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Imminent reforms will reveal the identity of those behind companies registered in the UK. The new disclosure obligations promise to create among the highest levels of transparency in the world

By Gibson Dunn & Crutcher partner James Barabas and associate Tony Downes in London

All companies in the UK will soon be required to obtain and maintain information on their ultimate beneficial owners. This information will be required to be made publicly available and searchable, and therefore accessible to journalists, business counterparties, employees and anyone else with an interest in the ownership of the company.

These new reforms – which will be enacted by the Small Business, Enterprise and Employment Bill – drastically extend existing disclosure obligations relating to beneficial ownership. The reforms go beyond the requirements expected to be imposed by the proposed Fourth Money Laundering Directive of the European Commission. The directive will require such information to be obtained and maintained, but only for the purposes of disclosure to government authorities, tax

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offices and law enforcement – not for general publication.

Pleased to meet you; hope you guess my name

The reforms have come about as a result of the advocacy of UK Prime Minister David Cameron. In June 2013 at the Lough Erne G8 Summit, the Prime Minister pushed for each member of the G8 to create a central register of beneficial ownership of

companies. The Prime Minister got his way: the Communique duly included a commitment given by each member of the G8 to implement such measures. On October 31 2013, in a speech to the Open Government Partnership Summit, the Prime Minister announced that the UK would go further, making all beneficial ownership information contained on the register publicly available.

Since April 2014, the bill has wound its way through the UK House of Commons to the UK House of Lords with cross-party support. It proposes several amendments to the Companies Act 2006 to introduce the new disclosure regime.

But what's puzzling you is the nature of my game

Who has to maintain a PSC Register?

The government intends the reforms to apply broadly across the corporate sphere. The new law will impose an obligation on all companies registered in the UK to maintain a register of all 'registrable' persons with 'significant control' (PSC Register), excluding companies whose shares are admitted to trading on a regulated market in the UK, which are subject to their own disclosure regime.

As presently drafted, the obligations do not extend to limited liability partnerships, which will therefore not be required to maintain a PSC Register. Neither does the bill extend to companies incorporated in Jersey or Guernsey, which may be tax resident in the UK.

The PSC Register will be required to be publicly available for inspection and copying at the registered office of the company. Private companies will have the option of maintaining the PSC Register on the public register at Companies House

which will be published online, rather than maintaining a separate register.

Who qualifies as a person with significant control?

The reforms aim to prevent the use of opaque or complex corporate structures to hide beneficial ownership by casting a wide net via the concept of a 'person with significant control'. This is defined as an individual (either alone or as one of a number of joint holders of the share or right in question) that meets one or more of the following conditions in respect of the company:

- the individual holds, directly or indirectly, more than 25% of the nominal value of the shares, more than 25% of the voting rights, or is entitled to more than 25% of the capital or profits;
- the individual holds the right, directly or indirectly, to appoint or remove a majority of the board of directors; or
- the individual has the right to exercise, or actually exercises, significant influence or control over the company.

Regarding the third test, whether a person exercises significant influence or control over a company will be determined by reference to guidance to be published by the Secretary of State. Depending on the nature of that guidance, the identity of persons subject to identification on the PSC Register could be significantly widened to include, for instance, shadow directors, creditors holding security, or other persons with contractual or equitable arrangements with companies.

A number of new rules have been introduced in an attempt to prevent circumvention of the effect of the reforms, including the following:

- the concept of holding control rights 'indirectly' means that the relevant rights are deemed to be held by the person who actually controls the rights, rather than any person who nominally holds the rights or is legally identifiable as the holder of the rights. For instance, a share held by a person as nominee for another is to be treated as being held by the other person, and not by the nominee. It is therefore no longer possible to disguise beneficial ownership or significant control through the use of nominee or other agency structures, or through the use of derivatives;
- trustees of a trust that has significant control over a company will be deemed a person with significant control over that company and will need to be

identified in the PSC Register. The fact that only trustees must be identified, and not the actual beneficiaries of the trust, does create a significant gap in the effectiveness of the reforms in identifying all beneficial owners. This is perhaps to be expected given the difficulty of determining issues of control in respect of trusts generally under common law;

- if two or more persons each hold a share or a right jointly, for the purposes of the PSC Register each of them shall be treated as holding that share or right; and
- rights attached to shares held by way of security will still be deemed to be held by the person granting the security.

