

BO DECLARATION GUIDELINES

FOREWORD

This document is intended to provide general guidance on what reporting entities must do to comply Requirement 2.5 of the EITI Standard¹ and to help a legal entity comply with the Beneficial Ownership (BO) requirements under the EITI Standard.

This Guidance Note should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide give general guidance.

Part 1: BO declaration framework

1.1. International Commitment

EITI Standard requires implementing countries to ensure that companies that apply for or hold a participating interest in an oil, gas or mining license or contract in their country disclose their Beneficial Owners (BOs). Such information must also be accessible and made available to public.

PNG, as EITI implementing country, has committed and continues to strive to meet the EITI Standard requirements.

1.2. The requirements at a glance

Legal entities that apply for or hold a participating interest in an oil, gas or mining license or contract in PNG, including foreign companies, are required to submit a BO declaration. As a result, these entities:

- should take reasonable steps to identify the individual BOs, if any, of a legal entity;
- should contact these persons whom it believes to be registrable persons, to confirm whether they meet the conditions and, if so, obtain the minimum required information in respect of such registrable persons;
- should file the minimum required information with respect to BOs and PEPs, as defined below in Part 2.1;
- should enter the minimum required information on the legal entity's BO declaration (see Part 3);
- should keep the minimum required information on such BOs and PEPs up-to-date (see Part 4).

1.3. Applicability of the BO requirements

The requirement to submit a BO declaration applies to all registered legal entities that apply for or hold a participating interest in an exploration or production of oil, gas or mining license or contract, except those that are specifically exempted as set forth below in Part 2.5.

¹ See <https://eiti.org/document/eiti-standard-2019#r2-5> for the requirement in full. And the guide (<https://eiti.org/beneficial-ownership#eiti-guidance-and-publications-on-beneficial-ownership>) for further guidance on BO transparency.

Part 2: Who is a Beneficial owner (BO)

2.1. Who is a Beneficial Owner?

Beneficial owners are always natural persons who ultimately own or control a legal entity.

A “beneficial owner” of a legal entity is the natural person(s) who ultimately control(s) or own(s) the legal entity, whether such ownership or control is direct or indirect.

For the purposes of this Clause, if a natural person directly or indirectly:

- a) owns or controls 5% or more of the shares or voting rights in a legal entity; or
- b) in the case where the natural person is a Politically Exposed Person, that natural person owns a single share or a single voting right or more in a legal entity; or
- c) has the right to appoint, veto the appointment or remove a majority of the board of directors or equivalent body of a legal entity or legally binding arrangement; or
- d) in circumstances where a) to c) do not apply, has the right to exercise, or actually exercises, significant influence or control over or derives significant economic benefit from a legal entity ,
- e) For the avoidance of doubt agents, nominees, trustees and other intermediaries shall not be deemed to be a beneficial owner.
- f) In the case of a joint venture, each entity within the venture should disclose its beneficial owner(s).

Exceptions

Publicly listed companies, including wholly-owned subsidiaries, are required to disclose the name of the stock exchange and include a link to the stock exchange filings where they are listed.

If a government or governmental body would, if it were a natural person, be deemed to be a beneficial owner pursuant to clause 1 above then that government or governmental body shall be a beneficial owner.

Politically Exposed Person

“The term ‘politically exposed person’ means :

- a) A natural person who is or has been entrusted with prominent public functions in a foreign country with prominent public functions, including but not limited to, a Head of State or the head of a government, a senior politician, a senior government official, a senior judicial or a senior military official; or
- b) A natural person who is or has been a senior executive in a foreign country of a state-owned company of that foreign company; or
- c) A natural person who is or has been a senior political party official in a foreign country; or
- d) A natural person who is or has been entrusted with a prominent function by an international organisation, including but not limited to directors, deputy directors and members of the board or equivalent positions; or
- e) A natural person who or has been entrusted in Papua New Guinea with prominent public functions as listed in Section 26 (applicant of Division 2) of the Constitution; or
- f) A natural person who is a family member or is known to be a close associate of a person mentioned in paragraphs (a) to (e)”

