

Revisions to Draft Companies (Beneficial Ownership Information) (Amendment) Regulations 2021 – Public Consultation

Open Ownership (OO) provides technical assistance to countries implementing beneficial ownership (BO) transparency reforms, to help generate accurate data on BO that complies with international standards and meets the needs of data users across government, obliged entities, civil society and the private sector.

Since 2017, OO has worked with [over 40 countries](#) to advance implementation of beneficial ownership reforms, as well as supporting the creation of over 15 new central and sectoral registers. OO has developed the world's leading [data standard](#) for beneficial ownership information, co-founded the international [Beneficial Ownership Leadership Group](#), and built the world's first [transnational public beneficial ownership register](#).

OO welcomes the Kenyan Business Registration Service (BRS)'s [amendments](#) to make BO information available to procurement and contracting authorities over the course of procurement. OO has [highlighted in detail](#) how BO information can help prevent fraud and corruption in procurement, thereby preventing the loss of funds through illicit financial flows. The use of BO data in procurement also supports the FATF Standard's aim to ensure a coordinated global response to prevent organised crime, corruption and terrorism, as well as the [proposed requirement](#) to make BO data available to public authorities in the course of public procurement.

OO is pleased to contribute to the public consultation on revisions to the Companies (Beneficial Ownership Information) (Amendment) Regulations. OO provided comments to an earlier draft of the regulations in 2018. We welcome the opportunity to engage in this latest review to update and strengthen the regulations.

Our contribution aims to address practical and technical considerations which need to be taken into account to enable BO data use for public procurement. Our contribution focuses on the rationale and methods for enabling timely access to adequate, accurate, and up-to-date BO information. We also provide a review of Form BOF1.

For further information or to discuss these responses in further detail, please contact karabo@openownership.org.

Timely access

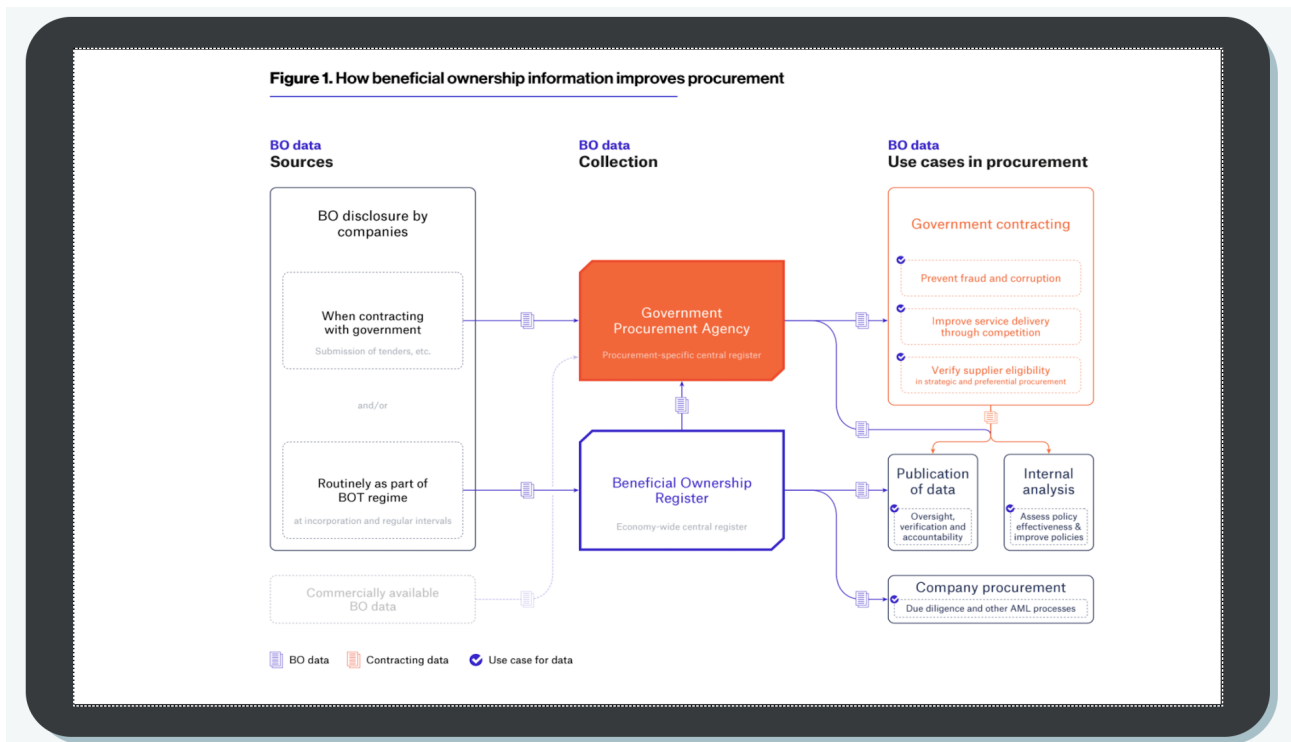
13 (5) Notwithstanding sub regulation (4), information relating to a beneficial owner shall only be made available to a competent authority upon written request by the competent authority to the Registrar

