



Fraud and Financial Crime

Disregarding privacy to combat fraud and financial crime

The question that arises is: how is privacy protected when private companies are being made public?

In response to the Mutual Evaluation Report of South Africa published by the Financial Action Task Force (“FATF”), the promulgation of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022 (“General Laws Amendment Act”) will effect the first substantial amendments to the Companies Act 71 of 2008 (“Companies Act”) since its enactment in 2011. However, the increased company compliance obligations may be burdensome and will weigh heavily on the right to privacy of individuals who are ultimately in control of South African companies.

Remediating the findings of FATF

The Mutual Evaluation Report of South Africa published by the FATF analysed the level of effectiveness of South Africa’s ‘Anti-Money Laundering and Combating the Financing of Terrorism’ (“AML/CTF”) system and provided recommendations on how the system could be strengthened. South Africa was afforded the opportunity to remediate the deficiencies identified by the FATF and implement the 40 FATF recommendations to avoid being grey-listed, a move we now know was not sufficient to prevent South Africa from being placed on the FATF grey list. Motivated by principles of transparency and accountability, the General Laws Amendment Act seeks to address fifteen of the twenty deficiencies identified by FATF by amending five separate South African Acts.

The effects of the amendments to the Companies Act

From 1 April 2023, the General Laws Amendment Act will require:

- Every company to submit a copy of its securities register simultaneously when filing its annual return at the Companies and Intellectual Property Commission (“CIPC”);
- If a company is a regulated company, or if it is controlled by or if it is a subsidiary of a regulated company, in terms of the Companies Act, such companies will be required to include a register of the disclosure of beneficial interest when

filing its annual return at the CIPC; and

- All other companies will be required to regularly file a record with the CIPC with information regarding individuals who are the beneficial owners of a company.

A beneficial owner is defined as an individual who, directly or indirectly, ultimately owns that company or exercises effective control of that company. This includes instances where an individual can materially influence the management of the company.

Companies will also be burdened with having to identify the chain of holders of beneficial interest to determine who is the ultimate owner of its securities, whether they exercise control over the company or not. They will need to file and regularly update the record of such beneficial ownership at the CIPC.

The impact of the FATF recommendations in the European Union

In accordance with the FATF recommendations, by 2015 most jurisdictions in the European Union (“EU”) with an AML/CTF regime implemented central beneficial ownership registers which contained accurate and up-to-date information on the beneficial ownership of legal persons or legal arrangements, accessible by persons or organisations that could demonstrate a “legitimate interest” to access those records.

It provided more legal certainty in relation to transactions or business activities with such legal persons or legal arrangements, reducing the risk of fraud and other financial crimes. The beneficial ownership registers included personal information such as the ultimate beneficial owner's name, month and year of birth, country of residence and nationality.

In 2018, the EU extended the access to beneficial ownership registers to any person of the public. Personal information was further made public when the EU's beneficial ownership registers interconnection system was created, linking all EU member states national registers containing beneficial ownership information. However, unfettered access to beneficial ownership registers may be seen as an unjustifiable violation of an individual's rights to privacy. In this regard, it was decided by the Court of Justice of the European Union in 2022 that, while it recognises that giving the public access to beneficial ownership information increases transparency and contributes to the prevention of money laundering and terrorist financing, general public access is unnecessary and disproportionate, and such access cannot justify its interference with privacy and the protection of personal information, therefore countries should consider limiting such access to persons and organisations with "legitimate interest".

A consideration of the right to privacy in the context of a South African company

The Companies Act of South Africa encourages transparency and high standards of corporate governance given the significant role of companies within the social and economic life of South Africa. The Promotion of Access to Information Act 2 of 2000 ("PAIA") particularly promotes transparency, accountability and effective governance of all public and private bodies and justifiably limits the right to privacy. This becomes a balancing act. Although there is the constitutional right to privacy which is now enshrined in the Protection of Personal Information Act 4 of 2013 ("POPIA"),

this right is not absolute and is subject to justifiable limitations aimed at protecting other rights and important interests.

The privacy risks the amendments will create

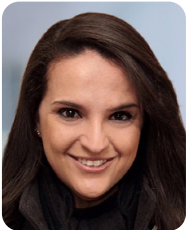
The amendments are not clear regarding the accessibility of companies' securities register to the public. In this regard, the amendments state that the CIPC must make the annual return electronically available to any person as prescribed. This means that unless limitations to accessing annual returns are developed, any person will have access to a company's annual financial statements as well as the details of the shareholders and beneficial owners (such as their name, address, and shareholding interest). Not only does the publication of such personal information render the distinction between a private and a public company uncomfortably superfluous, but public accessibility (if not appropriately limited) poses a risk of wealthy individuals being targeted by persons for nefarious purposes.

Who should have access?

It will be important for the Minister of Finance, after consultation with the Financial Intelligence Centre, to carefully consider which persons should have access to annual returns taking into account the data privacy rights of shareholders and beneficial owners in terms of POPIA. This determination should be considered in light of reasons driving the amendments to the Companies Act. If we presume that these reasons are to strengthen South Africa's anti-money laundering systems and combat the financing of terrorism, there is a strong case that such personal information should only be made available to law enforcement officials who have a reasonable and, perhaps, lawful purpose for requiring this information, as is the case in the EU.

Adapting to the change

Proposed changes to the Companies Act have been looming since 2018, with the revised Companies Amendment Bill being published as recently as 1 October 2021. Enacting the amendments highlighted above ensures greater transparency to mitigate against companies being used as vehicles for criminal activities in South Africa. Although unmasking the individuals who ultimately own or exercise effective control of the company will be a welcomed deterrent for fraud, corruption and financial crimes that cripple South Africa's economy, it should not come at too high a price by making sensitive personal information of individuals publicly available. In our view, it is important for the Minister of Finance to prescribe limitations to the accessibility of annual returns thereby balancing the right to data privacy against the right to access information in the public interest.



Nada Ford

**Manager
Legal Services**

(a business unit of KPMG Services (Pty) Ltd).

T: +27 72 686 1161

E: nada.ford@kpmg.co.za



Monica Wu

**Senior Manager
Forensic**

T: +27 72 446 7281

E: monica.wuyu@kpmg.co.za