

January 25, 2016

clearygottlieb.com

The Register of Persons with Significant Control – a new transparency regime for unlisted UK legal entities

The Small Business, Enterprise and Employment Act 2015 (the “Act”), which received Royal Assent on March 26, 2015 and is currently being implemented, introduces a requirement for UK companies and certain other legal entities to maintain a register of persons with significant control (a “PSC register”) from April 6, 2016. In summary, PSC registers will be publicly accessible and are intended to require disclosure regarding the individuals who have ultimate beneficial ownership and control of those legal entities. The new regime will apply only to UK legal entities that are not presently the subject of certain existing disclosure regimes.

The Act aims to promote transparency in the ownership and control of UK companies and certain other legal entities.

The UK government has published draft regulations to implement the regime, along with draft statutory and general guidance, which set out much of the detail. The final regulations and statutory and general guidance are expected to be published in January 2016.

Who will be required to maintain a PSC register?

The obligation to maintain a PSC register will apply to:

- UK companies, other than those subject to an existing disclosure regime (being (i) companies subject to Chapter 5 of the Disclosure Rules and Transparency Rules (the “DTRs”), i.e. companies who have their shares admitted to trading on a regulated market in the UK (such as the Main Market of the London Stock Exchange) and on a prescribed market in the UK (such as AIM), (ii) companies who have their shares admitted to trading on a regulated market in the UK or in the EEA, and (iii) companies who have their shares admitted to trading on certain markets in Israel, Japan, the USA and Switzerland);
- UK LLPs (for which separate regulations and statutory guidance will be published);
- Scottish limited partnerships (which have separate legal personality); and
- UK registered Societas Europaea.

The Secretary of State has the power to extend the obligation to other legal entities. In addition, it is expected that the final regulations will also be extended to certain other legal entities in 2017, when the UK government is due to implement the Fourth Money Laundering Directive.

A definitive list of exempt entities is expected in the final regulations, but it is not currently expected that the regime will apply to English limited partnerships (which do not have separate legal personality).

Who is a PSC?

A person with significant control (a “PSC”) is an individual who meets one or more of the following conditions in relation to a UK company:

1. holding, directly or indirectly, more than 25% of the shares;
2. holding, directly or indirectly, more than 25% of the voting rights;
3. holding the right, directly or indirectly, to appoint or remove a majority of the board of directors;
4. having the right to exercise, or actually exercising, significant influence or control over the company; and
5. having the right to exercise, or actually exercising, significant influence or control over the activities of a trust or firm¹ that would itself meet one or more of the first four conditions, if it were an individual.

Where shares or rights are held by a person as nominee for another person, then those shares or rights will be deemed to be held by the person for whom the nominee is acting.

If two or more persons have an arrangement (which includes any agreement, scheme or understanding (whether legally enforceable or not) and any custom, practice or convention of any kind, but excludes one-off arrangements) to jointly exercise all or substantially all of their rights arising from their shares in a pre-determined way, their shareholdings and rights will be aggregated. Each person must be entered separately on the PSC register.

