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Инициатива прозрачности
добывающих отраслей
в Кыргызстане

Evaluation Report for the Pilot Project on Beneficial Ownership in the Republic of Kyrgyzstan

Kyrgyzstan, 2015

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1. Grounds for the inclusion of Kyrgyzstan in the pilot project, methodology

Under the new Standard 2013 (3.11), “It is recommended that implementing countries maintain a publicly available register of the beneficial owners of the corporate entity(ies)” and the following definition of beneficial ownership is given:

“A beneficial owner in respect of a company means the natural person(s) who directly or indirectly ultimately owns or controls the corporate entity.”

Kyrgyzstan, together with 11 other countries, is taking part in the pilot project.

The Terms of Reference provide the following considerations in support of the importance of information about the owners of the companies:

“Transparency about company and government payments is important for accountability, but tells citizens little about who owns extractive companies and ultimately benefits from the companies’ activities. In many cases, the identity of the real owners – the ‘beneficial owners’ – of the companies that have acquired rights to extract oil, gas and minerals is unknown, often hidden behind a chain of corporate entities. In many countries, corporate regulators collect details about the ownership of the companies that are incorporated in the country (incorporation registers) but these registries often only hold information on ‘shareholders’ and not beneficial owners. Most countries also maintain a separate registry of extractive licence holders, but such registries often include only the name of the company holding the licence, and not its ultimate beneficial owners. In other countries less information on extractive company owners is available, particularly if foreign ownership is involved. This opacity can contribute to corruption, money laundering and tax evasion in the extractive sector

... The EITI Board agreed at its meeting in Oslo in February 2013 that following a period of testing and learning, the EITI should, in the future, require disclosure of beneficial ownership in oil, gas and mining companies operating in implementing countries. The Board also recognised that there was limited experience in addressing these issues in the context of the EITI, and that additional piloting and experimentation were needed.”

2. Beneficial ownership in the Republic of Kyrgyzstan

2.1 Short description of the main laws and regulations concerning beneficial ownership

Beneficial ownership is referred to in the following laws and regulations:

- Law №135 of the Republic of Kyrgyzstan “On combating the financing of terrorism and the legalization (laundering) of the proceeds of crime”, dated 31.07.2006

According to this law, “a beneficial owner (beneficiary) is a person having the right of ownership to money or property” and banks and financial institutions are obliged to provide “the information necessary to identify the natural or legal person on whose order and behalf an operation (transaction) is carried out, the taxpayer identification number (if any), address of residence or location of the natural or legal person.” However, they are only obliged to provide this information to an authorized body. And the heads and staff of such a body, and also of the National Bank of Kyrgyzstan and of other state bodies, including their former heads and staff, “who, in accordance with this Law, have or had access to information from the persons providing such information, shall bear criminal and other responsibility for the illegal disclosure and use of commercial secrets or other secrets.”

- Regulation on the identification and verification of a customer and beneficial owner (beneficiary) in order to combat the financing of terrorism (extremism) and the legalization

(laundering) of the proceeds of crime (approved by Resolution №135 of the Government of the Republic of Kyrgyzstan, dated March 5, 2010)

A beneficial owner (beneficiary) is understood in the meaning set out in Article 2 of the Law of the Republic of Kyrgyzstan “On combating the financing of terrorism and the legalization (laundering) of the proceeds of crime”.

This Regulation establishes general requirements for the implementation of the law on combating the financing of terrorism and the legalization (laundering) of the proceeds of crime.

- Rules for state registration of rights and encumbrances (restrictions) of rights to real estate and transactions with it (approved by Resolution № 49 of the Government of the Republic of Kyrgyzstan, dated February 15, 2011) define beneficial ownership as “the right of one party in a legal relationship to obtain some benefit from the conclusion of a civil-law transaction or on the basis of a decision by an authorized body”.

- Instruction for work with bank accounts, deposit accounts, approved by Resolution № 41/12 of the Board of the National Bank of Republic of Kyrgyzstan, dated 31 October, 2012.

The Instruction expresses the concept of a beneficial owner as “a person having the right of ownership of money or property”.

