as for companies and partnerships, their form and structures are often suitable for commercial transactions and economic activities thereby playing part in the development of economies. Notwithstanding their licit purposes, legal persons and arrangements are increasingly misused for money laundering, terrorism financing, and proliferation financing (ML/TF/PF) through their complex ownership and control structures, activities, and transactions to disguise and conceal; (1) identities of their legal and beneficial owners, (2) their sources/destination of income and wealth and (3) their true purposes, for criminal reasons. These include but are not limited to tax evasion, fraud, corruption, bribery, and ML/TF/PF.

7. Availability and access to adequate, accurate and up-to-date beneficial ownership information is crucial for providing regulators and law enforcement agencies with leads to identify persons responsible for criminal activities hidden through corporate vehicle assets and transactions. It is for this reason that the Financial Intelligence Act requires NBFIs to maintain current BO information and empowers the competent authorities to access the same information. Several international bodies including the Financial Action Task Force (FATF) and Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) have set an international standard for the upkeep of the BO information.

Financial Intelligence Act

8. The Financial Intelligence Act and its Regulations (FI Act) are the apex legislation for ML/TF/PF preventative control in Botswana. The legislation provides definition for beneficial owner and has, among others, an obligation for specified parties [which include NBFIs] to establish and verify the identity of beneficial owners before establishing a business relationship or carrying out a transaction with a potential customer.
9. This *Guidance Note* provides guidelines to the extent of the context provided by the FI Act.

Financial Action Task Force

10. The FATF is an intergovernmental body established to set standards for the prevention and suppression of ML/TF/PF. FATF relevant standards for BO are found under Recommendations 24 and 25 which require countries to obligate by law the upkeep of adequate, accurate, verifiable, and up-to-date legal and beneficial ownership information of legal persons and legal arrangements, and timely accessibility of that information by competent authorities. For effectiveness, the FATF advises that countries must adopt a risk-based approach when dealing with legal persons and legal arrangements in order to apply appropriate measures for identified risks.

11. Noting that reference to this *Guidance Note* by NBFIs is not mandatory, this *Guidance Note* applies the relevant FATF Recommendations as best practice.

Global Forum on Transparency and Exchange of Information for Tax Purposes

12. Global Forum is an intergovernmental organization responsible for standards regarding global transparency and exchange of information to prevent offshore tax evasion. Beneficial ownership subject forms a crucial part of the Global Forum standards as it is the basis for identification of those natural persons behind legal persons and legal arrangements that are susceptible to misuse for tax evasion across the different countries.

13. This *Guidance Note* applies Global Forum's BO standards vis-a-vis FATF Recommendations as best practice.

Beneficial Ownership Information

Distinction between Legal Ownership and Beneficial Ownership

14. Understanding the difference between legal ownership and beneficial ownership will ensure that NBFIs comply with the BO information requirements under the FI Act and so is the purpose of this *Guidance Note*. Whereas a legal owner refers to any person with direct or indirect control or ownership, beneficial owner is the natural person with ultimate control or ownership. In a case where there are multiple ownership and control layers as illustrated in the right part of Fig.1, the beneficial owner is the natural person(s) behind the legal owner(s) (legal person or legal arrangement). For an entity, with one direct ownership and control layer, as illustrated in the left part of Fig. 1, that legal owner is also the beneficial owner.

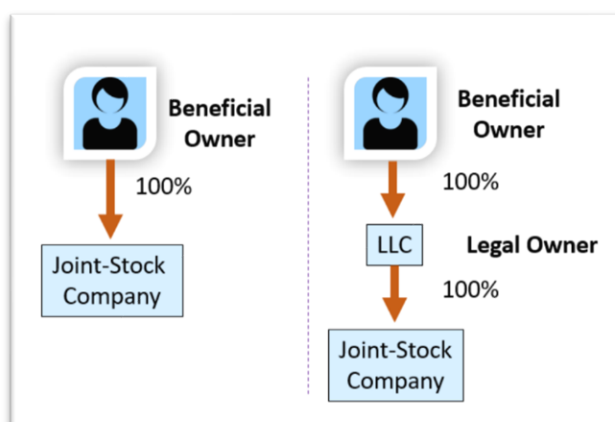


Fig. 1 LO vs BD¹

Identification of Beneficial Ownership

15. Section 20(1)(b) of the FI Act requires NBFIs to establish and verify the identity of beneficial owners before establishing a relationship or carrying out a transaction with a potential customer.

