

KIRKLAND ALERT

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New UK Law Will Require Public Disclosure of Individuals Anywhere in the World Who Control UK Companies

Summary

- From 6 April 2016, most UK companies and limited liability partnerships will be required to identify and keep a register of any individuals – i.e., human beings – who ultimately control them, wherever in the world those individuals are located. This applies whether or not they are operating entities and regardless of whether they are operationally controlled from outside the UK.
- The names of the controlling individuals will be accessible via a publicly searchable database.
- Affected UK companies should be preparing to comply with the new obligations. Controlling individuals (and certain legal entities through which they hold their interests) will also be subject to proactive disclosure obligations. Failure to comply with these obligations may attract criminal sanctions and can result in the shares of the UK company being disenfranchised.

From 6 April 2016, most UK corporate entities will be required to identify and keep a register of the individuals (of any nationality or domicile) who ultimately control them.

Background

During its 2013 Presidency of the then-G8, the UK Government committed to increasing corporate transparency by creating a publicly accessible central registry of individuals who ultimately control UK corporate entities, wherever in the world those individuals are located. The policy objective is to reduce financial crime, through tackling the misuse of corporate structures, and to provide a single information source in order to support global law enforcement processes.

'Trust is one of the most important commodities in the investment market. If you do not know who is behind a company, how can you be sure who you are doing business with, what motivates them and what they might be trying to achieve?' (Baroness Neville-Rolfe DBE CMG, Parliamentary Under-Secretary: Department for Business, Innovation and Skills).

What are the new requirements?

From 6 April 2016, most UK companies and limited liability partnerships (referred to in this note as 'companies') will be required to keep an up-to-date register of any individuals – i.e., human beings – who ultimately control them (defined in the legislation as a 'person with significant control', or 'PSC' for short). UK companies whose shares are admitted to trading on the London Stock Exchange or on another European regulated market (or on specified markets in the USA, Switzerland, Japan and Israel) are exempt from the requirement, on the grounds that they are already subject to rigorous transparency rules.

Over the coming weeks, relevant UK companies will need to take steps to find out whether they have any PSCs and, if so, to obtain information about them for inclusion in the company’s PSC register, wherever in the world those individuals are located. This applies whether or not the UK company is an operating company and regardless of whether it is operationally controlled from outside the UK. Companies (and their directors) who fail to take the requisite steps may face criminal sanctions.

An individual must satisfy, directly or indirectly, one of the five Conditions in relation to a UK company in order to be a PSC.

PSC individuals (and, in specific instances, certain companies) are expected to provide the necessary information, and failure to do so can also give rise to criminal sanctions. In addition, the UK company can impose restrictions on its shares or rights – including disenfranchising shareholders and blocking any dealings in its shares – if that information is not forthcoming.

Whether an individual is a PSC of a UK company will depend on whether he or she meets one or more qualifying Conditions in relation to the company – Box A below lists the relevant Conditions and Box B summarises the interpretative guidance on the Sweeper Conditions. The legislation also contains ‘anti-avoidance’ provisions – for example, where shares or rights are held by a nominee or under joint arrangements, or where they are controlled by someone else.

Box A – One or more of the following Conditions must be satisfied	
<i>Ownership of shares</i>	Directly or indirectly holding more than 25% of the company’s shares
<i>Holding voting rights</i>	Directly or indirectly holding more than 25% of voting rights at general meetings
<i>Board control</i>	Directly or indirectly controlling the appointment of directors holding a majority of voting rights
<i>Sweeper: Individual</i>	Having the right to exercise, or actually exercising, significant influence or control (see Box B below)
<i>Sweeper: Trust or firm</i>	Having the right to exercise, or actually exercising, significant influence or control over a trust or firm which would meet one of the Conditions (see Box B below)

Box B – Statutory Guidance on what constitutes ‘Significant Influence or Control’

The following would be indicative of having ‘significant influence or control’ over a UK company:

- Having (individual or joint) absolute veto rights over fundamental business decisions (customary minority protection veto rights would not typically be enough) or over the appointment of the majority directors
- Being significantly involved in its management and direction, including exercising requisite influence at board or shareholder level (this is intended to catch something less than shadow directorship)

The following would be indicative of having ‘significant influence or control’ over a trust or firm:

- Having the right to direct or influence the running of fundamental aspects of its activities or being regularly involved in running it
- Controlling the management or activities of a limited partnership without legal personality e.g. as a general partner

The cumulative effect of rights and relationships must be considered

Employees, directors and professional advisers will not normally be considered PSCs. This would include non-executive directors who have board-level casting votes, as well as employees or directors of a third party which itself has ‘significant influence or control’ over the company or trust/firm.

Controlling individuals will be subject to proactive disclosure obligations; failure to comply may result in criminal sanctions and disenfranchisement of their shares in the UK company.

