

# Beneficial Ownership Screening: Practical Measures to Reduce Corruption Risks in Extractives Licensing

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## INTRODUCTION

In most natural resource-rich countries, when a company is seeking the right to explore for or produce oil, gas or minerals, sector rules require that regulators check some basic information before granting the company a license and accompanying contract. Commonly, for instance, the regulator is supposed to judge whether the company is technically competent, financially sound, and in compliance with environmental and safety rules. However, licensing rules generally do not require screening of whether public sector officials have interests in an applicant company, which could create serious conflicts of interest. We reviewed over 50 mining and oil laws and found that about half contained prohibitions on government officials or their close associates – often called “politically exposed persons” (PEPs) – holding interests in companies applying for extractives licenses, but none required regulators to actually check whether or not such PEP interests existed as part of screening license applications. This is a potentially critical gap in regulatory oversight, not least because a large body of real-world cases suggests that the ability to hide a company’s true beneficial owner is a major enabler of corruption in the granting of extractive rights.

A growing number of governments are developing legal policies and information systems for collecting and publishing data about the beneficial owners of extractives companies – the real people who own, control, or economically benefit from a company. These reforms range from amending company registration laws and creating national public registers to sector-specific approaches like establishing extractives transparency laws and licensing requirements. But to have an impact, extractive sector reforms may need to go beyond just requiring beneficial ownership disclosure, namely by establishing rules on what types of beneficial ownership linkages will be considered unacceptable self-dealing or corruption, and by determining the consequences that will apply when that line is crossed. Our research shows that a number of countries have already established such rules, but monitoring and enforcement is lacking. Given the corruption risks, improving national policies and practices on allocating extractives licenses should be at the forefront of these efforts.

This briefing offers advice on how governments can strengthen their extractives licensing policies and processes to tackle basic corruption risks posed by problematic beneficial ownership linkages. The briefing is organized around the following five aspects of the extractives licensing process, with recommendations and example legal provisions that national actors can use in each stage:

- 1 Anticorruption provisions: Laying the legal foundation for tackling corruption in licensing
- 2 Prequalification/application submissions: Collecting and publishing beneficial ownership information
- 3 Initial screening: Disqualifying applications with manifest accuracy and corruption problems
- 4 Final decision-making: Scrutinizing problematic beneficial ownership risks in selected awardees
- 5 Complementary measures: Leveraging beneficial ownership disclosure for to address corruption

Resource-rich countries will need to choose beneficial ownership assessment rules that best address the political, legal and industry realities in which they award licenses. *The model legal provisions offered as templates in this briefing should not be used without proper customization and harmonization within national and sectoral legal frameworks.* These recommendations may be applicable to rules for license awards in sector laws, regulations or the guidelines for particular award processes. Given the relative newness of evaluating corruption risks using beneficial ownership information in licensing decisions, officials may want to put much of the detail into less formal documents such as guidelines, so that the rules will be easier to amend based on lessons learned. Regardless of where rules are stipulated, they should be subject to public consultation during their development, and publicly disclosed once finalized in order to facilitate monitoring and accountability.

It should be noted that the analysis and recommendations that follow focus narrowly on how governments could use beneficial ownership information when they award upstream exploration and production licenses for oil, gas and mineral deposits, whether through competitive bidding, first-come first-served systems, or some form of direct negotiations. We use the term “licensing” herein to include the allocation of extractives licenses and contracts. We have not attempted to cover broader best practices<sup>1</sup> for such awards processes, nor other grants of rights—e.g., licenses to lift or transport oil, construct refineries, market fuel. We have excluded these other processes mainly because the procedures involved can be substantially different from upstream licensing. At the same time, we recognize that the ownership-related corruption risks associated with them can be significant,<sup>2</sup> and that there could be a strong case for expanding beneficial ownership disclosure and assessment rules to cover them.

1 For broader guidance on licensing see Precept 3 of the Natural Resource Charter Benchmarking Framework (NRGI, 2016).

2 For an overview of possible corruption in commodity sales and transportation, for example, see Aaron Sayne and Alexandra Gillies, Initial Evidence of Corruption Risks in Government Oil and Gas Sales (NRGI, 2016).

Adding a beneficial ownership component to extractives sector license and contract assessments is no silver bullet against corruption, nor is it without risk. We are particularly aware that introducing beneficial ownership rules may raise concerns about creating administrative burdens and costs, reducing licensing efficiency, or even increasing corruption risks by introducing a new layer of discretionary decision-making into license allocation processes. These concerns are genuine, and countries would need to consider them proactively before implementing beneficial ownership screening. Partly in an attempt to respond to such concerns, in this briefing we emphasize the need for officials to adopt clear, objective screening criteria and strong transparency safeguards. We also emphasize how inter-agency approaches, such as central registers and extractives licensing screening, can mutually reinforce each other to reduce administrative tolls. And if officials push more of the ownership information they collect out into the public domain, this could help build broader trust in licensing processes and open doors for other actors to play larger roles in containing corruption.

## 1. ANTICORRUPTION PROVISIONS: LAYING THE LEGAL FOUNDATION FOR REDUCING CORRUPTION IN LICENSING

Typically, sector rules set certain basic restrictions on who may or may not apply for license allocations. We reviewed over 50 mining and oil laws and found that about half contained prohibitions on government officials or their close associates holding interests in companies applying for extractives licenses, but none required regulators to actually check whether or not such PEP interests existed as part of screening license applications. Some countries do ask about applicants' true owners, our research found, but thus far we have not seen officials using the answers to make decisions in well-guided ways that predictably serve the public interest.<sup>3</sup> But many other resource-rich countries simply do not have any legal restrictions on PEPs corruptly using interests in companies to benefit from sector operations in their countries. In those countries, even if a highly inappropriate conflict of interest was revealed, there may be no legal basis on which to take any action.

In license award processes, PEPs as beneficial owners can introduce corruption risks when:

- 1 Their presence creates a conflict of interest that can undermine the legitimate public goals or performance of the award process.<sup>4</sup>
- 2 The license gives the PEP a longer-term vehicle for siphoning off funds that should benefit the public, or a source of revenue for other activities that harm the public interest—e.g., bribing officials, influencing democratic processes, fomenting insecurity.<sup>5</sup>

*To help address these risks, licensing rules should lay the foundation for anticorruption efforts in awards processes by establishing clear prohibitions on certain PEPs holding extractive company interests that present conflict of interest risks and on companies seeking linkages with PEPs that raise corruption concerns.*

Many countries have laws establishing that companies and PEPs must not engage in bribery or self-dealing in extractive sector transactions, some even specify sanctions that should be applied if such rules are violated – such as termination of official duties or allocations being deemed null and void.

3 Author interviews, government officials and industry personnel, 2012-17.

4 Section 5 of this briefing has more information on preventing conflicts of interest in award processes.

5 These are by no means the only costs of allowing companies owned or controlled by PEPs to capture extractives licenses and contracts through corrupt means. Such a situation can also undermine the integrity and performance of key public institutions, weakening their overall ability to manage the sector. It can scare off risk-averse investors who do not want to be associated with scandal. The impacts of such corruption on companies have been dramatic as well: high-profile lawsuits and convictions, not least under laws like the U.S. Foreign Corrupt Practices Act (FCPA); billions of dollars in fines, penalties and professional fees; falling share prices; scuttled deals; negative coverage by the media, non-governmental organizations (NGOs) or other industry watchdogs; and broader reputational damage.

