



# The Meysan Lighthouse Series

## UBO Resolution

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The Masquerade is Over

## UBO Resolution - The Masquerade is Over

The Kuwaiti corporate environment is known for its traditional difficulties and legal hurdles. Foreign companies may not exercise commercial activities without a Kuwaiti majority partner<sup>1</sup> or without a Kuwaiti commercial agent<sup>2</sup>. Even with the introduction of a structured direct foreign investment program<sup>3</sup>, direct entries into the Kuwaiti market by foreign companies are limited.<sup>4</sup> To navigate the 51-49 ownership or local commercial agent hurdles, foreign companies and persons resorted to naming nominee shareholders to hold their true ownership stakes in Kuwait. Nominee shareholders could be Kuwaiti individuals or companies that are tied to the foreign ultimate beneficial owner by contract, or they could be offshore GCC<sup>5</sup> companies that are ultimately owned by the foreign beneficial owner.<sup>6</sup> And there are a slew of reasons for foreigners' decision to take the nominee shareholder track; some are relatively benign, such as a foreigner residing and having extensive business in Kuwait who does not want to split the profits with a Kuwaiti for no reason, and some are relatively illicit, such as a foreigner seeking to launder money through Kuwait.

Appointing a nominee is not criminalized in Kuwait. Although a nominee arrangement would, in some circumstances, risk the absolute voiding of the company's incorporation contracts or articles, Kuwait's criminal regime does not penalize it.<sup>7</sup>

Hence, for years, many companies have been engaging in a corporate masquerade. But, now, Kuwait intends to end the masquerade.

On 4 January 2023, the Ministry of Commerce and Industry ("**MoCI**") issued a resolution to delineate the procedures for determining the identity of the actual beneficiary of corporate entities in Kuwait (the "**UBO Resolution**").<sup>8</sup> In effect, the UBO Resolution institutes general and widespread obligations on corporate entities and persons acting for and within such corporate entities to disclose their ultimate beneficial owners to MoCI, in furtherance of the AML-CFT Law.<sup>9</sup>

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1. Commercial Law, (68/1980), Article 23.

2. Commercial Law, (68/1980), Article 24.

3. Kuwait Direct Investment Promotion Law, (116/2013).

4. As of FY 2021/2022, only 67 companies established entities in Kuwait via the Kuwait Direct Investment Promotion Authority. [https://kdipa.gov.kw/wp-content/uploads/2022/11/AR\\_2022\\_19\\_Oct\\_final.pdf](https://kdipa.gov.kw/wp-content/uploads/2022/11/AR_2022_19_Oct_final.pdf).

5. Short for Gulf Co-operation Council.

6. Dubai International Financial Centre ("**DIFC**") and Abu Dhabi Global Markets ("**ADGM**") allow foreigners to fully own companies incorporated therein, and such DIFC and ADGM companies are treated as GCC companies which are, in turn, treated as Kuwaiti companies in Kuwait.

7. There are penal tax implications if the nominee arrangement is used to evade payment of foreign income tax.

8. Procedures for Determining the Identity of Actual Beneficiaries Resolution, Ministry of Commerce and Industry, 4 January 2023, (4/2023) ("**UBO Resolution**"). "UBO" stands for "Ultimate Beneficial Owner".

9. Combatting of Money Laundering and Financing of Terrorism Law (106/2013) as amendment, (106/2013) ("**AML-CFT Law**")

In 2013, Kuwait enacted the AML-CFT Law to keep up with the developing nature of money laundering and terrorism financing internationally.<sup>10</sup> Chapter 1 of the AML-CFT Law includes extensive and widespread precautionary and preemptive provisions that aim to prevent or discover money laundering activities, and which impose on certain public and private institutions requirements to ascertain the beneficial owners of regulated entities and clients.<sup>11</sup> Based on these provisions of the AML-CFT Law, MoCI issued several resolutions regulating the activities of the currency exchange sector,<sup>12</sup> the insurance sector,<sup>13</sup> the real estate sector,<sup>14</sup> and the jewelry retail sector,<sup>15</sup> to ensure that both the actual clients and transactors within these sectors, and their sources of funds are ascertained.

To further implement the extensive provisions of the AML-CFT Law and in line with the steady enactments by MoCI, and other regulators,<sup>16</sup> MoCI issued this UBO Resolution.