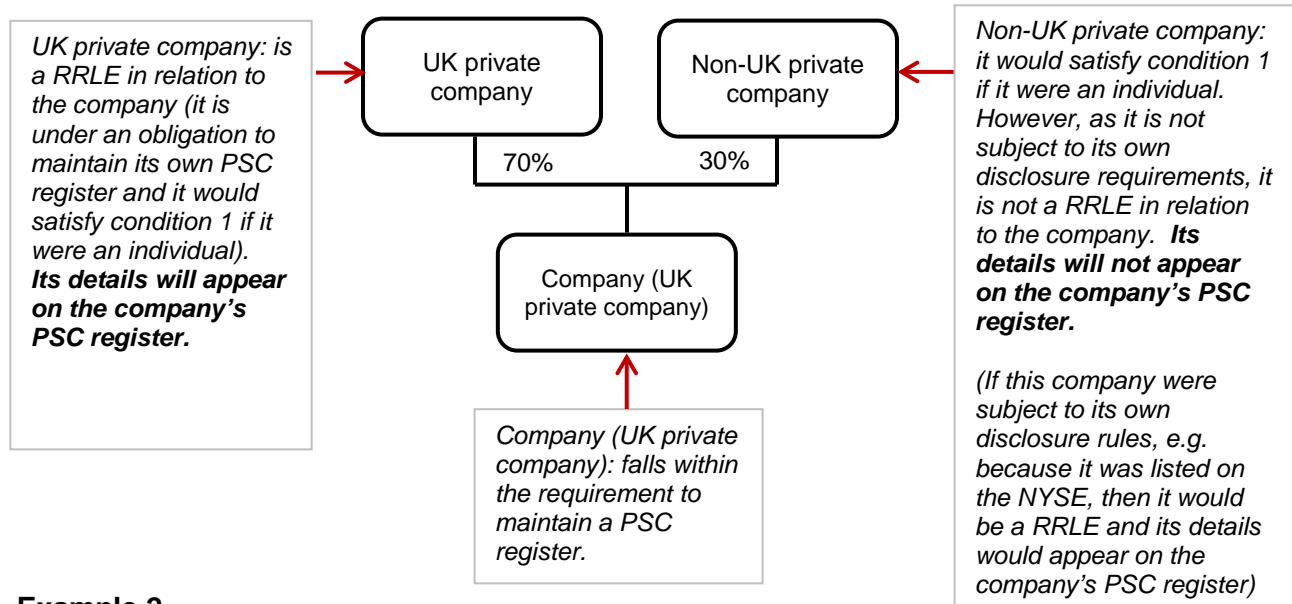
Corporate structures

In corporate structures, it will commonly be the case that a legal entity rather than an individual holds shares or rights in, or has significant control over, a company. If a legal entity would satisfy one or more of the conditions above in relation to a company if it were an individual, the company will be required to enter that legal entity on its PSC register, provided that the legal entity is a “registrable” and “relevant” legal entity (a “RRLE”). This will be the case if the legal entity is required to maintain its own PSC register (for example, by virtue of being a UK company), or it is subject to its own disclosure requirements (for example, because it is subject to Chapter 5 of the DTRs, has shares admitted to trading on a regulated market in the UK or in the EEA, or has shares admitted to trading on certain markets in Israel, Japan, the USA and Switzerland) (see Example 1).

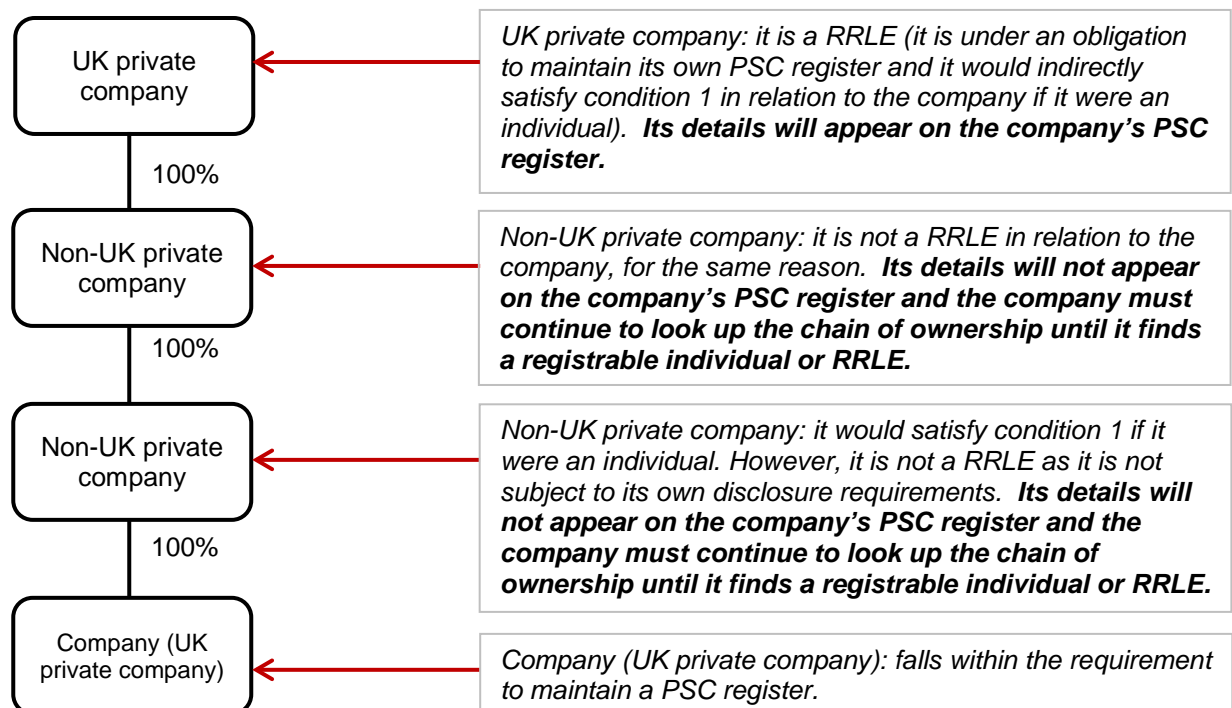
If the legal entity is not a RRLE (for example, because it is not subject to its own disclosure requirements), the company will not be permitted to enter that legal entity on its PSC register; instead, the company must continue to look up the chain of ownership until it finds a registrable individual or RRLE that can be entered on the PSC register (see Example 2).