For the purpose of clause 3 ‘family members’ definition includes the following:

- *the spouse, or a person considered to be equivalent to a spouse, of a politically exposed person;*
- *the children or grandchildren and their spouses, or persons considered to be equivalent to a spouse, of a politically exposed person;*
- *the parents or grandparents of a politically exposed person; whether such relationship be natural, adoptive or otherwise.*

‘persons known to be close associates’ means:

- natural persons who have joint BO of legal entities or legal arrangements, or any other close business relations, with a politically exposed person;
- natural persons who have sole BO of a legal entity or legal arrangement which is known to have been set up for the de facto benefit of a politically exposed person. “

Public functions listed in Section 26 (applicant of Division 2) of the Constitution are:

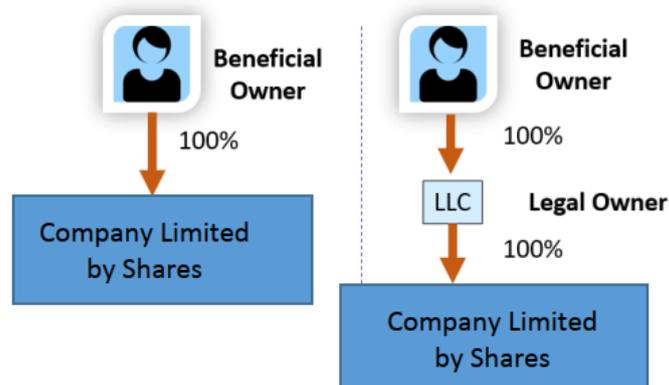
- a. the Prime Minister, the Deputy Prime Minister and the other Ministers; and
- b. the Leader and Deputy Leader of the Opposition; and
- c. all other members of the Parliament; and
- d. members of Provincial Assemblies and Local-level Governments; and
- e. all constitutional office-holders within the meaning of Section 221 (definitions); and
- f. all heads of Departments of the National Public Service; and
- g. all heads of or members of the boards or other controlling bodies of statutory authorities; and
- h. the Commissioner of Police; and
- i. the Commander of the Defence Force; and
- j. all ambassadors and other senior diplomatic and consular officials prescribed by an Organic Law or an Act of the Parliament; and
- k. the public trustee; and
- l. the personal staff of the Governor-General, the Ministers and the Leader and Deputy Leader of the Opposition; and
- m. executive officers of registered political parties as defined by Section 128 (“registered political party”); and
- n. persons holding such public offices as are declared under Subsection (3) to be offices to and in relation to which this Division applies.”

2.2. How does a legal entity determine BO?

Given that BO or control of shares, interest or rights can be exercised in many different ways, determining the BO of a legal entity can be a complex process that must be undertaken on a case-by-case basis. Note, also that, determining the BO is independent of the BO’s nationality and place of residence.

The use of a legal entity or arrangement can obscure identity of a beneficial owner. Where an individual is the sole shareholder of a company and controls it directly, that individual is the BO of the company. However, there may be more layers involved in the ownership structure, perhaps a chain of entities between a legal entity and its BO. In Figure 1, the example on the right side shows an additional layer - the Limited Liability Company (LLC) - between the legal entity (the company) and its beneficial owner. The LLC, as the shareholder of the company, is its direct legal owner, while the beneficial owner indirectly controls the company through the LLC.

Figure 1: Difference between beneficial owner and legal owner



When identifying a Beneficial Owner, a Company shall have regard to the following:

- Its Articles of Incorporation, and amendments thereto;
- Agreements pertaining to the corporation's establishment;
- Shareholders' resolutions;
- Information from private institutions in which the proceeds of share sales are deposited or transferred to;
- Documents belonging to the company or third party that shows that the individual concerned is the true owner of the Company's share capital;
- Documents belonging to the company or third party that shows that the individual concerned is the true owner of financial or other assets, or an investment in the company, and/or;
- Other information whose accuracy is capable of being verified.

