

AIFC GUIDANCE ON ULTIMATE BENEFICIAL OWNER



Introduction

This guidance provides further information on the meaning of the Ultimate Beneficial Owner (UBO) including complex ownership structures and examples.

Identification of the UBO involves an examination of constitutional documents and any other relevant documents (e.g. shareholder agreements), as well as looking at chains of ownership and other circumstances such as relationships between legal persons / arrangements and third parties.

The guidance follows the order of the 3-tiered approach to the definition of UBO in the AIFC Companies Regulations (2017).

The starting point is always whether or not any person within Test 1 (a natural person with control through ownership) exists or can be identified. If that is the case, that person (or persons) must be treated as the UBO.

If no person within Test 1 exists or can be identified, or if a person within Test 1 has been identified but there is reason to believe that another natural person is also ultimately exercising control over the legal person / arrangement by other means, Test 2 must be looked at. In the second situation, both the person within Test 1 and any person within Test 2 are the UBO.

If there is nobody within Tests 1 and 2, a natural person within Test 3 (member of Governing Body) will be the UBO.

The guidance is intended to assist in meeting the obligations under the Acting Law of the AIFC, including under the AIFC Companies Regulations, AIFC General Partnership Regulations, AIFC Limited Partnership Regulations, AIFC Limited Liability Partnership Regulations, AIFC Non-profit Incorporate Organisations Regulations, AIFC Foundations Regulations.

This guidance is neither intended to be legal advice, nor should be relied upon. The interpretation of the Acting Law of the AIFC is a matter on which the AFSA cannot advise and entities/individuals need to form their own independent view on compliance with the legislation. Independent legal advice is advised where there is any uncertainty.

The guidance is not intended to replace the any legal act therefore important that all relevant legal acts are read together in order to have a proper understanding of the definition of UBO under the Acting Law of the AIFC.

What is Ultimate Beneficial Owner?

Section 179-1(1) of the AIFC Companies Regulations provides that a UBO is a natural person who:

- (a) *in relation to a company:*
 - (i) *owns or controls (directly or indirectly) Shares in the share capital of the company or other Ownership Interests in the Relevant Person of at least 25%;*
 - (ii) *owns or controls (directly or indirectly) voting rights in the Relevant Person of at least 25%;*
 - (iii) *owns or controls (directly or indirectly) the right to appoint or remove the majority of the Directors of the Relevant Person; or*
 - (iv) *has the legal right or through other ownership interests to exercise, or actually exercises, significant control or influence over the activities of the company; or*
- (b) *in relation to a partnership, has the legal right to exercise, or actually exercises, significant control or influence over the activities of the partnership;*
- (c) *in relation to a Foundation or a Non-Profit Incorporated Organisation, has the legal right to exercise, or actually exercises, significant control or influence over the activities of the Governing Body, Person or other arrangement administering the property or carrying out the objects of the Foundation, or Non-Profit Incorporated Organisation; or*
- (d) *in relation to a Trust, is defined in the AIFC Trust Regulations.*

For the purpose of the Section 179-1(1) of the AIFC Companies Regulations under *the Relevant Person* meant any *Body Corporate, partnership, Trust, arrangement or ownership structure incorporated, registered, continued or carrying on business in the AIFC including without limitation a Public Company, Private Company, Recognised Company, a company incorporated under Part 2 of these Regulations, Foundation, Non-Profit Incorporated Organisation, General Partnership, Recognised General Partnership, Limited Partnership, Recognised Limited Partnership, Limited Liability Partnership or Recognised Limited Liability Partnership, Investment Company, Restricted Scope Company, Special Purpose Company, Protected Cell Company or any other legal body or structure created by Legislation administered by the Registrar established under the Acting Law of the AIFC.*

The starting point in most cases will be to consider whether or not a person's holding meets the threshold of more than 25% of shares or voting rights. When considering the extent of a person's holding, Section 179-1(3) of the AIFC Companies Regulations must be borne in mind, particularly the following provisions:

- *If 2 or more natural persons jointly own or control an interest in a Relevant Person in accordance with Section 179-1(1) of the AIFC Companies Regulations, each of them is treated for the purposes of these Regulations as owning or controlling that interest.*

It is important to note that even if a natural person's holding does not meet the threshold of more than 25% of shares or voting rights, that natural person will still be a UBO if he or she has

- (a) the right to appoint or remove the majority of the Directors of the Relevant Person or
- (b) the legal right or through other ownership interests to exercise, or actually exercises, significant control or influence over the activities of the Company / Partnership / Foundation / Non-profit incorporated organisation.

