

# Private companies and the new transparency provisions of the Companies Act

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The Companies Act No 71 of 2008 ("Act") was amended on 1 April 2023 with the purpose of increasing corporate ownership transparency in accordance with international norms. The new disclosure requirements introduced by the amendments are a bolt-on to pre-existing disclosure obligations contained in the Act. This has, unfortunately, resulted in an unnecessarily complicated disclosure regime, with different but overlapping disclosure requirements applicable to different categories of companies. The purpose of this article is to explain, in simple terms, the disclosure regime that is now contained in the Act, as it applies to private companies.

## Beneficial interest vs beneficial ownership

The linchpin of the new disclosure regime is the concept of a "beneficial owner". A beneficial owner of a company is, in essence, an **individual** (ie a natural person) who, directly or indirectly (i) ultimately owns that company or (ii) exercises effective control of that company. The definition of beneficial owner goes on to list several ways in which an individual may ultimately own or effectively control a company. For instance, a beneficial owner includes someone who is able to exercise control of a company through a "chain of ownership or control" by controlling the holding company of that company. The list is not closed, so the definition is extremely wide.

In order to make sense of the new disclosure regime, it is necessary to distinguish the novel concept of a beneficial owner from the pre-existing notion of "beneficial interest". A beneficial interest in a private company's securities is the right of a person (through ownership, agreement, relationship or otherwise) to —

- participate in any distribution in respect of the company's securities;
- exercise (or cause to be exercised) rights attaching to the company's securities; or
- dispose (or direct the disposal) of the company's securities, or any part of a distribution in respect of the securities.

In our view, a key difference between the concepts of beneficial ownership and beneficial interests is that the former requires one to look "up the chain" while the latter does not necessarily do so. This is best explained by way of example. Suppose private company A is wholly-owned by private company B, which, in turn, is wholly-owned by natural person John. It is clear that John is the beneficial owner of A. However, in our view, assuming that there are no special arrangements between the parties, the holder of beneficial interests in the securities of A is B, and not John. This is because B holds all of the beneficial interests in A's shares in its own right as a legal person separate from John. John himself does not have any legally enforceable rights against A. The fact that John may, in his capacity as shareholder of B, indirectly influence how B exercises its rights against A does not change this.

## From regulated companies to affected companies

Prior to the amendments, a private company was only subject to disclosure obligations if it was classified as a "regulated company". According to the Act, a private company is a regulated company if, inter alia,<sup>[1]</sup> more than 10% of the issued securities in the company have been transferred within a period of 24 months "immediately before the date of an affected transaction or offer".<sup>[2]</sup> In the context of determining disclosure obligations, this definition does not make sense, since there is no "affected transaction" or "offer" to speak of. In our view, the only intelligible reading of the definition for the purposes of the disclosure requirements (which effectively entails a re-writing of the definition) is that a private company is classified as a regulated company at a particular date if more than 10% of its securities were transferred within 24 months prior to

that date. Even on this charitable reading, the classification of a private company as a regulated company remains a moving target, because the moment a private company passes the 24-month mark it automatically reverts to being a non-regulated company.

Pursuant to the amendments, the disclosure obligations that are applicable to a private company are now mainly determined by reference to whether the company is an "affected company" or not. An "affected company" is defined as (i) a regulated company or (ii) a private company that is controlled by, or a subsidiary of, a regulated company.

Since the definition of "affected company" makes reference to "regulated company", the latter definition and our reading of it referred to above, remains relevant. The major difference post the amendments is that the uncertainty surrounding the classification of a company as a "regulated company" has been amplified across company groups. Using our example above, suppose John sells 20% of B. This would, according to our reading, render B a regulated company for 24 months from date of sale. However, the sale not only renders B an "affected company" (on the basis of it being a regulated company), but also A (because it is a subsidiary of a regulated company). On the date of expiry of the 24 month period, therefore, both A and B will revert to the status of non-affected company. Such automatic switching of categories could, potentially, be difficult to keep track of in large company groups.