¹ Partnerships without legal personality, such as English limited partnerships, are “firms” for the purpose of this condition.

Example 1



Example 2



Meaning of “significant influence or control”

The government has issued draft statutory guidance on the meaning of “significant influence or control” in order to clarify the meaning of the fourth and fifth conditions. Separate draft guidance has been published in relation to LLPs. It is currently expected that both sets of guidance will be finalized in January 2016.

In relation to companies, the draft statutory guidance provides that a variety of circumstances may result in a person having the right to exercise significant influence or control over a company; for example, by virtue of the rights attached to the shares, the company’s constitutional documents, or a shareholders’ agreement. A non-exhaustive list of situations indicative of a person having the right to exercise significant influence or control over a company is provided, which includes absolute decision rights or absolute veto rights over decisions relating to the operation of the company’s business, such as adopting or amending the business plan, approving additional borrowing from lenders and changing the nature of the company’s business. Having an absolute veto right in relation to certain fundamental matters relating to the company’s business for the purpose of protecting minority rights alone is unlikely to constitute “significant influence or control” (for example, having a veto right over amendments to the company’s constitution or the decision to wind up the company).

The draft guidance also provides examples of situations where a person is likely to be actually exercising significant influence and control over a company. These include where persons are involved in the day to day management and direction of a company, or where a person’s recommendations are always (or almost always) followed by majority shareholders when deciding how to vote.

Examples of a person having the right to exercise significant influence or control in the context of trusts and firms are also provided, which include a person having an absolute power to appoint or remove any of the trustees or partners, a right to direct investment decisions of the trust or firm, a right to direct the distribution of funds or assets, a power to amend the trust deed or partnership deed, and a power to revoke the trust or terminate the firm or partnership. The draft guidance provides that a person is likely to be actually exercising significant influence and control over the activities of a trust or firm if they are regularly involved in the running of the trust or firm (for example, if they are the trustee of the trust).

In the case of conditions 4 and 5, a number of “safe harbours” are provided to exclude certain categories of persons from being considered to be exercising significant influence or control over a company, or a trust or firm (for example, professional advisers, commercial third parties such as suppliers and customers, and employees acting in the course of their employment).

Further clarity on the meaning of “significant influence or control” is expected in the final statutory guidance.

Indirect holdings

Individuals or legal entities may also be recorded on a PSC register where they meet one or more of the conditions as a result of an indirect holding of shares or rights, or indirectly having

the power to exercise (or actually exercising) significant influence or control over a company, or a trust or firm.

Shares and rights will be held “indirectly” in a company (“Company A”) where a legal entity (“B”) holds the shares or rights in Company A satisfying the relevant condition, and someone else (either an individual or another legal entity) (“C”) holds a “majority stake” in B. In this case:

- if B is a RRLE – Company A must enter B’s details on the PSC register and B must enter C’s details on its own PSC register;
- if B is not a RRLE – Company A must look to the ownership of B to identify any registrable individuals or RRLEs who have a majority stake in B (which, in this case, would be C). Company A must therefore enter C’s details on the PSC register.

The holding of a “majority stake” includes (using the above example) C holding a majority of the voting rights in B, C holding shares in B and having the right to appoint or remove a majority of B’s directors, C holding shares in B and controlling a majority of the voting rights by agreement with other shareholders, and C having the right to exercise or actually exercising dominant influence or control over B.

If C does not hold a majority stake in B, then it will not satisfy any of conditions 1 to 3 indirectly. However, C may still satisfy conditions 4 or 5 if it indirectly has the power to exercise, or actually exercises, significant influence or control over a company, or a trust or firm. Further guidance as to how these conditions may be satisfied indirectly is expected in the final statutory guidance.

Interests held through an English limited partnership

Where shares or rights in a UK company are held as assets of an English limited partnership, the company will generally be required to enter the details of the general partner on the PSC register (provided that the general partner is a registrable individual or RRLE). This is because the general partner will generally be the person controlling the management and activities of the limited partnership, and will therefore satisfy condition 5 by virtue of being a person with significant influence or control over the activities of a firm. An English limited partner will not satisfy conditions 1 to 3 simply by virtue of being a limited partner. This principle is also expected to apply to foreign limited partnerships.

What information will be contained in the PSC register?