When opening an account (paragraph 25), a bank must determine “whether the customer is acting in their own interest or in the interest of a beneficial owner (beneficiary). If the customer is acting in the interest of a beneficial owner (beneficiary), the bank must identify the beneficial owner (beneficiary) in the manner prescribed by the laws of the Republic of Kyrgyzstan. The bank must ask the customer to provide information about the beneficial owner (beneficiary) in accordance with the requirements established by the laws of the Republic of Kyrgyzstan.”

The documents to be provided, on the basis of which the customer manages the funds of the beneficial owner (beneficiary) and acts in the interest of the beneficial owner (beneficiary), may include “a certificate of owned capital shares in the name of the beneficial owner (the beneficiary).” The Bank is also entitled to demand from the customer additional documents and information, which are necessary to identify the beneficial owner, and to refuse to open an account until the relevant documents have been provided.

The Bank has the right to terminate a bank account or bank deposit (deposit) contract unilaterally if “...the customer has not provided the relevant documents that are necessary to comply with requirements for the identification and verification of the customer and identification of the beneficial owner (beneficiary)” (paragraph 53).

The Bank must “refuse to open an account for a legal and natural person or to conduct transactions on the account if there is information, obtained in accordance with the laws of the Republic of Kyrgyzstan, regarding involvement of the customer and/or beneficial owner (beneficiary) in terrorist (extremist) activity and/or the legalization (laundering) of proceeds from crime” (paragraph 22).

Furthermore, according to Annex 1 to this Instruction, banks shall adhere to a policy of “Know your customer”, which determines the procedure for customer due diligence and includes a procedure for customer identification and the identification of the beneficial owner (beneficiary) at the time of opening of a bank account or deposit account, and information “about the customer and the beneficial owner (beneficiary), obtained in the course of identification is recorded in forms (a dossier) on the customer and beneficial owner (beneficiary), drawn up in accordance with the requirements of the authorized state body in the sphere of combatting the financing of terrorism (extremism) and legalization (laundering) of the proceeds of crime.” The procedure includes obligatory establishment of the customer’s identity.

When determining the beneficial owner (beneficiary) in respect of legal persons “special attention should be paid to the shareholders, persons with the right to sign or other persons who have a significant stake in capital or in any other way exercise control over the customer. If the

owner is another legal person, the bank must establish its owners or the persons exercising control over the legal person.”

Therefore banks certainly have information about the beneficial owners of legal persons, including their identification, but, according to the Law of the Republic of Kyrgyzstan “On bank secrecy”, “...information about accounts (deposits) of a customer (correspondent), which became known to the bank in connection with its services, information on operations (transactions), carried out on the order of a customer or on his behalf, as well as information about the customer are a bank secret.” Authorized bodies also have information. But this information cannot be made available to the public.

- The Law of the Republic of Kyrgyzstan “On sub-soil resources”

Articles 4 and 35 of the Law of the Republic of Kyrgyzstan “On subsoil resources” make reference to the Extractive Industries Transparency Initiative.

Article 4 has been supplemented with the following paragraph: The Extractive Industries Transparency Initiative (EITI) is a global international standard that promotes revenue transparency in the extractive industries, providing for verification of payments by companies and revenues received by the Government of the Republic of Kyrgyzstan and for the regular provision of information to the general public.”

Article 35, paragraph 5: “In the framework of the Extractive Industries Transparency Initiative (hereinafter - EITI), sub-soil users shall have the right, each year until the end of the first quarter of the year following the reporting year, to provide reports to the authorized state body for the implementation of state policy for sub-soil use regarding all taxes and payments made by the sub-soil user on a cash basis. The procedure for presentation, forms and reporting indicators under the EITI are regulated by normative legal acts of the Government of the Republic of Kyrgyzstan.”

So, as of today, reporting under the EITI is voluntary for companies (they have the right to do it but are not obliged to do it).

Amendments to the the Law have inserted clear references to the concepts of “company owner”, “ultimate owner” and “beneficiary” in paragraph 1 of part 3 of Article 27 and in paragraph 10 of part 6 of Article 30.

“Article 27. Part 3: Reasons for termination of sub-soil usage rights:

1) failure to provide timely notification to the authorized state body for the implementation of state policy on sub-soil use regarding a change of the owners of a licensee that is a legal person if such change involves the payment of a bonus in accordance with the tax laws of the Republic of Kyrgyzstan;”

“Article 30. The procedure for issuing licenses for sub-soil use:

Part 6 The following must be attached to an application for a license for sub-soil use:

10) information and documents disclosing the natural persons who are the ultimate owners and beneficiaries of the legal entity applicant.”

