

# Guidance on Beneficial Ownership Requirements of the Republic of the Marshall Islands Associations Law

November 2018

## **NOTICE:**

This guidance is not intended as a substitute for the Republic of the Marshall Islands Associations Law. It is provided as a courtesy for general information purposes only and should not be construed as legal advice or a substitute for legal counsel. For legal advice or a legal opinion regarding the requirements for beneficial ownership recordkeeping for your non-resident domestic entity, please consult independent counsel.

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## About this Guide

Internationally agreed standards for anti-money laundering and combating the financing of terrorism and for transparency and exchange of information require jurisdictions to ensure the availability of beneficial ownership information for legal entities and arrangements connected to the jurisdiction. The Republic of the Marshall Islands ("RMI") Associations Law ("RMI Associations Law") includes recordkeeping requirements for beneficial ownership information that are in line with these standards and with similar obligations in other leading corporate jurisdictions.

This guidance was prepared by the RMI Registrar of Corporations responsible for non-resident domestic entities ("Registrar"). It is intended to serve as a general overview of how non-resident domestic entities might comply with the requirement to collect and make available beneficial ownership information under the RMI Associations Law.

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## What beneficial ownership records must be kept?

In addition to reliable and complete accounting records and up-to-date legal ownership records, the RMI Associations Law requires non-resident domestic entities to use all reasonable efforts to obtain and maintain an up-to-date internal record of the entity's beneficial owners.<sup>1</sup> These records may be kept in any form so long as they can be converted into legible written form within a reasonable time, and they must be kept for a minimum of five years. Bearer shares are subject to additional requirements (see *What are the requirements for bearer shares?* below).

## Which entities must keep these records?

All non-resident domestic entities, except publicly-traded companies, are required to keep beneficial ownership records. "Publicly-traded company" is defined in each act of the RMI Associations Law and broadly includes companies listed on securities exchanges as well as their direct and indirect subsidiaries. An entity is a "subsidiary" of another entity if majority-owned by that other entity or included in that other entity's consolidated financial statements.

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<sup>1</sup> For reference, see § 80(3) of the Business Corporations Act, § 37(1)(c) of the Revised Partnership Act, § 32(1)(c) of the Limited Partnership Act, and § 22(1)(c) of the Limited Liability Company Act.

## Who is a "beneficial owner"?

In all cases, a "beneficial owner" will be a natural person. "Beneficial owner" has the same definition in each act of the RMI Associations Law:

*the natural person(s) who ultimately owns or controls, or has ultimate effective control of, a legal entity or arrangement, whether directly or indirectly, or on whose behalf such interest in such legal entity or arrangement is held.<sup>2</sup>*

This definition mirrors the internationally agreed standards established by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes ("Global Forum") and the Financial Action Task Force ("FATF"). Guidance produced by these organizations on identifying beneficial owners of legal entities may be a helpful resource (see *Other Resources* below).

The FATF Recommendations<sup>3</sup> describe the determination of beneficial ownership information of legal entities as a two-step process:

### **STEP 1**

- (a) Identify the natural persons (if any) who ultimately have a controlling ownership interest in a legal person, and
- (b) where there is doubt as to whether the persons identified under (a) are the beneficial owners, or where no natural person exerts control through ownership interests, identify the natural persons (if any) exercising control of the legal person through other means.

### **STEP 2**

Where no natural person is identified under (a) or (b) above, identify the relevant natural person who holds the position of senior managing official.

## Step 1(a) – What is a controlling ownership interest?

A controlling ownership interest will depend on the company's ownership structure. The RMI Associations Law bases a controlling ownership interest on a threshold: holding more than 25% of the interests or voting rights in a legal entity. Thus, the starting point in most cases will be to assess whether one or more persons meet this threshold. The threshold may be achieved through direct or indirect ownership.

### What is direct ownership?

An interest or voting right held and controlled by a natural person in his/her own name is directly owned by that natural person. Direct ownership is generally recorded in a share register, register of members or partners, or other register of ownership interests. An interest or right held jointly by natural persons may also be considered directly owned.

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<sup>2</sup> For reference, see § 80(3)(f) of the Business Corporations Act, § 37(1)(c)(v) of the Revised Partnership Act, § 32(1)(c)(v) of the Limited Partnership Act, and § 22(1)(c)(v) of the Limited Liability Company Act.

<sup>3</sup> FATF (2012-2018), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, available at: [www.fatf-gafi.org/recommendations.html](http://www.fatf-gafi.org/recommendations.html).

### What is indirect ownership?

Indirect ownership may occur through a chain of companies or through a nominee shareholder arrangement. Where a share or right is held indirectly, the chain of ownership or nominee arrangement must be looked through to identify the underlying natural persons with a controlling ownership interest.