Mexico's 2014 Hydrocarbons Law<sup>6</sup> provides such an example:

**Article 93.** ...Without prejudice to the specific provisions in the area of anticorruption, individuals and legal entities, national or foreign, who participate in the contracting procedures or permits regulated by this Law, will be sanctioned when they carry out any of the following actions:

- I. Offering or providing money or any other type of benefit to a public official or to a third party that in any manner intervenes in any of the actions within the contracting procedure, with the intention that the public official carries out or refrains from carrying out an action in relation to his duties or those of another public official, in order to obtain or maintain an advantage, whether or not money is actually received or benefits are obtained;
- II. Engaging in any conduct or omission which has the purpose or effect of evading the requirements or rules established to obtain any type of contract or simulating compliance with these;
- III. Acting in his own name but in the interest of another or others who are prevented from participating in public contracts, with the purpose of obtaining, in whole or in part, the benefits resulting from the contracting procedure; or
- IV. Influencing or exercising political power over any public official, for the purpose of obtaining for himself or for a third party a benefit or advantage, regardless of the willingness of the public official(s) or of the result obtained.

**Article 94.** The sanctions in relation to the conduct referred to in the previous Article will be determined by the competent authorities, in accordance with regulations in the area of anticorruption and can lead to the termination of the respective allocations, contracts, permits, or authorizations.

- Mexico 2014 Hydrocarbons Law

As does Côte d'Ivoire's 2014 Mining Code<sup>7</sup>:

**Article 10.** ...No public servant or public servant employed in the Public Administration, no agent of State-owned enterprises and no agent of a majority public financial holding company may hold a direct or indirect interest in a mining activity, a mining title or beneficiary of an authorization.

**Article 11.** Members of the Government, officials of the Mines Administration, and all officials and agents of the State having a role in the management of the mining sector may not take direct or indirect financial interests in mining enterprises and their direct or indirect subcontractors, within five (5) years after the termination of their duties.

– Côte d'Ivoire 2014 Mining Code

However, such laws usually do not contain clear rules dictating when authorities should check whether these types of prohibitions have been violated. When policies on monitoring potential conflicts of interest do exist, such monitoring is sometimes expected to be undertaken by members of the same agency being scrutinized, which makes strong enforcement unlikely. This creates a significant disconnect between the rules countries have put in place to reduce corruption and the actual monitoring and enforcement of such rules. In Section 2 below, we offer suggestions for closing this gap by using beneficial ownership certifications and disclosures as part of initial licensing screening.

But to enable monitoring and enforcement through licensing screening, countries first have to establish rules on what types of beneficial ownership linkages that

6 [https://www.mayerbrown.com/files/uploads/Documents/PDFs/2015/January/UPDATE-HydrocarbonsLaw\\_Translation.pdf](https://www.mayerbrown.com/files/uploads/Documents/PDFs/2015/January/UPDATE-HydrocarbonsLaw_Translation.pdf)

7 <https://www.a-mla.org/masteract/40>

awarding bodies should treat as evidence of unacceptable self-dealing or corruption, as well as the consequences that will apply when that line is crossed. Decision-makers need to know what constitutes a problematic beneficial ownership scenario, and what to do when such problems are identified. Without clear guidance to rely on, many officials may not feel comfortable or empowered to take action against a company.

In Box 1 below, we offer template anticorruption provisions that could be customized to be included in sector laws, regulations or guidelines to prohibit problematic beneficial ownership scenarios that raise clear corruption risks:

Box 1. Model language for anticorruption provisions

Model language	Considerations
<p>Article [ ]: Anticorruption</p> <p>(a) <b>Prohibitions on benefiting public officials:</b> It is prohibited for natural persons and legal entities, national or foreign, or any individual or legal entity operating on their behalf (including but not limited to any official, director, employee, representative or subcontractor) to acquire or hold, whether directly or indirectly, any right or interest in any [hydrocarbon] / [mineral] right if they have carried out any of the following actions:</p>	
<p>(i) Offering or providing money or any other type of benefit (including beneficial ownership) to a public official or to a third party who intervenes in any manner in any of the actions in the licensing or contracting procedure in respect of the right or interest, with the intention that the public official or third party carries out or refrains from carrying out an action in relation to his/her duties or those of another public official, in order to obtain or maintain an advantage for such natural person or legal entity, whether or not money is actually received or benefits are obtained;</p> <p>(ii) Engaging in any conduct or omission which has the purpose or effect of evading the requirements or rules established to obtain any type of license;</p> <p>(iii) Acting in his own name but in the interest of another or others who are prevented from participating in public contracts, with the purpose of obtaining, in whole or in part, the benefits resulting from the licensing procedure; or</p> <p>(iv) Influencing or exercising political power over any public official, for the purpose of obtaining for him/herself or for a third party a benefit or advantage, regardless of the willingness of the public official(s) or of the result obtained.</p>	<ul style="list-style-type: none"> <li>Beneficial ownership interests may not always involve the direct exchange of money.</li> <li>It is important to cover middlemen who may be operating on the behalf of others.</li> <li>It is important to cover licensing advantages that can be gained by getting an official to not take action by “looking the other way.”</li> <li>The mere offer to take or receive improper benefits should be prohibited, regardless of whether it is ultimately carried out.</li> <li>This provision is key as it covers proxies who may be working on behalf of public officials who are restricted from obtaining licenses, and links such violations with company-side prohibited actions.</li> <li>Again, the mere offer to take or receive improper benefits should be penalized, regardless of whether it is ultimately carried out.</li> </ul>
<p>(b) Any conduct referred to in the previous paragraph (a) may be subject to additional sanctions determined by the competent authorities in accordance with this law and relevant anticorruption laws, and [may] / [will] include the termination of previously allocated licenses.</p>	<ul style="list-style-type: none"> <li>While sector regulators can withhold issuing a license, they are not well-equipped to deal with more serious penalties that may be warranted when corruption has taken place. This provision ensures that activities can be turned over to relevant criminal authorities.</li> <li>If corrupt acts only come to light after an award has been made, it may necessitate revocation of the ill-gotten license.</li> </ul>
<p>(c) <b>Prohibitions on public officials acquiring interests:</b> The following persons shall not be eligible to acquire or hold, whether directly or indirectly, any right or interest in any [hydrocarbon] / [mineral] right or acquire or hold any beneficial ownership in a company which is the holder of a [hydrocarbon] / [mineral] right:</p> <p>(i) a head of state or government, (ii) a minister, (iii) a deputy minister, (iv) an agent involved in sector administration, or (v) a member of an administrative, management or supervisory body of a state owned enterprise.</p>	<ul style="list-style-type: none"> <li>The list of prohibited types of officials in subsection (c) would need to be adapted based on country context, to avoid being overly broad and unnecessarily blocking lower-risk, otherwise qualified applications. An understanding of the types of offices that may involve a high risk of sector corruption in the country should dictate which offices are prohibited from acquiring extractives interests. At a minimum, the senior-most government officials, as well as agents involved in extractive sector administration and extractives state-owned enterprises should be prohibited from holding extractives interests, on the basis that allowing them to participate commercially in the sector would present significant prima facie corruption risks.</li> </ul>