### Who is an Actual Beneficiary/UBO?

An actual beneficiary (aka ultimate beneficial owner) is any natural person who – directly or indirectly – owns 25% of the company, or has voting shares equal to or more than 25% of the company’s voting shares, or is able to control the company in any way possible, such as, for example, by having the right to appoint or remove directors of the company.

### What Does the UBO Resolution Do?

The UBO Resolution imposes the following main requirements:

#### **1. Companies must maintain an Ultimate Beneficial Owners (“UBOs”) Register.<sup>17</sup>**

Companies must maintain a register of its UBOs (“UBOs Register”). The UBOs Register must include:

- The UBO’s full name, nationality, date of birth and place of birth;
- The UBO’s actual or chosen domicile for the purpose of the receipt of any notice pursuant to the UBO Resolution;
- The UBO’s passport or civil identification card number, and the country and date of issuance, and the date of expiry;
- The basis on which the UBO became an ultimate beneficial owner of the company; and
- The date on which the UBO stopped being an ultimate beneficial owner of the company, if applicable.

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10. AML-CFT Law, Explanatory Memorandum.

11. AML-CFT Law, Chapter 1.

12. Guidelines and Instructions Regulating the Activities of Currency-Exchange Companies and Establishments Resolution, Ministry of Commerce and Industry, 6 October 2013, (409/2013).

13. Guidelines and Instructions Regulating the Activities of Insurance Companies, Agents and Brokers Resolution, Ministry of 14. 15. Commerce and Industry, 6 October 2013, (412/2013).

14. Guidelines Regulating the Activities of Companies and Establishments Practicing Real Estate and Real Estate Brokerage Activities Resolution, Ministry of Commerce and Industry, 1 January 2017, (430/2016).

15. Guidelines Regulating the Activities of Companies and Establishments Engaged in the Commerce of Gold, Gemstones and Precious Metals Resolution, Ministry of Commerce and Industry, 1 January 2017, (431/2016).

16. The Ministry of Finance, Capital Markets Authority and Central Bank of Kuwait, amongst others, have all issued similar resolutions and circulars to implement the AML-CFT Law on the entities they supervise and regulate.

17. The UBO Resolution uses the term “Actual Beneficiaries” rather than UBOs, but given the international use of the UBO nomenclature, “Actual Beneficiaries” and “UBOs” will be used interchangeably in this Client Alert.

## **2. Companies have an obligation to ascertain the identity of their UBOs.**

Companies must take reasonable measures to obtain adequate and accurate information about their UBOs and maintain such information.<sup>18</sup> If it is ascertained by a company that there is a natural person who may be its ultimate beneficial owner and the required details of such natural person are not fully included in the UBOs Register, the company must:

- a. Send out a query to the natural person inquiring about whether the natural person is a UBO of the company, or not.
- b. If fifteen days pass by without an answer from the natural person, the company must send out a notice to the natural person, including:
  - i. A reference to this UBO Resolution;
  - ii. Any information that indicates that the natural person is a UBO of the company, with a request for any missing or required information to complete the UBOs Register; and
  - iii. A request to the natural person to provide information in answer to (a) whether the natural person is actually a UBO of the company or not; (b) confirm whether the information in the notice is correct or not; and (c) furnish any missing information.
- c. If fifteen days pass by without an answer from the natural person, the company must register the information it possesses in the UBOs Register.

## **3. Companies must furnish the UBOs Register to the Commercial Registry Department at MoCI.**

All details of the UBOs Register must be provided to the Commercial Registry Department. The company must also provide any additional information requested by the Commercial Registry Department.

- a. The company must provide information about the UBOs within sixty (60) days of the effective date of this UBO Resolution and at the time of (i) incorporation; (ii) registration at the Commercial Registry Department; (iii) renewal of the commercial license; (iv) any amendments on the articles of the company, or as otherwise deemed appropriate by the Commercial Registry Department.
- b. The company must provide the Commercial Registry Department with the name and contact information of a natural person who is authorized to disclose information about the UBOs.
- c. The Commercial Registry Department may send requests and notices to the company, its employees or any other person the Commercial Registry Department deems to have information about the UBOs, and the Commercial Registry Department may summon employees or individuals to meetings to answer questions with respect to unfurnished information.

