

Establishing and maintaining a beneficial ownership register

May 2017

This technical briefing provides a summary of key points to note for any Cayman Islands company or Cayman Islands Limited Liability Company ("**LLC**") that has determined that it will be required to maintain a beneficial ownership register ("**Register**") once the beneficial ownership legislation is brought into effect in the Cayman Islands (1 July 2017, but with a one year implementation grace period).

We have highlighted certain key obligations imposed by this legislation on registrable persons (i.e. those beneficial owners of interests/shares in a company/LLC falling within the scope of the legislation).

Corporate Services Providers

With the exception of ordinary resident companies who may also engage the Registrar of Companies ("**Registrar**") to assist them, all companies and LLCs that will be subject to the beneficial ownership regime will be required to engage a licensed Cayman corporate services provider ("**CSP**") to assist them to establish and maintain their Register. CSPs and the Registrar will be required to maintain Registers on behalf of companies/LLCs in such a manner as to allow the Register to be searchable by the Cayman '**competent authority**'.

Registrable Persons; Notice Requirements

Companies and LLCs will be obliged to take reasonable steps to identify and obtain information about individuals and **relevant legal entities** who are considered beneficial owners under the law. Such persons are termed **registrable persons**.

Companies and LLCs will be obliged to give notice to anyone whom the company or LLC knows or has reasonable cause to believe is a registrable person in relation to it.

The notice will require a response from the person it is addressed within one month of the date of its receipt and will require the relevant person to:

- (a) State whether or not they are a registrable person; and
- (b) If they are a registrable person, confirm or correct any required particulars that are included in the notice and supply any required particulars that are missing from the notice.

A company or LLC may also give notice to a registered shareholder/member or a legal entity that it knows, or has reasonable cause to believe, is a relevant legal entity in relation to it (or would be a relevant legal entity if it were registered under the Companies Law/Limited Liability Companies Law) if the company/LLC knows, or has reasonable cause to believe that such registered shareholder/member or legal entity knows the identity of a registrable person.

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A notice addressed to such a person may require the addressee to:

- (a) State whether or not they know the identity of a registrable person or any person likely to have that knowledge; and
- (b) If so, within one month of receipt of the notice, to supply at the expense of the company/LLC, any required particulars respecting such registrable persons(s) that are within the addressee's knowledge, and to state whether the particulars are being supplied with or without the knowledge of the person concerned.

Carve-outs from the requirements for addressees of notices under the legislation are provided, namely (i) not requiring the disclosure of information where legal professional privilege could be maintained or (ii) where a person may otherwise be prohibited from disclosing it by any law applicable in the Cayman Islands.

A company/LLC is entitled to rely, without further enquiry, on the response from a person or legal entity to whom a notice has been sent in good faith unless the company/LLC has reason to believe that the response is misleading or false.

The legislation also places a pro-active obligation on registrable persons (whether an individual or relevant legal entity) to notify the company or LLC where they know they are a registrable person and their particulars are not already entered on the Register. The obligation to notify in these circumstances must be complied with, within one month of the registrable person becoming aware of the same.

Non-registrable persons

An individual is **not** a registrable person in respect of a company or LLC if the only interest that the individual holds in the company or LLC is through **one or more legal entities**:

- (a) In relation to which the individual is a beneficial owner; and
- (b) Each of which is a relevant legal entity in relation to the company or LLC.

The obligation in such cases to provide particulars falls on the relevant legal entity, not the individual beneficial owner(s) higher up the chain of ownership.

Similarly, a relevant legal entity is not a registrable person in respect of a company or LLC if the only interest the legal entity holds is itself through **one or more legal entities**:

- (a) In relation to each of which the legal entity would meet the specified conditions if it were an individual; and
- (b) Each of which is a relevant legal entity in relation to the company or LLC.

The obligation to provide particulars falls on the relevant legal entity that directly holds shares in the company or LLC interests.

Disclosure to CSPs and Required Particulars

Each company or LLC is required to give to its CSP (or the Registrar in the case of ordinary resident companies only) the required particulars of registrable persons and shall instruct the CSP to enter the required particulars in the Register or, if no registrable persons are identified, to enter a nil return in the prescribed terms.

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No particulars must be entered in the Register until the information has been '**confirmed**'. Particulars are confirmed if they have been provided or confirmed to the company or LLC by the individual or relevant legal entity or if there is reasonable cause to believe confirmation was given with their knowledge or if they were included in a statement of initial significant control delivered to the Registrar when the company or LLC was formed.

