

New requirements for companies to maintain registers of people with significant control

Introduction

The Small Business, Enterprise and Employment Act 2015 has introduced new requirements for most UK registered companies and limited liability partnerships to maintain a register of people who have significant control over them (called a “**PSC Register**”).

The requirements¹ apply from 6 April 2016 and entities to which they apply should be taking steps to ensure they are in a position to comply with them from this date as failure to do so will be an offence.

What is a PSC Register?

A PSC Register is an additional statutory register which most UK companies will need to maintain in addition to their existing registers of members, directors and secretaries. It must contain details about:-

- any individuals and registrable relevant legal entities that are deemed to have significant influence or control over the company; and
- the nature of that influence or control.

The register must be kept up to date and be accessible at the company’s registered office (or another location notified to Companies House).

As with other registers, the company must make the PSC Register available for inspection free of charge and must provide copies on request subject to payment of a statutory fee (£12 per request, regardless of how many parts of the register are requested).

The information contained in the register will need to be notified to Companies House at least annually from 30 June 2016 by means of new “*confirmation statements*”, which are replacing annual returns from 30 June 2016.

From 30 June 2016 private companies will be able to elect to maintain their PSC Register at Companies House only, in which case the information must be kept up to date as and when changes occur rather than waiting for the next confirmation statement. It should also be noted that certain information which is otherwise withheld from the public register will be accessible to the public if the register is maintained at Companies House only.

¹ For companies the requirement are largely set out in new Part 21A of the Companies Act 2006, the Register of People with Significant Control Regulations 2016 and the European Public Limited Liability Company (Register of People with Significant Control) Regulations 2016.

Recording information on the PSC Register

Where a PSC or a registrable relevant legal entity (*RRLE*) has been identified, the particulars that must be included in the PSC Register² include details about the PSC or RRLE and details relating to the nature and extent of their influence or control.

In addition to information about PSCs that have been identified, companies must also record in their PSC Register, where relevant:

- the fact that the company is taking reasonable steps to identify PSCs and RRLEs but has not yet identified them³; or
- the fact that the company has taken all reasonable to identify PSCs and RRLEs and is confident that none exist.

The requirements to update the register are ongoing so if the company becomes aware that circumstances have changed it must serve the necessary notices to obtain accurate up to date information as soon as practically possible and update its register once the necessary information has been provided or confirmed. If a response is not received to a notice within one month then a note to that effect must be entered on the register.

What entities need not maintain a PSC Register

All UK registered companies will need to maintain a PSC Register except for:

- companies to which the Disclosure and Transparency Rules apply (this includes companies with shares listed on the Main Market of the London Stock Exchange, AIM or the ISDX Growth Market); and
- companies with shares admitted to certain specified overseas markets⁴.

Meaning of “Person with Significant Control”

A person with significant control over a company is any individual who meets one or more of the following conditions:

1. they hold, directly or indirectly, more than 25% of the shares in the company;
2. they hold, directly or indirectly, more than 25% of the voting rights in the company;
3. they hold the right, directly or indirectly, to appoint or remove a majority of the board of directors of the company;
4. they have the right to exercise, or actually exercise, significant influence or control over the company; or

² Specified in new section 790K of the Companies Act 2006.

³ The wording to be included is set out in Regulations 10 to 17 of the Register of People with Significant Control Regulations 2016.

⁴ Such as EEA regulated markets and specified markets in Switzerland, the US, Japan and Israel.

5. they have the right to exercise, or actually exercise, significant influence or control over an arrangement such as a trust, which is not a legal entity but which meets any of the other specified conditions in relation to the company, or would do so if it were an individual.

Draft guidance regarding meaning of “significant influence or control”

The Department of Business, Innovation & Skills has published draft guidance regarding the meaning of the term “significant influence or control” as used above (the “**draft guidance**”).

The draft guidance highlights the fact that “significant influence” and “control” are alternatives and defines the two terms as follows:

- “Significant influence” enables the person exercising the significant influence to ensure that the company or trust adopts those policies or activities which are desired by the holder of the significant influence.
- a person has “control” of a company or of the activities of a trust or firm if they have the power to direct its policies and activities.

The draft guidance suggests that the right to exercise significant influence or control may derive from, for example, the provisions of the company’s constitution, provisions of a shareholders agreement and/ or rights attaching to a person’s shares or securities. Note that the right to exercise such significant influence or control is sufficient, regardless of whether such rights are in fact exercised.

The draft guidance suggests that the following may be indicative of a right to exercise significant influence or control:

- Absolute decision rights over decisions related to the running of the business (e.g. adopting or amending the business plan, making additional borrowing, appointing or removing the CEO, etc.);
- Absolute veto rights over decisions related to the running of the business (such as those referred to above) except to protect a minority interest (e.g. by preventing amendments to the company constitution or the dilution of shares or rights); and/ or
- Absolute veto rights over the appointment of the majority of the company’s directors.

The draft guidance specifies certain types of roles and relationships (“**safe harbours**”) that are unlikely, in themselves, to give rise to a right to exercise significant influence or control (although they may if the role or relationship differs from how they are typically understood or if they are combined with other factors). The safe harbours include (among others):

- A person providing advice in a professional capacity (e.g. a lawyer, accountant, management consultant, tax adviser, etc.);
- A person engaged in a third-party commercial or financial arrangement (e.g. a lender or customer);
- A person acting under an enactment (e.g. a regulator, a liquidator or a receiver);
- An employee acting in the course of their employment as nominee for their employer (e.g. an employee nominated by their employer to act as a director of a company in which the employer is a shareholder); and
- A director of the company (including a managing director, sole director or director with a casting vote);

Registrable Relevant Legal Entities (RRLEs)

Where another company or corporate entity (**Company A**) has significant control over a company (**Company B**), the way this will be recorded in the PSC Register of Company B will depend on whether Company A is a RRLE.