¹ Source: Beneficial Ownership Implementation Toolkit (Global Forum on TEOI)

16. A NBFI should establish a systematic procedure for verifying the identity of its customers including beneficial owners. A NBFI should not establish a relationship or carry out any transactions with a prospective customer until the identity of that customer has been satisfactorily established and verified in accordance with the FI Act.
17. A beneficial owner is an individual (natural person) who either directly or indirectly owns and/or controls a legal person or legal arrangement.
18. A NBFI should verify the identity of any individual who exercises ultimate effective control over a legal entity or legal arrangement.
19. A NBFI should understand the nature of business, ownership and control structure of a legal entity and legal arrangement for purposes of establishing a customer risk profile.
20. A NBFI should verify the identity of any person acting on behalf of a legal entity or legal arrangement. The identity of a customer, beneficial owner(s), as well as persons acting on their behalf, should be verified using credible sources.
21. A NBFI should, on an on-going basis, conduct customer due diligence with respect to an existing business relationship which is subject to the requirements of customer identification and verification, including periodic review of customer information to ensure that it maintains current information and records relating to the customer and beneficial owner.

Accuracy of Beneficial Ownership Information

22. To ensure that collected information is accurate, a NBFI should take steps to verify the (1) identity of the recorded beneficial owner (i.e., authenticity of identity documents) and (2) the basis of identification of that person as a beneficial owner (i.e., whether that natural person meets the threshold of being a beneficial owner).

Beneficial Ownership Information Procedures

23. In line with the *FI Act (and Regulations)*, *Financial Action Task Force (FATF) Guidance on Transparency and Beneficial Ownership* and the *Global Forum on Transparency and Exchange of Information for Tax Purposes – A Beneficial Ownership Implementation Toolkit*, a NBFI should proceed as outlined in the next sections in determining the beneficial owners of legal persons and legal arrangements.

Legal Persons

24. A NBFI should obtain and verify the identity of beneficial owner(s) of the following nature:
 - (i) individual(s) who ultimately have a controlling ownership interest in a legal entity, whether by shares, voting property or other right; or

- (ii) where it is not possible to identify natural person(s) who have control through ownership, or if there is doubt that those persons with the controlling ownership interest are the actual beneficial owners, then a NBFIs should identify the individual(s) exercising control over the legal entity through other means, such as personal or financial influence. Examples of control by other means include personal connections to those owning or controlling a legal person, financing the legal entity, or contractual association; and
- (iii) where no natural persons are identified under (i) and (ii) above, a NBFIs should identify and verify the relevant natural persons who are senior managing officers of the legal person.

25. In terms of Regulation 7 (1) (h) (iii) of the Financial Intelligence Regulations, natural persons who may control the legal person through ownership interest refers to natural persons who directly or indirectly hold a minimum of 10 percent ownership interest in a legal person.

26. Despite the prescription of a threshold of 10 percent, it should be noted that shareholders can exercise control alone or together with other shareholders, including through a contract, arrangement, understanding, relationship, intermediary or tiered entity (a majority interest approach). This indirect control could be identified through various means such as shareholders' agreement, exercise of dominant influence or power to appoint senior management. Shareholders may thus collaborate to increase the level of control by a person through formal or informal agreements, or through the use of nominee shareholders. In such instances, a NBFIs should identify and verify the identity of such shareholders. Other issues worth considering are whether a legal person has issued convertible stock or has any outstanding debt that is convertible into voting equity.

27. A common form of indirect control is through chains of ownership. Common examples of both direct and indirect control are as follows:

- (i) ownership of shares.
- (ii) ownership of voting rights.
- (iii) other ownership arrangements (for example, nominee and joint ownership arrangements).
- (iv) contractual associations or personal connections with management or directors.
- (v) management control (right to appoint or remove majority of directors); and
- (vi) other ability to exert significant influence on corporate activity (for example, veto rights, decision rights, right to profit).

28. Natural persons may also exert control of a legal person through means such as:

- (i) exerting control of a legal person through personal connections to those owning or controlling a legal person; and
- (ii) exerting control without ownership, by participating in the financing of the enterprise, or because of close and intimate family relationships, historical or contractual associations, or use or benefit from legal person assets.

