Out of the shadows

Large Corporate OMB



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Andrew Goodman and *Andrew Dickson* provide an overview of the rules regarding persons with significant control of a company

Key Points

What is the issue?

New rules are now in place for most UK companies and LLPs requiring public disclosure of the persons who beneficially own or control the entity.

What does it mean to me?

Clients may not be up to speed with their legal obligations under the PSC rules and may need reminding of the basic principles.

What can I take away?

How to identify a person with significant control of a company and in particular those companies held by trusts.

Since 6 April 2016, most UK companies and LLPs have been required to keep a ‘persons with significant control’ (PSC) register identifying the individuals who are their ultimate beneficial owners and controllers. From 30 June the new look annual returns, now called ‘Confirmation Statements’, must contain a snapshot of the information and will be available online from Companies House.

The PSC register will be an unpleasant concept for those valuing their privacy. For example, before the introduction of these rules, the beneficial ownership of private company shares could be kept confidential via the use of nominees. Now this information can be accessed by the public and journalists in just a few seconds.

Who is subject to the rules?

The rules apply to most UK incorporated companies and LLPs and, of these, only the following remain outside of their scope:

- Open Ended Investment Companies;
- Community benefit societies;
- Charitable Incorporated Organisations;
- Certain publicly listed companies – including UK listed companies (described as ‘DTR5 Issuers’) and those listed on specified exchanges in the EEA, Switzerland, the USA, Japan and Israel.

Foreign entities which have registered branches in the UK have not been brought within the rules, although David Cameron announced on 12 May that the register will be extended to all companies holding UK land. Whether, when and exactly how this will be implemented (particularly given the Government’s new focus on Brexit)

remains to be seen.

Who will be registrable?

Only an individual or a Relevant Legal Entity ('RLE') can be entered on a company's register. Broadly, an RLE will be either a UK company which maintains its own PSC register or is listed on the regulated markets mentioned above.

If the 'PSC' is not a natural person or RLE, its name cannot be entered on the register and further investigation is required to look at the ownership and control of the entity. Where a company is controlled by a chain of entities only the first RLE above it in the chain needs to be entered on the register.

First step: identifying PSCs

The first task for a company or LLP subject to the rules is to take 'reasonable' steps to identify any PSCs. For companies, a PSC will be a person who meets one or more of the following conditions:

1. directly or indirectly holds more than 25% of the shares;
2. directly or indirectly holds more than 25% of the voting rights;
3. holds the right to appoint or remove the majority of the board of directors;
4. has the right to exercise, or actually exercises, significant influence or control; or
5. has the right to exercise, or actually exercises, significant influence or control over the activities of a trust or firm which is not a legal entity, but would itself satisfy any of the first four conditions if it were an individual.

Shareholdings and rights held indirectly will only trigger registration if held via a 'majority stake' in a controlling company so, for example, a 100% shareholder of an overseas company which in turn holds 40% of UKCo would not be registrable despite owning a de facto 40% of UK Co by value. Nominee arrangements are transparent – requiring the company to look through to the underlying beneficial owner.

The fourth and fifth tests identify someone as being a PSC where that person exercises 'significant influence or control' either over the company itself or over the

activities of a trust or a firm which meets any of the other conditions. These terms are defined widely and the most difficult test to apply will be whether an individual is ‘actually’ exercising influence and control in the absence of any legal rights.

The statutory guidance sets out two principal (but non-exhaustive) examples for companies which require the registration of a person where:

- the person ‘regularly or consistently directs or influences a significant section of the board, or is regularly consulted on board decisions and whose views influence decisions made by the board’ or
- the person’s ‘recommendations are always or almost always followed by shareholders who hold the majority of the voting rights in the company, when they are deciding how to vote’.

There is no exclusion based on a person’s residence so individuals can be located in any jurisdiction – although the limited definition of an RLE means that most non-UK companies will not qualify.

The statutory guidance also provides a helpful list of roles and relationships for which the carrying out of normal duties will not constitute ‘significant influence or control’. These include directors of the company itself, directors and employees of other entities with significant influence or control over the company and professional advisers such as accountants, lawyers and financial advisers.

Second step: contacting PSCs

The actual process to be followed by the company appears designed to combat complex structures, which unfortunately adds a layer of bureaucracy to the majority of straightforward cases. After identifying its PSCs (or suspected PSCs) a company must contact them for the information it requires to complete the register. If it cannot obtain all the information it needs, the company must state the steps that it has taken and, importantly, it cannot record an individual’s details on the register unless and until the PSC has provided their written confirmation.

For each individual PSC, the company will require the person’s name, date of birth, nationality, country of residence, service and residential address, and the dates when the individual became, or ceased to be, a PSC in relation to the company. The register must also record which of the five conditions applies.

Where a company has identified a PSC but cannot obtain information from that party for the register then it should serve a notice requiring a response from the PSC within one month. PSCs commit a criminal offence if they do not respond. If the company still has not received a reply, it must send an additional warning notice and if this does not provoke a response the company can impose restrictions on any shares or rights the person holds in the company. These restrictions are supposedly not mandatory but the guidance states that 'restrictions should be considered as part of the company's legal requirements to take reasonable steps'. Where information remains outstanding about a PSC the register should state: 'The company has identified a registrable person in relation to the company but all the required particulars of that person have not been confirmed.'

How trusts will be affected

For trusts, the rules need to be considered at two levels – how they apply to the trustees, and then how they apply to the trust itself.
If a trust meets one of the conditions set out above, then the trustees may need to be included on the register:

- individual trustees must be included as PSCs (joint owners such as trustees are treated as owning the whole);
- UK corporate trustees must be included as a 'relevant legal entity'; and
- offshore corporate trustees are not included but their ownership structure will need to be reviewed to identify any individual or relevant legal entity with a 'majority stake' in the company.

It is then necessary to identify any individual who has 'a right to exercise, or actually exercises, significant influence or control over the activities' of the trust. This would include the right to:

- appoint or remove trustees;
- direct the distribution of funds or assets;
- direct investment decisions of the trust;
- amend the trust deed; or
- revoke the trust.

These terms could include both protectors and settlors holding formal powers and anybody regularly influencing these decisions without formal power to do so. The

statutory guidance provides a description of ‘actual’ influence or control akin to that for companies, fortunately with the same exclusions for directors and employees of trustee companies and all manner of advisers.

Corporate trustees should take steps now to identify all of their trusts that meet one of the conditions and begin the process of identifying those individuals with either formal influence and control (such as protectors) or informal influence, for whom registration would be particularly unattractive. It may also be possible to plan around the new rules – for example, substituting individual protectors with professionals or protector companies and diluting shareholdings.

Family companies held by offshore trustees will not of course wish to record that family members are exercising informal control over their trustees and so, in some cases, now would be a good time to educate settlors and beneficiaries in the need for trustees to administer the trust without undue influence, which might otherwise place them all in a difficult position if HMRC were to review their filings. The register is based on the current position and so a clean break from the past should allow historical influence to be ignored provided the individuals can avoid activity that might meet the conditions in the future.