Where a UK company is part of a larger group and its shares or rights are held by an individual ‘indirectly’ i.e., through one or more entities with legal personality (wherever in the world they are located), the legal entity immediately above the UK company must hold the shares or rights **and** the individual and each legal entity in between must hold a so-called ‘majority stake’ in the legal entity immediately below it: see Box C and Fig. 1 below. In the absence of a majority stake at each level in the chain, the individual will not be considered an indirect PSC of the UK company under the first three Conditions listed in Box A above. However, the requirement for there to be a ‘majority stake’ at each level in the chain does not apply in the case of the Sweeper Condition listed in Box A above.

Box C – Majority stake

- Holding a majority of voting rights
- Being a member and having the right to appoint or remove a majority of the board of directors
- Being a member and controlling alone, pursuant to an agreement with other members, a majority of voting rights
- Having the right to exercise, or actually exercising, dominant influence or control

In Fig. 1, X is a direct PSC of A and an indirect PSC of D. Y is also a direct PSC of A, but is not (subject to the application of the Sweeper Condition) a PSC of D (because, assuming none of the other ‘majority stake’ tests are satisfied, Y does not hold a ‘majority stake’ in A). Z is not (subject to the application of the Sweeper Condition) a PSC of either of A or D.

What information needs to be contained in the PSC register?

There must always be an entry in the company’s PSC register – even if this is a holding disclosure (for example, explaining that the company is in the process of investigating the position). The legislation anticipates that companies may not have *any* relevant PSC individuals or may have more than one.

A PSC has to be an individual: Box D below details the information that will be required for each PSC individual. However, in certain cases – to avoid duplication of registrations in a group context – another UK company which has the same PSCs (or a company which is exempt from the requirements) must be recorded in the register instead.

Who can access the information?

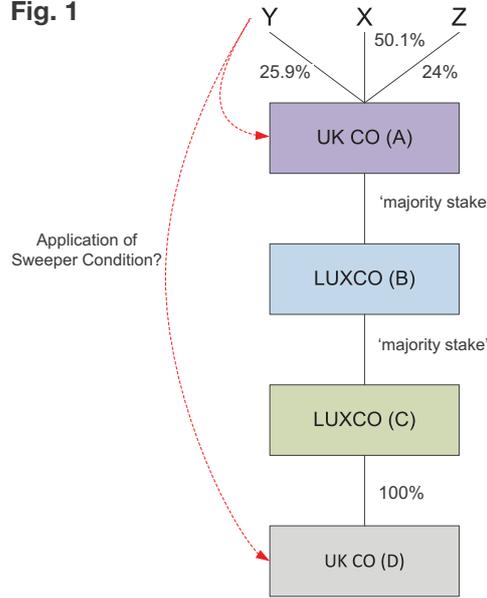
Any person with a proper purpose may inspect the company’s PSC register (without charge) or may require a copy of it (on payment of a nominal fee). In either case, a PSC individual’s usual residential address must be withheld by the company.

From 30 June 2016 onwards, UK companies will also have to file up-to-date information on their PSCs with the UK Companies’ Registry at least once in every 12 month period. The information filed will be publicly available online, free of charge. The PSC individual’s usual residential address and the day of their date of birth will not be made public, but will still be available to credit reference and law enforcement agencies.

Box D – Required details: Individuals

- Name
- Date of birth
- Nationality
- Country/state or part of the UK in which resident
- Service address
- Usual residential address
- Date of becoming a PSC
- Which of the Conditions are met (with quantification, where required)
- Whether an application has been made for protection from public disclosure

Fig. 1



Details of controlling individuals will be accessible via a publicly searchable database.

It will be possible for an individual or UK company to apply for a PSC individual’s residential address not to be shared with credit reference agencies. In addition, where there is a serious risk of harm to the individual, it will also be possible to apply to keep all PSC information private. In all cases, the information will still be available to law enforcement agencies.

Application to interests in UK companies held through private fund structures

The application of the new provisions to interests in UK companies which are held through a private fund structure is complex and may be uncertain, given that the Statutory Guidance on the Sweeper Condition is only indicative. Determining which (if any) principals or other key individuals within the fund management structure are PSCs of a UK portfolio company is inevitably fact-specific and will ultimately depend upon the fund's investment and the GP's ownership and control structure.

More generally, sponsor firms will need to consider how the analysis will sit alongside their disclosure positions in other contexts – for example, for regulatory or accounting purposes. Specifically, in assessing the application of the new PSC regime, regard should be had to the UK's future implementation of the Fourth EU Anti-Money Laundering Directive, as précised below:

'The PSC regime will provide the basis for the UK's implementation of the [4th EU AML Directive] from the implementation date of 27 June 2017, subject to any further modification required to complete the implementation. A company's PSC may be regarded, for that purpose, as equivalent to its beneficial owner' (the Department for Business, Innovation and Skills, as laid before Parliament during implementation of the PSC regime).

Conclusion

- It remains to be seen whether the new transparency requirements will achieve the UK Government's ambitious policy objectives in the longer term.
- Regardless, relevant UK companies should be taking steps to review their ownership and control structures and gather relevant information *now*, in readiness for implementation on 6 April 2016. Likewise, individuals with significant control over a UK company should be preparing to provide the required information. From 30 June 2016 onwards, that information will become publicly available online.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

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Relevant UK companies should take steps to review their ownership and control structures in readiness for 6 April 2016.