

MEMORANDUM

TO : Ms. Louise Poy Wing, Senior State Counsel

FROM : Ms. Arlene Lawrence, State Counsel II

DATE : June 13, 2018

SUBJECT : **Advice on the Request for the MEEI's Official Position on Beneficial Owner for EITI Validation**

INTRODUCTION

The Extractive Industries Transparency Initiative ('EITI') is a voluntary multi-stakeholder initiative which sets a global standard for companies in the natural resources sector to publish what they pay and for governments to publish what they receive from the companies. These payments and receipts are then reconciled by an independent auditor, otherwise known as the Administrator. The findings of the Administrator are then published in a report which is widely disseminated to the public.

Since its launch in 2002 at the World Summit on Sustainable Development in Johannesburg, fifty-one (51) countries have implemented the EITI. With regard to Trinidad and Tobago, this twin-island state received Candidate Country status on 1 March 2011 and Compliant Country Status on 23 January 2015.

Notably, in order to reach and maintain Compliant Country Status implementing countries must demonstrate through Validation (a process where a country's implementation procedure is subjected to a detailed examination and analysis by an independent Validator approved by the EITI Board) that they have met all seven (7) EITI requirements contained in the new 2016 EITI Standard.

The new 2016 EITI Standard introduces new aspects and breaks new ground in that the identity of the real owners – the beneficial owners – of the companies that have obtained rights to extract oil, gas and minerals will have to be disclosed by 2020. The reason behind the need for disclosure is that in many resource rich countries, ownership secrecy contributes to corruption, money laundering and tax evasion.

In light of the above, I am asked to advise on the following:

- a) The Government's position on requiring bidding companies to publicly disclose Beneficial Ownership ('BO') information.
- b) The Government's position on requiring the signatories of future Production Sharing Contracts ('PSCs') to disclose their beneficial owners.
- c) The Ministry of Energy and Energy Industries ('MEEI') procedure for verifying BO data received from PSC & Exploration and Production ('E&P') signatories.
- d) Information on any reforms planned or underway related to BO disclosure.
- e) Information on how the MEEI stores BO data and clarity on whether this information can be made available to the public.
- f) Guidance on the applicability of the BO & PEP definition for oil & gas entities to the mining sector.

EITI REQUIREMENT – BENEFICIAL OWNERSHIP

EITI Requirement 2.5 provides as follows:

(a) *It is recommended that implementing countries maintain a publicly available register of the beneficial owners of the corporate entity (ies) that bid for, operate or invest in extractive assets, including the identity (ies) of their beneficial owner(s), the level of ownership and details about how ownership or control is exerted. Where possible, beneficial ownership information should be incorporated in existing filings by companies to corporate regulators, stock exchanges or agencies regulating extractive industry licensing. Where this information is already publicly available, the EITI Report should include guidance on how to access this information.*

(b) *It is required that:*

(i) *The EITI Report documents the government's policy and MSG's discussion on disclosure of beneficial ownership. This should include ^{Multi-Stakeholder Group} tails ^{and spell & then abbreviate} of the relevant legal provisions, actual disclosure practices and any reforms that are planned or underway related to beneficial ownership disclosure.*

(ii) *By 1 January 2017, the multi-stakeholder group publishes a roadmap for disclosing beneficial ownership information in accordance with clauses (c)-(f) below. The MSG will determine all milestones and deadlines in the roadmap, and the MSG will evaluate implementation of the roadmap as part of the MSG's annual activity report.*

(c) *As of 1 January 2020, it is required that implementing countries request, and companies disclose, beneficial ownership information for inclusion in the EITI Report. This applies to corporate entity (ies) that bid for, operate or invest in extractive assets and should include the identity (ies) of their beneficial owner(s), the level of ownership and details about how ownership or control is exerted. Any gaps or weaknesses in reporting on beneficial*

ownership information must be disclosed in the EITI Report, including naming any entities that failed to submit all or parts of the beneficial ownership information. Where a country is facing constitutional or significant practical barriers to the implementation of this requirement by 1 January 2020, the country may seek adapted implementation in accordance with requirement 8.1.

- (d) Information about the identity of the beneficial owner should include the name of the beneficial owner, the nationality and the country of residence as well as identifying any politically exposed persons. It is also recommended that the national identity number, date of birth, residential or service address and means of contact are disclosed.*
- (e) The multi-stakeholder group should agree an approach for participating companies assuring the accuracy of the beneficial ownership information they provide. This could include requiring companies to attest the beneficial ownership declaration form through sign off by a member of the senior management team or senior legal counsel, or submit supporting documentation.*
- (f) Definition of beneficial ownership:
 - (i) A beneficial owner in respect of a company means the natural person(s) who directly or indirectly ultimately owns or controls the corporate entity.*
 - (ii) The multi-stakeholder group should agree an appropriate definition of the term beneficial owner. The definition should be aligned with (f) (i) above and take international norms and relevant national laws into account, and should include ownership threshold(s). The definition should also specify reporting obligations for politically exposed persons.*
 - (iii) 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.*
 - (iv) In the case of joint ventures, each entity within the venture should disclose its beneficial owner(s), unless it is publicly listed or is a wholly-owned subsidiary of a publicly listed company. Each entity is responsible for the accuracy of the information provided.**
- (g) The EITI Report should also disclose the legal owners and share of ownership of such companies.¹*

