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## UK Companies Must Disclose Beneficial Owners

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*From April 2016, UK companies will be required to maintain a publicly available register of people who have “significant control” over them. This new register is part of a wider movement to increase transparency around who ultimately owns and controls companies incorporated in the UK and is being implemented before other EU countries do the same in 2017. With final form guidance due in the next few months, now is the time for companies to consider how they will approach what could well be a time-consuming process of compiling the register, informing possible overseas shareholders on the new rules, and ensuring compliance with these new obligations.*

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The new rules will apply to all public and private companies incorporated in the UK, other than those already subject to transparency requirements under Chapter 5 of the Disclosure and Transparency Rules. The Government has confirmed that from 2016 requirements equivalent to the new rules for companies will also apply to LLPs formed in the UK.

While the legislation imposing the obligation has been approved by Parliament, the regulations setting out the details of the rules and the corresponding guidance are currently in draft form. The draft regulations were originally scheduled to be laid before Parliament last autumn but, at the time of writing, we continue to await the finalised regulations and guidance on them.

### **Persons of Significant Control (PSC)**

For the purposes of the PSC register, a person who holds “significant control” over a company is any person who, either alone or as one of a number of joint holders of the share or right in question:

- ultimately holds, directly or indirectly, 25% or more of the company’s shares or voting rights in the company;

- has the right, directly or indirectly, to appoint or remove the majority of the board of directors of the company;
- has the right to exercise, or actually exercises, significant influence or control over the company; or
- has the right to exercise, or actually exercises, significant control over a trust or firm that is not a legal entity but which itself satisfies one or more of the above conditions.

Importantly, in this context, “ultimately” means looking up through the chain of ownership until the last person satisfying one of the above criteria is identified. It is not necessarily enough to identify just the immediate controllers.

In addition to details such as the name, service address, nationality and date of birth of each person identified, the PSC register must also include details of the nature and extent of the control of those persons. The exact percentages of amounts held may not need to be disclosed, but in certain instances it must be indicated if the amount held is 25-50%, 50-75% or 75-100%.

### The meaning of “significant influence or control”

#### General principles

In late December 2015, the UK Government published draft guidance setting out a number of principles and examples which are indicative of holding the right to, or actually exercising, significant influence or control.

The draft guidance confirms that significant influence and control are alternatives. A person has **control** of a company, or of the activities of a trust or firm, if he or she has the power to direct its policies and activities. A person has **significant influence** if he or she can ensure that the company or trust adopts those policies or activities that he or she desires to be adopted. The draft guidance clarifies that the control or significant influence does not need to be directed towards the financial and operating policies of the company or trust and does not have to be exercised by a person with a view to gaining economic benefits from the policies or activities of the company or trust.

#### Companies

A person may hold a right to exercise significant influence or control over a company as a result of a variety of circumstances including but not limited to the provisions of a company’s constitution, the rights attached to shares in the company, a shareholders’ agreement or some other agreement. The draft guidance sets out a number of examples of rights which may constitute significant influence or control, including:

- veto rights or absolute decision rights over decisions related to the running of the company’s business, including rights over adopting or amending a company’s business plan, changing the nature of a company’s business or making additional borrowing from lenders; and
- veto rights over the appointment of the majority of the board of directors.

Helpfully, the draft guidance notes that a veto right for the purpose of protecting a minority interest (for example, amending the constitution or dilution of shares) is unlikely, on its own, to constitute significant influence or control. It also includes confirmation that a person would not have significant influence or control where the veto rights derive solely from being a prospective seller or purchaser in relation to the company, for a temporary period of time (for example, pending clearance by competition authorities).

The draft guidance also sets out specific safe harbours which will not usually constitute significant influence or control, including:

- a person providing advice or direction in a professional capacity;
- a person engaging in a third-party commercial or financial agreement (such as a supplier, a customer or a lender);
- an employee acting in the course of their employment; and
- a director of a company.

### **Limited partnerships**

The Government has stipulated in its draft statutory guidance that, in the case of firms such as limited partnerships, anyone who controls the management or activities of the partnership or firm will be considered a PSC, which in most cases will be the general partner.