Another factor to bear in mind is that there may be beneficial ownership traced through any number of Persons or arrangements of any description and the Relevant Person may have any number of natural persons each identified as its UBO.

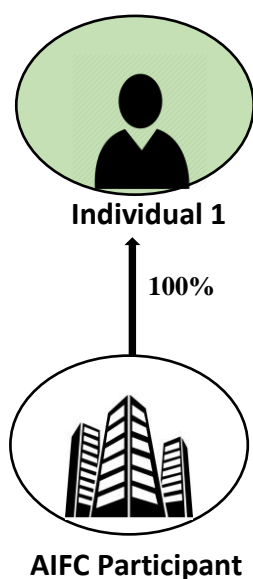
Test 1: The Ownership Test

The ownership test is to identify the individual who Ultimate Beneficial Owner the AIFC Participant. According to Part 14-1 of the AIFC Companies Regulations with amendments as of 27 December 2019, Ultimate Beneficial Owners are considered to be a registrable Ultimate Beneficial Owner.

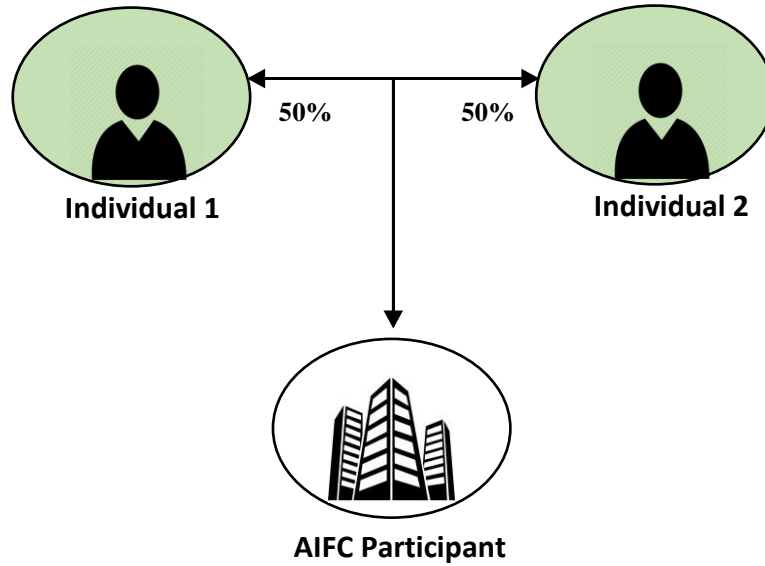
To help you identify the registrable Ultimate Beneficial Owners, please refer to the illustration below. Registrable Ultimate Beneficial Owners are identified in green circles.

Direct Ownership

In this example, Individual 1 owns 100% of the AIFC Participant. He is the Ultimate Beneficial Owner.

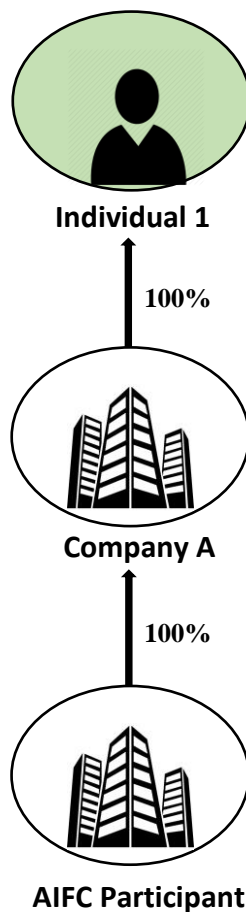


In this example, Individual 1 and Individual 2 are direct Ultimate Beneficial Owners of AIFC Participant. Both individual are the Ultimate Beneficial Owners.