This applies not only to licenses that are to be obtained for the first time, but also to previously issued licenses, since they are subject to re-registration in accordance with parts 1 and 5 of Article 53:

“Article 53. Transitional provisions

1. Licenses for sub-soil use issued prior to the entry into force of this Law shall be subject to re-registration converting them to licenses for sub-soil use compliant with this Law no later than December 31, 2014.

5. Sub-soil users, which have not given timely notification to the authorized state body for the implementation of sub-soil policy of a change of the company's owners that occurred prior to the entry into force of Law № 160 of the Republic of Kyrgyzstan “On sub-soil resources” dated August 9, 2012, must give such notification no later than December 31, 2014.

So, according to the latest amendments and additions to the Law of the Republic of Kyrgyzstan "On sub-soil", information disclosing a beneficiary who is a natural person should be provided when a license is issued (and re-registered), and inaccuracy of such information is grounds for the termination of sub-soil usage rights.

It should also be noted that all kinds of sub-soil use of all types of mineral raw materials, including fresh, mineral and thermal groundwater, are subject to licensing, but with the exception of sub-soil usage rights under a concession agreement and a production sharing agreement, as well as works carried out on the basis of state registration. The procedure for granting sub-soil usage rights on the basis of concession agreements and production sharing agreements is defined by the laws of the Republic of Kyrgyzstan "On concessions and concession enterprises in the Republic of Kyrgyzstan" and "On production sharing agreements in sub-soil use".

According to Article 11, paragraph 3, of the Law "On production sharing agreements in sub-soil use", "Representatives of the Government of the Republic of Kyrgyzstan, or of the authorized state body are not entitled to disclose information, which is classified by the Agreement contract as being confidential information or a trade secret of the Concessionaire." The Law also extends the principle of stability of legislation to PSAs (Article 19).

If the other party to the PSA consists of foreign natural or legal persons, then the agreement is ratified by the Zogorku Kenesh (Parliament) of the Republic of Kyrgyzstan. After the agreement has been signed, a license is issued to the investor following the procedure established by laws of the Republic of Kyrgyzstan.

So, if information on the beneficiaries is deemed by a party to the PSA to be confidential, it may not be disclosed, by citing the principle of stability of legislation. However, if a license is then granted, there is a possibility of disclosure, unless the company, which is the sub-soil user, specifically refuses to make such disclosure.

2.2 Short description of main registers of companies

Provision 3.9 (b) of the Rules of the EITI for 2013 states that "It is expected that the license register or cadastre includes information about licenses held by all entities, including companies and individuals or groups that are not included in the EITI Report".

A database of licensees can be found on the website of the Kyrgyz State Agency for Geology and Mineral Resources at www.geology.kg

The total number of active licenses at the end of 2014 was 1359, which is 317 more than at the end of 2013 (see the Chart).



Number of active licenses by years

The structure of licensed sub-soil areas in the Republic of Kyrgyzstan is presented in the following table.

Number of active sub-soil licenses on December 31, 2014

Type	Prospecting	Exploration	Production	Total
Gold	73	53	47	173
Ore minerals	27	27	22	76
Coal	12	66	158	236
Oil	38	0	19	57
Non-ore minerals	26	211	344	581
Underground water	1	10	225	236
Total	177	367	815	1359

A list of licensees can be found on the website of the State Agency for Geology and Mineral Resources at

http://www.geology.kg/index.php?option=com_content&view=category&id=124&Itemid=340&lang=ru)

This database contains the following information:

- License number, date of issue, period of validity
- The name of the area
- The sub-soil user
- Location of the area (region and municipality)
- Type of minerals
- Type of sub-soil use (production, exploration, prospecting)
- The size of the area, ha
- Address, telephone, fax and full name of the head of the organization

This information, where sub-soil users are listed as legal persons (particularly the name of the sub-soil user), may be useful as a starting point for the purposes of the pilot project.