2.3. Why is it important to identify BOs?

Anonymity enables many illegal activities to take place hidden from law enforcement and regulatory authorities, such as tax evasion, corruption, money laundering, and terrorist financing.

For example, money laundering involves complex operations and transactions to make money from illicit sources, in order to appear to have legal sources, while in reality the money is from illicit activities.

In a business setting, in particular, it is therefore important to know the BOs of legal entities and arrangements to prevent misuse of such structures.¹ Whilst it is open to persons to create sophisticated corporate structures including corporate structures across jurisdictions, the concern is that certain persons could use such structures for illegal purposes such as to obscure their identity, income or property ownership.

2.4. Establishing BO

A BO can only be a natural person. A legal entity cannot be a beneficial owner and must determine the identity of its BOs. Moreover, there may be more than one BO of a legal entity that owns or controls, through direct or indirect ownership, 5% or more of the shares in a company.

❖ Calculating shareholdings

In the case of a company limited by shares, information in its register of members can assist a company in determining whether any individual or individuals directly own or control at least 5% of its shares.

All shares issued (whether voting or non-voting) by a company should be included when calculating shareholdings. However, shares which have never been issued or which have been bought back and cancelled by the company, should not be included in the calculation. If a company's shares or voting rights are held by legal arrangement, the company should take steps to identify the BOs of that legal arrangement.

BO must be determined in relation to another person in certain situations including, but not limited to:

- shares or voting rights that are held jointly by two or more persons, each person must be treated as holding the entirety of the shares or rights;
- shares or voting rights that are not held jointly and are subject to an arrangement between the people who hold them (whether or not the arrangement is in writing) that they will exercise their rights in the same way, each person who is party to the arrangement must be treated as holding the entirety of the shares or rights that are covered by the arrangement. This applies to voting rights attached to shares or any other rights;
- a person controls a voting right held by another, the person with control must be treated as holding the right. This is also the case if the person who holds the right, the latter also has control of such right. If, however, the person who holds the right has to act entirely as directed by another, only that person directing the actions should be treated as holding the right.

¹ For this reason, EITI, FATF and OECD have included BO requirements in their standards and conduct peer review assessments across jurisdictions, on availability of such BO information.

If no individual's holding meets the threshold of 5% of shares or voting rights, that individual will still be a beneficial owner if he or she is a Political exposed Person (PEP) or has the right to appoint, veto the appointment or remove a majority of the board of directors or equivalent body of a legal entity or legally binding arrangement.

❖ **Calculating BO of voting rights**

The voting rights attached to any shares or LLC interests are likely to be set out in the legal entity's governing documents. Voting rights can be exercisable in different ways, including at general meetings or through written resolutions. Often one vote is attached to one share or percentage of interest, but the entity may have different classes of shares or interests with different rights. Some shares or interests may have no voting rights, or the right to vote only in certain circumstances, or additional rights to more than one vote per share or percentage of interest.

Where shares or interests in a legal entity are directly owned and the voting rights attached to shares or LLC are set out in such governing documents, then the information contained in the register of members and the voting rights provisions of the governing documents, may enable such entity to work out if any individual or entity directly at least 5% of the voting rights. Voting rights attached to shares that have been bought back and are held as treasury shares or interests should not be included.

In the case of LLC interests, all interests which are allocated to the members of the LLC should be used to calculate the percentage of LLC interests held by any member. This may correspond with the voting rights, or if the interest does not carry the right to vote, the rights of members to share in the profits of the LLC.

❖ **Control by other means**

Any individual exercising control over an entity whether directly or indirectly, should be identified as a beneficial owner (subject to the 5% threshold, as mentioned in Part 2.1).