Only natural persons can be "beneficial owners" under the RMI Associations Law. Where the holder of an interest or voting right is a legal entity, the direct owners of that shareholder-entity must be considered. Where one or more of these are also legal entities, the direct owners of these shareholder-entities must be considered too. This process should be continued until a determination can be made as to whether any natural person in the ownership chain meets the 25% threshold for the company in question.

#### EXAMPLE

The shares of Corporation A are 10% held by Corporation B and 90% held by Corporation C. Corporation B is 100% owned and controlled by Individual 1. Corporation C is owned and controlled 25% by Individual 1 and 75% by Individual 2. In this case, Individual 1 and Individual 2 are each an indirect owner of Corporation A. Corporation A is ultimately owned and controlled 32.5% by Individual 1 and 67.5% by Individual B. Both Individual 1 and Individual 2 exceed the 25% ownership threshold, so both are "beneficial owners" of Corporation A.

Similarly, shares held by a nominee on behalf of another person must be treated as belonging to that other person, not the nominee.

#### EXAMPLE

The shares of Corporation D are 100% held by Individual 3. Individual 3 holds the shares as a nominee on behalf of Individual 4 under the terms of a nominee arrangement. The shares must be treated as belonging to Individual 4, not the nominee. Individual 4 therefore exceeds the 25% ownership threshold and is the "beneficial owner" of Corporation D.

### What if no natural person meets the 25% threshold?

Even if there is no natural person meeting the controlling ownership interest threshold, there may be control through other ownership means. Shareholders may collaborate to increase a person's level of control through formal or informal agreements. If no natural person meets the 25% threshold, or if there is doubt as to whether a natural person meeting the threshold is the true "beneficial owner," any shareholder agreements, powers to appoint senior management, convertible stock, or outstanding debt that is convertible into voting equity should be considered. A natural person exercising indirect control over the legal entity through one or more of these other ownership means may be considered a "beneficial owner."

#### EXAMPLE

The shares of Corporation E are held by 10 shareholders, each with 10% of the ownership and voting rights. All hold Class B shares except Individual 5, who holds Class A shares. Corporation E's articles of incorporation give Class A shares veto power over any sale of Corporation E's sole asset and any change to the nature of Corporation E's business. Individual 5, as the sole holder of Class A shares, may be considered the "beneficial owner" of Corporation E.

### Step 1(b) – What is control through other means?

The RMI Associations Law states that if no natural person exerts control through ownership interests, the natural persons who exercise control through management or other means will be regarded as the "beneficial owner." Other means may include control through personal connections, the financing of the company, family relationships, historical or contractual associations, or default by the company on certain payments. There may be a presumption of control, even if not exercised, where a natural person uses, enjoys, or benefits from the assets of the legal person.

If no natural person exerts control through ownership interests, or if there is doubt as to whether the natural persons exerting control through ownership interests are the true "beneficial owners," a natural person exercising control of the legal entity through one of these other means may be considered a "beneficial owner."

**EXAMPLE**

Corporation F was founded, owned, and operated by Individual 6. Individual 6 has retired and transferred the shares of Corporation F in equal 16.667% proportions to her six children, none of whom exert control through ownership means. Though no longer officially involved, Individual 6 still regularly exerts substantial influence over the decisions of board and the votes of her children as shareholders. Individual 6 may be considered the "beneficial owner" of Corporation F.

### Step 2 – Who is a senior managing official?

As noted above, the RMI Associations Law states that if no natural person exerts control through ownership interests, the natural persons who exercise control through management or other means will be regarded as the "beneficial owner." Natural persons who may exercise control through positions held within a legal entity include those responsible for strategic decisions fundamentally affecting the entity's business practices or strategic direction and those with executive control over the entity's daily affairs. These may include directors (but not nominee directors), managers, or executive officers.

If no natural person exerts control through ownership interests or other means discussed above, the natural person(s) exercising control through management positions held within a legal entity may be considered "beneficial owners."

### Who is not a "beneficial owner"?

A legal entity or arrangement is not a "beneficial owner" under the RMI Associations Law. Only a natural person may be a "beneficial owner."

A nominee is not a "beneficial owner" under the RMI Associations Law. Shares held by a nominee on behalf of another person must be treated as belonging to that other person, not the nominee. Similarly, persons acting on behalf of another person as a nominee director is not a "beneficial owner."