Information on legal persons is contained in the electronic database of legal persons, their branches and representative offices on the website of the Ministry of Justice of the Republic of Kyrgyzstan, www.minjust.gov.kg, where registration documents for any company registered in the Republic can be opened via the name, registration number, taxpayer code or company classifier. So information can be obtained that includes details of state registration, form of ownership, foreign ownership and information about the founders (both legal and natural persons), which in some cases may be beneficial owners.

2.3 Definition of “beneficial ownership”

The new Standard 2013 (3.11), gives the following definition of beneficial ownership: “A beneficial owner in respect of a company means the natural person(s) who directly or indirectly ultimately owns or controls the corporate entity.”

The definitions of a beneficiary in local legislation (described in paragraph 3A) give the following understanding of a beneficiary:

“a beneficial owner (beneficiary) is a person having the right of ownership of money or property”, “a person on behalf of and/or at whose expense the customer performs an operation (transaction) with funds or property, or having the ability to directly or indirectly influence performance by the customer of transactions (deals) with funds or property, in accordance with a contract concluded between such person and the customer, or a person in whose ultimate favour an operation (transaction) with funds or property is carried out.” It is also “the right of one party in a legal relationship to obtain some benefit as the result of a civil-law transaction.”

So a **beneficiary** is a natural person who has right of ownership, influences the carrying out of operations, receives certain benefits from transactions.

The fourth EU Directive on combating money laundering proposes the establishment of a threshold of 25% plus one share as the mark of ownership or control through ownership of shares at all levels of direct or indirect ownership.

Paragraph 6 of Article 37 of the Law “On sub-soil resources” states that, when sub-soil licenses are transferred, “Change in ownership shares by 10 percent or more is a ground for payment of a bonus in accordance with the tax laws of the Republic of Kyrgyzstan, except in the case of companies listed on stock exchanges.”

The MSG discussed what percentage ownership level should be taken as a threshold for the purposes of the project. The threshold was originally set at 10% to provide consistency with the Law “On sub-soil resources”, but the MSG later concluded that it was necessary to disclose beneficiaries with a 5% level of ownership (the level recommended by Global Witness).

Further, regarding the inclusion of the concept of politically-exposed persons (PEPs). Law №135 of the Republic of Kyrgyzstan “On combating financing of terrorism and the legalization (laundering) of proceeds from crime”, dated 31.07.2006, gives the following definition:

“Foreign politically-exposed persons are foreign nationals who were assigned or are assigned prominent public and political functions in a foreign country (heads of state or government, senior politicians, senior officials in government, the courts, the military, law enforcement and fiscal agencies, heads and leaders of political parties and religious organizations), including people who previously occupied such positions.”

This definition is appropriate for application to local PEPs as persons who were assigned or are assigned prominent public and political functions in Kyrgyzstan (heads of state or government, senior politicians, senior officials in government, the courts, the military, law

enforcement and fiscal agencies, heads and leaders of political parties and religious organizations), including people who previously occupied such positions.

Therefore the following definition of a beneficiary is proposed for the purposes of the pilot project:

A **Beneficiary** is a natural person who has right of ownership, influences the carrying out of operations, receives certain benefits from transactions, and who had an ownership share of 5% or more. If the beneficiary is a politically-exposed person, his or her share is subject to mandatory disclosure, regardless of the ownership level.

4. Methodology and schedule for collecting information on beneficial ownership

The study has shown that, in accordance with the latest amendments and additions to the Law of the Republic of Kyrgyzstan “On sub-soil resources”, an applicant for the issue (or re-registration) of a license must provide information that discloses the beneficiary who is a natural person or persons who are the ultimate owners and beneficiaries of an applicant who is a legal person.

As described above, a database of licensees can be found on the website of the Kyrgyz State Agency on Geology and Mineral Resources, www.geology.kg, and currently contains the following information: license number, date of issue, period of validity; the name of the area and of the sub-soil user; location of the area; the type of mineral and type of sub-soil user; the size of the area; and the address, phone number, fax and name of the head of the organization.

The laws of Kyrgyzstan do not contain provisions that would require companies to disclose to the public their founding documents and information about their beneficiaries, but there are also no provisions preventing such disclosure. The MSG and EITI Secretariat should make every effort for information on beneficiaries to be added to the website where the database of licensees is available to the public.