OO welcomes the dedicated mechanisms to provide efficient access through amendments to section 13 of the regulations. However, in addition to the ability for competent authorities and procurement authorities to be given access to BO information on a per record basis, OO would recommend that the BRS considers mechanisms by which multiple records could be shared in bulk based on contractual agreements with relevant authorities.

This would help reduce the time required for BRS staff to process individual requests if there are particular authorities which make multiple regular requests. The mechanisms for sharing such information could include sharing a monthly download of BO data or creating an application programming interface (API) through which the BRS technical team could provide data access to approved external users. While OO notes that this may introduce concerns on **data privacy and confidentiality**, these can be addressed and mitigated (see detailed section on this point further down in this submission).

Operationalising the use of BO data in procurement is more easily done through integrated digital technologies rather than through paper based systems. In order to maximise the potential benefit of using BO data in procurement, it should be collected and stored as structured, interoperable and machine-readable data, which can be analysed easily and cheaply. When BO data is combined with other open and structured datasets, such as open contracting or spending data, analysis can provide powerful insights into procurement practices, consumption models, and supplier transactions. OO provides a diagram below which represents the system for data sharing, analysis and publication once data is adequately structured.

OO further notes that subregulation 13 (5) does not explicitly include procuring authorities. To remove any further doubt, the clause should be expanded to include **procuring entities and contracting authorities**.



This diagram represents the different methods data can be collected as part of a procurement process, and used for internal analysis and publication by procurement authorities. Where data is collected through an existing central registry, as is the case with the Kenyan BRS, this is a useful reference dataset for procurement agencies and is a source of potentially higher quality data (compared to other sources of data). This diagram also shows the various uses of BO data in procurement.

Access to up-to-date information

A company shall lodge with the Registrar the particulars of change of its beneficial owners in Form BOF2 set out in the First Schedule and shall pay the fees set out in the Second Schedule.

The current regulations provide for a process where the BRS is notified of changes to beneficial ownership data. The ability of competent authorities and procurement authorities to also be updated on changes to ownership and control of companies is equally important, particularly where an investigation or analysis requires information on changes of ownership over time.

In public procurement this may be important for on-going contract monitoring to ensure loopholes aren't created where ownership changes are used to conceal interests once a contract is awarded or where procuring entities requires up-to-date information for analysis. OO would therefore recommend a provision be included which allows for procurement and competent authorities to access up-to-date records, as well as historical records.

Sanctions and penalties for non-compliance

5. A company shall issue a warning notice to a person who fails to comply with the provisions of regulation 4 and keep a copy of the warning notice in its register of beneficial owners....A company shall restrict the relevant interest of a person if the person has not complied with the warning notice within fourteen days from the date of the notice.

