

LEGAL UPDATES

October 2021

Opening Pandora's Box – Beneficial Ownership Reporting in Malaysia

In an effort to ensure that business entities registered or operating in or from Malaysia are protected from the threat of being misused to carry out illicit activities, and to identify the individuals behind business entities, the Companies Commission of Malaysia (**CCM**) had pursuant to its powers under the Companies Commission of Malaysia Act 2001 (**CCMA 2001**), issued the Guideline for the Reporting Framework for Beneficial Ownership (**BO**) of Legal Persons (**Guideline**).

Disclosure Obligations

The Guideline provides guidance on the beneficial ownership reporting framework (**Framework**), with the Framework being applicable to the following entities, unless exempted:

- all companies, including foreign companies, incorporated and registered under the Companies Act 2016 (**CA 2016**); and
- all limited liability partnerships (**LLP**), including foreign LLPs, registered under the Limited Liability Partnerships Act 2012 (**LLPA 2012**)

The Guideline imposes a self-regulated approach on business entities, and sets out certain timelines detailing the obligations placed upon companies and LLPs, and this is separated into the transitional period and the post-transitional period. Whilst the transition period was slated to end on 31 December 2020, this has been extended to a later date, to be determined by the Registrar to coincide with the enforcement date of the Companies (Amendment) Bill and the Limited Liability Partnerships (Amendment) Bill (**Enforcement Date**). The obligations as set out in the timeline are as follows:

	Transitional Period (1 March 2020 until Enforcement Date)	Post Transitional Period (Commencing from the Enforcement Date)
Obligation to obtain and keep BO information	Obtain, keep & update the BO information at entity level	Obtain, keep and update the BO information & notify the Registrar.

Source: Guideline for the Reporting Framework for Beneficial Ownership of Legal Persons revised on 17 December 2020

Note that exempted entities (primarily licensed entities and regulated persons, as well as listed entities) are still required to make a declaration of their exempted status in their yearly annual return (with respect to companies) or annual declaration (with respect to LLPs).

Some Key Takeaways

- Under the CA 2016 and the Guideline, beneficial owner(s) are the natural persons who ultimately own or control a legal entity or arrangement, not being a nominee, and this definition needs to be read with the concept of "interests in shares" and generally covers both ownership and effective control.

Authors

Hsian Siong Yong

Xiang Yen Foo

For further information,
kindly reach out to us at:

E: info@hsianco.com

LEGAL UPDATES

October 2021

- In the case of a company limited by shares, “the ultimate owner of the shares” is the individual that fulfills one or more of the following criteria:
 - has interest, directly or indirectly, in not less than 20% of the shares of the company;
 - holds, directly or indirectly, not less than 20% of the voting shares of the company;
 - has the right to exercise ultimate effective control, whether formal or informal, over the company; or the directors or the management of the company;
 - has the right or power to, directly or indirectly, appoint or remove a director(s) who holds a majority of the voting rights at the meeting of directors; or
 - is a member of the company and, under an agreement with another member of the company, controls alone a majority of the voting rights in the company.
- Reporting with respect to companies limited by guarantee, is similar but extends only to effective control.
- In respect of LLPs, a person is deemed a BO where he:
 - holds, directly or indirectly, a right to share in not less than 20% of the capital contribution of the LLP;
 - holds, directly or indirectly, not less than 20% of the rights to vote in the LLP;
 - has the right exercise ultimate effective control, whether formal or informal, over the LLP; or the partners of the LLP; or
 - holds, directly or indirectly, the right to appoint or remove the majority of those involved in management.
- Companies are required to notify and submit BO information to the Registrar through the submission of the annual return. To clarify and streamline the lodgment of BO information accompanying the annual return, CCM had issued *Practice Directive No. 7/2021* in March 2021.
- Companies must serve the applicable Notices under subsection 56(1), (2) or (3) CA 2016 (**Notices**) to their members, at least once in a calendar year for the purpose of annual return submission.
- In respect of LLPs, they are required to submit the BO information upon registration, where any changes occur and also when they submit their annual declaration pursuant to section 68 of the LLPA 2012.
- Whilst the obligation lies on companies to send out the Notices at least once a calendar year for the purpose of annual return submission, the board of directors is responsible to ensure that the company has exercised its powers accordingly. In respect of LLPs, each partner is responsible to ensure the BO information is provided and recorded in a register of BO while the compliance officer is responsible for lodging the BO information.
- In the event that the company or limited liability partnership is unable to obtain the BO information, they must provide evidence that attempts have been made by sending at least 2 notices to shareholders or partners, and the records of such attempts must be kept at the same location with the register of BO.

