Implementation of the Fourth Money Laundering Directive

ICAEW welcomes the opportunity to comment on the *Implementation of the Fourth Money Laundering Directive* published by BEIS on 3 November 2016, a copy of which is available from this link.

We believe the short consultation period may affect BEIS's ability to draw valid conclusions from the consultation exercise would like to draw its attention government guidance regarding consultations https://www.gov.uk/government/publications/consultation-principles-guidance

This ICAEW response of 16 December 2016 reflects consultation with the Money Laundering Sub-Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on Anti-Money Laundering and related submissions to legislators, regulators and other external bodies. ICAEW is a company incorporated by Royal Charter and the comments on the possible treatment of Royal Charter companies in this response reflect our own perspective and interests. We do not, however, believe that there is any conflict between these comments and the broader views expressed.

The Institute of Chartered Accountants in England and Wales
Level 1, Metropolitan House
321 Avebury Boulevard
Milton Keynes
MK9 2FZ UK

T +44 (0)1908 248 100
F +44 (0)1908 248 088
icaew.com

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For more information, please contact representations@icaew.com

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MAJOR POINTS

1. ICAEW have previously responded to Government consultations on beneficial ownership transparency (regarding beneficial ownership registers for UK Companies). These were submitted on 17 September 2013 and 17 July 2015. We queried both the necessity and the value of making such registers public and these considerations are also relevant to the proposals in this consultation, as are concerns around the operational practicalities and the of quality control over submitted information. We understand that public access and 'legitimate interest' are still matters of considerable debate at a European level.

2. No quality assurance is undertaken on the information submitted to Companies House under the Persons with Significant Control (PSC) regime. We would urge that a new approach is adopted now by requiring Companies House to carry out due diligence checks on the information submitted to them, thus retaining control of such work at a central level and mitigating a key vulnerability in the UK financial system, as well as reducing the extensive duplication (and resulting increase in consumer costs) of such responsibilities in the private sector. That said, ongoing reviews of the quality of information held on such a registry will remain difficult since changes in ownership of companies cannot be easily monitored on a unilateral basis.

3. We understand that the data on the register was recently tested[1] and questions remain as to whether people had "lied" or provided "inaccurate information" (examples include PSCs born in 2016 and 9988) . This indicates that not only is there no check on the integrity of the data, but that it is not even subject to a basic sense check. Data accuracy has to be ensured if the register is to be credible. We fear that, whilst the well-meaning will comply, criminals will simply ignore the regime.

RESPONSES TO SPECIFIC QUESTIONS

Q1: The Government welcomes views on this approach for determining the scope of Article 30 and on any alternative methods which could be considered.

4. We feel that the Government is losing sight of the bigger picture. A purposive, as opposed to literal, approach to transposition may be preferable. It is unclear what, if any, money laundering risks are posed by the entities listed (with perhaps a couple of exceptions). We believe that Government should follow the spirit of the Directive and adopt a risk based approach that addresses the economic crime risks that the entities listed actually pose.

5. We understand that BEIS is considering whether various forms of mutual companies regulated by the FCA and whether CIOs might be excluded from the PSC requirements. The same sort of considerations would apply to many Royal Charter companies, such as ICAEW, which do not have share capital, are not aimed at distributing profits to members and are mutual in nature, albeit they may have public interest objectives. ICAEW is itself subject to regulatory oversight (for instance by the Financial Reporting Council) and we believe that any exclusions of this kind should be sufficiently wide to exclude ICAEW and similar Royal Charter companies.

Q2: Do you agree with this analysis regarding the types of entity that should and should not be considered to be in the scope of Article 30 of the Directive? Are there entities not listed above which should be considered in the context of determining the scope of Article 30?

6. Given that the vast majority of entities listed will be highly unlikely to have a beneficial owner then, if they are to be brought in, a regime of reporting by exception would appear appropriate.

[1] https://www.globalwitness.org/en-gb/blog/what-does-uk-beneficial-ownership-data-show-us/

7. If exclusions of the kind noted above are not made, then the exclusion of Non-Departmental Government Bodies (in light of the entities that are included) appears quite distasteful. Would it not be a matter of legitimate public concern were such a body, in fact, to be controlled by some individual other than that disclosed elsewhere as being responsible?

8. Also, the reasoning behind their exclusion would be questionable, their existence being by the will of Parliament, board members appointed by The Queen and a number having been established by Royal Charter. A similar rationale would apply to exclude all Royal Chartered bodies, which surrender significant aspects of control over their internal affairs to the Privy Council, with amendments to the Charter and by laws requiring the approval of The Queen and Council respectively. We can see no basis on which a Royal Charter company such as ICAEW should be caught by the regime while other Royal Charter companies would be excluded due to closer government association.