The PSC register must contain the following information in a clear and concise manner that is relevant, appropriate, and proportionate:

Individual	RRLE
<ul style="list-style-type: none"> • Name • Service address • Country of usual residence • Nationality • Date of birth 	<ul style="list-style-type: none"> • Corporate or firm name • Registered or principal office • Legal form and law by which it is governed • If applicable, the register of companies in which it is entered and its registration

<ul style="list-style-type: none"> • Usual residential address • Date on which he became registrable (for existing companies, April 6, 2016) • Which of the conditions for being a PSC are met • Whether any restrictions have been imposed 	<ul style="list-style-type: none"> • number in that register • Date on which it became registrable (for existing companies, April 6, 2016) • Which of the conditions for being a PSC are met • Whether any restrictions have been imposed
---	---

In relation to conditions 1 and 2, the PSC register will need to record the level of shareholding and/or voting rights held by the PSC by reference to defined limits (over 25% up to (and including) 50%; over 50% up to (and including) 75%; and more than 75%). The final regulations are expected to provide that if a registrable individual or RRLE satisfies any of the first three conditions, a company does not have to record in its PSC register that such registrable individual or RRLE also satisfies the fourth condition.

This information will be publicly accessible both on a company's PSC register and at Companies House (as companies will be required to provide this information as part of the annual confirmation statement, which is to replace the annual return from June 30, 2016), other than an individual's usual residential address, which will not be publicly disclosed in either case. The day of an individual's date of birth will also be protected at Companies House (although this will be displayed on the company's PSC register, which may be accessed on request; see below). The exceptions to this are (i) all information held at Companies House will be accessible by law enforcement agencies, and (ii) Companies House will make residential addresses available to credit reference agencies.

However, individuals will be able to apply for their personal information to be restricted if they consider themselves to be at serious risk of violence due to the information being made public and, in relation to their residential address specifically, due to such address being shared with credit reference agencies.

What are a company's (or other legal entity's) responsibilities?

In order to produce the PSC register, the Act requires UK companies and other legal entities falling within the regime to take reasonable steps to identify persons they know or suspect to have, directly or indirectly, significant control over the company. Companies will do this by giving notice to anyone that the company knows or has reasonable cause to believe to be a registrable individual or RRLE in relation to the company. A company may also give notice to a person if it knows or has reasonable cause to believe that the person knows the identity of a registrable individual or RRLE or knows someone likely to have that knowledge, which may include intermediaries or advisers.

The information on the PSC register will need to be sent to Companies House at least once every 12 months (it will be submitted as part of the annual confirmation statement). Private companies may opt to have the PSC information held solely at Companies House and not maintain a separate PSC register.

If a company fails to take reasonable steps to identify its PSCs, a criminal offence is committed by the company and every officer of the company in default, punishable by imprisonment or a fine.

A company's PSC register must never be blank. **If, by April 6, 2016, it has not been possible for a company to confirm the requisite information regarding its PSCs, this fact must be entered on the PSC register.** Going forward, a company must always have on its PSC register information about its PSCs or the status in searching for its PSCs.

What are a PSC's responsibilities?

A registrable individual or RRLE who has significant control over a company will be obliged to inform the company of that fact and provide the relevant information for entry on the company's PSC register. Those who receive notices from the company are required to respond appropriately and a failure to do so is a criminal offence.

In addition, a company can impose voting, transfer or other restrictions on a person who fails to respond to a notice in certain circumstances.

Implications for corporate transactions

If a PSC repeatedly fails to respond to notices received from a company or other legal entity requesting PSC information, the company or other legal entity may impose voting, transfer or other restrictions on the PSC's shares, voting rights or other rights that it holds. Such restrictions may include, for example, that the relevant shares cannot be sold or transferred (and any agreement to sell or transfer the shares is void), that no rights associated with the shares can be sold or transferred (and any agreement to sell such rights is void), or that no rights may be exercised in respect of the shares. The existence of any restriction will be noted on the PSC register.

In the context of share sales, we expect that buyers will, amongst other things, seek warranties from sellers in relation to compliance with the PSC regime, to ensure that any shares and/or rights being acquired are fully transferable, and that any agreement to sell or transfer such shares and/or rights is valid and enforceable. We expect that review of the PSC register, along with establishing compliance with the PSC regime and the existence of any restrictions over shares and rights, will form a key part of a buyer's due diligence.

* * *

If you have any questions, please feel free to contact any of your regular contacts at the firm. You may also contact our partners and counsel listed on our website at <http://www.clearygottlieb.com>.

CLEARY GOTTlieb STEEN & HAMILTON LLP

Office Locations

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG

Cleary Gottlieb Steen & Hamilton (Hong Kong)
Hysan Place, 37th Floor
500 Hennessy Road, Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Cleary Gottlieb Steen & Hamilton LLP
45th Floor, Fortune Financial Center
5 Dong San Huan Zhong Lu
Chaoyang District
Beijing 100020, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI

Al Sila Tower, 27th Floor
Abu Dhabi Global Market Square
Al Maryah Island, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL

Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099