Model language	Considerations
(d) For the purposes of the previous paragraph (c), the acquisition or holding of a [hydrocarbon] / [mineral] right or beneficial ownership in a company by an immediate family member or a close associate of the applicable public official shall be deemed to be an acquisition or holding of such a right or beneficial ownership by the applicable public official.	
(e) In the event that any of the persons referred to in the previous paragraph (c) already held a [hydrocarbon] / [mineral] right prior to assuming the functions of the office, then such person may either dispose of such right or place such right in a blind trust.	
(f) Any conduct referred to in the previous paragraph (c) may be subject to additional sanctions <b>determined by the competent authorities</b> in accordance with this law and relevant anticorruption laws, and [may] / [will] include the termination from official duties.	<ul style="list-style-type: none"> <li>• While sector regulators can withhold issuing a license, they are not well-equipped to deal with more serious penalties that may be warranted when corruption has taken place. This provision ensures that activities can be turned over to relevant law enforcement authorities.</li> </ul>
(g) Nothing in this article shall have effect so as to prevent the state from entering into a [hydrocarbon] / [mineral] agreement, any joint venture or production sharing or other joint arrangement.	

Officials in charge of drafting new rules should of course remember that evidence that any PEP owns a stake in, or is receiving economic benefits from, an extractives company is not automatic proof of corruption. Some PEPs as beneficial owners will present these risks very strongly – as noted above with respect to senior-most government officials, agents involved in extractive sector administration, and extractives state-owned enterprises – others not at all. Ironically, a company owned or controlled by a PEP may sometimes be the most qualified, desirable applicant, particularly in smaller sectors with a limited number of bona fide industry players. Thus, while all license or contract seekers that have PEPs as beneficial owners deserve at least some heightened screening for clear conflict of interest risks (discussed further in Section 3 below), not all will raise equal concerns from an anticorruption perspective. As proposed in the above model language, at a minimum, the senior-most government officials, as well as agents involved in extractive sector administration and extractives state-owned enterprises should be prohibited from holding extractives interests.

## 2. PREQUALIFICATION/APPLICATION SUBMISSIONS: COLLECTING AND PUBLISHING BENEFICIAL OWNERSHIP INFORMATION

Competent and law-abiding companies are more likely than incompetent or corrupt companies to make discoveries, maximize income from those discoveries, and avoid accidents and corruption. The government needs a company selection process that screens potential license-holders and prevents licenses awarded for the personal gain of public officials. Governments often use pre-qualification processes for this purpose.

– Precept 3, Natural Resource Charter

Whether extractive rights are allocated through a competitive bidding process or direct negotiations, and whether the stage is exploration or production, an initial step in most extractives projects involves interested companies submitting some form of application to the government agency overseeing the award process. The pieces of information that companies must include in a license prequalification or application submission are generally stipulated in pre-established requirements. These requirements are usually either spelled out in the primary sector law, or else such a law establishes broad categories of necessary information and stipulates that further details must be included in subsequent regulations and/or guidelines. **Companies should be required to submit anticorruption certifications, as well as beneficial ownership and PEP information as part of their license applications, and governments should make those beneficial ownership and PEP disclosures public.**

Liberia's 2014 Petroleum Act is an example of a sector law that contains a general requirement mandating the inclusion of beneficial ownership details in prequalification guidelines and the public disclosure of beneficial ownership information for qualified companies:

### 15. Pre-qualification of applicants

15.1 A company wishing to apply for a petroleum agreement in a bidding round shall apply for pre-qualification in accordance with the pre-qualification guidelines prepared by the Authority and approved by the Board.

15.2 The pre-qualification guidelines shall provide, at a minimum:...

(d) the required legal documentation evidencing the good standing of the company, and the identity of its directors, shareholders and beneficial owners.

15.7 A company which holds a pre-qualification notice shall give written notice to the Director General within forty-five days of any material change, including changes in beneficial ownership from that originally reported...

15.10 The Authority shall keep a register of the companies qualified as operators and participants and shall record, in respect of each such company, the grounds for the issue of a pre-qualification notice and reasons for its cancellation. The register shall include all documentation submitted to the Authority in support of an application for a prequalification notice or received under subsection 15.7 of this Act.

### 64. Availability of information to the public

64.2 The Authority shall make available to the public on the Authority website and by any other appropriate means, and shall provide to the LEITI Secretariat for publication on the LEITI website in accordance with LEITI policy all announcements of public hearing issued under this Act, as well as full copies of the following documents within twenty days from the date of signature, issue, approval or receipt:...

(f) the pre-qualification guidelines and the registry of pre-qualified applicants, the tender protocol, the bid assessment report and the winning bidder announcement, in relation to each licensing round...

– Liberia 2014 Petroleum Act



There are benefits to having the details of required disclosures specified in guidelines, as these documents can be customized to fit the unique circumstances of each specific round. However, there may also be risks in placing detailed requirements primarily in guidelines, as it allows a high degree of regulator discretion about how much beneficial ownership information to collect and publish. This could undermine the entire purpose of these disclosures, especially if regulators were seeking to conceal problematic ownership of applicant companies. Ideally, beneficial ownership disclosure requirements should be included in a prequalification phase.

The approach that will be most effective will vary from country to country depending on many contextual factors. In practice, we have seen that most regulators and civil society advocates are pushing to embed beneficial ownership disclosures in the legal instruments most likely to be amended in the near term, regardless of what the ideal legal framing might be. The message we often hear from in-country stakeholders is an imperative to get started with these reforms and then further strengthen the approach when there are future openings to amend other laws.

Many countries have started with reforms to company registration laws in order to create national beneficial ownership registers. A global beneficial ownership register is also being developed.<sup>8</sup> These non-sector-specific registers can be very useful, as governance challenges related to hidden ownership cut across sectoral and jurisdictional lines. While such registers are not a substitute for conducting screening on conflict of interest risks using beneficial ownership information in extractive license applications, they can be an important complementary tool. The UK is an example of how a national beneficial ownership register can operate in parallel with a policy on beneficial ownership disclosures in extractives licensing. The UK has developed a non-sector-specific beneficial ownership register.<sup>9</sup> In parallel, the UK Oil & Gas Authority (OGA) has developed guidelines<sup>10</sup> for production license applications that stipulate that: “The OGA will publish a list of the names of all applicants for Production Licenses and of their beneficial owners among other information whose publication is required by the Extractive Industries Transparency Initiative Standard.” In Sierra Leone, the National Minerals Agency is redesigning license application forms to request beneficial ownership information, and is working on a memorandum of understanding on information sharing with the Corporate Affairs Commission in charge of general company registration.

The approach proposed in this briefing includes an option for extractive license applications to cross-reference information contained in centralized national or international beneficial ownership registers, but this approach should only be used where such registries contain the same level of detail outlined in the template, are in open data formats, and are up-to-date. In practice, part of the relevant beneficial ownership information may need to be collected via license applications, with other parts collected via centralized registers.

