

Proposed Amendments to the Companies Act, 2004 (Act No. 28 of 2004) and the Close Corporations Act, 1988 (Act No. 26 of 1988)

Purpose

Provide the rationale behind the proposed amendments to the Companies Act, 2004 (Act No. 13 of 2012) and the Close Corporations Act, 1988 (Act No. 28 of 2004);

Background

The Business and Intellectual Property authority (BIPA) is a member of the Members of the National Focal Committee responsible for Namibia's Financial Action Task Force (FATF)/Eastern and Southern Africa Anti Money Laundering Group (ESAAMLG) Mutual Evaluation. The assessment was conducted by ESAAMLG Assessors on 30 September 2021 and 7 June 2022, to assess Namibia's technical and effective compliance with applicable Anti-Money Laundering and Combatting the Financing of Terrorism and Proliferation (AML/CFT/CPF) UN Conventions and mandatory UN Security Council Resolutions issued under Chapter VII of the UN Charter, as embedded in the FATF International Standards.

Following the finalisation of the assessment and adoption of the Report during the ESAAMLG Task Force and Council of Ministers meeting during September/October 2022 in Livingstone, Zambia, the National Focal Committee responsible for the preparation of stakeholders and coordination of the exercise has drafted a proposed National Action Plan to address shortcomings raised in the Mutual Evaluation Report.

BIPA as a member of the National Focal Committee is tasked as the lead institution to mainly implement the priority actions under Immediate Outcome 5 and Recommendation 24 which tests Namibia's Effectiveness and Technical Compliance, respectively, in ensuring that Legal persons are prevented from misuse for money laundering or terrorist financing.

The key issues the ESAAMLG Assessors were concerned with after the publishing of Namibia's Mutual Evaluation Report are as follows:

- a) Namibia is yet to conduct an assessment of the ML/TF risks associated with legal persons and arrangements. As such, the potential level for them to be abused for ML/TF is not known, but indicators of the use of legal entities in the Fishrot case to receive bribes in a corruption racket suggest that the existing framework has weaknesses which are being exploited to abuse legal persons and arrangements for ML and other predicate offences.

- b) Competent authorities do not fully appreciate the concept of BO information and do not require that sufficient BO information to be obtained at registration and during information updates. Legal ownership is mostly misunderstood for BO information.
- c) The current requirements only require legal persons to provide BO information when submitting their annual returns and not at the time of registration of the legal person. Hence no information is obtained on BO at the time of registration. The BIPA has still not started collecting BO information even when annual returns are filed and such information is not collected and updated. This greatly undermines the adequacy of the basic and BO information accessed and or requested by the public, competent authorities.
- d) The FIA designates the BIPA and Master of the HC as supervisory authorities to enforce the requirements to obtain BO ownership and keep the information accurate and updated, however this mandate has hardly been exercised. No initiatives have been undertaken by the authorities to establish the level of compliance, and as such the quality and efficacy of the information held at registries is undermined and may not be of great use to persons who access or request it.
- e) In Namibia no sanctions have been applied for non-compliance with the requirements to keep BO information accurate and updated. Whereas, this may be attributed to a lack of awareness of the authorities of their designated mandate, or challenges relating to limited resources including staffing, the state of affairs gives room for any ongoing abuse for ML/TF to continue undetected.

In developing the action plan which includes the proposed legislative amendments flowing from it, the following amendments have been proposed to include provisions speaking to the FATF standards under recommendation 24 and an IO5.

To assist with the amendment process, the following legislative literature have been considered:

- a. Companies and Other Business Entities Act, 2019 (Zimbabwe)
- b. Companies Act, 2001 (Mauritius)
- c. The Financial Intelligence and Money Laundering Act, Act 06 of 2002, as amended, of Mauritius
- d. Determination no 2 of 2016 of the Financial Intelligence Centre

Proposed Amendments to Companies Act, 2004

#	Reference	Old Section	New Provision	Rationale
1	Section 1; Definitions	New Insertion	<p>1. Section 1 of the Principal Act is hereby amended –</p> <p>by inserting, in the appropriate alphabetical order, the following new definition –</p> <p>“beneficial owner” or “ultimate beneficial owner” –</p> <p>(a) means any natural person who ultimately owns or controls a company or the natural person on whose behalf a transaction or activity is being conducted in relation to a company; and</p> <p>(b) is the natural person who ultimately owns or controls a company through –</p> <p>(i) direct or indirect ownership of such shares in such percentage as may be prescribed;</p> <p>(ii) voting rights;</p>	<p>To address weaknesses raised in Namibia’s ESAAMLG/FATF Mutual Evaluation Report and align the Act with Financial Action Task Force (FATF) Recommendations.</p> <p>Namibia was found in Non-Compliance with Recommendation 12 because it has no law setting out obligations on Politically Exposed Persons, as defined by the FATF, for AIs/Ris.</p> <p>The definition for Close Associates of PIPs is derived from the FIC Guidance Note No 01 of 2019 for Politically Exposed Persons. For purposes of the current amendments, the term “Prominent Influential Person” is</p>