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<sup>18</sup> The obligation on a company to take reasonable measures to identify its UBOs is not applicable to listed companies or a company majority-owned by a listed company.

#### **4. Nominee managers must disclose to the company that they are nominees.**

Any natural person in a management position acting as a nominee for another person, a natural or legal person, must disclose their capacity as a nominee to the company.

- a. The nominee manager must disclose to the company detailed information of the person that the nominee is acting for.
- b. The company must furnish the information of the actual manager – as furnished by the nominee – to the Commercial Registry Department.

#### **Exceptions**

The UBO Resolution is not applicable to state-owned companies or companies owned by state-owned companies.

#### **Penalties**

A company's failure to comply with the UBO Resolution would bar the company from obtaining or renewing any MoCI license. Companies that are directly subject to the AML-CFT Law, namely financial institutions or designated non-financial businesses or professions, are subject to the AML-CFT Law's criminal penalties, if they are found to be in violation of this.

#### **Other Aspects of the UBO Resolution**

The UBO Resolution includes other aspects that relate to the maintenance of a shareholders' register, obligations of the Commercial Registry Department, a person's right to seek a court order to amend the UBOs Register, publication matters, and international cooperation with foreign authorities.

#### **Companies' Action Plan**

The UBO Resolution has a sunrise clause and several timeframes for its applicability. Below is a timetable and action plan for companies to comply with the UBO Resolution, assuming that the Commercial Registry Department will be prepared to implement this UBO Resolution by then.

Date and/or Time	Action	Article	Comments
4 January 2023	MoCI issued the UBO Resolution		
8 January 2023	Kuwait Gazette published the UBO Resolution		
1 April 2023	Effective date of the UBO Resolution	Article 18	
1 June 2023	Deadline for the preparation the UBOs Register	Article 7	The company generally has sixty (60) days for the date of incorporation to establish the UBOs register.
			The company has fifteen (15) days to amend the UBOs register in case any changes occur to the UBOs; from the date of the occurrence of the change or the date from which the company should have known of such change.
1 June 2023	Deadline for the submission of the UBOs Register to the Commercial Registry Department	Article 11	The company generally has sixty (60) days from the date of its date of licensing to submit the UBOs Register to the Commercial Registry Department.
			The company has fifteen (15) days from the date of the amendment of the UBOs Register to submit such amendment to the Commercial Registry Department.

To implement the UBO Resolution, the company should take the following steps:

1. The company should identify its UBOs.<sup>19</sup>
  - a. If the company cannot identify its UBOs, then any natural person who exercises control over the company is considered its UBO.
  - b. If no natural person is identified as exercising control over the company, then the natural person who is responsible for the management of the company is the UBO.
2. The company should contact its UBOs and seek the following information from each UBO:

Information Required	
Full name	Nationality
Date of birth	Place of birth
Address <sup>20</sup>	Identification document number <sup>21</sup>
Identification document country of issuance	Identification document date of issuance
Identification document date of expiry	Basis upon which the UBO became a UBO <sup>22</sup>

3. If the UBO does not furnish the company with the information in (2), the company must send out a query to the UBO inquiring about whether the person is actually a UBO or not.
  - a. If the UBO does not respond, the company must send the UBO official notice requesting the information in (2).
  - b. If fifteen (15) days pass by without response by the UBO, the company must register the UBO in the UBOs Register.
4. The company must prepare a UBOs Register which includes all information received from the company's UBOs, as stated in (2).
5. The company must furnish the UBOs Register to the Commercial Registry Department by 1 June 2023.
6. The company must also include the details of its nominee managers in its Shareholders' Register to the Commercial Registry Department.

In short, the UBO Resolution tells Kuwaiti companies to look up their ownership structure and identify their UBOs; those natural persons who control them by 25% or more. Once those UBOs are identified, Kuwaiti companies must seek, obtain and register the UBOs' information in the UBOs Register. Upon completion, the UBOs Register must be submitted to MoCI.

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19. A UBO is any natural person who – directly or indirectly – owns 25% of the company, or has voting shares equal to or more than 25% of the voting shares, or is able to control the company in any way possible, such as the right to appoint or remove directors.

20. Actual or chosen domicile, so long as the address is valid for the receipt of notices.

21. Passport or Civil ID.

22. The company's ownership structure.