Authors

Hsian Siong Yong

Xiang Yen Foo

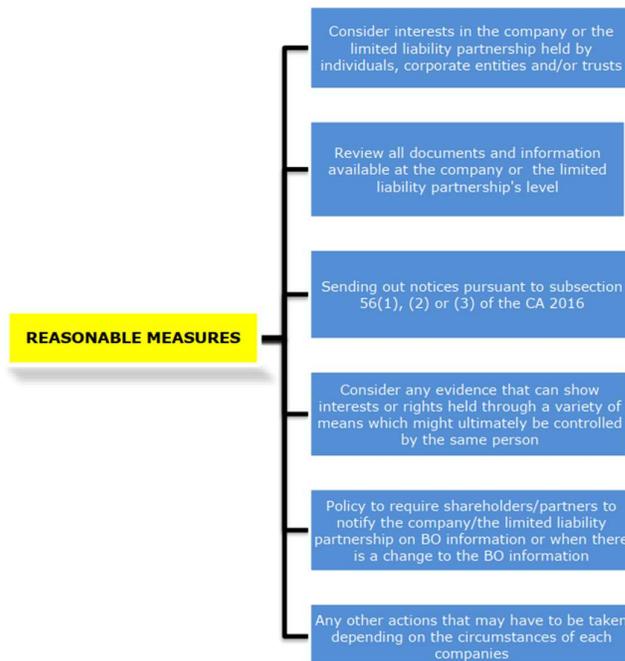
For further information,
kindly reach out to us at:

E: info@hsianco.com

LEGAL UPDATES

October 2021

- Upon receipt of BO information, the business entities and their company secretary, agent or compliance officer, are under an obligation to conduct verification of the information. To comply with this obligation, they are required to collect information or supporting documentation accordingly, which are to be kept at the same location as the register of BO (such supporting documents are to be kept for up to 7 years after such person ceases to be a BO).
- Entities are required to take reasonable measures to identify their beneficial owner(s) by employing at least one or more of the following actions as listed below:



Source: Guideline for the Reporting Framework for Beneficial Ownership of Legal Persons revised on 17 December 2020

Varying penalties will be imposed in accordance with the offending party's role and responsibility with regards to the BO information. In the case of an individual or member, who has been given a Notice, he has an obligation to inform and provide the relevant confirmation. The obligation also extends to non-members. Where they fail to comply with such notice, or provides false or misleading information, they commit an offence and may be liable, on conviction, to imprisonment or to a fine, or to both. Further, the company secretary must ensure that all due diligence and vetting processes have been performed, prior to lodging the BO information and that the information lodged is true (to the best of his knowledge). Failure to do so is an offence which may result in the company secretary being liable, upon conviction, to imprisonment or to a fine, or to both.

Authors

Hsian Siong Yong

Xiang Yen Foo

For further information,
kindly reach out to us at:

E: info@hsianco.com

LEGAL UPDATES

October 2021

Final Thoughts

At present, arising from the requirement for filing of the annual return or annual declaration, the company secretary or the compliance officer, as the case may be, is requesting information on BO at least once a calendar year.

Given that the CCM has expressed their intention to conduct inspections during the transitional period due to the importance of the Framework, and also taking note of the reporting obligations post-transitional period, business entities and members / partners are advised to be mindful of their obligations under the Guideline, and to take such steps as are necessary to ensure compliance.

Business entities and members / partners will also need to be mindful whether disclosure pursuant to the obligations will impact any licensing, structuring or operational matters at the business entities' level. It is unclear at this juncture, whether BO information reported to the CCM will be made publicly available (for example via searches).

As penalties for non-compliance are high, which include fines, imprisonment or both, and there will be increasing pressure to provide appropriate disclosure and information on BO, business entities, and members or partners will need to ensure that they are in a position to comply with the requirements. Where in doubt, they should seek advice accordingly.

Authors

Hsian Siong Yong

Xiang Yen Foo

For further information,
kindly reach out to us at:

E: info@hsianco.com