### **Trusts**

With regard to trusts, a person exercises significant influence or control over the trust if they have the right to direct or influence the running of the activities of the trust. For example:

- an absolute power to appoint or remove any of the trustees;
- a right to direct the distribution of funds or assets;
- a right to direct investment decisions of the trust;
- a power to amend the trust deed; or
- a power to revoke the trust.

The guidance notes that a person is likely to exercise significant influence or control over a trust if they are regularly involved in the running of the trust or firm. For a discretionary trust, this will most likely be the trustees whereas for a bare trust the settlor or protector may also need to be included on the PSC register, as well as any beneficiaries who are actively involved in directing the activities of the trust.

### **Limited liability partnerships**

For limited liability partnerships, the Government has published draft guidance which largely follows the guidance for companies on the meaning of significant control. Broadly, the guidance only varies to take into account the differences between the structures of companies and LLPs. Most notably:

- whether a person directly or indirectly holds a 25% ownership interest will be determined by reference to rights in respect of the surplus assets of an LLP on winding up;
- in relation to the voting rights condition, LLPs must consider rights to vote on matters which are decided by a vote of the members; and
- in determining if someone holds a right to exercise control, the terms of the LLP or other agreement, through rights attached to a financial interest or otherwise, should be considered.

A person who is likely to receive more than 25% of the profits of an LLP is given as an example of what might constitute a right to exercise significant influence or control.

## Identifying PSCs

The general requirement is that entities must take reasonable steps to identify their PSCs. Entities should consider who may meet one or more of the conditions by reviewing documents such as their constitution, register of shareholders or members, shareholder agreements and other agreements concerning appointment and removal of directors. Any other relevant information should also be followed up; the key test is what a reasonable person would do if he or she were aware of that information.

Companies must serve notice on those who they know or have reasonable cause to believe should be recorded on their PSC register or who might have knowledge of such persons. If the company does not receive a response to such a notice within one month, it may send a warning notice giving the recipient another month to respond, followed by a restrictions notice if the recipient fails to respond. (See “Consequences of Non-Compliance” below.)

## Consequences of Non-Compliance

The new rules provide for sanctions against those who do not declare their interests in UK companies. These affect both the company and its PSCs. First, the company in question, and its directors and officers, and the individuals or legal entities which have significant control over the company may face criminal penalties for non-compliance.

Second, PSCs who do not comply with the requirements may become disenfranchised by means of a “restrictions notice” issued by the company, which will freeze the shares from transfer and rights of the person in question (including the receipt of dividends).

## Exceptions

The new rules provide extremely limited exceptions to the obligation to include persons holding significant control on the PSC register. Such persons may only apply to have some or all of their information withheld from the public register or from being shared with credit reference agencies if they believe that there is a serious risk that they or someone they live with will be subjected to violence or intimidation.

## International Reach

The new rules apply equally to UK companies sitting within corporate structures with only UK-incorporated entities and to those companies with overseas holding companies (either directly or indirectly). UK companies will therefore be required to disclose details of their PSCs, regardless of jurisdiction. This may be challenging for UK companies with overseas holding companies, particularly as those overseas entities will be within their rights to refuse to be compelled to comply with UK law.

The new rules do not, however, apply to companies incorporated overseas which have only a “UK establishment” or “branch” in the UK.

There have been repeated calls from the UK Government for British Overseas Territories to adopt similar rules making it mandatory to make company beneficial ownership information open to the public. So far, none of the territories have agreed to do so.

## Timetable for Implementation

Companies are obligated to keep a PSC register from 6 April 2016, which must be kept available for inspection at the company's registered office, or for private companies, on the public register at Companies House. In addition, companies will be obligated to deliver the information contained in the PSC register to Companies House with all confirmation statements (which are replacing the annual return) filed on or after 30 June 2016 and the information will also need to be provided on incorporation of companies after 30 June 2016.

## Looking Forward

The Government's draft guidance on the rules is subject to public consultation, with final form guidance due to be published in the coming months. We will release another update once the final guidance has been published.

In the meantime, companies should bear in mind that compiling the PSC register could be a lengthy and time-consuming process, particularly those which are members of complex and/or multi-jurisdictional corporate structures. Companies should begin now to consider how they will approach compiling their PSC registers in order to ensure they are compliant with the new rules in time. UK companies with overseas shareholders may also find it helpful to brief their overseas shareholders on the new obligations and the potential consequences of non-compliance.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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