		<p>(iii) ownership interest;</p> <p>(iv) control by any other means; or</p> <p>(c) otherwise exercises control over the management of the legal person in his or her capacity as executive officer, non-executive director, independent non-executive director, director, manager or partner.</p>	<p>considered more appropriate in the Namibian context as it is wide enough to cover persons in different sectors that may hold a prominent function. It is not necessary that Namibia adopt the same terminology as the FATF, as long as the measures are catered for in the AML/CFT/CPF framework for a category of persons that aligns to the FATF Definition.</p> <p>The FATF Standard requires that the measures applied for PEPs must apply for the Close Associates of PEPs, amongst others. A list of what is considered to be a PIP will be catered for under a new Schedule, Schedule 5.</p> <p>Therefore, it was required to provide a definition for a Close Associate of a PIP.</p>
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2	Section 107; Share warrants to Bearer	New Insertion	<p>2. Section 107 of the Principal Act is hereby repealed in its entirety and is substituted with the following section:</p> <p>Bearer of existing warrants after the amendment of this section are to convert their warrants into ordinary par value shares</p>	<p>To address weaknesses raised in Namibia's ESAAMLG/FATF Mutual Evaluation Report and align the Act with Financial Action Task Force (FATF) Recommendations.</p> <p>Namibia was found in Non-Compliance with Recommendation 12 because it has no law setting out PEPs obligations for AIs/RIs.</p> <p>The definition for Domestic PIPs is derived from the FIC Guidance Note No 01 of 2019 for Politically Exposed Persons. For purposes of the current amendments, the term "Prominent Influential Person" is considered more appropriate in the Namibian context as it is wide enough to cover persons in different sectors that may hold a prominent function. It is not necessary that Namibia adopt the same terminology as the FATF, as long as the measures are catered for in the</p>
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				<p>AML/CFT/CPF framework for a category of persons that aligns to the FATF Definition.</p> <p>The FATF Standard requires that there is a distinction between a Foreign and Domestic PEP.</p> <p>Therefore, it was required to provide a definition for a Domestic PIP. A list of persons that would be considered PIPs is catered for under a new Schedule 5.</p>
3	Section 112; Register of Members	New Insertion	<p>(9) Every company shall maintain an accurate and up-to-date register of the beneficial owner or owners of the company, to be known as the register of beneficial owners which register shall—</p> <p>(a) be kept, within Namibia, and at the same office at which the register of members is kept; and</p> <p>(b) with respect to each director, record his or her first name and surname, any former first</p>	<p>To address weaknesses raised in Namibia's ESAAMLG/FATF Mutual Evaluation Report and align the Act with Financial Action Task Force (FATF) Recommendations.</p> <p>Namibia was found in Non-Compliance with Recommendation 12 because it has no law setting out PEPs obligations for AIs/RIs.</p>

		<p>name and surname, an identification reference number appearing in his or her identity document, his or her full residential or business address and postal address and his or her nationality, as well as the nature and extent of his or her beneficial ownership in the company.</p> <p>(10) Every company shall file with the Registrar, in prescribed form, accurate and up-to-date beneficial ownership information referred to in this section and shall within seven days of any change file updates as and when there is any material change to the information.</p> <p>(11) Beneficial ownership information held and maintained in terms of this section, either by the company or by the Registrar, shall be made available for inspection by the Financial Intelligence Centre or by a Competent Authority referred to in the Financial Intelligence Act or any other relevant legislation,</p> <p>(12) The company shall appoint a person, resident in Namibia, who shall be responsible for keeping custody of the register of beneficial owners and who shall be authorised to make the information</p>	<p>The definition for Family Member of PIPs is derived from the FIC Guidance Note No 01 of 2019 for Politically Exposed Persons. For purposes of the current amendments, the term “Prominent Influential Person” is considered more appropriate in the Namibian context as it is wide enough to cover persons in different sectors that may hold a prominent function. It is not necessary that Namibia adopt the same terminology as the FATF, as long as the measures are catered for in the AML/CFT/CPF framework for a category of persons that aligns to the FATF Definition.</p> <p>The FATF Standard requires that the measures applied for PEPs must apply for the Family Members of PEPs, amongst others.</p> <p>Therefore, it was required to provide a definition for a Family Member of a PIP. A list of persons that would be considered</p>
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		<p>available to the Financial Intelligence Centre or Competent authorities, upon request.</p> <p>(13) The names and sufficient contact details of the person referred to in subsection (11) shall be recorded in the form filed by the company with the Registrar in terms of subsection (10).</p> <p>(14) Beneficial ownership and other company information held by the Registrar, shall be public information and shall be available for inspection, whether electronically or physically—</p> <ul style="list-style-type: none">(a) by members of the public (subject to section 8); and(b) by a financial institution or a designated non-financial business or profession <p>(15) The Registrar or the Financial Intelligence Centre may each, on its own behalf or on behalf of a Competent authority, seek beneficial ownership or other company information from their foreign counterparts, in respect of any company, and, likewise, may provide beneficial ownership or other company information to their foreign counterparts.</p> <p>(16) The Registrar and the Financial Intelligence Centre and any competent authority which, through them, requests beneficial ownership and other company information from other countries, shall</p>	PIPs is catered for under a new Schedule 5.
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			<p>monitor the quality of the assistance given by the foreign authorities and shall keep records of such requests and responses.</p> <p>(17) The company or its administrators, liquidators or other persons involved in the dissolution of the company, shall maintain beneficial ownership information records for a period of at least five years after the date on which the company is dissolved or otherwise ceases to exist.</p> <p>(18) Any person who fails to comply with the requirements of subsection (9), (10), (11), (12), (13) or (17) shall be guilty of an offence and be liable to a fine not exceeding 10 million Namibian dollars or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.</p>	
4	Section 1 of CC Act, 1988; Definitions	New Insertion	<p><u>By the insertion after the definition of “Beneficial Ownership” of the following definition:</u></p> <p>1. Section 1 of the Principal Act is hereby amended –</p>	<p>To address weaknesses raised in Namibia’s ESAAMLG/FATF Mutual Evaluation Report and align the Act with Financial Action Task Force (FATF) Recommendations.</p> <p>Namibia was found in Non-Compliance with Recommendation 12 because it has no</p>