As drafted, an individual will not meet the conditions of significant control by virtue only of being a limited partner of a limited partnership that satisfies such criteria, provided that the individual does not take part in the management of the partnership business. Silent limited partners in such arrangements will still be able to maintain a degree of anonymity under the reforms.

What does it mean to be registrable or non-registrable?

The government has introduced a concept of ‘registrable’ and ‘non-registrable’ persons to create some administrative efficiency for companies that are part of large corporate groups. In practice, these concepts allow a company to identify in its PSC Register only the most proximate parent company in the group that qualifies as a person with significant control over that company. The company is not required to identify all other companies in the group that qualify as persons with significant control over it, provided that the most proximate parent company also maintains a PSC Register.

For example, if Company A is wholly-owned by Company B and Company B maintains its own PSC Register, then:

- Company C, that has significant control over both Company A and Company B (as a result of its shareholding in Company B) does not need to be included in the PSC Register maintained by Company A;
- instead, Company B will be noted in the PSC Register maintained by Company A as a person with significant control of Company A; and
- an inquirer would then need to examine the PSC Register maintained by Company B to identify that Company C has significant control over both

Company B and Company A.

This requirement therefore places an effective limitation on the extent of investigation required to be undertaken by certain companies to identify those persons to be added to the PSC Register.

As a consequence, this exemption has the effect that the PSC Register of individual companies may not of itself comprise a complete look-through to the ultimate beneficial owners. There will still, therefore, be some investigatory steps required to piece together ownership chains.

What information has to be recorded?

The government intends to ensure that the PSC Register enables the complete identification of the relevant individual beneficial owner, or in the case of a relevant legal entity, the full identification of that entity for the purposes of enabling further discovery of the beneficial owners of that entity.

The information required to be included in the PSC Register for individuals with significant control will be equivalent to information required to be held in respect of company directors. It will include the individual’s full name, address for service of documents, country or state of usual residence, nationality, date of birth and usual residential address. The usual residential address of an individual will be considered protected information. While recorded in the PSC Register, it will be omitted from the public register at Companies House and from the information required to be made available at the registered office of the company for inspection.

In the case of a relevant legal entity recorded on a PSC Register, the required information will include its corporate or firm name, registered or principal office, legal form and law by which it is governed, register of companies in which it is entered and registration number.

In all instances, the PSC Register must include in respect of each person with significant control a note describing which of the specified conditions for being a person with significant control have been met, and the nature of such control. For instance, a person who acquired significant control pursuant to the general test mentioned above will have to state this fact, and will be required to state the

nature by which the significant control is acquired.

If a company does not have any individual or legal entity who qualifies as a person with significant control, the company will be required to make a

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statement to that effect on its PSC Register, which must still be maintained and publicly available.

Who is obliged to investigate to obtain all this information?

The government intends to place the burden of investigation and discovery on companies themselves. The reforms impose obligations on all UK companies to investigate and identify all persons who may have significant control with respect to that company, to ensure the PSC Register maintained by the company is accurate, complete and current. These obligations include the requirement for the company to:

- take reasonable steps to determine if there is any person who should be included on the PSC Register, and to identify and give notice to such persons requiring them to state whether or not they are registrable;
- give notice to any person it knows, or has reasonable cause to believe, knows the identity of any person registrable on the PSC Register, requiring that person to state whether they have such knowledge and supply or confirm particulars. There is an exception where legal professional privilege applies; and
- give notice to a person included on the PSC Register if it knows, or has reasonable cause to believe, that there has been a change in the particulars of such person or such person has ceased to be registrable on the PSC Register.

If a company fails to comply with its obligations to investigate, it and every officer in default commits an offence. Similarly, if a person fails to comply with a notice issued by a company in respect of the PSC Register, or knowingly or recklessly makes a false statement in response to such notice, that person commits an offence (unless that person can

show that the notice was issued in a frivolous or vexatious manner).

Are there any obligations on individuals if the company does not serve notice?

In addition to a requirement to respond to notices sent by the company, individuals who may be registrable have a proactive disclosure obligation where:

- they know or ought reasonably to know that they are a person with significant control of the company;
- they have not received a relevant notice from the company; and
- the circumstances above have continued for at least one month.