12. A person who discloses beneficial ownership information in any manner other than for the purpose for which such information is obtained commits an offence and shall be liable upon conviction to a fine not exceeding twenty thousand shillings or to imprisonment for a period not exceeding six months, or to both.

The current regulations have important provisions empowering companies to penalise beneficial owners for non-disclosure (regulations 5- 11). The BRS having sufficient powers to enforce compliance is essential to improve the quality of data for use, consistent with international standards. In line with best practice, we recommend that the BRS consider including sanctions – administrative and criminal – for non-compliance as an addition to regulation 12, which currently only penalises unlawful disclosure of BO data.

OO research shows that where governments use BO data in procurement, they can drive up compliance to a BOT regime by imposing sanctions relating specifically to procurement. A number of countries have implemented sanctions for the failure to provide correct BO data. These sanctions range from preventing companies and their beneficial owners from signing contracts, or debarring them from being involved in procurement for a specific period of time. We recommend that these additional sanctions be created and enforced in a coordinated fashion with the procuring and contracting authorities.

Verification

A company shall take reasonable steps to identify its beneficial owners and shall enter in its register of beneficial owners the following particulars in respect of its beneficial owner

Centralised BO registers can help with simplifying and automating the verification process. The current regulations place an onus on companies to undertake this task, which is commendable. However, a dual system where the BRS is also able to verify data independently from the declarations made by companies would also support driving up the quality of data and data use.

To maximise the impact of BO data, it is important that data users and authorities can trust that the data contained in a register broadly reflects the true and up-to-date reality of who owns or controls a particular company. OO recommends that data should be verified on submission and updated – or confirmed that it still holds true – on a regular basis. Procurement officers want to be confident that the data is correct at the time of decision making, so data should at a minimum be (re)verified at that point in time (see OO guidance on [verification](#)).

Data privacy and confidentiality

13(4) Beneficial ownership information shall not be made available to the public except for publishing the information relating to entities that have participated in a tendering process undertaken by a procuring entity or contracting authority pursuant to the Public Procurement and Asset Disposal Act, No. 33 of 2015 or the Public Private Partnership Act, No. 15 of 2013, respectively.

Through amendments to regulation 13, sub-regulation 4, an exemption to the bar on publication of BO data is created. This is a significant step. Publishing BO data for procurement or otherwise has the wider benefit of driving up the quality of data in addition to furthering the public policy aims.

Going further to create a fully public BO register would have additional indirect benefits for public procurement including allowing companies to use this data to manage and reduce risk in their own due diligence processes. OO's [briefing](#) explores the benefits of making central beneficial ownership registers public as well as issues authorities should consider before taking this step.

To address legitimate concerns the publication of BO data may raise, OO recommends that the BRS considers:

- (1) minimising the data collected and shared with procuring entities and contracting authorities to what is strictly necessary to achieve the policy aims (see OO's further guidance on [data minimisation](#); Section 4 of the Form BOF1 review below provides further discussion and recommendations).
- (2) allow for narrowly defined exceptions to the publication of BO data. The regulations and amendments do not currently provide for a narrowly defined set of circumstances where a credible threat to an individual may be reasonable grounds for non-publication of one or more fields. In exceptional circumstances, the regulations may provide for an exemption from publication. This may be addressed through an additional sub-regulation at regulation 13. Where an exemption is permitted, this should be clearly reflected in the published contract.
- (3) if data is made public, making a smaller subset available to the public than to competent and procurement authorities, omitting data fields that are particularly sensitive and unnecessary to public data use and oversight (also known as layered access).

Amendments to Form BOF1

The First Schedule of the principal Regulations is amended by amending by deleting Form BOF1 and substituting therefore the following new Form BOF1

Below OO provides comments on the new Form BOF1. However note that preferably the form review should include all relevant forms to ensure each is complementary. Should the BRS require, OO is available to review BOF2 and BOF3.

