BIS CONSULTATION ON PSC REGISTER

ICAEW welcomes the opportunity to comment on *BIS consultation on PSC register* published by the Department of Business Innovation & Skills in October 2014, a copy of which is available from this link.

This response of 9 December has been prepared on behalf of ICAEW by the Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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MAJOR POINTS

1. We agree with government objectives to ensure that the information on the register is clear and concise, relevant, appropriate and proportionate, respects confidential information and is consistent. We comment on the detailed proposals below but, by way of preface, note that, due to the nature of the proposed regime, it is likely to be difficult to meet these objectives fully, however the Bill is implemented (in its present form). In particular, the Bill requires the register to be made public, relies upon companies to obtain and register the information (without independent verification checks by Companies House) and includes complex tests on whether or not significant control arises.

2. The regime treats principles of confidentiality as subservient to its objectives without substantiating how those objectives will be served as a result. It does not, therefore start from a position of respecting confidentiality and, as a result, a number of the questions raised are dilemmas to which there is no right or wrong answer, dilemmas which might have been avoided had the government adopted a different approach. For instance, regarding the scope of possible exemptions, narrow grounds for exemption are more likely to result in consistency, but less likely to result in proportionate regulation. The questions themselves highlight that the potential harm resulting from public disclosure can extend beyond risk of physical harm to economic harm. In fact, there are risks resulting from loss of rights to privacy that might affect all PSCs, including risks associated with identity theft and use for other improper purposes including harassment[1].

3. It is clear from FATF Guidance of October 2014 that there are a number alternative approaches open to governments to meet the objective of preventing the misuse of legal persons for criminal purposes. It is not, for instance, necessary for the information to be made public and it is possible for the relevant registry authority to be given responsibility (and resource) to verify relevant information. We also suggested alternative approaches in our response to the 2013 trust and transparency consultation. The dilemmas arising could still, to some extent, be avoided if the Bill were to be modified (for instance, by removing provisions to make the register public) or implementation of the relevant provisions were to be delayed.

4. Another difficulty arising from the regime is that individuals with significant control over a parent company will also be individuals with significant control over its subsidiaries which would result in duplication of effort if each company in the group needed to obtain and disclose the relevant information. The Bill seeks to address this concern through the provisions for 'registrable relevant legal entities', but the drafting is byzantine in its complexity and results in registration of legal entities, as opposed to individuals, in certain limited cases, albeit only legal entities subject to equivalent transparency requirements. The regime does not apply generally to foreign companies and this is something that might be exploited by those who wish to keep their interests private and have resource available to do so.

Chapter 1: Understanding the new requirements

1) We welcome your views on the structure, format and content of the statutory guidance on significant influence and control.

5. We strongly prefer guidance to be principles based, in particular that it be based on objective principles. It should not be necessary for examples to be given if the guidance is clear and concise, but if examples are given, they should simply illustrate how the principles would apply in a particular case.

[1] In the recent case of Burry & Knight Limited & another v Knight (concerning a company's register of shareholders, rather than PSCs) the Court of Appeal decided that a minority shareholder did not have a 'proper purpose' to seek disclosure of the register of shareholders of a company and may have been seeking the information to harass the other shareholders.

6. It will be important that the guidance on what is meant by 'exercise or right to exercise significant influence or control' results in an outcome which is proportionate to the underlying objectives of the legislation.

2) Do you agree that a Working Group would be useful? a) If yes, which organisations and interests ought to be represented on it? b) If not, what would be your preferred alternative?

7. Yes, we think it essential that the SMEs that will be affected by these proposals are given the opportunity to be involved, in particular that family owned companies are engaged so that the potential effect on family members who may not be shareholders but may be PSCs can be assessed. This could involve direct engagement of family owned companies or indirect engagement through relevant bodies such as the Federation of Small Businesses or those who advise SMEs, such as accountants or lawyers.

8. Input of this kind would be particularly helpful to identify the various ways in which 'significant influence' might arise in the broadest sense in the context of running SME companies, for instance whether one spouse who is a shareholder might expect to be influenced by the other who is not (and, if so, whether the registration duties will apply). The proportionality of this legislation may ultimately be judged on the degree to which it intrudes upon day to day activities of owners of law abiding small and medium sized companies and their families.