It is not possible to give an exhaustive definition of "control" because it will depend on the particular circumstances of each specific legal entity. However, generally speaking an individual is likely to have control over a legal entity in situations which include, but are not limited to:

- (i) The individual holds, directly or indirectly, at least 5% of the shares, interests or voting rights in an entity, which may include having absolute decision or veto rights over the running of the business of the legal entity;
- (ii) The individual holds the right, directly or indirectly, to appoint, veto the appointment or remove a majority of the board of directors or equivalent body of a legal entity;
- (iii) The individual otherwise has the right to exercise, or actually exercise, significant influence and control over the management and operations of the company;
- (iv) The individual otherwise has the capacity to predetermine decisions through other means, including and not limited to:
 - Trust management agreement
 - Agreement on joint activities
 - Option agreement
 - shares for debt agreement

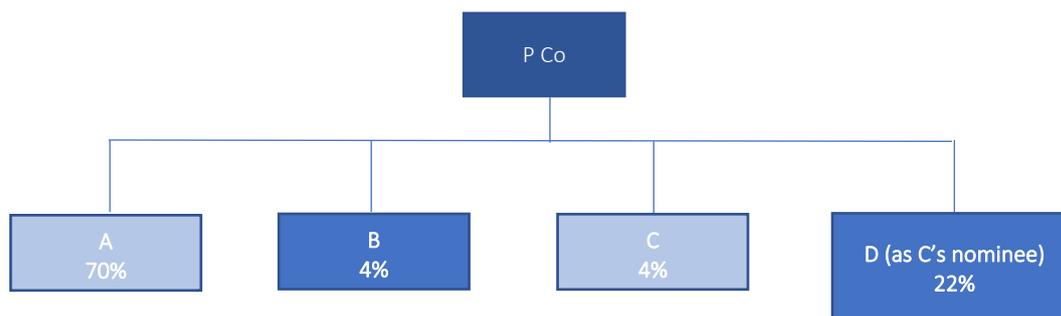
Control will not ordinarily arise in the context of a standard professional or commercial relationship between the legal entity and an individual such as a legal adviser, an accountant, a client, a lender or a supplier, nor will it ordinarily arise in the context of the exercise of a statutory function such as that of a regulator or a liquidator.

❖ **Further guidance on other ownership arrangements**

➤ **Nominees**

If shares, voting rights or interests are held by a nominee, these should be treated as if they were held by the person for whom the nominee is acting. If this individual is a BO, you must enter the minimum required information in respect of that BO on the BO declaration. If the nominee is acting for a legal entity or legal arrangement, a legal entity must follow the steps in Part 2 as it would for any other legal entity or legal arrangement with an interest in such entity.

Figure 2



In Figure 2, P Co is a PNG company in which A holds 70% of the shares, B and C each hold 4% of the shares, and D holds 22% of the shares as nominee for C. As A holds more than 5% of the shares in G Co, A is a beneficial owner of P Co. B holds less than 5% of the shares in P Co, so B is not a beneficial owner of P Co. Although C only holds 4% of the shares in his own name, D holds a further 22% of the shares as C's nominee. Shares held by D must be treated for purposes of determining BO as belonging to C, not D. This means that C holds more than 5% of the shares in total, so C is a beneficial owner of P Co.

➤ **Jointly and severally held interests**

If two or more people jointly and severally hold shares, voting rights or interests, each of them is treated as holding the total number of shares, interests or voting rights held by all of them. So, if two or more people hold jointly and severally 5% or more of the shares, interests or voting rights, the minimum required information in respect of each of them must be separately entered on the BO declaration.

➤ **Joint arrangements**

A joint arrangement includes proxy agreements, voting blocs, and any scheme, agreement or understanding, whether or not legally enforceable and any convention, custom or practice of any kind. It does not include one-off arrangements, partnerships or LLCs.

If two or more people have such an arrangement which relates to voting rights or interests in a legal entity, each of them is treated as holding the total number of shares or percentage of interests held by all of them. Where an arrangement covers at least 5% of the shares or interests, the minimum required information in respect of each party to the arrangement must separately be entered on the BO declaration. If the arrangement covers appointment or removal of directors with a majority of board level voting rights, then the minimum required information in respect of each party to the arrangement must separately be entered on the BO register.