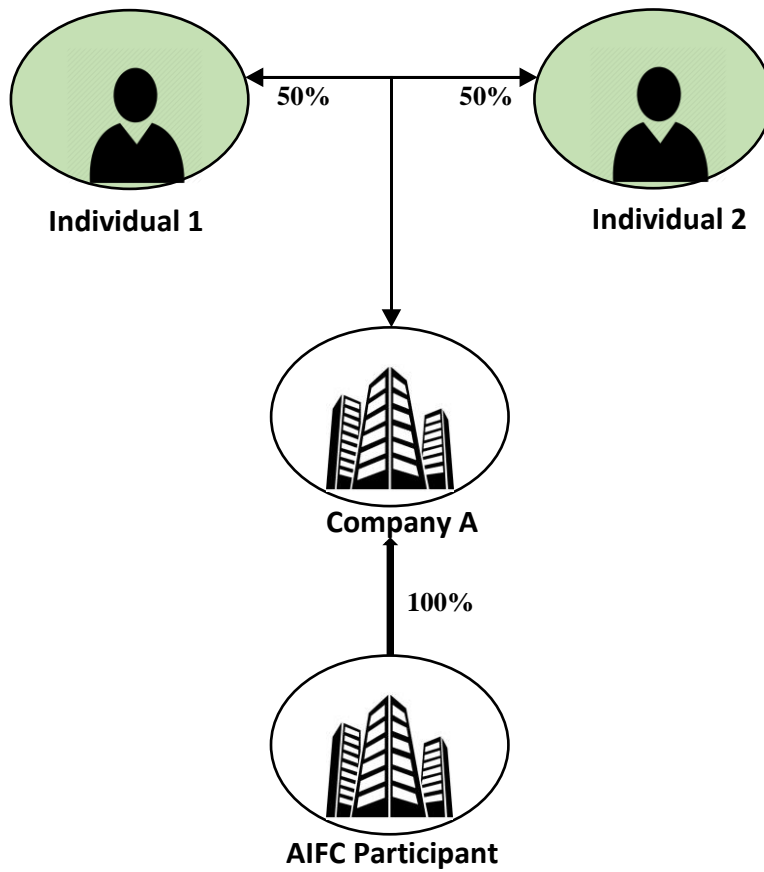


Indirect Ownership

In this example, Individual 1 is the indirect owner and Ultimate Beneficial Owner of the AIFC Participant.