The required particulars for an individual are:

- Name;
- Residential address and, if different, an address for service of notices under the Companies Law;
- Date of birth;
- Information identifying the individual from their passport, driver's licence or other government-issued document; and
- The date on which the individual became or ceased to be a registrable person in relation to the company or LLC in question.

The required particulars for the entities deemed, for the purposes of the legislation, to be individuals are:

- Name;
- Principal office;
- Legal form and the law of by which the person is governed; and
- The date on which the person became or ceased to be a registrable person in relation to the legal entity in question.

The required particulars for a relevant legal entity are:

- Corporate or firm name;
- Registered or principal office;
- The legal form of the entity and the law by which it is governed;
- If applicable, the register of companies in which it is entered and its registration number in that register; and
- The date on which it became or ceased to be a registrable relevant legal entity in relation to the company or LLC in question.

Additional Prescribed Notations on the Register

Under regulations issued in connection with the primary beneficial ownership legislation, a company/LLC must include certain prescribed notations on the Register in the following situations:

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- Where there is no registrable person;
- Where registrable persons have been identified but all the required particulars are yet to be confirmed;
- Where the company/LLC is still in the process of taking reasonable steps to identify any registrable persons;
- Where a restrictions notice has been issued • Where a company/LLC withdraws a restrictions notice; and/or
- Where a Court directs that a relevant interest cease to be subject to restrictions.

Maintenance of a Beneficial Ownership Register

A company or LLC is required to keep information in its Register up to date. Where a company or LLC becomes aware of a change in the information on a registrable person or that a registrable person has changed, it must give notice to the registrable person as soon as reasonably practicable to confirm, within the time period provided, whether the change has occurred and to state the date of the change and to correct, complete, or confirm the particulars included in the notice.

CSPs and the Registrar are required to notify the company or LLC that engaged them if they are of the opinion that the company or LLC has failed to comply (without reasonable excuse) with its obligations to establish and maintain its Register or if they consider the company or LLC has provided them with false, deceptive or misleading information in respect of a material particular. On receipt of such a notice the company/LLC must provide any missing particulars and provide a justification or correction of any statements identified in the notice.

If the company/LLC is unable to provide missing particulars of a registrable person due to failure of a registrable person to provide missing particulars within one month of receipt of a notice from the CSP or Registrar, the company/LLC must (i) issue a **restrictions notice** (see further below under **Restrictions Notices**) to the registrable persons whose particulars are missing with respect to the shares/other interests of the registrable person and (ii) send a copy of such restrictions notice to the competent authority within two weeks of issuing it.

Each registrable person is obliged to notify a company or LLC of relevant changes to information in the company's/LLC's Register. The notification must state the date on which the change occurred and provide any information needed by the company or LLC to update the Register. The notification must be given within one month after the person discovered the change.

An entry in the Register concerning a registrable person who has ceased to be a registrable person may be removed after five years from the date the person ceased to be a registrable person.

It is an offence for a person on whom a notice has been served, either to request particulars or to confirm a change in particulars, to knowingly or wilfully fail to comply, or to knowingly or recklessly make a false statement. However, the offence does not apply if the person can prove that the requirement was frivolous or vexatious.

Restrictions Notices

If a company or LLC serves notice either (i) on a person (individual or legal entity) it believes is a registrable person or (ii) on a registrable person requesting confirmation of a change in particulars and that person fails to comply with the notice, the company or LLC may, after one month from the date of receipt of the notice, issue the person with a restrictions notice if no valid reason has been

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provided for the non-compliance and provided that the relevant interest is not subject to a security interest granted to a third party who is not affiliated with the person.

The legislation specifically provides that a company or LLC must have regard to the effect of issuing a restrictions notice on third parties (including persons with a security interest, shareholders/members and other beneficial owners) in deciding whether to issue a restrictions notice.

A restrictions notice, when issued, has the following effect:

- Any transfer or agreement to transfer the interest effected is void;
- No rights may be exercised in respect of the interest;
- No shares or LLC interests may be issued in respect of the interest or in pursuance of an offer made to the interest-holder;
- (except in a liquidation situation) no payment may be made of sums due from the company or LLC in respect of the interest (whether capital or otherwise) i.e. no dividends/distributions; and
- (except in a liquidation situation) an agreement to transfer any rights associated with the interest (such as the right to be issued shares or LLC interests or the receive payment) is void.