## Disclosure requirements from 1 April 2023

The disclosure requirements that apply from 1 April 2023, as set out in the Act, are summarised in the table below. The new disclosure requirements are shaded in grey. As shown in the table below, the disclosure requirements applicable to non-affected companies are all new.

| Affected (private) companies                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | Non-affected (private) companies                                                                                                                                                                       |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"><li>must maintain a register of disclosures of beneficial interests <b>[s56(7)(a)]</b></li></ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <ul style="list-style-type: none"><li>must record details of beneficial owners in its securities register and update with changes <b>[s50(3A)(a)]</b></li></ul>                                        |
| <ul style="list-style-type: none"><li>must maintain a register of persons who hold beneficial interests equal to or in excess of 5% of a class of securities ("<b>Beneficial Interest Register</b>")</li><li>must update its Beneficial Interest Register after receipt of a section 122(1) notice. These are notices received by an affected company from a person who has acquired (or disposed of) a beneficial interest in the company's securities which resulted in that person holding (or ceasing to hold) a beneficial interest in any multiple of 5% of the company's securities <b>[s56(7)(aA)]</b></li><li>must file section 122(1) notices with the Companies and Intellectual Property Commission ("CIPC") <b>[s122(3A)]</b></li></ul> | <ul style="list-style-type: none"><li>must file details of beneficial owners with CIPC and update with changes <b>[s56(12)]</b></li></ul>                                                              |
| <ul style="list-style-type: none"><li>if the company is a regulated company, must —<ul style="list-style-type: none"><li>file section 122(1) notices with the Takeover Regulation Panel</li><li>report the information in the notice to the holders of the relevant class of securities (unless the notice concerned a disposition of less than 1% of the class of securities) <b>[s122(3)]</b></li></ul></li></ul>                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                        |
| <ul style="list-style-type: none"><li>must publish details of beneficial interests equal to or in excess of 5% of securities of a particular class in annual financial statements (if they are required to be audited) <b>[s56(7)(b)]</b></li></ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                        |
| <ul style="list-style-type: none"><li>in its annual return filed with CIPC, must include a copy of —<ul style="list-style-type: none"><li>its securities register <b>[s33(1)(aA)]</b></li><li>its Beneficial Interest Register <b>[s33(1)(aB)]</b></li></ul></li></ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | <ul style="list-style-type: none"><li>in its annual return filed with CIPC, must include a copy of its securities register (which includes details of beneficial owners) <b>[s33(1)(aA)]</b></li></ul> |

- CIPC must —
  - maintain a register of the information contained in the section 122(1) notices **[s122(6)]**
  - maintain a register of the information contained in the Beneficial Interest Register **[s56(14)]**
  - make a company's annual return available electronically to any person "as prescribed" **[s33(1A)(a)]**

- CIPC must —
  - maintain a register of records of beneficial owners that are filed with CIPC **[s56(14)]**
  - make a company's annual return available electronically to any person "as prescribed" **[s33(1A)(a)]**

## Regulations

Final regulations relating to the new transparency provisions were published and came into force on 24 May 2023. Unfortunately, these regulations are not a model of clarity. They appear to confuse the concepts of beneficial interest and beneficial ownership as well as the disclosure requirements that apply in relation to affected versus non-affected companies. The information brochures and guidance note published by CIPC are similarly unclear.

## Conclusion

Despite the concerns regarding the new transparency provisions outlined above, we anticipate that compliance with the provisions should be relatively straightforward for private companies with simple shareholding structures that change infrequently. However, the unnecessarily complicated disclosure regime contained in the Act, compounded by the regulations' lack of clarity, are a cause for concern for directors of companies with complex shareholding structures.

The disclosure obligations described above are already in force and the Act makes no provision for a grace period within which companies may become compliant. While there are, as yet, no penalties specifically prescribed for non-compliance with the transparency provisions, a contravention of the Act may result in the issue of a compliance notice by CIPC. Failure to comply with a compliance notice may result in a court-ordered administrative fine or a referral of the matter to the National Prosecuting Authority for prosecution as an offence.

1. The Act also makes provision for a private company to make itself a regulated company by express provision in its MOI, but this is rare in practice.
2. Intra-group transfers are not included for purposes of determining whether this threshold has been breached.



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