		<p>by inserting, in the appropriate alphabetical order, the following new definition –</p> <p>“beneficial owner” or “ultimate beneficial owner” –</p> <p>(a) means any natural person or legal arrangement that ultimately owns or controls a corporation or the natural person on whose behalf a transaction or activity is being conducted in relation to a corporation; and</p> <p>(b) is the natural person or legal arrangement that ultimately owns or controls a corporation through –</p> <p>(i) direct or indirect ownership of such membership interest in such percentage as may be prescribed;</p> <p>(ii) voting rights;</p> <p>(iii) membership interest;</p> <p>(iv) control by any other means;</p>	<p>law setting out PEPs obligations for AIs/RIs.</p> <p>The definition for Foreign PIPs is derived from the FIC Guidance Note No 01 of 2019 for Politically Exposed Persons. For purposes of the current amendments, the term “Prominent Influential Person” is considered more appropriate in the Namibian context as it is wide enough to cover persons in different sectors that may hold a prominent function. It is not necessary that Namibia adopt the same terminology as the FATF, as long as the measures are catered for in the AML/CFT/CPF framework for a category of persons that aligns to the FATF Definition.</p> <p>The FATF Standard requires that there is a distinction between a Foreign and Domestic PEP.</p> <p>Therefore, it was required to provide a definition for a Foreign PIP. A list of</p>
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				persons that would be considered PIPs is catered for under a new Schedule 5.
5	Section 16 of CC Act, 1988; Keeping of copies of founding statements by corporations	New Insertion	<p>3. Section 16(1) of the Principal Act is hereby amended to add subsection 4-13</p> <p>4) Every corporation shall maintain an accurate and up-to-date register of the beneficial owner or owners of the corporation, to be known as the register of beneficial owners which register shall—</p> <p>(a) be kept, within Namibia, and at the same office at which the register of members is kept; and</p> <p>(b) with respect to each member, record his or her first name and surname, any former first name and surname, an identification reference number appearing in his or her identity document, his or her full residential or business address and postal address and his or her nationality, as well as the nature and extent of his or her beneficial ownership in the corporation.</p>	

(5) Every corporation shall file with the Registrar, in prescribed form, accurate and up-to-date beneficial ownership information referred to in this section and shall within seven days of any change file updates as and when there is any material change to the information.

(6) Beneficial ownership information held and maintained in terms of this section, either by the corporation or by the Registrar, shall be made available for inspection by the Financial Intelligence Centre or by a Competent Authority referred to in the Financial Intelligence Act or any other relevant legislation,

(7) The corporation shall appoint a person, resident in Namibia, who shall be responsible for keeping custody of the register of beneficial owners and who shall be authorised to make the information available to the Financial Intelligence Centre or Competent authorities, upon request.

(8) The names and sufficient contact details of the person referred to in subsection (6) shall be

recorded in the form filed by the corporation with the Registrar in terms of subsection (5).

(9) Beneficial ownership and other corporation information held by the Registrar, shall be public information and shall be available for inspection, whether electronically or physically—

(a) by members of the public (subject to section 5); and

(b) by a financial institution or a designated non-financial business or profession

(10) The Registrar or the Financial Intelligence Centre may each, on its own behalf or on behalf of a Competent authority, seek beneficial ownership or other corporation information from their foreign counterparts, in respect of any corporation, and, likewise, may provide beneficial ownership or other corporation information to their foreign counterparts.

(11) The Registrar and the Financial Intelligence Centre and any competent authority which, through them, requests beneficial ownership and other corporation information from other countries, shall monitor the quality of the assistance given by the foreign authorities and shall keep records of such requests and responses.

(12) The corporation or its administrators, liquidators or other persons involved in the dissolution of the corporation, shall maintain beneficial ownership information records for a period of at least five years after the date on which the corporation is dissolved or otherwise ceases to exist.

(13) Any person who fails to comply with the requirements of subsection (4), (5), (6), (7), (8) or (12) shall be guilty of an offence and be liable to a fine not exceeding 10 million Namibian dollars or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.