



Bermuda's beneficial ownership registers and privacy: status update and further observations

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Bermuda companies, limited liability companies and partnerships have until 30 April 2019 to update or verify beneficial ownership information under Bermuda's 'beneficial ownership legislation'. Bermuda's central register of beneficial ownership information is held on the Bermuda Monetary Authority's (BMA) "Integra portal", a secure online registration and filing system. Currently, under Bermuda law, the information on the central register will not be publicly available. There is no indication that Bermuda's Parliament would enact legislation to make such registers publicly available, in whole or part, unless and until public beneficial ownership registers become a 'global standard'.

Following the most recent European Union (EU) Anti Money Laundering Directives (AMLDs) public beneficial ownership registers for certain entities have been introduced in certain jurisdictions, including the United Kingdom (UK), Denmark and Luxembourg. However it may be that a global standard for public beneficial ownership information is far from a foregone conclusion. Last year, against the wishes of the UK Government, the UK Parliament legislated to require its Secretary of State to no later than 31 December 2020 prepare a draft Order in Council requiring the government of any British Overseas Territory that has not introduced a publicly accessible register of beneficial ownership of companies to do so. The UK Government has indicated that, while it will introduce the order by this date, British Overseas Territories will have a further 3 years thereafter to comply.

Nevertheless, serious constitutional questions have arisen as to the extent which the UK Government can legally order the British Overseas Territories (such as Bermuda, the British Virgin Islands and the Cayman Islands) and Crown Dependencies (such as Jersey, Guernsey and the Isle of Man) to make their existing beneficial ownership registers publicly accessible.

These developments have provided another opportunity to further consider the Companies and Limited Liability Company (Beneficial Ownership) Amendment Act 2017 and the Partnership, Exempted Partnerships and Limited Partnership (Beneficial Ownership) Amendment Act 2018 (**beneficial ownership legislation**), alongside publications issued by Bermuda's Ministry of Finance– including guidance notes issued on 8 January 2019 (**Guidance**) and guidance in respect of the Integra platform.

More broadly, the new deadline is also an opportunity to reflect upon and make further observations regarding the:

- definition of 'beneficial owner'
- relationship between Bermuda's exchange control legislation and beneficial ownership legislation
- relationship between Bermuda's beneficial ownership legislation and legal privilege
- Integra portal
- relationship between Bermuda's privacy legislation and the beneficial ownership legislation

The core obligations

As a recap, under Bermuda's beneficial ownership legislation, companies (which for the purposes of this article shall also include limited liability companies) and partnerships established under Bermuda law that are not exempt from doing so are among other things required to:

- take reasonable steps to identify 'beneficial owners' (which by definition are natural persons)
- maintain and update a register of beneficial owners and 'relevant legal entities'
- file the minimum required information in respect of the beneficial owners with the BMA; and
- file updated minimum required beneficial ownership information with the BMA (i.e. on the Integra platform) upon becoming aware (or being notified) of and verifying such changes.

The 'minimum required information' in respect of individuals primarily includes:

- full name
- residential address
- nationality
- date of birth; and
- nature and extent of interest in the company or partnership.

Exemptions

The following entities and their 'subsidiaries' are exempt from the requirements under the beneficial ownership legislation:

- companies or partnerships whose interests are listed on the Bermuda Stock Exchange or an 'appointed exchange'
- closed ended investment vehicles managed or administered by designated Bermuda licensed service providers
- permit companies (i.e. overseas companies with a branch office in Bermuda); and
- certain 'financial institutions' (essentially institutions licensed to carry on regulated activities in or from Bermuda).

Careful consideration may need to be given as to whether an entity is a 'subsidiary' of another entity for the purpose of the exemptions.

The beneficial ownership legislation also provides that it shall not be construed as requiring establishment of a new beneficial ownership register or filing of minimum required information if the minimum required information with respect to the company or partnership is already being kept and filed as the case may be, pursuant to another statutory provision. It appears that this would apply to information kept and filed under Bermuda's exchange control legislation.

Definition of beneficial owner

The relevant definition of 'beneficial owner' in respect of companies within scope that are incorporated under the Companies Act 1981 (**Companies Act**) is as follows:

beneficial owner means—

- (a) *any individual or individuals who own or control more than 25% of the shares, voting rights or interests in the company through direct or indirect ownership thereof;*
- (b) *if no such individual or individuals referred to in paragraph (a) exist or can be identified, any individual or individuals who control a company by other means*
- (c) *if no such individual or individuals referred to in paragraphs (a) and (b) exist or can be identified, the individual who holds the position of senior manager of the company, and "beneficial ownership" shall be construed accordingly.*

This tiered definition is largely influenced by the definition of 'beneficial owner' in respect of corporate entities contained in the Fourth EU AMLD. The definition does not, for example, specify who are considered the beneficial owners of a company in circumstances where a trust is included in the company's ownership structure. While individuals holding certain interests or wielding significant powers under a trust might be considered beneficial owners of an underlying Bermuda company in certain cases, the beneficial ownership registers in place in Bermuda ought not be regarded as de-facto registers of trusts.

The definition of 'beneficial owner' in this context varies between the British Overseas Territories and Crown Dependencies who have implemented beneficial ownership legislation and differs from the UK definition of 'person of significant control' in relation to UK 'PSC registers'. It also differs from the definition of 'beneficial owner' in Bermuda's proceeds of crime and exchange control legislation.