8 For more information on the OpenOwnership global beneficial ownership register see: <https://register.openownership.org/>

9 <https://www.gov.uk/government/publications/guidance-to-the-people-with-significant-control-requirements-for-companies-and-limited-liability-partnerships>

10 <https://www.ogauthority.co.uk/media/3951/general-guidance.pdf>

With these practical realities in mind, in Box 2, below, we offer template provisions that could be customized to be included in sector laws, sector regulations, or license round guidelines (as well as any combination of such rules) to stipulate prequalification or application requirements for collecting and publishing beneficial ownership information. It is important to note that these template provisions will not be effective without being accompanied by additional defined terms and anticorruption provisions as noted below:

**Box 2. Model language for pre-qualification/application requirements**

Model language	Considerations
Article [ ]: [Prequalification] / [Application] Requirements	
( ) An application [to prequalify] for the grant of [an exploration]/[a production] license shall contain:	<ul style="list-style-type: none"> <li>Ideally, detailed beneficial ownership disclosure requirements should be included in a prequalification phase.</li> </ul>
( ) certification that each applicant has <b>not violated the prohibitions on benefiting public officials and prohibitions on public officials acquiring interests</b> contained in paragraphs (a) through (g) in Article [ ] (Anticorruption) herein;	<ul style="list-style-type: none"> <li>While far from foolproof, requiring applicants to formally certify that they have not violated anticorruption provisions can be a first step to deterring or detecting certain problematic beneficial ownership scenarios. Even if violations of prohibitions only come to light after an award has been made, the fact that an awardee made a false certification during the prequalification/application phase could help provide a legal basis to take action. Anticorruption provisions prohibiting bribery and self-dealing must be included elsewhere in the applicable rules (see model provisions in Section 1 above).</li> </ul>
( ) The identity of the beneficial owner(s) of <b>each applicant</b> , including for each <b>beneficial owner</b> : the present full name and any former name, nationality and national identity number, country of residence, the date and place of birth, indication as a <b>politically exposed person</b> (including the position and dates of office ), level of beneficial ownership, and details of how ownership, control or economic interest is exerted; [and if all such details have been filed on a <b>centralized beneficial ownership register</b> , the application may fulfil this requirement by cross-referencing and attaching such filing;] and	<ul style="list-style-type: none"> <li>Each member of a joint venture should disclose beneficial ownership information.</li> <li>The terms “beneficial owner” and “politically exposed person” must be well-defined elsewhere in the applicable rules. See more on such definitions below.</li> <li>These model provisions include an option for applications to cross-reference information contained in centralized national or international registers containing beneficial ownership information, but this should only be used where such registries contain the same level of detail outlined in the template, are in open data formats, and are up-to-date.</li> </ul>
( ) certification by a duly authorized officer of each applicant that all representations, statements, and information contained in the application are based on reasonable inquiry and are <b>true, accurate and complete</b> .	<ul style="list-style-type: none"> <li>Again, requiring applicants to certify the accuracy of all information can help support legal remedies if serious omissions or misrepresentations are later discovered. The EITI Standard provisions on beneficial ownership require company assurance of accuracy.<sup>11</sup></li> </ul>
( ) The applicant(s) shall promptly notify the [ministry] / [agency] of <b>any transfer of beneficial ownership or other change</b> in previously-submitted beneficial ownership information, and shall submit updated documentation and certification with respect to such transfer or other change within [5] days of the transfer or other change.	<ul style="list-style-type: none"> <li>Requiring transfer and change notifications is key, as one tactic to conceal true beneficial owners is to make a submission with once set of details, and then change ownership or control after public disclosures and/or award decisions have been made.</li> </ul>
( ) Every beneficial ownership declaration made by an applicant and any supporting documentation submitted therewith shall, within [5] days after the deadline for receipt of applications and no later than [15] days prior to the announcement date of [prequalified applicants] / [license awardees], be <b>made public in an open data format</b> [on the website of the ministry/agency] / [in the public register maintained for license applications under law].	<ul style="list-style-type: none"> <li>The earlier the awarding body publishes beneficial ownership information, the more opportunities accountability actors will have to monitor the award process in real time and raise concerns before decisions are final. Beneficial ownership information should be published alongside other license application information in an open data format. The EITI Standard requires public disclosure.<sup>12</sup></li> </ul>

11 Extractive Industries Transparency Initiative, The EITI Standard 2016, sec.2.5(e).

12 Extractive Industries Transparency Initiative, The EITI Standard 2016, sec.2.5.

## Defining key terms

For beneficial ownership disclosure to effectively reduce corruption risks in licensing rounds, companies must know what information to turn over, and decision-makers must know how to assess it. The real-world complexities of how hidden ownership is used to facilitate corruption, together with the inevitable grey areas around the edges of even the best definitions, will inevitably give companies and their owners space to hide in, or grounds for arguing—credibly or not—that disclosure requirements do not apply to them. To help guard against these sorts of self-serving responses, the rules for the award process must clearly define certain key terms—“beneficial owner,” foremost.

### A. Defining beneficial owner

No single definition will be a perfect fit for all contexts; all will be over- or under-inclusive in at least some cases. Nonetheless, in this section we offer some basic guidance on good practice with definitions. The recommendations are based primarily on i) NREGI’s ongoing experience of providing support on beneficial ownership disclosure implementation in nearly a dozen countries, and ii) the results of our 2017 research into “red flags” of corruption in extractives license and contract awards.<sup>13</sup> For the latter, we examined over 100 real-world cases of license or contract awards in the oil, gas and mining sectors where accusations of corruption arose. The cases came from 49 resource-producing countries. In 55 of the cases, companies being used to channel benefits to a hidden beneficial owner was a key flag of corruption.

We recommend the following definition of “beneficial owner”:

“Beneficial owner” means a natural person who, directly or indirectly, exercises substantial control over, has a substantial economic interest in, or receives substantial economic benefit from a company.

This definition, we believe, is best placed to also reach cases where a government official or their close associates—often called “politically exposed persons” (PEPs)—or other individual involved in corruption receives a significant part of the company’s economic benefit not through a formal equity interest (i.e. shares in the company), but rather by virtue of indirect relationships or other lines of influence.

In addition to setting a definition for beneficial owners, regulators will need to set out other aspects regarding the scope of this concept. In this vein, we recommend that in addition to setting out a clear definition of beneficial owner, regulators provide guidance to prospective applicant companies on reporting beneficial ownership and PEP information to help explain the definition. Below we set out several lessons drawn from the corruption cases we have studied that may be of use in drafting guidance.

**Ultimate versus all.** First, the findings of our research counsel that language, whether in the definition of “beneficial owner” or elsewhere, about requiring companies to disclose only their “ultimate” beneficial owners should not be used. A company’s “ultimate” owner, however defined, is not always clear. Instead, companies should have to disclose i) their full ownership structures and ii), within the full structure, *all* owners that meet the chosen criteria for beneficial owner. The

<sup>13</sup> For more details, see Aaron Sayne, Alexandra Gillies and Andrew Watkins, *Twelve Red Flags: Corruption Risks in the Award of Extractives Sector Licenses and Contracts* (NRGI, 2017).

corruption cases we analyzed included a range of instances in which a company provided “substantial economic benefit” to multiple PEPs. For example, we saw cases in which:

- A company acted as a clearinghouse or conduit for payments to many PEPs.
- A PEP acted as a proxy or nominee for a higher-level PEP.
- The company’s ownership structure included one or more professional nominee shareholders who has represented many officials or other persons.