Q3: What would be the potential costs and benefits of companies on UK prescribed markets also having to comply with UK PSC register requirements from June 2017? Please provide evidence where possible.

9. We have no comment on the potential costs but are concerned that many entities will have separate reporting requirements under other regulatory regimes that result in a duplication of costs when complying with the PSC regime. It is therefore not the absolute costs that are an issue more that they are unnecessary with little to no additional benefit, and by virtue of that, disproportionate.

Q4: If UK companies on prescribed markets were to be brought into scope, what transitional arrangements would be necessary or helpful?

10. No comment.

Q5: We welcome views as to what modifications to these conditions would be required in respect of any of the different types of entity listed at paragraph [39].

11. We fear that in transposing the Directive the Government may have put themselves in the position of having to square a circle, since beneficial ownership is not the same as significant control. Therefore, the beneficial ownership information held by obliged entities carrying out client due diligence might not match the information entered on the register of persons with significant control. In many situations it is unlikely that anyone exercising control by means other than beneficial ownership will be able to provide a % proportion in relation to such control. Furthermore it is unlikely that such control would be evident from any documentation therefore nil returns are likely.

Q6: Do you have views on the definition of 'significant control' and the requirement to record the 'nature and extent of control' for the additional types of entity to be brought within scope? Are there particular issues to which you would draw our attention regarding the application of this approach to any of the types of entity listed at paragraph 37?

12. See our response to Q5.

Q7: Do you agree with our proposed approach to ensuring the 'accuracy' and 'adequacy' of PSC information? Namely, to retain the arrangements as they are for entities already covered by the PSC register and extend the same approach to those brought within scope by the Directive?

13. Yes (but see also our response to Q12 below).

Q8: Do you agree with our analysis on the need for change to ensure that information is 'current'? Is six months an appropriate period to allow an entity to update its PSC information following any change? If not, why not?

14. Yes. That said it is difficult to suggest a suitable timeframe for the updating of such information without knowing what the impact might be on the prevention and detection of crime. In the absence of any such evidence an event driven process with a substantial time allowed for filing seems proportionate and appropriate.

15. The fact that those charged with conducting anti-money laundering checks are not entitled to rely upon the PSC register (ie as being accurate, adequate and current) is a failing of the regime, albeit perhaps a tacit recognition of its inherent limitations. Unless this is going to change, imposing more onerous filing obligations on companies will simply add to the administrative burden without producing tangible and meaningful benefits. If a period much shorter than 6 months were to apply, then we suggest that a reasonable perspective should be applied as regards non-compliance. In particular, it may be disproportionate for late filing of this kind of information to constitute a criminal offence.

Q9: For entities which already fulfil domestic PSC requirements: Do you expect any changes in terms of who, within the corporate entity, will be involved and how long it will take for the corporate entity to update PSC information as a result of changing the frequency of updates from 12 months to within 6 months of a change?

16. No comment.

Q10: Are there any practical implications that publicly accessible information will have for particular types of entity that you would like to draw to our attention?

17. One of the unintended consequences of the existing PSC register, and therefore of the proposed extensions, is the facilitation of fraud against all beneficial owners that have correctly submitted legitimate information for entry on to the register.

Q11: Are there any practical implications for extending access to usual residential address information to financial intelligence units, competent authorities and obliged entities as defined in the Directive?

18. It is as yet unclear how tiered access rights will be granted and whether this will be achieved through registration or request. Both will require resourcing to ensure that the process is carefully controlled, especially if access is to be granted upon on request. Questions remain as to how Companies House will determine if someone is an obliged entity or has a legitimate interest and how far the assurance of the person submitting the request will be relied upon.

Q12: Are there specific issues we should be aware of regarding the application of this approach to beneficial owners of the new entities brought within scope by the Directive?

19. Please note that unregistered Royal Charter companies such as ICAEW currently have no Companies House filing requirements. If the regime is extended to them, they will be brought into a filing regime solely for this purpose when it has previously been determined that it would be inappropriate for other filing requirements applicable to other kinds of corporate bodies to apply (for good reason, in our view). This in itself seems disproportionate. It would be also be necessary to consider how the tests introduced for entities that are currently caught by the regime would apply to entities of this kind so that 'proving a negative' may, in fact, take resource; it would not necessarily simply be a question of filing negative returns annually where there are no 'beneficial owners'.

Q13: Are there specific issues we should be aware of in allowing access of protected information to credit and financial institutions?

20. See our response to Q11.