

July 23, 2015

Owning and Controlling a Company in the United Kingdom: The Company Law Reforms

Overview

A number of important reforms are being introduced into UK company law that will increase the accountability of companies registered in the UK. Some are already in effect and some are being introduced on a phased basis up to October 2016. The new measures are intended to make it easier for those dealing with a company to identify the individuals who ultimately own that company and/or influence the decisions about how that company is run. The reforms are part of a global initiative designed to tackle the criminal misuse of companies (whether through money laundering, tax evasion or otherwise) by means of enhanced corporate transparency. The UK has committed to implement this initiative through its Transparency and Trust Agenda. The reforms will impose a significant compliance and administrative burden on companies and certain shareholders.

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The PSC Register

The centrepiece of the company law reforms is the requirement for all companies to maintain a register of individuals who have 'significant control' over the company (a "**PSC Register**"), which will have to be available for public review. The regime will apply to all companies other than those that are already subject to a public disclosure regime. Companies will have to investigate and obtain the requisite information in relation to any individuals with significant control and then compile their PSC Register in readiness for an anticipated January 2016 commencement date. From April 2016, a company will have to provide the information contained in this PSC Register to Companies House at least on an annual basis. Perhaps the most controversial aspect of the reforms is that the PSC information will be available online for public review: Companies House will maintain a system that will be searchable either by company or by individual.

Individuals with significant control will also be under a complementary obligation to disclose their status to the company, either in response to a request for disclosure from a company or if the company has failed to identify their status. Criminal penalties are intended to apply to companies, their directors and relevant individuals or legal entities who fail to comply with their obligations.

Individuals with significant control

Who comes within scope of this new reform? A company will have to collect details of those individuals or relevant legal entities (whether UK resident or otherwise) who own or control more than 25 percent of the shares or voting rights of a company, who have the right to appoint and remove a majority of the board or who otherwise exercise significant influence or control over a company. Specific rules establish how to assess the extent of any individual's shareholding or voting rights for these purposes. Significant control will also encompass interests that are held via joint arrangements and/or indirectly, including via nominee arrangements and via trusts and partnerships, and again specific rules clarify how these arrangements should be assessed in practice.

Indirect Interests and Group Structures

The regime seeks to avoid duplicative reporting. Where an individual has direct significant control of a company via an intermediate legal entity, details of the intermediate legal entity will be included in the company's PSC Register (as opposed to details of the individual who has ultimate significant control), provided that this intermediate legal

entity itself satisfies one of the conditions for significant control and also, significantly, that it is required to maintain its own PSC Register (or to comply with some other form of comparable disclosure requirement).

The legal framework

The framework for these reforms is provided by the Small Business, Enterprise & Employment Act 2015. Much of the detail of how the PSC Register will operate in practice will be provided by secondary legislation and statutory and non-statutory guidance, which is expected to be finalised during the course of the Autumn. When this is finalised, a more forensic analysis of the application of this regime to group and fund structures will be possible, and we will be able to provide practical advice on how portfolio companies should commence the process of compiling their PSC Registers. In respect of shareholders who are limited partnerships, we are assuming that the general partner (and its controlling persons) may be caught by the disclosure obligations, but it remains to be clarified whether any other holders of interests in the partnerships could be.

Abolition of corporate directors

As part of these new transparency reforms, with effect from October 2016, companies will no longer be able to appoint corporate directors (namely, company directors that are themselves a corporate entity) to their boards. Any such appointment made after this date will be void. Existing corporate directors will have a 12-month transitional period during which to resign their office (until October 2017). With effect from the end of the 12-month transitional period, all company directors will have to be natural persons. A consultation process is still ongoing to determine the scope and extent of possible exempted categories of corporate director. Companies with corporate directors should be on notice that changes will need to be made to the constitution of their boards from October 2016. A more definitive action plan will be possible when any exempted categories of corporate director have been finalised.

Expansion of shadow directors' duties

The new transparency measures have also tightened up the application of statutory directors' duties to shadow directors of a company. With effect from 26 May 2015, the statutory directors' duties under UK company law now apply to shadow directors (namely, persons in accordance with whose directions or instructions the directors of a company are accustomed to act) to the extent that they are capable of applying. As it stands, the precise scope and extent of this expansion may be relatively subtle in practice. This said, the BVCA has raised the specific question as to how the duty to avoid conflicts of interest would apply in practice to someone who had unintentionally become a shadow director, on the grounds that usual constitutional provisions addressing how conflicts of interest may be disclosed and managed would not be available to such a person. It is worth remembering that as a matter of good practice, steps should be taken to avoid an individual being inadvertently characterised as a shadow director. In light of the uncertainty that this expansion of liability may cause, a renewed focus on these precautions is advisable.