➤ **Option agreement**

Voting rights and rights to appoint or remove company directors, LLC managers or general partners may only be exercisable in certain circumstances. If the circumstances under which the rights are exercisable are within the control of the individual who holds them, then they are relevant for identifying the BO of a legal entity. Otherwise, a legal entity should only consider these rights if those circumstances have arisen, and for as long as those circumstances continue.

2.5. Exemptions

➤ **Publicly listed company**

The requirements to obtain BO information do not apply to entities whose shares are listed on the PNG's National Stock Exchange or other appointed stock exchange. In addition, more than 95% owned subsidiaries of such entities are also exempted from these. However, these entities are required to collect and submit data legal ownership and on the publicly listed shares, including stock exchange name, Legal Entity Identifier (LEI) and link to the stock exchange documents/filings. The data for each Stock Exchange shall be filled in separately.

➤ **State owned company**

If the shareholder holding more than 95% is a Governing authority, bodies, agencies or legal persons governed by public national laws, the requirements to obtain BO information do not apply. Example would be investment by a District Development Authority in the mining or petroleum sector in which the beneficial owner is the provincial government and not a specific person or individual. However, the legal entity is required to collect and submit data on state participation and legal ownership.

2.6. When a BO cannot be identified

➤ Where a legal entity is unable to immediately identify its BOs

If a legal entity has reason to believe that it has a BO that it was unable to identify within the reporting timeframe. The company should submit the BO declaration on time and should indicate, for example :

“The company has not yet completed the process of taking reasonable steps to identify anyone who is a BO in relation to the company.”

➤ Where a legal entity is unable to verify BOs data

If a company has one or more BOs, but is unable to verify the information relating to such person(s), when it has taken reasonable steps to do so, it must note this fact on the BO declaration. The BO declaration should indicate that, for example:

“The company knows or has reasonable cause to believe that there is a BO in relation to the company, but it has not been able to verify such BO.”

➤ Where a legal entity has identified a BO but can not confirm BO details

A company may find that it has identified the BO but is unable to confirm one or more pieces of the minimum required information, it must note this fact on the BO declaration. The BO register should indicate that :

“The company identified a BO in relation to the company, but the minimum required information in respect of that person has not been confirmed”.

Part 3: Procedure for filling in and submitting Declaration on Beneficial Owners

1.1. Declaration Structure

DF1. BO declaration includes the signed statement of submitting person along with data on beneficial owners, which shall be filled in Sections A to B according to the instructions below. In this statement the company is required to tick off certifying:

- the number of identified beneficial owners;
- the exemption from BO data declaration (filling Section A) if the company is a publicly listed company, a wholly owned subsidiary of a publicly listed company or of the BO is a State;
- the Absence of a Beneficial Owner -if surveys have revealed no natural persons considered as beneficial owners of the given company for the purpose of EITI reporting; and
- the information provided is accurate and complete. If not, the company is required to explain the reasons.

DF2. Section A shall be filled in data on the legal entity (hereinafter referred to as Company) submitting the Declaration. Each company shall fill in this Section only once.

DF3. Section B shall be filled in data on the natural person - the beneficial owner. This Section shall be filled in separately for each for the company’s beneficial owner. Each beneficial owner is given a number (1, 2, 3 etc.)

1.2. The rules of completing Section A - Company

1. Company data: Name and registration data of the company shall be filled in this Sub-Section, including name of the company, the country of registration , the registration number and the office address of the Company by which the State registration of the Company has been is carried out.

2. State Participation: Data on State participation in the company shall be filled in this Sub-Section. Any direct or indirect State ownership of the Company shall be filled in the Table regardless of the participation percentage.

3. Publicly listed Company :

3.1 This Sub-Section shall be ticked off to certify public listing of the Company. Data on the publicly listed shares shall be filled in this Sub-Section, including stock exchange name, Legal Entity Identifier (LEI) and link to the stock exchange documents/filings. The data for each Stock Exchange shall be filled in separately.

3.2 In case of ticking off the field “Company is a wholly owned subsidiary of a publicly listed entity,” the company shall fill in data of the publicly listed Legal Entity including the name of the legal entity, stock exchange name, Legal Entity Identifier (LEI) and link to the stock exchange documents/filings.