Do the reforms have effective sanctions to ensure compliance?

The legislation makes available various sanctions in the case of non-compliance with the new regime. Companies themselves are empowered to impose sanctions on individuals or legal entities who fail to comply with their obligations to provide particulars for inclusion in the PSC Register, or who fail to respond to a notice requesting confirmation of their status. There is no requirement on companies to seek a court order to enforce such sanctions.

If a person with a relevant interest that may require registration on the PSC Register fails to comply with a notice sent by the company, the company may issue a

courts to have the restrictions lifted. The courts may only do so if the relevant facts about the interest are disclosed to the company and the person failing to make the initial disclosure accrued no unfair advantage by delaying the disclosure. Following the imposition of the restrictions, the company may seek a court order that a relevant interest subject to restrictions is sold or transferred to another nominated person.

There is no positive obligation on companies to actually implement these sanctions. While companies are empowered to serve a restrictions notice, they are not obliged to do so. Provided that a company complies with its obligations to take reasonable steps to obtain the relevant information, and uses whatever information it has to maintain the PSC Register as accurately as possible, the draft legislation will not require it to issue a restrictions notice to an individual who fails to comply with its request for information.

When I saw it was a time for a change

Some companies' compliance burden will increase significantly

The reforms will create a new compliance burden for all UK companies. For many, identifying persons with significant control will be a straightforward exercise, and compliance with the new regime will involve little more than a regular filing of information with Companies House. However for companies with complex ownership structures – and those with shareholder registers that include overseas individuals

and entities, or with ownership and control structures involving multiple arrangements or agreements – compliance with the new regime will entail significant investigatory efforts. These companies can expect to be required to undertake significant investigation into the identity of their ultimate beneficial owners, and to follow up on myriad potential avenues of enquiry to ensure the completeness and accuracy of the companies' PSC Register.

Increased anonymity advantages for some

As noted above, limited liability partnerships, discretionary trusts and limited partnerships are, to various extents, exempt from the disclosure requirements or are able to circumvent from disclosure certain persons who may actually have a substantial beneficial interest in the

relevant company. It may be expected that persons wishing to maintain a degree of public anonymity in their dealings may begin to favour these legal forms as a means of minimising the impact of the new requirements.

The reforms may not catch overseas individuals and companies

One of the open questions is how effective the new regime will be in penetrating legal forms and corporate structures of entities incorporated outside the UK. Companies will have the ability to impose restrictions on such entities if they do not cooperate. However it would be unlikely for a company to take this drastic step in the event that an overseas entity complied with the letter, if not the spirit, of the law and was still able to frustrate attempts to identify the ultimate beneficial owner due to different or less stringent disclosure standards in overseas jurisdictions.

One result of the reforms may therefore be the discouragement of direct investment into the UK, and the encouragement for individuals to do so via jurisdictions with less strict and transparent disclosure regimes.

Reforms stricter than the rest of Europe

The proposed Fourth Money Laundering Directive of the European Commission also contains provisions requiring companies to obtain and hold adequate, accurate and current information on their beneficial ownership. However, as proposed, the directive only requires companies to hold such information to enable government authorities (for the purpose of enforcement) and certain other firms (who require the information to comply with their own anti-money laundering obligations), to access such information in a timely manner. It does not require the information be made available to the public or is otherwise more widely published.

The reforms will be implemented

At the time of writing, the bill is at the Committee Stage in the House of Lords. As it enjoys cross-parliamentary support it is unlikely to be impacted greatly by the UK general election due to take place in May 2015, and is therefore expected to be passed in the near future. The requirement for companies to maintain a PSC Register is proposed to take effect on January 1 2016.

Read online at iflr.com/UKregister

The reforms will create a new compliance burden for all UK companies

warning notice that it intends to issue a restrictions notice with respect to the relevant interest. A restrictions notice may then be issued one month later if the person fails to comply with the warning notice and has not provided a valid reason for non-compliance.

The consequences of a restrictions notice being served are significant. Any purported transfer of interests subject to such restrictions is void and no rights may be exercised, nor any shares issued in respect of that interest. The company will also be prevented from paying any sums due (such as dividends) in respect of that interest while the restrictions notice is current (other than in circumstances where the company is in liquidation).

A person who receives a restrictions notice from a company may apply to the