**Nominees.** Second, all companies disclosing their beneficial owners should be required to identify all nominees (both natural and legal persons) and state whom they represent. This should be the case even if relevant law in the jurisdiction does not require disclosure of nominees in corporate filings or other official documents.

**Thresholds.** One of the thorniest issues in defining beneficial ownership is when describing when a person’s “control,” “economic interest” or “economic benefit” from a company is “substantial” enough for them to be considered its beneficial owner. Our corruption case studies research suggests that setting thresholds for disclosure of ownership and control to particular shareholding percentages (or other quantifiable measures such as percentage of voting rights exercised, number of board seats held) in the disclosing company risks exempting a wide range of high risk owners from disclosure. Defining “substantial control” is especially difficult: in a number of the corruption cases we analyzed, a PEP exercised control over a company via informal means, not through commonly understood rules, vehicles and processes of corporate governance. For example, we saw cases in which:

- No clear, single natural person acted as a nominee, proxy or other “front” for the PEP in the disclosing company’s ownership structure.
- The PEP did not exercise any voting rights, powers of attorney, or other standard forms of corporate control in the disclosing company.
- The PEP exercised control over the disclosing company in more informal, extralegal ways—e.g., political seniority, blackmail, extortion, other threats, past favors.

Similarly, our research has not reached any “one-size-fits-all” rule or standard for defining when economic benefit should be deemed “substantial.” We have considered a number of different threshold markers, including the value of the benefit conferred to government (e.g., as a percentage of revenues/earnings/profits), the value to recipient (as a percentage of income, salary, assets, etc.), value in local economic terms, number and/or frequency of payments made.

The mechanics of natural resource-related corruption are too context specific for a single definition of “substantial” control, economic benefit or interest to avoid being over- or under-inclusive in some contexts. We strongly encourage officials to create definitions that best capture how corruption via hidden ownership happens in their jurisdictions. At the same time, we believe that a five percent threshold on ownership, benefit and interest, however measured, would strike a decent balance between inclusiveness and efficiency in most cases. The guidance should also require companies to disclose all PEPs that potentially meet the definition of beneficial owner, regardless of whether they meet the chosen threshold. The next subsection includes more guidance on defining PEP.

**Future benefits.** Fourth, any guidance accompanying the disclosure rules should make clear that the rules still apply to beneficial owners who will likely receive economic benefit from the applicant company only *in the future*. During our research of extractives sector corruption cases, we saw instances in which a PEP arguably had not yet personally received any “substantial economic interest in” or “substantial economic benefit from” a disclosing company but would do so at some future time. For example, we saw instances in which:

- The disclosing company earned revenues to pay dividends to a PEP, or used its funds to buy assets on behalf of a PEP, but then held these for the PEP, did not distribute to him/her (e.g., held assets in a blind trust).
- The disclosing company held a block of authorized but unissued shares for a PEP.
- The disclosing company provided a PEP with something that only has value in the future (e.g., an unredeemed note, unexercised stock options).
- The disclosing company gave a PEP something that is illiquid, hard to value, for which no market exists, or which has no clear, immediate monetary value.
- The disclosing company made only very small payments on behalf of a PEP (e.g., for travel, housing or entertainment expenses).

**Indirect interests.** Finally, disclosure rules ideally would make clear that companies must also report their beneficial owners who hold interests in more indirect ways, and potentially include a (non-exhaustive) list or description of the types of indirect ownership relationships that are covered. To be an effective tool for preventing and detecting corruption in license awards, disclosure must reach beyond the more obvious, simple cases in which a PEP holds a hidden stake directly in a company via a nominee shareholder, bearer shares or other legal proxy. The corruption case studies we analyzed included many examples of PEPs holding beneficial interests in more indirect ways and via other legal entities—e.g., through:

- trusts
- complex chains of subsidiary or parent-child/sister company relationships
- different types of holding company structures
- other types of foreign or offshore investment vehicles

It may also be advisable to have disclosing companies submit written statements that concretely describe how the beneficial owner holds his/her interest, including a diagram or corporate organogram that visually shows the relationship, as well as the full corporate structure. Without this additional information, users of the data may often find it difficult to ascertain how the individual holds and exercises his/her ownership or control, or whether certain entities are actually related parties.

### *B. Defining politically exposed person*

Though definitions of PEPs vary by jurisdiction and body of law, most broadly echo the one adopted by the Financial Action Task Force (FATF): “An individual who is or has been entrusted with a prominent public function.”<sup>14</sup> Sector laws should define PEP in a way that addresses key corruption risks, which can be country-specific. Our review of sector law restrictions on public officials holding interests in extractive companies indicate that some of the most frequently cited offices were: heads of

<sup>14</sup> <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf>

government, politicians, government members, agents involved in extractive sector administration, judicial officials, military officials, and officers of state-owned corporations. Former officials can also be PEPs if they still have influential roles in the affairs of state, and two sector laws that we reviewed extended restrictions on former PEP for some years following the end of official duties (two years in Algeria and five years in Côte d'Ivoire). Covered family members can be related by blood, marriage, or other forms of civil partnership, and can stretch beyond the immediate family. Associations can be both personal and professional.

We recommend the following definition of “politically exposed person”:

As a starting point, we recommend the following basic language for defining “politically exposed person”: (a) an individual who is, or has been, entrusted with a foreign or domestic public function and includes — (i) a head of state or government; (ii) a minister; (iii) a deputy minister; (iv) an agent involved in sector administration, (v) a politician; (vi) a political party official; (vii) a judicial official or other senior official of a quasi-judicial body; (viii) a military official; or (ix) an state owned enterprise official; (b) an immediate family member of a person referred to in paragraph (a), including but not limited to a spouse, child, or parent; or (c) a close associate of a person referred to in paragraph (a).

This language, again, is basic and possibly could leave too much room for interpretation in some jurisdictions. In the context of individual award processes, governments should consider adopting more tailored definitions that:

- Distinguish more clearly between “Domestic PEPs,” “Foreign PEPs,” and “International Organization PEPs,” per the recommendations of the Financial Action Task Force (FATF).<sup>15</sup> For Domestic PEPs, for instance, the definition may need to specify which grade levels, ranks or titles of officials and which agencies of government are covered. The definition might also need to make clear which types of officials—e.g., elected, political appointees, civil service, military—will be treated as PEPs.
- At a minimum, encompass existing legal definitions of PEP in the jurisdiction’s relevant laws or regulations.

Beneficial ownership of extractives companies by PEPs, while not always problematic, can be linked to corrupt self-dealing and conflicts of interest during extractives licensing. It can also create avenues for bribery, money laundering, contract fraud and other types of financial crime. Most of the 55 cases of corruption with beneficial ownership problems that we analyzed for our red flags research involved one or more PEPs. The following Sections 2 and 3 address mechanisms for screening beneficial ownership and PEP information that applicants have disclosed, and how to respond when certain corruption risk factors exist.

<sup>15</sup> FATF, *International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations*, FATF, 2017.

### 3. INITIAL SCREENING: DISQUALIFYING APPLICATIONS WITH MANIFEST ACCURACY AND CORRUPTION PROBLEMS

In Section 2, we recommend that applicants for licenses be required to have a duly authorized officer certify that all statements and information contained in the application are based on reasonable inquiry and are true, accurate and complete. In practice, even with such certifications, additional scrutiny about the accuracy of the beneficial ownership and PEP information provided may be warranted in certain circumstances.