3) What are the key areas we should cover in non-statutory guidance?
4) How best should it be communicated to companies and others?
5) Who should lead on or be involved in its production?

9. We believe that the statutory guidance should be the priority for BIS as it will help shape the legal requirements and would ideally result in a legal regime which is clear and proportionate. As regards informal guidance, we would expect Companies House to produce guidance along the usual lines, explaining the requirements in relatively simple terms perhaps with practical examples covering the questions most likely to arise. Any examples should illustrate the guidance, rather than leaving people to identify the principles from the examples alone. We think that this exercise would be led by BIS. Other organisations, such as ICSA would be free also to produce commentary should they think appropriate. However, if non-statutory guidance beyond this required for the practical application of the regulations, then the question arises as to whether the regulations and statutory guidance are sufficiently clear.

Chapter 2: Recording nature of control on the PSC register

6) We welcome your views on whether the [outlined] objectives are appropriate and whether there are any other factors that should be taken into account?

10. We agree with these high level objectives. The challenge will be their implementation.

7) Do you agree with the approach of simplifying and standardising what is recorded under nature of control? a) If yes, which is your preferred model?
b) If not, what is your preferred alternative? 9) If you prefer a less prescriptive system, what safeguards should exist to ensure that entries in the register are comparable and easy to understand? 8) Should there be a different approach for more complex arrangements? Does this need to provide a full explanation of the nature of control?

11. We agree that simplifying and standardising what is required is necessary to meet BIS's general objectives outlined in Chapter 2. For the same reason, we advocate having the minimum possible number of categories and minimum amount of free-form fields. However, it would be useful to add a free-form field for companies to use on a purely optional basis; for instance, a person may be caught by the definitions of significant control, yet, in practice, exercise no real control (for instance, if contingent rights are involved) and may wish to make this clear. The risks of requiring more include that so much information will be provided (none

of which will necessarily be independently verified) that the ease of use and reliability of the register may be prejudiced and that the burdens on business will be increased to an extent not justified by the declared objectives of the legislation and earlier consultations.

12. We understand that the effectiveness of the regime will be subject to ongoing review. There is merit in starting with the simplest approach whilst the system is introduced and considering whether any modifications are required (whether to increase detail of information required or otherwise) in light of experience with the simplest regime.

Chapter 3: Protection regime

10) Should any modifications to this [URA suppression] process be made in the context of PSCs? 11) Should applications be allowed to be made by third parties other than the company or subscribers to the memorandum? If so, who?

13. We do not believe that PSC URA should be disclosed to credit reference agencies as the default position. We can see no reason for credit reference agencies to see this information or for the administrative burdens (and £100 fee) to be put on individuals who do not wish this information to be disclosed to them. If this feature of the regime is retained, then the administrative procedures involved in applying for non-disclosure should be made as straightforward as possible and cost free.

12) We welcome views on which of the required particulars should be suppressed from public disclosure [in the context of PSCs at serious risk of harm]?

14. As this information will be available to the law enforcement authorities anyhow, we do not think that public disclosure of any of the more limited information considered will serve any useful purpose.

13) We welcome views on: a) The factors that should be taken into consideration when deciding whether someone is eligible for protection? b) Where the line should be drawn between actual and possible threat? c) Whether there are sectors or types of company or individual that will be inherently at risk? Which? d) Any evidence you have on the link between public disclosure and the consequences for individuals at risk; and the costs/impacts of those consequences?

15. As noted in our introductory comments, these questions highlight dilemmas that arise from the decision to make the register public. For instance, the risk of economic harm resulting from the disclosure regime might be reduced through widening the criteria for exemptions; and the administrative burdens on those individuals who are PSCs of multiple companies might be reduced if a blanket exemption were allowed (possibilities raised in the consultation). However, other difficulties could then be expected to arise. For instance, broader criteria for exemption could result in: inconsistent application of the regime; difficulties in providing evidence required for exemption (including expert opinion); and increased prospects of dispute.

14) We welcome views on:
a) Who should be able to make an application, including whether and when third parties should be able to apply?

16. We believe that the process should be as administratively easy for users as possible, so that third parties should be able to apply. It may be that the type of agents able to apply should be limited, for instance to the AML regulated sector. It may be instructive to consider how well the current regime for protection of disclosure of URAs for directors is working and what difficulties arose under the old regime when directors had to apply to have their URA kept off the register. This applies in relation to a number of the questions related to applications for exemption, including as regards evidence required and appeals. If there is a desire for the new regime (at

least for disclosure to credit reference agencies) to be consistent with the current regime for directors' applications, it may be that the current directors' regime should be changed (for instance, to permit applications to be made by other third parties).

b) The evidence requirements to support the application?