For the EITI Report in 2013:

First step: Obtain a full list of sub-soil users that are license holders (legal persons). (Licensing, the list of licensees via the link http://www.geology.kg/index.php?option=com_content&view=category&id=124&Itemid=340&lang=ru)

It appears most realistic to expect that reports on beneficial ownership will be provided by companies, which carry out reporting to EITI standards.

Second step: Include all companies reporting to EITI standards (73 companies for principal minerals and coal) in the pilot project on beneficial ownership. At present the list does not include companies, that are at the exploration stage. The MSG recommends considering the inclusion of companies at the exploration stage in EITI reporting and, respectively, in reporting on beneficial ownership, at least for the EITI Report in 2014.

Third step: Since public companies and their 100% subsidiaries are not required to disclose their beneficial owners (EITI standard 2013 (3.11.d.iii)), such companies are to be determined from public sources (Bloomberg websites, websites of stock exchanges) and excluded from the list.

For example, the Bloomberg site has information on traded companies by sector (metals, energy, etc.), so that a list of such companies can be accessed by following the link – for gold

mining, for example, – where the exchange, on which the company is traded is also shown (<http://www.bloomberg.com/markets/companies/gold-mining/>)

Fourth step: For remaining companies: a search of constituent documents in the electronic database of legal entities, branches and representative offices on the website of the Ministry of Justice of the Republic of Kyrgyzstan, www.minjust.gov.kg, where registration documents can be opened and founders identified (natural and legal persons) by name, registration number, taxpayer number or company code.

Fifth step: If the constituent documents specify another entity, steps 3-4 are repeated. If further identification is not possible (and there is no information in public search systems or the company is located in an offshore zone), declaration forms on beneficial ownership must be sent to such companies.

For the EITI Report in 2013 it is recommended to include collection of information on company beneficiaries, using the proposed definition and methodology, in the Terms of Reference of the reconciliation specialist, which will collect information and to include the data in the general EITI Report.

The following is proposed for the **EITI Report in 2014:**

1) The beneficial interest declaration form should be included in the overall EITI reporting form for 2014, which will be agreed by the MSG and approved by the Government. In this case, companies will be required to completed the form and provide data on beneficiaries.

2) The MSG and EITI Secretariat should lobby the State Agency for Geology and Mineral Resources to include information about beneficiaries in the publicly accessible database of licensees on the Agency’s website (based on the Law of the Republic of Kyrgyzstan “On sub-soil resources”)

4. Risks.

1. Companies, legal persons with foreign ownership, particularly from countries that are not participating in the EITI, may refuse to fill in the forms, and potential to influence them is minimal, as they are based in other jurisdictions. The same applies to legal entities registered in offshore zones.
2. Some companies have expressed strong concerns about the disclosure of information as part of this pilot project. There are concerns about increase in the number of inspections by authorized bodies and additional sanctions. Also, the disclosure of data about owners who are natural persons, with the addition of contact details, could attract the attention of criminal structures.
3. Removal from the list of license holders that participate in EITI reporting of licensees working with freely available minerals, since these are likely to be small and medium-sized businesses, their payments to the budget will be negligible, foreign participation will be minimal, and disclosure of their owners is of little interest to the general public.
4. Exclusion from the EITI list of companies at prospecting and exploration stages.
5. Multi-tier companies. In many cases, the identity of real owners – the beneficiaries – of companies that have received rights to extract oil, gas and minerals, is unknown and hidden behind a chain of corporate entities.

6. In many countries, the regulatory authorities collect data on ownership of companies that are registered in the country (company registers), but these registers often contain information only on “shareholders” and not on the real beneficiaries.
7. Lack of information on the owners of extractive companies, especially if they include foreign owners registered abroad as legal persons.
8. Lack of information in public search systems.
9. Lack of a mechanism for obtaining information on a license holder, if the company is registered in an offshore zone.

5. Recommendations

1. In the first stage, include in the Terms of Reference for the independent administrator the task of collecting information on beneficiaries of companies in the EITI list and publish the information in the reconciliation report.
2. Obtain Government approval of the declaration form on beneficial ownership and include it in the general reporting form for all sub-soil users.
3. The State Agency for Geology and Mineral Resources should include information about beneficiaries in the publicly accessible database of licensees on the Agency’s website (based on the Law of the Republic of Kyrgyzstan “On sub-soil resources”).