

FOR WHOSE BENEFIT? TRANSPARENCY AND BENEFICIAL OWNERSHIP IN THE ISLE OF MAN

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30 June 2018 is the absolute cut-off date by which all companies and certain other entities in the Isle of Man must have submitted details of their principal owners and controllers to the Companies Registry for inclusion on the new database of beneficial ownership. In this article, we look at the practical application of the rules created under this significant and far-reaching new regime.

At the summit meeting in 2013, the members of the G8 group (including the United Kingdom) committed to introducing national action plans implementing the FATF's recommendations on transparency and beneficial ownership, the intention being to combat the misuse of companies for money laundering and terrorist financing purposes.¹ Companies, it was declared, "should know who really owns them and tax collectors and law enforcers should be able to obtain this information easily".²

In 2016, the Governments of the UK and the Isle of Man (**IOM**) made commitments to improve law enforcement cooperation between the two jurisdictions over the sharing of beneficial ownership information.³

¹ Recommendations 24 and 25 (see <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf>).

² G8 Lough Erne Declaration, paragraph 3.

³ An exchange of notes between the Government of the UK and the Government of the Isle of Man evidencing the mutual commitments may be found at <https://www.gov.im/media/1356973/april2016-beneficial-ownership-exchange-of-notes.pdf>.

The IOM undertook to establish a central database of the beneficial owners of companies to be held by the IOM Companies Registry and overseen by the IOM Financial Services Authority (**FSA**). As a result, the Beneficial Ownership Act 2017 (**BOA**) came into force in the IOM on 21 June 2017 and the new central database for storing information collected under its provisions (**Database**) was launched on 1 July 2017.

TO WHOM DOES THE BOA APPLY?

The BOA applies to all legal entities incorporated, registered or established in the IOM (**Relevant Entities**). This includes companies in all their forms (with limited exceptions), limited partnerships with legal personality under section 48B of the Partnership Act 1909 and foundations established under the Foundations Act 2011. It is intended that the Database will provide a searchable record of the natural persons who enjoy beneficial ownership of these Relevant Entities, or exercise effective control over them, or both.

NOMINATED OFFICERS

Each legal owner of a Relevant Entity is under a duty to ascertain the identity of the Relevant Entity's beneficial owner or owners. This information together with corroborating documentation is then given to the Relevant Entity's "nominated officer". Nominated officers are the lynchpin in the mechanism: they are responsible for collating and maintaining the Relevant Entity's beneficial ownership records, submitting the information to the Database, and responding to requests for disclosure. Each Relevant Entity must have a nominated officer who is either an individual resident in the IOM or a local licensed corporate services provider.

BENEFICIAL OWNERS

Working out who is or is not a beneficial owner is not always straightforward. According to section 4 of the BOA a beneficial owner is:

"a natural person who ultimately owns or controls a [Relevant Entity], in whole or in part, through direct or indirect ownership, control of shares, voting rights or other ownership interest, or who exercises control via other means..."⁴

The Act then goes on to say that beneficial ownership "may be traced through any number of persons or arrangements of any description"⁵; the obligation is, therefore, to drill up through the strata of ownership until all beneficial owners and controllers are found. All ultimate and intermediate owners within the structure have a duty to assist in this process.⁶

Neither "ownership" nor "control" is defined in the BOA; instead, the FSA has issued guidance on the interpretation of these and other terms explaining that the definition of "beneficial owner":

*"is intentionally extremely broad and seeks to capture **all** of those individuals who hold **any** defined interest through whatever means in the legal entity concerned or who are able to exercise control over the entity concerned."⁷*

Where there is a trust within the structure, careful analysis will be needed as there may be multiple beneficial owners. An individual trustee will be a beneficial owner of the Relevant Entity. If there is a corporate trustee, then its individual shareholders will be beneficial owners. Fixed interest beneficiaries will be beneficial owners; discretionary beneficiaries – those with no absolute right to trust property – may be discounted. There may be other candidates: a settlor with a power of revocation or other reserved powers may have sufficient control "via

⁴ Section 4(1), BOA (emphasis added).

⁵ Section 4(3), BOA.

⁶ Section 10(2), BOA.

⁷ Beneficial Ownership Act 2017 Guidance, June 2017, GC 2017/0003.

other means” over a entity held in the trust, as may a Protector or an Enforcer with power to change the trustees.

Clearly, control via other means has the potential to bring any number of activities within the scope of the Act. Helpfully, the FSA’s guidance contains a list of roles which do not, on their own, confer control for the purposes of the Act.⁸

REGISTRABLE BENEFICIAL OWNERS

Whilst all beneficial owners must be made known to the nominated officer, not all will appear on the Database. Only persons who own or control more than 25% of the beneficial ownership of a Relevant Entity (referred to in the BOA as “registrable beneficial owners”) must have their details submitted. The nominated officer has, therefore, to be able to quantify the beneficial interest of each beneficial owner. In many instances, this should be a relatively simple exercise; in others, it may prove conceptually difficult (for example, trying to place a figure on the degree of control which a Protector or an Enforcer has over a trust).

This nominated officer must submit the details to the Companies Registry via the online services portal as soon as reasonably practicable after the information has been obtained and, in any event, by the earlier of the annual return date for the Relevant Entity or 30 June 2018.

ACCESS TO THE DATABASE

Despite pressure on the IOM Government to make it so, the Database is not open for public inspection. Only certain “competent authorities” are entitled to the information: the Financial Intelligence Unit, the Attorney General, the Assessor of Income Tax, the FSA, the Chief Constable and the Collector of Customs and Excise. The authority must submit a notice to the nominated officer requesting the information and confirming that the request is for a “permitted purpose”.⁹ The information must be provided within seven days of the notice if it relates to the registrable beneficial owner, or within one month if it relates to another beneficial owner.

NON-COMPLIANCE

Various offences are created for non-compliance. Nominated officers should be aware that there are offences reserved specifically for them: failing to maintain and preserve the required information can lead to a fine; knowingly or recklessly making misleading statements in response to a notice from a competent authority can lead to imprisonment.

CONCLUSION

The introduction of the Database confirms that the IOM is serious about its commitments to maintaining the highest standards of transparency and cooperation. That the information it contains should be made available only to those law enforcement and other bodies who might need it, rather than the public at large, is also to be welcomed.

⁸ This includes lawyers, accountants and other advisors to the Relevant Entity, persons acting in the course of their employment with the Relevant Entity, directors of the Relevant Entity, regulators, liquidators and receivers.

⁹ “Permitted purpose” is defined in the BOA and includes the prevention, detection, investigation and prosecution of criminal, civil and regulatory offences in the IOM and elsewhere and, in the case of the FIU, the disclosure of information to external intelligence or law enforcement agencies in accordance with a beneficial ownership information sharing agreement.

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