4. Legal ownership - Data on shareholding in the Company shall be filled in this Sub-Section, including the names of direct shareholders, the participation interest, the nature, the country of registration and the identification number. If the shareholder is a publicly listed entity, the stock exchange name, Legal Entity Identifier (LEI) and link to the stock exchange documents/filings shall be filled in this section.

The data for each shareholder shall be filled in separately.

1.3. The rules of completing Section B - Beneficial owner

1. Beneficial Owner’s identity data - Personal identity data of a beneficial owner shall be filled in this Sub-Section as given in the beneficial owner’s ID. Beneficial owner’s contacts and address of residence shall also be filled in this subsection.

2. Status of a Politically Exposed Person -This Sub-Section shall be ticked off, if the beneficial owner is considered a Politically Exposed Person for the purpose of the EITI Reporting. The company determines the circumstance of being a PEP based on the data that became available no longer than 30 days before the day of submission of the Declaration on BO.

3. Information about how ownership is held or control over the company is exercised - The grounds for being considered a beneficial owner of the company shall be filled in in this Sub-Section along with the required information related to these grounds. In case of being a beneficial owner on more than one grounds, all grounds shall be marked in the appropriate clauses.

3.1 This Sub-Section shall be filled, if a natural person holds at least 5 percent of shares in the company, either through ownership of a stock/shares in the company (direct shareholding) or through ownership of a stock/shares of another Legal Entity owning a stock/shares in the company (indirect shareholding). Indirect shareholding may be exercised regardless of the number of intermediary legal entities in the chain of the “Natural person - Company”.

A politically exposed person holding a stake in the company is considered the beneficial owner regardless of the level of control or ownership.

Total shares/voting rights shall be calculated based on the sum of all the percentages of shares/voting rights in the company both directly and indirectly owned by the beneficial owner. In the event of indirect shareholding, the share of the beneficial owner in the company shall be calculated based on the participation/voting rights percentage of each previous intermediary entity, namely, by multiplying the percentage of the Legal Entity’s shares in the company by the percentage of shares of relevant intermediary entity in the Legal Entity owning shares in the Company and so on.

In case the field “indirect shareholding” is filled, the number of intermediary entities operating in the chain of the company and beneficial owner shall be filled in for the relevant beneficial owner.

3.2 This shall be filled, if the natural person holds the right to exercise influence or control over the company by other means. The legal tools underlying such a capacity shall be mentioned, if available.

3.3 In the field “Acquisition date, the date of the last acquisition, by the power of which a person becomes a beneficial owner of the company shall be filled in, and if the person has become a beneficial owner on another ground, the date of becoming a beneficial owner is indicated.

3.4 Data on shareholding of the intermediary legal entity, either direct, or indirect or mixed combination of both, in the company, shall be filled in in this Sub-Section.

Part 4: Submission of declaration

The minimum required information in respect of the company and BO data should be filled in the declaration form. The scanned version of the signed declaration should be submitted to eiti.png@bdo.tn (copy jane.valles@bdo.com.pg; francis_diakon@treasury.gov.pg; lucas_alkan@treasury.gov.pg) no later than 6th November 2020.

No matter when it was incorporated or formed, the company must ensure that the information filed is up to date.

The declaration is filed with all the sections enclosed to the statement signed by the person entitled to submit company's declaration. The statement shall indicate the first and last names of the person submitting the declaration, their position in the company, their contact details (email and phone number) and the date of submission .

When submitting a declaration or within 1 month after its submission, the company may be requested to provide a document certifying the ownership right of the legal entity's equity share issued by the relevant competent authority (including foreign country's) and any other document certifying the accuracy of the BO information submitted.

Where there are changes to the minimum required information concerning individual BOs or where an individual BO has changed throughout the year, the minimum required information relating the company's individual BOs should be updated and a BO declaration should be submitted as soon as practicable, but not later than 30 days, after the minimum required information has been confirmed by the company in respect of the change.