ADVICE

- (a) The Government's position on requiring bidding companies to publicly disclose BO information.**

Currently, during a Bid Round the financial, technical and legal background of the companies are evaluated by the Technical Evaluation Committee. In this regard, there is

¹ The EITI Standard 2016

no specific requirement for bidding companies to disclose BO information. However, in going forward the disclosure of BO information can be included as part of the requirements by bidding companies especially since the Prime Minister, the Honourable Dr. Keith Rowley pledged, *inter alia*, to identify the real owners of locally registered companies at the Anti-Corruption Summit in May 2016.

For ease of reference, Dr. Rowley stated, *"Trinidad and Tobago is open and committed to assisting its international partners in the fight against corruption. Trinidad and Tobago will work towards the establishing of a registry of company beneficial ownership information. Trinidad and Tobago commits to ensuring that law enforcement agencies have full and effective access to beneficial ownership information for companies and other legal entities registered within its jurisdiction."*²

(b) The Government's position on requiring signatories of future PSCs to disclose their beneficial owners.

As stated under item (a) above it is Government's intention to identify the real owners of locally registered companies and in this regard, it is recommended that the MEEI should require signatories of future PSCs to disclose their beneficial owners.

(c) The MEEI's procedure for verifying BO data received from PSC and E&P signatories.

Currently, the MEEI does not have a procedure for verifying BO data received from PSC and E&P signatories. However, for UK companies the MEEI can verify such information on the Beneficial Ownership Register. For other companies the MEEI can verify the information once they are listed on the Stock Exchange.

(d) Information on any reforms planned or underway related to BO disclosure.

In recent years, lifting the veil of ownership and the greater issue of beneficial ownership has taken centre stage on the global economic front as a solution to the fight against money laundering and terrorism financing. As with everything else, this concept has also trickled down to the Caribbean region and is of growing importance.

In Trinidad and Tobago, there have been many indications of moves being made to implement a Beneficial Ownership Registry (BOR).

In order to fully understand the need for beneficial ownership registries and their relevance to Trinidad and Tobago, one must first understand the international body which codified and promulgated the need for beneficial ownership.

² Hart, V., EITI and Anti-Corruption Summit 2016
www.tteiti.org.tt/eiti-anti-corruption-summit-2016/ (last visited 13 June 2016).

The Financial Action Task Force ('FATF')

FATF is an independent inter-governmental body established to develop and promote policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction.

Formed in 1989 by the G-7 Summit held in Paris, FATF was a direct response to money laundering and the threats it posed to banking systems and financial institutions worldwide. Henceforth, it has been developing and revising international standards of transparency that its member countries should strive to meet in order to combat such threats.

FATF is therefore a "policy-making body" which works to generate the necessary political will to bring about national legislative and regulatory reforms. This it accomplishes by ensuring that countries are compliant with the forty (40) Recommendations as set forth by the body itself.

The FATF'S Forty Recommendations and Beneficial Ownership

The Forty Recommendations were specifically developed by the Task Force to combat money laundering and were initially released in 1990. Since then, the Forty Recommendations have been revised, most recently in 2012, with the aim of strengthening global safeguards and further protecting the integrity of the financial system by providing governments with stronger tools to take action against financial crime.

Of the Forty Recommendations, the following three focused on the concept of beneficial ownership as a means to combat money laundering:

- Recommendation 10
- Recommendation 24
- Recommendation 25

Recommendation 10 sets out the standards by which Financial Institutions should maintain all necessary records on both domestic and international transactions so that they may comply swiftly with any requests from authorities. These records are usually generated in Trinidad and Tobago through the use of Know Your Customer (KYC) Forms and additional requirements.

Recommendation 24 states that Countries should take measures to prevent the misuse of legal entities for money laundering or terrorism financing. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal entities that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal entities that are able to issue bearer shares or bearer share warrants, or which allow nominee shareholders or nominee directors, should take effective measures to ensure that they are not misused for money

laundering or terrorism financing. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.

Recommendation 25 states that “Countries should take measures to prevent the misuse of legal arrangements for money laundering or terrorism financing. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries that can be obtained or accessed in a timely fashion by competent authorities. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.”

The fundamental requirement of these Recommendations is to ensure that there is adequate, accurate and timely information available on the beneficial ownership of all legal entities and trusts, so that the authorities can access this information in a timely manner.