29. Natural persons may exercise control through positions held in a legal entity in the following way:

- (i) responsibility for strategic decisions that fundamentally affect the business practices or general direction of the legal person. For example, depending on the legal entity, directors may or may not take part in exercising control over the affairs of an entity; and
- (ii) exercising executive control over the daily or regular affairs of the legal person through the holding of senior management positions such as chief executive officer, chief financial officer, executive director.

30. Where the customer or the owner of the controlling interest is a legal person listed on a stock exchange and subject to disclosure requirements; either by stock exchange rules or through law or enforceable means, which impose requirements to ensure adequate transparency of beneficial ownership, or is a majority-owned subsidiary of such a legal person, the relevant identification data may be obtained from a public register, from the customer or from other reliable sources.

Insurance policy or investment benefits

31. A NBFIs should obtain and verify the identity of beneficiaries of proceeds of a life insurance policy and/or investment services at the time of claim but before it is honoured.

Trusts

32. NBFIs should identify individuals who are settlors, trustees, protectors (if any), beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over a trust (including through a chain of control/ownership).

Penalties for Non-Compliance

33. Whereas reference to this *Guidance Note* is neither obligatory nor enforceable, provisions related to maintenance of beneficial information in the Financial Intelligence Act as further guided by the *Guidance Note* are. The FI Act empowers the NBFIRA to impose administrative penalties on NBFIs, where the latter has

without reasonable cause failed to comply with provisions of the Act and its Regulations.²

34. A NBFIs that fails to comply with the requirements of Section 20(1)(b) of the FI Act by not establishing and verifying the identity of the beneficial owner shall be liable to a fine not exceeding P1 million, as may be imposed by the NBFIRA.

Authorisation

35. This Guidance Note was approved on October 1, 2023, and it applies immediately.

² See s.49(2)(a)

Annexure 1

Identification of Legal Persons

1. An NBFIs should obtain, record, and maintain the following information concerning legal entities:
 - (i) the legal person's name (registered name, legal person's constitution, legal person's registration number, income tax and value-added-tax registration numbers, the address of the registered office) country of incorporation, legal form and status, nature of business of the legal entity, basic regulating powers, and a list of board of directors.
 - (ii) identity of natural persons who are authorised to transact or conduct business on behalf of the legal person customer.
 - (iii) identity of individuals holding senior management positions.
 - (iv) identity of board of directors.
 - (v) identity of the beneficial owners according to guidance in this paper.
 - (vi) a register of shareholders or members (owning at least 10 percent), containing the number of shares held by each shareholder and categories of shares (including the nature of the associated voting rights).
 - (vii) nature and purpose of the activities of the legal entity and its legitimacy.
 - (viii) financial situation of the entity – this includes assets, liabilities, income, expenditure as well as expected source of funds. The information can be obtained through requesting recent financial statements for existing companies and projected cash flows for new companies (latest financial statement); and
 - (ix) expected use of the business relationship: purpose of the business relationship, expected amount and frequency of the transactions during business relationship. Origin sources and destination of funds transacted throughout the business relationship.
2. A NBFIs should verify the identity of customer information collected using reliable, independent source documents, data, or information. For locally registered companies, entities could verify the information from the Companies and Intellectual Property Authority (CIPA) on-line business registration system.
3. For foreign companies that are not registered with CIPA, a NBFIs may verify legal person information using credible sources.
4. The measures to verify the information produced should be proportionate to the risk posed by a customer and should allow a NBFIs to satisfy itself that it knows

the identity of the customer. At a minimum, a NBFIs should use the verification procedures listed below:

- (i) obtaining a copy of the certificate of incorporation and a legal person constitution, or partnership agreement (or any other legal document certifying the existence of the entity, for example, an abstract of the registry of companies).
- (ii) for established corporate entities, review a copy of the latest financial statements (audited, if available); and
- (iii) verify the identity of the beneficial owners.

5. For high-risk customers, a NBFIs may consider the additional verification procedures below:

- (i) undertaking a legal person search and/or other commercial enquiries to ascertain that the legal person has not been, or is not in the process of being dissolved, struck off, wound up or terminated.
- (ii) using an independent information-verification process, such as by accessing public corporate registers, private databases, or other reliable independent sources (for example, lawyers, accountants).
- (iii) obtain prior references.
- (iv) visiting the corporate entity's premises.
- (v) contacting the corporate entity by telephone, mail, or e-mail; and
- (vi) as part of its broader customer due diligence measures, a NBFIs will consider, on a risk-sensitive basis, whether the information regarding the financial situation and source of funds or origins of funds should be corroborated.