Awarding bodies ideally would have complete, accurate beneficial ownership information at their disposal when awarding a company an extractives license. In practice, however, doing this verification may be one of the toughest challenges officials in resource-rich countries face. For many awards, there will be little or no independently discoverable, irrefutable evidence that a PEP does or does not hold a hidden stake in a company for the purpose of cross-checking what the companies have submitted. What evidence does exist could be as scarce as a lone piece of paper in a drawer or safe somewhere—for example, a letter of intent or power of attorney between a PEP and a nominee shareholder, or a bearer share certificate. At times, even overt facilitators of corruption are not sure whom they are working for.<sup>16</sup> The best available evidence often will be circumstantial, one or more warning signs that point to the possibility of hidden ownership without proving it.

At a minimum and even if more comprehensive verification is not feasible, **regulators should screen for certain manifest deficiencies in an application that raise such clear corruption risks as to justify automatic disqualification from further consideration in a licensing process.** Thus, the rules for an award process should explicitly include at least some of the below factors as being required checks and disqualifying violations of the model provisions set out in Boxes 1 and 2 of this briefing:

A. Screening for basic accuracy of a company's beneficial ownership and PEP disclosures: These include:

- The company's beneficial ownership or PEP disclosures are uncertified or never submitted;
- The company claims it has no beneficial owner, or that its beneficial owner cannot be identified;
- The company identifies another company as its beneficial owner;
- Cross-checks of the company's certifications and disclosures against the supporting documents provided reveal that one or more claims in the application is contradicted by the company's supporting documentation or other reliable information readily available to the awarding body (e.g. an application claims there are no PEP beneficial owners, but public official asset disclosures indicate that a PEP is a beneficial owner of the applicant company).

<sup>16</sup> According to coverage of the Panama Papers leaks, for example, Mossack Fonseca at one point knew the beneficial owners for only 204 of over 14,000 Seychelles-registered shell companies it helped set up. New York Review of Books, Panama: The Hidden Trillions, <http://www.nybooks.com/articles/2016/10/27/panama-the-hidden-trillions/>

B. Screening for manifest corruption risks: These include:

- The applicant failed to certify non-violation of the prohibitions on benefiting public officials and prohibitions on public officials acquiring interests contained in the licensing rules' anticorruption provisions (as outlined in Sections 1 and 2 above);
- The disclosures in the application, or the awarding body's verification efforts, shows that the company has a PEP as a beneficial owner that violates the prohibitions on benefiting public officials and prohibitions on public officials acquiring interests contained in the applicable anticorruption provisions (as outlined in Sections 1 and 2 above).
- The disclosure strongly suggests the company has engaged in collusive or anti-competitive behavior—e.g., multiple companies with the same beneficial owner apply for the same license or contract.

In screening for these basic problems, regulators should be required to exercise a reasonable duty of care in verifying beneficial ownership and PEP information, and thus laws or regulations may need to specify:

Article [ ]: **Verification**

The [Ministry] / [Agency] shall take reasonable measures to verify the beneficial ownership and politically-exposed person information provided by applicants. If verification processes reveal beneficial ownership or politically-exposed person information that is different than or additional to the information provided in an application, such verified information will be noted as such and made public in an open data format [on the website of the Ministry/Agency] / [in the public register maintained for license applications under law].

Box 3. Model language for verification standard of care



## 4. DECISION-MAKING: PREVENTING FINAL AWARDS TO COMPANIES WITH PROBLEMATIC OWNERS

The kind of basic collection and scrutiny of ownership information at the pre-qualification stage recommended in the preceding sections may not capture all the corruption risks built into a company's ownership structure. Even after regulators have pre-screened for manifest problems and disqualified obvious offenders, it may still be advisable in some cases to subject the selected awardee to added scrutiny in the final stages of consideration.

More particularly, officials may sometimes encounter cases in which an applicant that has met all pre-qualification requirements still shows some warning signs of corruption. To increase the chances of catching these in time, the awarding body could assess at least the selected awardee using a corruption red flags checklist. NRGi has already developed such a non-country-specific list based on its corruption red flags research, portions of which are shown in Box 4. This tool would need to be adapted to particular country and industry contexts.

Box 4. Selected warning signs that a company could have a problematic hidden beneficial owner<sup>17</sup>

### Features of the company's shareholder structure

- The company's shareholder structure includes a chain or network of shell companies, or a complex holding company sub-structure, that obscures who ultimately owns or controls the company.
- The company has one or more nominee shareholders. Corporate records may explicitly identify the individual as a nominee, or he/she may exhibit common characteristics of nominees—for instance, being a shareholder or director in many other entities; working for a law firm, corporate services firm or other business that specializes in creating shell companies or managing private wealth.
- Some of the company's shares are bearer shares.
- The company's shareholder structure includes a name that appears to be altered or fabricated. This could be the name of a person or company for which no public records exist; a name that appears to have been deliberately misspelled; a name that no one with relevant knowledge recognizes; a name that otherwise closely resembles some other, identifiable name; or a known or suspected alias, particularly of a PEP.
- A list of shareholders for the company—whether contained in a corporate filing or some other official document—does not fully account for all of the company's issued shares.
- An individual with familial, personal, political, business or other close financial ties to a PEP is a shareholder, director or officer in the company. Particularly when other red flags are present, this could raise concerns that the individual is a proxy or "front" for the PEP.
- A shareholder with a significant interest in the company has a modest occupation that is unrelated to extractives, and that would not generate sufficient income to buy his/her stake or otherwise contribute financially to the company.
- When contacted, a shareholder is unaware that he or she is an owner of the company, suggesting that his or her identity may have been used without his or her knowledge or permission.
- An entity in the company's shareholder structure is incorporated in a jurisdiction that does not publicly report on shareholders, or does not collect or records shareholder information.
- The company's shareholder structure contains a trust with unknown or unclear beneficiaries.
- The company shares a registered or actual physical address, registered agent, office space, phone number, or other business infrastructure with another firm that is owned or controlled by a PEP, or with an individual linked to a PEP.

### Talk in the market

- Rumors circulate that a firm is actually a particular person's company, despite appearances, or is "linked" or "close to" a PEP.
- A news story, NGO report or court case makes similar claims.
- Industry insiders or officials will not discuss who owns a company.
- A little-known person, company, or network of companies keeps cropping up in different deals, suggesting one beneficial owner has stakes in all of them.

<sup>17</sup> Adapted from research findings reproduced in Sayne et al., *Twelve Red Flags* and Aaron Sayne, Erica Westenberg and Amir Shafaie, *Owning Up: Options for Disclosing the Identities of Beneficial Owners of Extractives Companies* (NRGI: 2015).