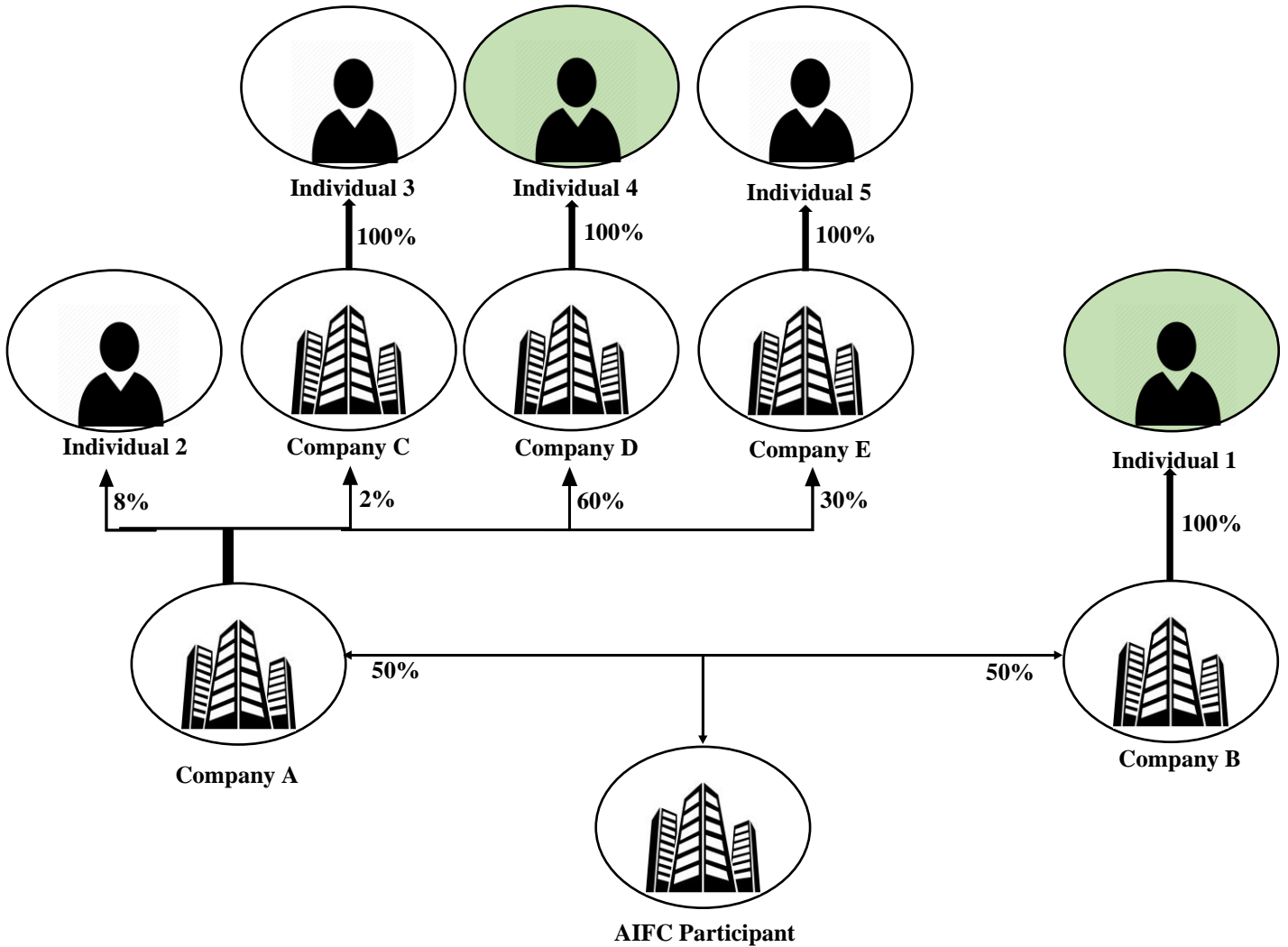


In this example, Individual 1 and Individual 2 are indirect owners and Ultimate Beneficial Owners of AIFC Participant.



Multiple Indirect Ownership

In this example, there are multiple levels of indirect ownership. The Ultimate Beneficial Owners are clearly marked in green circles. In this case, Individual 4 has a 30% interest in AIFC Participant ($50\% \times 60\% \times 100\% = 30\%$) and Individual 1 has 50% ($50\% \times 100\% = 50\%$).



Test 2: The Control Test

The starting point is always whether or not any person within Test 1 exists or can be identified. If that is the case, that person (or persons) must be treated as the UBO.

Test 2 must be looked at in two situations. The first is where no person within Test 1 exists or can be identified.

The second is where a person within Test 1 has been identified but there is reason to believe that another natural person is also ultimately exercising control over the legal person by other means. In other words, although there is an identified person with a controlling ownership interest as set out above, there is reason to believe that this controlling ownership interest does not reflect the full extent of actual control of the legal person in practice. In that situation, both the person with the controlling ownership interest and the other person believed to be ultimately exercising control over the legal person (i.e. persons within both Test 1 and Test 2) are the UBO. Whether or not this situation arises will depend on the specific facts of every case. By way of illustration, it might arise where the person with the controlling ownership interest is dominated by another because of a familial or employment relationship, or where another person holds certain powers in relation to the legal person which are being or are likely to be used in practice to affect decisions taken by the person with the controlling ownership interest.

It is not possible to give an exhaustive definition of “ultimate control through other means”, because it will depend on the particular circumstances of each specific legal person. However, generally speaking an individual is likely to have ultimate control over a legal person in one of two ways.