Legal Arrangements and Similar Arrangements

6. For legal arrangements, a NBFIs should obtain and maintain the following information:

- (i) name of legal arrangement and proof of existence.
- (ii) contact telephone and facsimile numbers, if relevant.
- (iii) address and country of establishment.

- (iv) nature, purpose, and objects of the legal arrangement (for example, is it discretionary, testamentary etc.).
- (v) names and addresses of the settlor(s), the trustee(s), the protector(s) (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the legal arrangement (including through a chain of control/ownership).
- (vi) identity of natural persons who are authorised to transact or conduct business on behalf of an arrangement.
- (vii) identity of relevant persons holding senior management positions.
- (viii) description of the purpose and activities of the legal arrangement (for example, in a formal constitution, trust deed); and
- (ix) source of funds.

7. A NBFIs shall verify the identity of a customer established through information collected using reliable, independent source documents, data, or information. At a minimum, a NBFIs shall obtain a copy of documentation confirming the nature and legal existence of a legal arrangement (for example, a deed of trust, register of charities), verifying that any person purporting to act on behalf of the legal arrangement is so authorised. A NBFIs shall verify not only the identity of that person but also the person's authorisation to act on behalf of the legal arrangement (by means of a signed mandate, an official judgment, or another equivalent document). Measures to verify the information produced should be proportionate to the risk posed by the customer. Examples of other procedures of verification of high-risk customers include:

- (i) obtaining an independent undertaking from a reputable and known firm of lawyers or accountants confirming the documents submitted.
- (ii) obtaining prior references.
- (iii) accessing or searching public and private databases or other reliable independent sources (for example the Master's trusts registry);
- (iv) verifying the identity of the beneficial owners of the legal arrangements; and
- (v) verifying the information regarding the source of funds and/or origins of funds.

Professional Intermediaries

8. When a professional intermediary opens an account on behalf of a single customer, that customer must be identified.
9. Where funds held by the intermediary are not commingled, but sub-accounts are established that can be attributed to each beneficial owner, all beneficial owners of the account held by the intermediary should be identified.
10. Where the funds are commingled, an institution should establish beneficial owners. However, in cases where this is not be practically feasible, in which case the institution may with discretion and due prudence rely on the intermediary having considered:
 - (i) that the intermediary is subject to equivalent or stricter regulation and supervision on CDD obligations and AML/CFT/P; and
 - (ii) the need for additional controls against commission of financial crimes, and possible compliance risks.
11. Where an account is established for an open or closed-end investment company, unit trust or limited partnership that is subject to customer due-diligence requirements that are equivalent to those applying to the institution itself, the institution should treat this investment vehicle as its customer and proceed to identify the following:
 - (i) the fund itself;
 - (ii) directors or any controlling board where it is a company;
 - (iii) trustee, where it is a unit trust;
 - (iv) managing (general) partner, where it is a limited partnership;
 - (iv) account signatories; and
 - (v) any other person who has control over the relationship for example, fund administrator or manager.
12. In cases where no equivalent due diligence standards apply to an investment vehicle, all reasonable steps should be taken to verify the identity of the beneficial owners of the funds and those who have control of the funds.

Retirement Benefit Programmes

13. Where an occupational pension programme, employee pension fund, employee benefit trust or share option plan is a prospective customer, a NBFIs should identify and verify identities of the following:

- (i) trustees and any other persons who have control over the relationship (for example, administrator, programme manager or representatives (signatories)); and
- (ii) obtain a certificate of registration with the NBFIRA.

14. A NBFI should verify that any person acting on behalf of a retirement benefit is so authorised and should verify the identity of that person.

Societies and Cooperatives

15. Where societies and cooperatives start a business relationship, persons exercising control or significant influence over their assets should be considered the beneficial owners and must be identified and verified. Identification and verification should be carried out on board members, executives, and authorised representatives (signatories), among others.

Trust & Company Service Providers (TCSPs)

16. When a Trust and Company Service Provider (TCSP) establishes a business relationship on behalf of a single customer, that customer [and their beneficial owners if it is a legal person/arrangement] must be identified.