17. There is a balance to be struck between asking for third party evidence initially or reserving the right for the granting body to require it if necessary.

15) Do you think applications should be accompanied by a qualifying statement?
16) If yes, who should be able to make such a statement?

18. We believe that the relevant body (ie Companies House) should have responsibility for evaluating applications based on such evidence as it requires for the purpose along similar lines to the existing URA regime for directors. Where risk of physical harm is involved, it would seem that the police would be in the best position to assess this, although whether they are, or should be, resourced to deal with applications of this kind is a matter for government. It is unclear to us on what basis other persons might be qualified to assess the risks involved or take responsibility for doing so.

17) We welcome views on:
a) Retrospective applications; b) Prospective applications; c) Cumulative applications; and d) Whether 'blanket' applications should be able to be made in respect of all companies of which an individual is a PSC. 18) We welcome views on: a) Whether a PSC's protection should be indefinite? b) If not, how and how often it should be renewed?
19) We welcome views on an appeals process. 20) We welcome views on a revocation process.

19. As regards the mechanics of applications for exemption, the process should be as simple as possible in order to meet the declared objectives set out in Chapter 2. While we believe that retrospective applications should be facilitated, once information is made public it will often be too late to remove all trace of the information afterwards (as it may have been copied and distributed widely).

20. It is essential that the regime facilitate applications being made before a person becomes a PSC so that a potential PSC can know whether or not exemption would be granted before becoming a PSC. We do not see any reason for a time limit to be imposed (the important thing would be the exemption is granted or refused quickly), but if a time limit is to be imposed, it should be long enough to permit corporate transactions to take place.

21. The exemption regime will need to be in place in sufficient time before the disclosure requirements take effect to permit applications to be processed and exemptions made (where applicable) for persons who are PSCs before the disclosure regime is implemented.

22. We believe that the regime should cater for prospective threats of harm, but this does mean that a body (presumably, Companies House), will need to assess that risk and, in our view, the applicant should have a right of appeal to a judicial body (although this would need to be done in a way which would not result in public disclosure). The relevant body might, presumably, seek expert opinion on specific matters covered by any application, the nature of which would depend upon what risks of harm are involved. If the regime is to extend to protecting against economic harm, for instance, it may be harder to identify objective criteria and identify relevant experts.

23. In the interests of efficiency, we would like to see a streamlined procedure apply to individuals already benefiting from exemption when they seek additional exemptions, in particular where the exemption has been granted on grounds of risk of physical harm.

24. The question of blanket exceptions, eg, for individuals with particular affiliations such as religious or political affiliation or those in particular occupations (such as defence workers), is an inherent problem. The whole population is at risk of terrorism, fraud and other crime and if the regime is perceived to operate in favour of particular sections of society it could easily become divisive. This is, however, another of the dilemmas arising from the regime itself.

Chapter 4: Costs and access
21) We welcome views on:
a) Whether the current list of public authorities is appropriate in the context of PSCs' URA information?
b) Whether the current list of public authorities should be narrowed in the context of information of PSCs at serious risk of harm?
c) If yes, who should still have access?

25. We assume that the procedure for disclosure to the public authorities and other relevant provisions of the 2009 regulations will apply. Disclosure to overseas regulatory authorities should, we suggest, only apply to the extent that the relevant jurisdictions have implemented reciprocal disclosure arrangements that the UK government has assessed as sufficient and effective.

Chapter 5: Impact of proposals
22) We welcome your views on the costs and benefits of the policy changes set out in this discussion document for those identified as people with significant control, companies and other third parties.

26. We believe that the costs for SMEs as a result of the PSC proposals generally will be substantial, in particular as many will need to seek professional advice. For straightforward cases requiring basic advice, the cost could be a few hundred pounds. For complex cases (eg companies with many shareholders) extensive advice could be needed, which could cost tens of thousands of pounds. It is clear from this consultation that the degree of costs involved, both to SMEs and to the public purse (eg through police involvement and resource for Companies House) will depend to some degree on how the proposals are implemented.