Remote control: Public registers of beneficial ownership for offshore companies

The UK has passed a new law designed to require many companies in its overseas territories, such as the Cayman Islands, to make their beneficial ownership registers publicly available. The law will be fiercely resisted by the overseas territories.

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On 23 May 2018, the UK Parliament passed the Sanctions and Anti-Money Laundering Act, which requires companies incorporated in the Cayman Islands, the British Virgin Islands (BVI), Bermuda and other British Overseas Territories to maintain public registers of their significant beneficial owners.

The UK territories in question already require many companies (although not funds) to maintain beneficial ownership registers, and so the primary effect of the new rules would be to make most of the information on those registers public. Significant uncertainty remains over whether or not public registers will be introduced.

Why has this law been passed?

In April 2016, in response to pressure from the UK government, an agreement was reached with the UK's overseas territories for the creation of registers of the significant beneficial owners of certain companies. These registers are "private", in the sense that they are only accessible to UK law enforcement and tax authorities and not to the general public. The registers are also not required for investment funds and certain other companies.

Following those agreements, the UK government's position has been that public registers would be unnecessary and economically damaging for the territories. But the government's parliamentary majority is very thin, and in May this year a breakaway group of Conservative MPs forced the UK government to include a section in the Sanctions and Anti-Money Laundering Act that obliges the UK government, by 31 December 2020, to take steps to order British Overseas Territories to introduce public registers. Their rationale was that public scrutiny would inform the policy debates in the UK.

Which jurisdictions are covered?

The law covers British Overseas Territories. The most relevant of these to the asset management sector are the Cayman Islands, the BVI, Bermuda and Gibraltar.

Jersey, Guernsey and the Isle of Man are Crown Dependencies - a different category of territory - and are not covered by the new law. They are, though, parties to the agreements reached in 2016 that require private registers to be maintained for law enforcement and tax purposes. The stated intention of the UK government is for public registers to be introduced for the Crown Dependencies as well, but through less coercive means.

Will the rules definitely come into force?

The law has been severely criticised by the Cayman Islands, the BVI and Bermuda. As well as objecting to the threat to their economies, they take the view that the UK government has no constitutional power to impose the registers, even if mandated to do so by the UK Parliament. They also believe that the steps would breach the agreements reached in 2016 regarding private registers.

There has also been noticeable public opposition in the territories, including public demonstrations against the law in the BVI.

If and when the UK government attempts to force the introduction of the public registers, as it is now legally required to do, the territories are certain to raise legal challenges on constitutional and human rights grounds. Regardless of how that litigation might turn out, there would be a lengthy process of litigation before the territories might be obliged to do anything.

What information must the registers contain?

The information to be included on the public registers is expected to be the same as the information already contained in the existing private registers, except that some of the information (such as residential addresses) would not need to be made public in all cases.

More specifically, the registers are to provide information that, in the opinion of the UK government, is “broadly equivalent” to the registers of beneficial ownership that UK companies have been required to produce since 2016, known as “PSC registers”. PSC registers contain information on “people with significant control”, and a “person with significant control” is, essentially, an individual who controls, directly or indirectly, 25% or more of the company’s shares, or who can appoint and remove the directors or otherwise exert significant control over the company. A detailed note on the UK’s PSC registers can be found here.

Which entities need to maintain a register?

The requirement to maintain a register only applies to incorporated entities such as companies and limited liability companies (LLCs). The existing offshore rules also exclude investment funds and SPVs (including many management entities used by UK asset management businesses), on the basis that the offshore funds industry is seen to be low-risk for money laundering by comparison to certain other branches of the offshore industry.

The new UK law does not specify which entities would be subject to the public registers. The position of the territories (leaving aside their opposition to public registers entirely) would therefore be that the scope of the registers, including the exemptions, should remain in line with the agreements reached in 2016, as the new law does not mandate any change. In support of that view, it is notable that the UK PSC regime has a number of exemptions itself (explicit or implied), including open-ended investment companies and listed companies.

Is there any action to take now in respect of existing investment funds?

No. These developments should be watched closely, but there is currently no expectation that investment funds incorporated in these territories would be required to maintain registers of beneficial ownership, even if public registers were ultimately to be introduced.

Further developments

Simmons & Simmons will update you further if there are any significant developments in this area. Alternatively, please get in touch with Art Markham or your usual contact at Simmons & Simmons if you would like to discuss these issues further.

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