- 1 *Which risk factors to assess?* The guidance for the award process would need to clarify how wide a net would be cast. For example, would the awarding body simply look deeper any issues with company ownership, or the results of a broader due diligence or “integrity screening” conducted on the company.<sup>18</sup> In the latter case, the exercise could resemble the anticorruption due diligence that some private investors undertake before doing deals in resource-rich countries. These investigations collect purported facts and opinions on things such as a company’s reputation for business ethics; its wider political relationships and entanglements; its involvement in past scandal or illegal behavior (e.g., organized crime such as terrorism or drug trafficking); its questionable transactions, business partners or third-party suppliers; its placement on any domestic or foreign sanctions lists; and any potential conflicts of interest.
- 2 *What investigative methodology to adopt?* The regulations or guidelines should also make clear how far the awarding body will limit itself to interrogating the documentation a company submits or find independent sources of evidence. If an awarding body decides to go deeper, it could rely on anything from basic open source research and human source inquiries to information requests and exchanges with other government agencies, searches of non-public databases and government registries or even undercover operations. A wide range of investigative methods and tools are also available—e.g., basic reputational assessments, social network analysis, database mining or physical surveillance techniques. The latter will be more time-consuming, expensive and not necessarily more likely to deliver results. In some countries they could also pose serious personal security risks.
- 3 *Who will do the work?* Awarding bodies without the experience or resources to vet companies or their owners could explore outsourcing parts of the work to other government agencies—for example, the state’s intelligence services, supreme audit institutions, corporate registrars, anticorruption agency or embassies. Hiring private investigators, due diligence or forensic audit firms is another, relatively expensive option. The chosen institution would need the right mix of skills, tools and sources of information, credibility, political independence, and affordability. Where two or more government agencies are involved, it may take considerable time, relationship building and bureaucratic coordination to develop the necessary trust and mechanisms for sharing information.
- 4 *How will officials use the results as a factor in final decision-making?* Finally, governments would need to decide whether and when to allow the final decision-maker to veto an award to a company, whatever its other strengths, because of concerns over its owners or other findings of the screening conducted at this late stage of the award process. This sort of allowance is not the norm in resource-rich country licensing rules right now, and would need careful consideration before it is implemented. On the company side, past corruption cases in oil, gas and mining show that due diligence is not always an effective check in preventing corruption in license and contract awards. Methodologies vary widely and not all of the info obtained is reliable. Even when the awarding body is dedicated to running a clean, well-performing process, due diligence

18 For more recommendations on including enhanced vetting in award processes, see Votava, Cari L., Jean M Hauch, and Francesco Clementucci. forthcoming 2018. *License to Drill: A Manual on Integrity Due Diligence for Licensing in Extractive Sectors*. International Development in Practice. Washington, DC: World Bank.

findings sometimes could muddy the waters more than clear up which is the best company to choose. In worst cases, players could use anticorruption vetting to “manufacture deniability” and paper over corrupt bargains, or as a ready tool for blocking political or business rivals.<sup>19</sup> As such, while a broader risk assessment process ostensibly could give decision-makers fresh information to make informed judgments about avoiding corruption in awards, it could just as easily be abused in the pursuit of patronage and narrow self-interest.

Here we offer template provisions that could be customized to be included in sector laws or sector regulations to stipulate eligibility criteria aimed at limiting license allocation in cases where problematic beneficial ownership scenarios signal corruption risks:

Box 5. Model language for final award evaluation criteria

Template: final award evaluation criteria	Considerations
<p>Article [ ]: Evaluation Criteria</p> <p>The <b>evaluation</b> by the [regulatory authority] of [bids] / [applications] shall be based on objective criteria stipulated herein [and in the tender documents]. Such criteria shall include:</p> <p>( ) ...</p> <p>( ) <b>continued certification of non-violation of the prohibitions on benefiting public officials and prohibitions on public officials acquiring interests</b> contained in paragraphs (a) through (g) in Article [ ](Anticorruption) herein.</p>	<ul style="list-style-type: none"> <li>• Many sector laws already contain prohibitions on corrupt practices, but they do not make proactive assessment of these factors part of the evaluation process for awarding licenses.</li> <li>• If in the near term it is not possible to amend sector laws or regulations to include anticorruption evaluation and prohibitions, then including them in tender documents for each new licensing round could be a practical next-best approach until more comprehensive legal reforms can be pursued.</li> <li>• Regulators could also request that awardee companies certify continued non-violation of anticorruption prohibitions.</li> </ul>

### Basic aspects of the decision-making process to regulate

However officials decide to use beneficial ownership information in license or contract awards, the regulations or guidelines should, at a minimum:

- Describe when, and in what form, decision-makers will consider the information. In particular, the rules should clarify whether officials must consider beneficial ownership information during pre-qualification, at final decision, or both.
- Stipulate whether the awarding body must give a company with a problematic beneficial owner or ownership disclosure an opportunity to cure or correct the issues identified—for example, by allowing the company to submit additional evidence or take steps to remove the owner from the ownership structure.
- Say how the decision-maker will communicate its decision to the company.

The guidelines or recommendations could also address what the awarding body can or should do in the event that corruption-related beneficial ownership issues with a winning company surface after an award happens and the award process wraps—for instance, when officials receive a petition or whistleblower tip, or when the issues arise during a license or contract transfer, renewal or re-negotiation. This would include some guidance on how far the awarding body should address the issues in house versus push them to an external actor.

<sup>19</sup> In one of NREGI’s priority countries, for instance, we reviewed unpublished pre-qualification documents from a past oil block bid round suggesting that the regulator had used findings of “problematic beneficial owner” or incomplete disclosure to block companies controlled by a political enemy of the country’s then-president.

## 5. COMPLEMENTARY MEASURES: LEVERAGING BENEFICIAL OWNERSHIP DISCLOSURE TO ADDRESS CORRUPTION

Together with the collection and publication of beneficial ownership information, the following measures could, in at least some country contexts, assist awarding bodies in making decisions that limit corruption risks, as well as help oversight actors do their jobs. They could serve as proxies or alternatives to the verification and broader due diligence work that some will not attempt, or provide other chances to tackle the kinds of corruption that beneficial ownership transparency seeks to address. In countries where awarding bodies face heavy political interference, or otherwise lack a strong political mandate to exclude corruption-prone companies, officials could use these measures to crowd-source anticorruption work around licensing and contracting, helping others to ask the hard questions that they themselves cannot. How far this will deter or remedy corruption the first time the measures are tried will depend on the circumstances of the particular license or contract awards. Longer term, adopting them could promote a culture of oversight and accountability around awards that could help prevent corruption by companies with problematic owners. As such, we recommend that awarding bodies consider taking or supporting the following actions:

### Direct action by the awarding body

- *Setting and abiding by rigorous pre-qualification and bid evaluation criteria.* Tough technical and financial scrutiny of companies and bids could help weed out unqualified, well-connected firms whose main leg up in the award process is the identity of their hidden owner. Countries that want to use license and contract awards to promote indigenization and local content development would need to consider how to balance this goal against the importance of controlling beneficial ownership-related corruption.<sup>20</sup>
- *Forcing company executives and government decision-makers to consider and justify their choices.* A growing body of social science research suggests that individuals engage in corruption in part because few things in their daily environments force them to consider the ethical dimensions and consequences of the choices they make, or to endorse their own choices as correct and defensible.<sup>21</sup> In an attempt to counteract this situation, the regulations or guidelines for licensing processes could:
  - Require companies to submit signed statements that their beneficial ownership statements are correct and complete, and that they are in full compliance with the award process's eligibility criteria. Ideally, multiple high-level actors would sign the statements—e.g., senior management or the board of directors.
  - Require decision-makers to publish statements explaining the rationale behind certain types of decisions. This could arise, for example, when the final decision-maker sets aside or ignores recommendations from lower-level officials (e.g., a bid evaluation committee), intervenes in the process to benefit a particular company, or awards any license to a company with a PEP as a beneficial owner.