Any person upon whom a restrictions notice has been served is required to notify any person with the right to vote in respect of that interest of that fact (unless they know the person to be aware of that fact). It is also an offence (summary conviction, CI\$5,000 fine) for a person to deal in an interest (voting an interest or purporting to transfer it to another person for example) or fail to notify another person who they know is entitled to vote in respect of the interest of the restrictions notice, where they know such interest is subject to a restrictions notice.

A person can apply to Court to have a restrictions notice set aside or modified (removing certain restrictions set out above only, for example) if (i) it unfairly affects the rights of third parties, persons with a security interest over the relevant interest, shareholders/members or other beneficial owners or (ii) if the information requested has been disclosed to the company or LLC and no unfair advantage has accrued to any person as a result of an earlier failure to disclose; or (iii) the relevant interest is to be transferred for valuable consideration and the Court approves the transfer.

A company/LLC which has issued a restrictions notice can also apply to the Court for the relevant interest to be sold provided the Court approves the sale.

Further, a company or LLC must itself (by notice) withdraw a restrictions notice if it is satisfied that there is a valid reason to justify the person's failure to comply. The company or LLC must also withdraw the restrictions notice if the relevant information in respect of the notice is provided or if it discovers that there is an unfair impact on third parties in respect of the interest subject to restrictions.

Rectification of the Beneficial Ownership Register by the Cayman Islands Court

If the name of any person is without sufficient cause entered in or omitted from a company's or LLC's Register or default or unnecessary delay is caused in noting that one is no longer a registrable person, the person aggrieved can apply to the Grand Court of the Cayman Islands for rectification of the Register. The Court has a wide range of powers including rectification, refusal of the

application, payment by the company/LLC of any damages incurred by any aggrieved person and deciding all matters in connection therewith. Any Court approved rectifications must be notified to the competent authority.

Competent Authority Search Platform and Limits of Disclosure

The beneficial ownership regime will permit the competent authority to establish a search platform that will enable it to search companies' or LLCs' Registers. The search platform must be secure, prevent disclosure of the search or the fact that a search has been carried out, and allow searches by the name of a company or LLC, an individual or a legal entity.

Only the **competent authority** is to have access to the platform. Other law enforcement agencies and similar regulatory authorities such as the Cayman Islands financial intelligence unit, the Financial Reporting Authority, the Cayman Islands Monetary Authority and the Tax Information Authority can request a search of the platform by the competent authority. The ability to request a search is not without limit however, as a senior official from the relevant body must certify that a search request is proper and lawful under the legislation governing that agency. Alternatively, where a search is requested by the Financial Crime Unit of the Royal Cayman Islands Police Service a senior official from the Unit must certify that the request is in response to a request from a jurisdiction listed in Schedule 6 of the Companies Law which has entered into an agreement with the Cayman Islands Government respecting the sharing of beneficial ownership information (currently only the UK).

Information maintained by a CSP or the Registrar in respect of beneficial ownership of a company or LLC is confidential information under the Confidential Information Disclosure Law, 2016 and may only be disclosed in accordance with that law or as otherwise permitted under the Tax Information Law (2016 Revision).

Offences

The legislation carries financial penalties against a company/LLC which fails to comply with its obligations (for example a fine of CI\$25,000 on summary conviction for each contravention).

A person to whom a notice under the legislation is addressed who knowingly and wilfully fails to comply with a notice or who knowingly or recklessly makes a material false statement in its responses can face up to two years imprisonment and/or fines of up to CI\$10,000. Similarly, persons who fail to comply with their duties to proactively notify the company/LLC they are registrable persons and with their relevant particulars or to update the company/LLC of changes in accordance with the legislation can face the same penalties.

Where a company/LLC or other legal entity is guilty of an offence and it is proved that the offence was committed with the consent or connivance of, or was attributable to wilful default on the part of a director/manager or other officer concerned in the management of the company/LLC or other legal entity then that individual is guilty of the same offence and liable to the same penalty as the company/LLC/legal entity.

The above is an overview of matters relating to the beneficial ownership register regime which it is expected will be brought in to force in the Cayman Islands, it is not intended to be legal advice.

Collas Crill is able to assist companies in determining if the beneficial ownership regime applies to them and the steps necessary to fulfil their obligations under Cayman Islands law.

Collas Crill Corporate Services Limited as a licensed corporate services provider (including the provision of registered office services), is also able to assist with the establishment and maintenance of the Register where it provides registered office services to a company

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or LLC.

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