Beneficial Ownership: The Caribbean Perspective

The FATF’s Recommendations applied to its 37 Member States, which represented most major financial centres around the world. However, in order to expand its reach and garner more member states to the cause, the FATF established a separate and somewhat subsidiary body known as the Caribbean Financial Action Task Force (CFATF). The CFATF is a group of twenty-seven member states in the Caribbean basin, Central and South America whose main objective is to implement and comply with the Forty Recommendations as set forth by the FATF, to combat money laundering and terrorism financing.

Trinidad and Tobago is a member state of this body. The significance of this is that Trinidad and Tobago is now bound by the Recommendations, including those that relate to beneficial ownership and have implicitly undertaken to fulfill the mandate set forth by the FATF in combatting money laundering and terrorism financing.

To implement the FATF’s policies, Trinidad has established a Financial Intelligence Unit, incorporated under the Financial Intelligence Act of 2009. The functions of this Unit are to:

- receive suspicious transactions and reports from financial institutions and businesses;
- request financial information from financial institutions and businesses; and
- analyze and evaluate reports and information.

To date, four (4) Mutual Evaluation Reports on Anti-Money Laundering and Counter Terrorism Financing measures in Trinidad and Tobago have been issued.

Within recent times in order to become fully compliant with all regulations, there has been a bid towards implementing a BOR system in Trinidad with indications that this would be soon legislated on before Parliament. The premise of implementing the BOR would be to “lift the veil” on the system of trust which is used to hold shares in companies or land in Trinidad and Tobago.³

In light of the above, the intention to legislate by Government has come in the form of the Companies (Amendment) Bill 2017. The Bill is being introduced for a very limited purpose. The intent of the Bill is to create a definition of “beneficial owner” that captures the natural person (or persons) who ultimately owns or controls the legal person or legal arrangement. It seeks to introduce measures to enhance the transparency of legal persons in the Companies Registry with a requirement for the provision of beneficial ownership information. The intention is to ensure that accurate and timely beneficial ownership information and access to a central register is available for improving transparency of investments in and transfers of shares and sharing with competent authorities for utilization in the fight against fraud corruption money laundering and other illicit financial flows.⁴

(e) Information on how the MEEI stores BO data and clarity on whether this information can be made available to the public.

The MEEI does not currently store BO data. However, the MEEI does have a petroleum register which is publicly available on its website. In going forward it is recommended that BO information be included in the petroleum register.

(f) Guidance on the applicability of the BO & PEP definition for oil & gas entities to the mining sector.

The TTEITI Steering Committee has defined ‘beneficial owner’ to mean *the natural person who is directly or indirectly the owner of a company or controls at least ten percent of the shares or total votes, exclude persons acting as a nominee, intermediary, custodian or agent on behalf of another person.*

Further, the TTEITI Steering Committee has defined a ‘politically exposed person’ as *an individual who has been entrusted with a prominent political function. These include foreign and local political figures and extend to their immediate family members and close associates.*

³ TERRALEX: Beneficial Ownership Registers and the Way Forward for Trinidad and Tobago <https://www.terralex.org/publication/p858c9ff6a5> (last visited on 13 June 2018).

⁴ Lawassociationtt: Comments of the Law Association of Trinidad and Tobago on the Companies (Amendment) Act, 2017 Lawassociationtt.com/wp-content/uploads/2018/04/April-12-2018-GENERAL-COMMENTS-on-Companies-Amendment-Bill-2017.pdf (last visited on 13 June 2018).

With regard to 'beneficial owner' it would be prudent for the definition to be in alignment with the proposed definition prescribed in the Companies (Amendment) Bill 2017; that is,

"beneficial owner" means *the natural person-*

(a) who ultimately owns or controls a share or shares of a company;

(b) who effectively exercises ultimate control over a person or arrangement in relation to a share or shares of a company; or

(c) on whose behalf a transaction in relation to a share is conducted.

With regard to 'politically exposed person' the following definition is recommended:

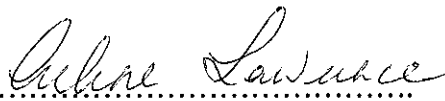
"politically exposed person" means *an individual who holds a political office in or outside of Trinidad and Tobago and includes their immediate family members and close associates.*

CONCLUSION

The 2016 EITI Standard requirement for disclosure of BO by companies represent another step to advance the promotion of transparency, accountability and good corporate governance in the extractive sectors by disclosing the "real" owners of companies that extract and market the energy resources which belong to all citizens. Greater transparency will contribute towards the enhancement of a sound business climate that will encourage increased investment and help in building trust among government, companies, civil society and the general public.

In light of the above, the MEEI should take active steps to ensure that BO information is disclosed by bidding companies for future Bid Rounds. Also, MEEI should take steps to ensure that BO information for all companies with PSCs and E&Ps in Trinidad and Tobago, disclose said information for inclusion on the Petroleum Register.

And so I advise.



Arlene Lawrence