The first is where an individual has absolute decision or veto rights over the running of the business of the legal person. These rights may arise in a variety of ways, for example, under the constitution of the legal person, by being attached to shares or securities in the legal person held by the individual, or by virtue of a shareholder agreement or other arrangement.

Sometimes these rights are held solely to protect minority interests or are held on a temporary basis only. Each situation has to be considered on a case by case basis, but as a general rule the more restricted the rights or the shorter the period for which they are held, the less likely they are to give the holder ultimate control over the legal person. The following are examples of the kind of situations where an individual is likely to be a person with ultimate control over a legal person:

- having absolute decision or veto rights over the adoption or amendment of the legal person’s business plan;
- having absolute decision or veto rights over changes to the nature of the legal person’s business;
- having absolute decision or veto rights over making any additional borrowing from lenders;
- having absolute decision or veto rights over the appointment or removal of the CEO;
- having absolute decision or veto rights over the establishment or amendment of any profit-sharing, bonus or other incentive scheme of any nature for directors or employees;

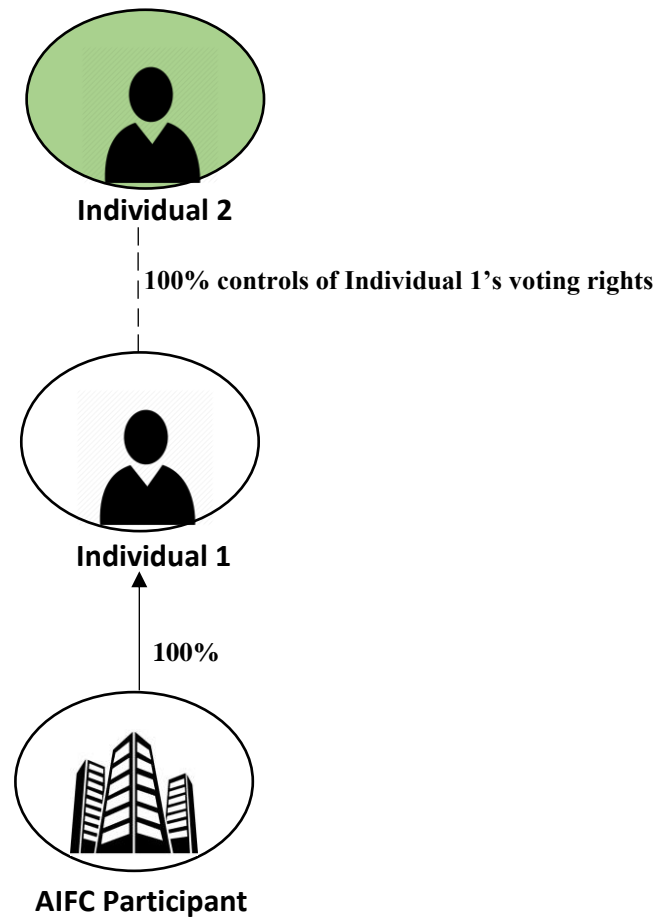
- having absolute decision or veto rights over granting options under a share option or other share based incentive scheme.

The second way in which an individual is likely to have ultimate control over a legal person is where, in practice, that individual controls the decisions that affect the activities of the legal person. Examples include:

- where the individual's relationship with the legal person or with particular individuals connected with it means that the individual regularly directs or influences the decisions of board members or the way in which shareholders vote (for example, where a father has founded a company in which he is no longer officially involved but whose directors or shareholders include family members who invariably defer to his views about decisions relating to the company);
- where the individual acts as a "shadow director" in respect of a majority of the board or otherwise directs or influences board decisions;
- where the individual uses ownership of certain rights or assets relevant to the running of the business of the legal person (e.g. factory premises) as a means of controlling the running of that business;
- where the individual owns or controls an entity that holds decision or veto rights over the legal person in the respects listed above and may use those rights to control the activities of the legal person.