Company A will be an RRLE with respect to Company B if:

1. It would meet one of the conditions for being a PSC with respect to Company B if it were an individual;
2. It is subject to its own disclosure requirements (i.e. it is covered by the PSC regime or an equivalent disclosure regime); and
3. It is the first such relevant legal entity in Company B's ownership chain.

For example, if Company B is wholly owned by Company A, which is listed on the London Stock Exchange (i.e. subject to an equivalent disclosure regime), then Company A will be a RRLE with respect to Company B and needs to be entered in the PSC Register of Company B. However, if Company A were an overseas company not subject to an equivalent disclosure regime then it would not be a RRLE and so would not need to be entered in the PSC Register of Company B.

RRLE's can themselves be referred to in a company's PSC Register without having to "look through" them to identify their PSCs as well (as the identity of their PSCs will be ascertainable from their own PSC Register or equivalent records). However, if a corporate entity would fulfil the conditions for being a PSC if it was an individual but it is not a RRLE (because, for example, it is not subject to a disclosure regime) then it will be necessary to "look through" that entity to identify any individual PSCs or RRLEs of the intermediate entity who would then need to be entered in the PSC Register of the company. The draft guidance includes example scenarios to demonstrate this.

Obligations on Companies to Identify PSCs

There will be a duty on companies to take reasonable steps to identify their PSCs and RRLEs. Failure to do so will be a criminal offence on the part of the company and any officer who is in default. The maximum penalty for such an offence will be a prison term of up to two years and/ or a fine.

The draft guidance suggests practical steps that a company should take to identify possible PSCs and RRLEs, including reviewing its shareholder register and statement of capital and reviewing its articles of association. However these examples are not exhaustive and the appropriate steps will vary depending on the circumstances.

There are a number of steps the company will be able to take under the new provisions to assist it in identifying and gathering information regarding PSCs and RRLEs:

1. It can send a notice to anyone it knows, or has reasonable cause to believe, is a PSC or RRLE asking them to confirm whether or not they are a PSC or RRLE and to confirm or correct relevant particulars.
2. It can serve a notice on anyone it knows, or has reasonable cause to believe, can identify a PSC or RRLE or knows the identity of someone else who can (e.g. advisers known to act for the PSC or RRLE, family members or associates of the PSC or RRLE etc.).
3. If anyone with a relevant interest in the company (e.g. shares, voting rights, the right to appoint directors etc.) does not respond to a notice, the company may serve a warning notice on them, informing them that the company is proposing to issue them with a restrictions notice in relation to their relevant interest⁵.
4. If, within one month of the warning notice being sent, the initial notice requesting information is not complied with and no valid reason is given for non-compliance, the company may serve a restriction notice. A restriction notice effectively disenfranchises the individual's or corporate entity's interest in the company until the information is provided and the company lifts the restriction.

There is no requirement for the company to issue a restriction notice and the draft guidance encourages companies to consider whether such a step is appropriate, bearing in mind the impact it may have on third parties as well as the individual or corporate entity concerned and the company itself. Where a restrictions notice is issued and the requested information is subsequently provided the company must withdraw the restrictions notice within 14 days.

Obligations on PSCs and RRLEs

PSCs and RRLEs will be under a corresponding duty proactively to notify companies over which they have significant influence or control of their status and particulars. The obligation is triggered if the following conditions are satisfied:

1. A person knows or ought reasonably to know that they are a PSC or RRLE;

⁵ A warning notice must contain the information set out in Regulation 18 of the Register of People with Significant Control Regulations 2016.

2. Their particulars are not already registered in the company's PSC register;
3. They have not received a notice from the company; and
4. These circumstances have continued for a period of at least one month.

The person concerned will then have one month to notify the company that they are a PSC/RRLE, stating the date on which they became such a person and giving the company their required particulars.

There are equivalent obligation on PSCs and RRLEs to notify the company of any change to their status or particulars (for example if they cease to be a PSC or RRLE or if the nature or extent of their influence or control changes in such a way that the particulars contained in the company's register are incorrect or incomplete).

Failure to comply with these obligations will be an offence.

Protection regime

A protection regime, along the lines of the existing regime for protecting director's residential addresses, has been included to protect PSCs who believe the disclosure of certain information will put them or somebody they live with at serious risk. There are three elements to the protection regime:

1. The residential address of PSCs (unless also given as their service address) will not be included in the public register and must be protected by companies when allowing inspection or providing copies of their register. However this information will ordinarily be accessible to specified public authorities and credit reference agencies.
2. A PSC can apply to Companies House to prevent their residential address from being disclosed to credit reference agencies.
3. A PSC can apply to Companies House to prevent their wider PSC information from appearing on the public register.

With regard to elements 2 and 3 above, the application must be on the basis that the PSC feels that they or somebody they live with would be at serious risk of violence or intimidation as a result of the disclosure. Where protection is applied for under 2 or 3, protection will commence as soon as the application is registered at Companies House and will continue until the application and any appeal is dealt with. Applications can be made before an individual becomes a PSC to ensure the information is never made publicly available.