## What are the requirements for bearer shares?

Existing and newly formed non-resident domestic corporations are permitted to issue bearer shares under the Business Corporations Act.<sup>4</sup>

Bearer shares are subject to additional recordkeeping requirements, but these requirements are straightforward: the holders and beneficial owners of bearer shares must be recorded with the registered agent for non-resident domestic entities (the "Registered Agent") in the RMI. The validity, rights, and privileges of bearer shares and any transfer of bearer shares are conditional on this recordation.<sup>5</sup> "Beneficial owner" has the same meaning as specified above (see *Who is a "beneficial owner"?* and *Who is not a "beneficial owner"?*), but here the Business Corporations Act refers to the "beneficial owners of [the] bearer shares" rather than the "beneficial owners of the corporation."

### EXAMPLE

The articles of incorporation of Corporation G authorize 100 registered and/or bearer shares. The directors authorize the issuance of 99 registered shares and 1 bearer share. Individual 7 purchases the 99 registered shares for his own benefit. Corporation H purchases and holds the 1 bearer share. Corporation H is 100% owned and controlled by Individual 8.

To be valid, and for Corporation H to exercise any rights or privileges as a holder of the bearer share, the required records must first be recorded with the Registered Agent. Corporation H should be recorded as the holder of the share and, unless Corporation H holds the share under a nominee or similar arrangement, Individual 8 should be recorded as the beneficial owner of the share.

Bearer share information may initially be recorded with the Registered Agent by completing the [Declaration of Holders and Beneficial Owners of Bearer Shares](#). For any transfer after the initial recordation, the [Declaration of Transfer of Bearer Shares](#) may be used to record the necessary information on the new holders and beneficial owners of the shares with the Registered Agent. The Registered Agent adheres to strict data privacy requirements.

## How should entities obtain ownership information?

The RMI Associations Law obligates the legal and beneficial owners of non-resident domestic entities to provide the required ownership details. Non-resident domestic entities are required to use all reasonable efforts to notify their legal and beneficial owners of their obligation to provide the information required to be kept by the entity. This requirement may be fulfilled through an annual written request for the requisite ownership details. Entities are entitled to rely on beneficial ownership details provided in response to these written requests unless the entity has reason to believe the responses is misleading or false.

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<sup>4</sup> For reference, see § 42(2) of the Business Corporations Act.

<sup>5</sup> For reference, see §§ 42(2) and 80(3)(c) of the Business Corporations Act.

## How is compliance monitored?

Under internationally agreed standards, compliance with beneficial ownership recordkeeping requirements must be monitored. To ensure the RMI meets its international obligations, the Registered Agent has been authorized under the RMI Associations Law to audit compliance with recordkeeping requirements. The Registered Agent may request beneficial ownership records in connection with its audit functions, and upon such a request, records must be provided to the Registered Agent in the RMI within 60 days.

In addition, the RMI Associations Law requires non-resident domestic entities, except publicly-traded companies, to make an annual attestation that records are being maintained as required. For ease of use, the attestation has been integrated into the Registrar's formation and annual invoicing processes.

## What are the penalties for non-compliance?

Knowingly or recklessly failing to maintain records as required under the RMI Associations Law is punishable by a substantial fine, forcible annulment, or both. There is an exception to liability for failure to maintain beneficial ownership information where all reasonable efforts have been undertaken to obtain and maintain the required information. Failure to produce records to the Registered Agent within 60 days upon request, failure to make attestations as required, willfully maintaining or producing false or misleading records, and making false or misleading attestations are also punishable by a substantial fine, forcible annulment, or both.<sup>6</sup>

With respect to bearer shares, the validity, rights, and privileges of bearer shares are conditional on recordation of the required ownership information with the Registered Agent. Bearer shares that do not comply become invalid and must be cancelled by the corporation.<sup>7</sup>

## Other Resources

The Trust Company of the Marshall Islands, Inc., *Republic of the Marshall Islands Associations Law*, available at: <http://www.register-iri.com/index.cfm?action=page&page=31>.

FATF (2012-2018), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, available at: [www.fatf-gafi.org/recommendations.html](http://www.fatf-gafi.org/recommendations.html).

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<sup>6</sup> For reference, see § 80(6) of the Business Corporations Act, § 37(1)(f) of the Revised Partnership Act, § 32(1)(f) of the Limited Partnership Act, and § 22(1)(f) of the Limited Liability Company Act.

<sup>7</sup> For reference, see § 80(3)(h) of the Business Corporations Act.

FATF (2014), *FATF Guidance: Transparency and Beneficial Ownership*, available at: <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/transparency-and-beneficial-ownership.html>.

OECD, *Exchange of Information on Request: Handbook for Peer Reviews 2010-2016*, 3d Edition, available at: <http://www.oecd.org/tax/transparency/global-forum-handbook-2016.pdf>.