Ultimate control will not ordinarily arise in the context of a standard professional or commercial relationship between the legal person and an individual such as a legal adviser, an accountant, a client, a lender or a supplier. Nor will it ordinarily arise in the context of the exercise of a statutory function such as that of a regulator or a liquidator. However, relationships or functions of this kind may give an individual ultimate control over the legal person if the particular relationship or function is significantly different from the way in which such relationships or functions are normally understood, or if it is one of a number of opportunities the relevant individual has to influence or direct the legal person. In other words, what is relevant here is the substance of the relationship, not its formal description. An example where the substance of an individual's relationship would lead to the individual being treated as a beneficial owner irrespective of the individual's official status is where a legal person routinely deferred to its legal advisor on matters relating to the running of its business above and beyond the provision of legal advice.

In this example, Individual 1 holds more than 25% of the voting rights of AIFC Participant but the exercise of such voting rights is controlled by Individual 2. In this case Individual 2 is an Ultimate Beneficial Owner in respect of the AIFC Participant.



It is important to note that if, in relation to AIFC Participant, there are individual who satisfy Test 2 in addition to individual / corporate beneficial owners that satisfy Test 1, then all are registrable in respect of that AIFC Participant.

Test 3: The Management Test

This test only applies if no registrable owners have been identified under Test 1 or Test 2 or if owners are Government authorities, Public listed companies and Regulators, in these cases stipulates that natural person that is a member of its Governing Body and Ultimate Beneficial Owner of a body corporate member of its Governing Body shall be deemed to be an Ultimate Beneficial Owner of the Relevant Person.

This will depend on the constitution of the particular legal person, but as a general rule this will be someone who exercises strategic decision-making powers in respect of the legal person (for example, a chief executive officer (CEO), chief financial officer (CFO), managing or executive / non-executive director, or president).

It is important to note that if, in relation to AIFC Participant, there are individual who satisfy Test 3 in addition to individual / corporate beneficial owners that satisfy Test 1 and Test 2, then all are registrable in respect of that AIFC Participant.

Beneficial Ownership Register

According to Section 179-4 of AIFC Companies Regulations a Relevant Person shall keep and maintain a Beneficial Ownership Register, in which the UBO Details in respect of each of its Ultimate Beneficial Owners shall be recorded. The Relevant Person shall record any changes to this information in the Beneficial Ownership Register within thirty (30) days of becoming aware of such change. Therefore, a Relevant Person once identifies Ultimate Beneficial Owners should maintain the Beneficial Ownership Register and must be kept up-to-date throughout the lifecycle of AIFC Participant.

A Relevant Person shall cause the following information to be entered in its Beneficial Ownership Register in respect of each Ultimate Beneficial Owner:

- full legal name;
- residential address and, if different, an address for service of notices;
- date and place of birth;
- nationality;
- information identifying the Person from their passport or other government-issued national identification document acceptable to the Registrar, including:
 - o identifying number;
 - o country of issue; and
 - o date of issue and of expiry;
- the date on which the Person became an Ultimate Beneficial Owner of the Relevant Person; and
- the date on which the Person ceased to be an Ultimate Beneficial Owner of the Relevant Person.

Filing Obligations of AIFC Participants to the Registrar of Companies

If any of the Ultimate Beneficial Owner or any information (information to be entered in Beneficial Ownership Register are listed in section above) indicated in Beneficial Ownership was changed AIFC Participant should notify the Registrar of Companies of changes of information in Beneficial Ownership Register that occur with regards to the registered entities.

It is important for AIFC Participant to gain an understanding of what events trigger filing requirements and the obligations in order to avoid fines.

Please familiarize yourself with filling flow and guidance on filling in [Guidance on Filing Obligations of AIFC Participants to the Registrar of Companies](#).

Disclaimer

This general Guide provides information on how to identify the Ultimate Beneficial Owner of AIFC Participant and should be read in conjunction with the relevant legislation. This Guide does not cover other requirements as set out in the relevant legislation. The AFSA makes no representations as to accuracy, completeness, correctness or suitability of any information and will not be liable for any error or omission. Information in this Guide is not to be deemed, considered or relied upon as legal advice and should not be treated as a substitute for a specific advice concerning any individual situation. Any action taken upon the information provided in this Guide is strictly at your own risk and AFSA will not be liable for any losses and damages in connection with the use of or reliance on information provided in this Guidance.