One of the more difficult challenges, when it arises, under most jurisdictions' beneficial ownership laws is determining when a person controls a company by means other than through an ownership interest. In respect of companies incorporated under the Companies Act, the beneficial ownership legislation provides that:

"control by other means" includes the right to appoint or remove a majority of the board of directors of a company and the exercise of control over a company by any means other than control by ownership of any interest.

The Guidance acknowledges that "control" depends on the circumstances but that generally speaking an individual is likely to have control over a company in situations which include, for example, where an individual has the right to exercise or actually exercises:

- significant influence over the company; or
- significant influence or control over the activities of a trust where the trustees own or control more than 25% of shares or voting rights of company.

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The AMLDs provide relatively limited assistance on this question.

In each case, a general consideration of the governing documents of entities in the structure and the conduct of individuals involved in the management of the structure appears to be relevant.

Legal privilege

Bermuda's beneficial ownership legislation provides that a person is not required to provide information or answer questions under its provisions which the person would be entitled to refuse to provide or answer on grounds of legal professional privilege in proceedings in Court. On the point of legal privilege generally, those seeking advice on beneficial ownership or other issues might consider whether the types of advisers they engage are in a position to claim legal privilege.

Guidance

The Guidance may function as an aide to some extent but, as with any non-statutory guidance, should be treated with caution. The Guidance expressly provides that it should be read in conjunction with the law, should not be relied upon as a source of law, should not be relied upon in any specific matter and does not absolve persons under other statutory provisions relating to beneficial ownership. It states that it is intended merely to provide general guidance and recommends that legal advice be obtained. The same caveats ought to be adopted in connection with other government guidance in respect of the beneficial ownership legislation—including that in respect of Integra portal.

The Integra portal

'Integra' is a secure online registration and filing portal upon which beneficial ownership information is now required to be uploaded for the purposes of Bermuda's beneficial ownership legislation and exchange control regime. It is through the Integra portal that the BMA receives and determines applications under exchange control purposes in respect of the formation, registration and continuations of companies, permit applications for overseas companies wishing to establish a Bermuda branch office, partnership formations and transfers of interests in companies and partnerships.

Non-compliance and offences

Fines of up to \$5,000 may be imposed for contravention of, or failure to comply with, the obligations under the beneficial ownership legislation. Knowingly providing misleading information to the Registrar of Companies or the BMA attracts fines of up to \$50,000. The obligations under the beneficial ownership legislation are primarily imposed on companies and partnerships existing under Bermuda laws.

Directors, officers or managers, as the case may be, may be liable for fines if a contravention or failure to comply is committed with their consent or connivance. Corporate service providers often provide director or secretarial services and should be mindful of this potential exposure. Service providers might separately be exposed to breach of contract or negligence claims if, for example, the company or partnership's failure to fulfill their obligations under beneficial ownership legislation is due to the service provider's negligence. Corporate service providers that commit similar contraventions across a number of entities risk being exposed to claims by those entities to provide compensation for the penalties incurred.

Failure of beneficial owners to cooperate and provide or confirm the minimum required information can result in the company or partnership taking steps to restrict the ability of such persons to exercise rights and receive payments in respect of the individual's interest in the company or partnership, as the case may be.

Privacy legislation

The Personal Information Protection Act 2016 (PIPA) was enacted in Bermuda during 2016 but only certain of its provisions have since become operative. It is anticipated to become fully operative this year, following the appointment of a Privacy Commissioner. PIPA will impose obligations on the 'use' of 'personal information' by 'organisations' (i.e. individuals' entities or public authorities) in Bermuda. While different to the EU General Data Protection Directive (GDPR) in scope and the level of offences, it contains many principles that are reflected in the GDPR. Some of these principles are also consistent with the approach in Bermuda's beneficial ownership legislation. For example, PIPA's principles of ensuring that information collected and processed is kept accurate and up to date and used only for the purposes for which it is collected appear to be reflected in Bermuda's beneficial ownership legislation.

What is the relationship between beneficial ownership legislation and PIPA? One may conclude that beneficial ownership legislation has precedence. Bermuda's beneficial ownership legislation provides that obligations thereunder have effect despite any obligation as to confidentiality or other restriction on the disclosure of beneficial ownership information imposed by statute, contract or otherwise. PIPA would appear to be such a statute. PIPA provides that an organisation may use an individual's personal information pursuant to a provision of law that authorises such use. Under Bermuda's beneficial ownership legislation, disclosure in good faith to comply with the beneficial ownership regime is an absolute defence to any claim made against a person in respect of such disclosure.

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However, Bermuda's beneficial ownership legislation does not otherwise authorise disclosure that is in contravention of PIPA. Entities that are subject to the beneficial ownership legislation should ensure that they do not commit an offence under PIPA or the beneficial ownership legislation or breach other confidentiality obligations by, for example, including in a beneficial ownership register the identity or other details of individuals that are not required to be included.

Conclusions

The extension of the transition period for updating and verifying beneficial ownership information provides breathing space to Bermuda companies and partnership (and those who may be their 'beneficial owners') to check and confirm their approach. Guidance published in respect of Bermuda's beneficial ownership legislation may provide an aide to some extent but provides no defence to non-compliance with the beneficial ownership legislation itself. Ultimately, the beneficial ownership legislation, exchange control legislation and PIPA (when fully operative) need to be carefully considered and complied with. Constitutional questions and international political developments suggest public beneficial ownership registers in British Overseas Territories or Crown Dependencies and perhaps elsewhere may not be a foregone conclusion.



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