Well-designed beneficial ownership declaration forms will generally meet all of the following criteria:

- It is clear who (people as well as companies) will fall under the scope of the disclosure process (it may be necessary to provide detailed guidance alongside the form and referenced from the form in order to achieve this)
- The form is easy to understand and navigate
- It is easy for people to supply good quality data for each field
- It is easy for companies with simple BO structures to make their declarations
- The full range of BO structures, declarable by law, can be disclosed via the form(s)
- Form submissions can be linked to data in other official databases, so that companies do not have to submit the same information multiple time

Although Form BOF1 seeks to gather much of the information OO recommends collecting in order to allow full disclosure of beneficial ownership, the form could be adjusted in several ways to support more streamlined data entry, reduce accidental errors and facilitate easier data use. These recommendations are informed by guidance provided in [OO's Beneficial ownership declaration forms: guide for regulators and designers](#):

1) Include definitions of BO terminology at the point where they are needed

BOF1 calls on people to declare they are a beneficial owner without providing an explanation of how a beneficial owner is defined in Kenyan law. If the form may be shared with individuals or companies in a paper form without accompanying guidance, it may be prudent to include this definition prominently in Form BOF1 to raise awareness of some of the key BO definitions and concepts.

Similarly information is requested on any beneficial owners linked to the declaring company via an indirect beneficial ownership relationship or structure. However the definition of indirect ownership is not provided in the form.

OO understands that the indirect ownership declaration section of Form BOF1 is intended to capture nominee arrangements (nominee shareholdership and nominee directorship) but indirect ownership as a concept extends beyond just these types of arrangements. Where BO of a registered private company is exercised indirectly (via intermediaries, including legal owners), OO advises that sufficient information about intermediaries should be collected to reveal full ownership/control chains. Questions about how best to capture and understand the full range of indirect beneficial ownership arrangements and structures are explored in OO's [Beneficial ownership in law: Definitions and thresholds briefing](#).

The concept of legal ownership is not the same as the concept of beneficial ownership, but they are related. Providing a definition of legal ownership to explain how it is different from beneficial ownership could be a useful addition to Form BOF1.

2) Be clear about the format in which answers are expected

OO is pleased to see in Form BOF1 that some fields provide guidance on the format that individuals or companies should follow when filling out the form. For example, the dd/mm/yyyy format is clearly provided for the Date that the person became a beneficial owner and Date of birth fields in recognition of the multiple formats that people may otherwise use to write dates.

This approach should be extended to additional fields from the form in order to ensure that the BRS is able to collect more standardised, well-formatted BO data which can more easily be used or shared with the relevant authorities without the need for cleaning the data.

For example, the Form BOF1 asks for a full name but doesn't explain whether an individual's first name, middle name(s) and family name should be provided or just the first name and family name. To resolve this, OO would recommend either explaining the format required or separating out any name fields to avoid any confusion by creating separate fields for the first name and family name. Separating out the fields would be in line with the best practices for high-quality BO data collection that OO has documented as part of our [Beneficial Ownership Data Standard](#).

Where an individual is required to provide a birth certificate number, national identity card number or passport number, OO would advise creating one field or tick box where the individual can indicate which type of ID they will provide followed by a separate field for the number. This will support better quality data collection and would support easier automated checks of the IDs provided via the online version of Form BOF1 as the ID numbers could be checked for correct length and formatting. [Good-quality, well-structured identifiers](#) for individuals or companies are essential to be able to combine datasets from multiple systems.

Where the company number is requested at the top of Form BOF1, it would be good to clearly indicate that this should be the company number from the BRS Company Registry in case there is any chance of misunderstandings where perhaps a tax ID might be mistakenly provided by an individual or company. From the BRS Company Registry, it seems like valid company numbers can be of varying length and formatting including examples like C.140512, CPR/2011/41483 and PVT/2016/025014. Additional text guidance could be useful here to explain whether or not - for example - companies should enter the full stops or backslashes in their company numbers or just the letters and numbers. Again, this will improve the quality of the company identifier data which will make it easier to connect the collected BO data to other data like that collected during public procurement processes.