<sup>20</sup> For more recommendations on this topic, given in the context of a bid round in Liberia, see NRGI-ACET, *Liberia's Oil Block Bid Round: Comments and Questions*, 2014.

<sup>21</sup> For a recent summary of such research, see Eugene Soltes, *Why They Do It: Inside the Mind of the White Collar Criminal* (New York: Public Affairs, 2016).

All statements should be written, signed and handled such that they could later become evidence for sanctioning companies and individuals found to have engaged in misconduct. The correct forms and procedures to follow will depend on the content of the particular jurisdiction's relevant laws—for example, those governing fraud or making false statements to government. For more on sanctions, see later in this section.

- *Taking preventative measures against conflicts of interest.* A conflict of interest arises in an award process when an official has multiple roles or stakes in the process, and this fact potentially creates tension between the official's self-interest and his/her official responsibilities. According to our corruption red flags research, common variations of conflicts in extractives licensing processes include those in which:
  - An official involved in selecting the winner, or a close associate, holds a commercial interest in the sector in which the award is being made.
  - The official or a close associate is a director, officer or owner of a company that is competing for the award.
  - The official or a close associate consults for, provides services to, was previously employed by, or otherwise benefits from a competing company.

The presence of a conflict is not a sure sign of corruption. Rather, it heightens the risks that the official could use his/her entrusted power in ways that undermine the award's integrity, fairness or potential returns to the state. Sometimes the perception of a conflict is enough to weaken investor confidence and lead to scandal.

Many mechanisms exist for addressing conflicts of interest in award processes; a full list is outside this briefing's scope. By way for example, however, awarding bodies could require officials overseeing an award process to submit legal declarations of their prior employers and clients, or a declaration that they have no interests in or benefits from any of the competing companies. The awarding body could set out procedures for recusal, or mandate "cooling-off periods" for officials who used to work in a relevant part of the private sector. Such rules and procedures could be contained in the regulations or guidelines for the award process, in the awarding body's code of conduct or other ethical rules, or in individual employment contracts, as may be most appropriate under the jurisdiction's laws.

- *Revoking licenses for false declarations.* The awarding body may want to reserve the right to cancel or revoke licenses in cases where credible evidence surfaces after the award that the winning company submitted false, misleading or incomplete beneficial ownership information during the award process. A 2017 law from the Kyrgyz Republic includes false declarations as one ground for revoking an extractives license.<sup>22</sup>

22 Art. 23.3.6 of the Law of the Kyrgyz Republic "On Subsoil" (18 October 2017) gives the awarding body the right to terminate a license if a company fails to declare or wrongly declares its beneficial owner. The law reads in relevant part: "Grounds for termination of subsoil use right: (include...) failure to provide, or declaration of inaccurate information of beneficial ownership."

- *Taking action against non-performing companies.* After the award process ends, revoking the licenses of companies that do not meet their obligations could send a message that award processes are not opportunities for well-connected firms to speculate without providing value back to the state. To this end, awarding bodies could write stringent (though realistic) drill-or-drop rules, use-it-or-lose-it criteria, minimum work obligations or agreed work programs into regulations or contracts, and then enforce such rules, wresting assets away from non-performers through established relinquishment procedures.

### Empowering oversight actors

Oversight actors are critical players for addressing corruption in extractives license awards. Award processes offer oversight actors chances to more effectively exercise their roles. Compared with more day-to-day regulatory decisions, awards are more often announced publicly, subject to established rules, receive media coverage and, in some places, are subject to approval by parliament. This makes them concrete, high profile events that journalists, activists, parliamentarians and anticorruption authorities can scrutinize.

Adding beneficial ownership disclosure and risk assessment requirements to award processes could empower oversight actors to investigate and report on the corruption that can occur. Realistically, in many resource-rich countries much of the work will fall to them anyway. Disclosure could remove one of the biggest challenges they often face when investigating corruption: accessing company ownership information. In particular, beneficial ownership transparency during award processes could aid:

- Journalist, NGO, think tank or demand-side investigations of individual suspect deals or the ownership structures of license holders
- Due diligence, profiling or reputational assessments of winners or applicants by the same actors<sup>23</sup>
- Official third-party monitoring and oversight of license and contract awards, for example by parliamentary bodies or EITI multi-stakeholder groups seeking to implement the EITI Standard requirements to collect and publish beneficial ownership information for companies that “apply for, or hold a participating interest in an exploration or production oil, gas or mining license or contract”<sup>24</sup> and to monitor “any non-trivial deviations from the applicable legal and regulatory framework governing license transfers and awards”<sup>25</sup>
- Law enforcement investigations

23 For a recent example, see *Lebanon Oil and Gas Initiative, Investigating Lebanon’s pre-qualified oil and gas bidders: Who are they and how should we assess them?* (LOGI, forthcoming 2017).

24 Extractive Industries Transparency Initiative, *The EITI Standard 2016*, sec.2.5(c).

25 *Ibid.* sec.2.2(a)(iv).

Beyond simply publishing the beneficial ownership disclosures they receive from companies, awarding bodies could support the work of oversight actors by:

- *Creating and supporting other mechanisms for external accountability.*  
To increase the chances that allegations of beneficial ownership-related corruption in the award process are addressed, the government looking to award new licenses and contracts could:

- Set up a whistleblower mechanism.
- Establish an ombudsman, either for the particular award process or for broader public sector decisions.
- Offer losing companies a process for appealing award decisions on certain listed grounds, including false beneficial ownership disclosure by the winner and corruption in the award process involving the winner.
- Create a role for, and cooperate with, an outside monitor or external monitoring by a supreme audit institution.

The chosen accountability mechanisms should remain open for an appropriate period after the award process ends, to catch allegations or questionable conduct that arise later.

- *Referring offending companies for sanction.* Finally, awarding bodies should have the option, if not the formal legal obligation, of cooperating with law enforcement or other government oversight bodies to address cases of corruption involving license winners that come to light. Available penalties could be small, depending on the conduct involved and the provisions of relevant law in the jurisdiction. Other agencies could be reluctant or unable to take up cases. Nonetheless, having the awarding body take steps to make examples of a few companies arguably could deter others from misbehaving in future. For example, officials could cooperate with other agencies where evidence from the award process, or that surfaces later, strongly suggests that:
  - A company has knowingly submitted false information—and especially, has claimed a false beneficial owner.
  - A company's beneficial owner is a PEP, and the PEP may not have listed his/her interest in the company on his/her public asset declaration filed with the government.
  - A company made payments to an official with influence over the award process.

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## CONCLUSION

There is no shortage of evidence that allocating oil, gas and mining licenses and contracts to companies with corruption-prone owners can make it more difficult for a country to reap the benefits of its natural resource wealth. Recent years have seen some progress on pushing beneficial ownership as an important extractives sector governance issue, and on introducing basic anticorruption safeguards into sector licensing rules—e.g., provisions in national laws that prohibit PEP ownership. Much work remains to be done, though, and officials in charge of awards still need stronger guidance for addressing the ownership-related corruption issues that complicate the particular award decisions they face. We hope that relevant actors will invest more in developing practical knowledge and tools in this area, and that this brief can contribute to that work.

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