17. Where a business relationship is established for an open or closed-end investment company, unit trust or limited partnership that is subject to customer due-diligence requirements that are equivalent to those applying to the NBFI itself, the NBFI should treat this investment vehicle as its customer and proceed to identify the following:

- (i) the fund itself.
- (ii) directors or any controlling board where it is a legal person.
- (iii) trustee, where it is a unit trust.
- (iv) managing (general) partner, where it is a limited partnership.
- (v) representatives (signatories); and
- (vi) any other person who has control over the relationship for example, fund administrator or manager.

18. In cases where no equivalent due diligence standards apply to an investment vehicle, all reasonable steps should be taken to verify the identity of the beneficial owners of the funds and those who have control of the funds.

Glossary

Beneficial owner: a natural person who ultimately owns or controls a customer or a natural person on whose behalf a transaction is being conducted, including a natural person who exercises ultimate effective control over a legal person or arrangement,

- (i) in relation to a legal person – a beneficial owner is a natural person who either directly or indirectly holds at least 10 percent of the shares, voting rights or other ownership interest. Provided that to the extent that there is doubt as to whether the person identified hereunder is the beneficial owner or where no natural person is identified as the beneficial owner, the natural person exercising control of the legal person through other means shall be the beneficial owner, or
- (ii) is a person who holds the position of senior managing official where no natural person was identified as a beneficial owner in terms of subparagraph (i).
- (iii) in the case of a trust – beneficial owner is the settlor, trustee, protector (if any), a beneficiary of a trust or a class of beneficiaries, where the individuals benefiting from the trust have yet to be determined, or any other natural person exercising ultimate effective control over the trust by means of direct or indirect ownership or by other means, such as when he or she has the power, alone or jointly with another person or with the consent of another person, to:
 - dispose of, advance, lend, invest, pay, or apply trust property or property of the trust,
 - vary or terminate the trust,
 - add or remove a person as a beneficiary or from a class of beneficiaries,
 - appoint or remove a trustee or give another person control over the trust, or
 - direct, withhold consent or to overrule the exercise of a power referred to above.
- (iv) in relation to other legal arrangements similar to trusts – beneficial owner is the natural person holding equivalent or similar positions to those referred to in paragraph (iii) above.

Business relationship: an arrangement between a customer and a NBFIs with the effect of purchasing and use of financial products and services of the latter and conducting financial transactions.

Credible sources: any independent and reliable sources of information such as government institutions, inter-governmental and some international institutions. To some degree, these may include non-government institution i.e., credit/information bureaus.

Control: a natural person controls a legal entity if that natural person –

- (i) beneficially owns 10 percent or more of the issued share capital of the legal entity.

- (ii) is entitled to exercise a majority of the votes that may be cast at a general meeting of the legal entity or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that legal person.
- (iii) is able to appoint or to veto the appointment of a majority of the board of directors of a legal person.
- (iv) in the case of the legal person being a close company, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or
- (v) has the ability materially to influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraph (i) to (iv) to influence the course of events.

Controller: a person who is in a position to control or exert significant influence over the business or financial operations.

Controlling interest: an interest that permits the holder or owner thereof to elect, name or place into office a majority of the directors or senior managers of a legal entity.

Shareholder: an individual, group, or organization that owns one or more shares in a legal person and whose name appears in the share register or register of members.

Trust³: includes a trust, non-profit trust, a foundation, or any other arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed –

- (i) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument;
- (ii) or to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument, but does not include the case where the property of another is to be administered by any person as a trustee, executor, tutor or curator in terms of the provisions of any other written law.

Trust and company service provider⁴: means a person or business that is not covered under this Act, and which as a business, provides any of the following services

- (i) formation agent of legal persons;
- (ii) acting or arranging for another person to act as a director or secretary of a legal person, a partner of a partnership or a similar position in relation to other legal persons;

³ See Trust Property Control Act 2022

⁴ See FI Act

- (iii) providing a registered office, business address or accommodation, correspondence or administrative address for a legal person, a partnership or any other arrangement;
- (iv) acting as or arranging for another to act as a trustee or a trust or performing the equivalent function for another form of legal arrangement;
- (v) acting as or arranging for another person to act as a nominee shareholder for another person;

Ultimate effective control: where ownership or control is exercised through a chain of ownership or by means of control other than direct.

Verify: establishing the authenticity of information received from the customer on the basis of documents or information obtained from a credible source which is independent of the person whose identity is being verified.