In the nationality field, it should be clear what users should do if they hold dual or multiple nationalities. If people with dual nationality need to fill out this form, it may be prudent to provide multiple nationality fields in line with the best practice for BO data collection set out in [OO's example beneficial ownership declaration form](#).

To allow for high-quality data collection, OO would recommend that the postal address, business address and residential address fields are split out into different fields to allow for the capturing of a postal code and country details alongside a full address where each part of the address should be on a different line or separated by commas.

Data management systems often use a diversity of address formats and data is often inconsistently entered across data fields in these source systems. This is why OO recommends the use of a very simple address format to improve data quality, allow easier analysis of structured data and enhance the ability of the BRS to connect BO data with other datasets via linking by address data.

3) State clearly which fields are required and which are optional

Form BOF1 currently provides no indication next to fields as to whether they are required or optional for individuals or companies to fill in. Adding these indications is a useful signal to individuals and companies required to fill out the form and will help ensure compliance with more complete data collection.

In certain cases, BO forms should provide a way for the individual or company filling out the form to declare that they have tried and failed to collect the required information. The legal basis for this is set out in regulation 11 of the [Companies \(Beneficial Ownership Information\) Regulations, 2020](#).

For instance, a beneficial owner whose details are unknown could be flagged as an “unknown person”. OO’s [Beneficial Ownership Data Standard](#) provides guidance on best practices for the capturing of data on such unspecified or unknown beneficial owners via the unspecified field in an [ownership or control statement](#), unspecifiedEntityDetails field in a [entity or company statement](#) and the unspecifiedPersonDetails field in a [person statement](#).

If Form BOF1 could be updated to collect information on unknown persons or unknown ownership or control relationships, additional guidance should be provided to explain how a field should be correctly filled in as unknown.

OO would recommend the inclusion of an additional field allowing people to choose from a list of the reasons set out in the 2020 regulations for why full BO information cannot be provided:

- The company has not identified the beneficial owner
- The company has not been able to identify the beneficial owner particulars
- The company has issued a warning notice which has not been complied with
- The company has issued a restriction notice
- There is a matter pending before court in relation to beneficial ownership

Many of these explanations can easily be mapped to the range of reasons for unknown information laid out in the [Beneficial Ownership Data Standard](#) except for additional provisions in the data standard covering situations where subjects may be exempt from disclosure rules:

- No beneficial owners
- Subject unable to confirm or identify beneficial owner
- Interested party has not provided information
- Subject exempt from disclosure
- Interested party exempt from disclosure
- Unknown
- Information unknown to publisher

If the BRS considers OO’s recommendation to add an additional sub-regulation at regulation 13 to provide exemption from publication in limited cases, the publicly available data should note that beneficial ownership information is held by authorities but has been exempt from publication, this

could be done, for example, by including a field to the Form BOF1 where the individual or company can declare this exemption

4) State which information is for internal use only and will not be openly published

There will be information collected about individual beneficial owners and other people which should not be published widely. Some private addresses, private contact details and identification details may be disclosable but not widely shareable due to limits in the legal mandate for publishing or sharing data, or reasons of personal privacy or security.

OO recommends that Form BOF1 should make it clear what information is being collected for agency and state use only and will not be made public. For example, such information could be annotated with a message “This will not be made public”.

5) State which additional documentation or information must be provided with the form

The process for submitting BO information via the BRS eRegister as set out in the [user manual](#) requires an individual to upload a colour passport photo as part of the BO registration process. Is this also a requirement for any individuals filling out Form BOF1? If so, OO would recommend guidance be added setting out any additional documentation or proof of identity which is required to be submitted along with the form as well as explaining what format it should be submitted in.