

ADVISORY
Industry Information

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Shining a Light on the Beneficial Ownership of Irish Companies: New Disclosure Requirements Imminent

As part of the transposition of the Fourth Anti-Money Laundering Directive (EU 2015/849) (“4MLD”), Irish companies and other legal structures such as trusts and collective investment vehicles will for the first time be obliged to;

- » maintain details of their underlying beneficial owners and
- » report the details to a central register which will be accessible to regulators and other certain other interested parties.

It is expected that the first phase of this initiative will come into effect this month, when a statutory instrument (the “S.I.”) will be signed into law requiring entities within scope (“Obligated Entities”) to start maintaining beneficial ownership data in their own internal registers. The obligation to report to a central register is unlikely to come into effect until 4MLD is fully transposed which is expected to occur in June 2017.

Background

In recent years, the Financial Action Task Force (“FATF”) and European policymakers have been on a drive to increase transparency of ownership of corporate structures on the basis that accurate and up-to-date information on beneficial owners facilitates counterparties in conducting due diligence when dealing with such corporates structures. This drive towards transparency manifested itself in an obligation being included in 4MLD requiring EU Member States to keep central registers of information on the ultimate beneficial owners of legal entities.

In response to terrorist attacks in Europe and the leak of the Panama Papers, the European Commissioner revisited 4MLD. A proposal for a Fifth Anti-Money Laundering Directive is currently being negotiated in Brussels but it is already clear that the 4MLD provisions relating to the beneficial owner requirements are likely to be amended prior to their full transposition next year. However, in order for the beneficial owner register to be effective as early as possible after full transposition, Ireland has decided to transpose the data-gathering element of the 4MLD provisions six months ahead of schedule.

Obligated Entities

The preamble to 4MLD encouraged Member States to ensure that the widest possible range of legal entities should be covered by the new registers. The current indications are that the S.I. when published will extend to all companies and other legal entities. Limited exceptions are possible for certain entities that are already subject to similar or existing disclosure requirements (e.g. listed companies on regulated markets that are currently within scope for the Transparency Directive disclosure regime).

Details to be maintained

Obligated Entities will need to take all reasonable measures to obtain and hold adequate, accurate and current information in respect of its beneficial owners, e.g. name, date of birth, address and a statement of nature and extent of interest held by each beneficial owner.

A “beneficial owner” in the case of an Obligated Entity is defined in 4MLD as the natural person(s) who ultimately owns or controls the entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity.



A shareholding of 25% plus one share or an ownership interest of more than 25% held by a natural person will be an indication of direct ownership. Shareholdings will be aggregated for calculation purposes – so a shareholding of 25% plus one share or an ownership interest of more than 25% by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s), will be an indication of indirect ownership.

In the event that all possible means for determining the beneficial owner have been exhausted to no avail, the names of the senior managing official(s) of the relevant Obligated Entity should be added to the register.

The S.I. is likely to contain provisions which will allow Obligated Entities to issue notices to persons whom they believe to be beneficial owners. The S.I. will also likely provide for mechanisms to keep Obligated Entities' registers up to date, including notifications concerning relevant changes in beneficial ownership between Obligated Entities and their beneficial owners.

Beneficial owners are likely to be subject to a duty to notify Obligated Entities, in certain circumstances, of their status as beneficial owner.

Reporting obligations

Given the broad range of Obligated Entities which will be within scope of the S.I., it is unlikely that there will be a single central register of beneficial owners. It is likely that the Companies Registration Office will operate a register for incorporated companies but separate registers may also be operated by the Revenue Commissioners for trusts and by the Central Bank of Ireland for Collective Asset-Management Vehicles (ICAV's).

4MLD requires entries at the central register to be "current". Under the UK's beneficial ownership reporting regime which was introduced earlier this year, companies are required to report to the register once a year. However, it remains to be seen whether annual reporting would meet the 4MLD requirement.

Access to information

The registers will be fully accessible by competent authorities (e.g. Central Bank of Ireland), An Garda Síochána and the Revenue Commissioners. The registers will also be accessible by counterparties when trying to complete customer due diligence on Obligated Entities for the purposes of compliance with anti-money laundering requirements.

The current draft of the Fifth Anti-Money Laundering Directive contains a proposal that the registers be publicly accessible albeit that access may be subject to online registration and payment of an administrative fee. In exceptional circumstances, Member States can provide for an exemption from such public access where it would expose the beneficial owner to the risk of fraud, blackmail, kidnapping, violence or intimidation or where the beneficial owner is a minor or otherwise incapable.

Potential impact

The final form of the S.I. and the full impact of these requirements remain to be seen. However, it is clear that this is a novel and far reaching development that runs contrary to the principles of Irish company law, past and present, which expressly provide that no notice of trust needs to be recorded on the register of members of a company¹.

A practical question also arises as to how companies will cope with the compliance burden of establishing beneficial ownership and also keeping such information current and accurate – for example, where multiple different persons make differing claims about beneficial ownership.

Finally, there are corporate structures established in Ireland with the specific purpose of concealing the identity of the beneficial owners of particular shareholdings and assets. This can be for a variety of reasons – sometimes, simply to ensure privacy. It will be necessary to review these structures to ensure clients' interests are protected in light of this new development. Directors of companies in these structures may find themselves with conflicting obligations in these circumstances.

¹ Section 170, Companies Act 2014 and previously Section 123, Companies Act 1963



Next steps

The immediate priority for Obligated Entities will be to establish an internal register of beneficial owners and to then take steps to populate the register. For companies with simple ownership structures, population of the register should be straightforward. However, for companies with complex ownership structures, groups which include foreign entities and for private equity backed companies, this may not be the case. These companies should consider taking preparatory steps - for example:

- » review constitutional documents and any “behind the scenes” arrangements, such as shareholders’ agreements;
- » make informal enquiries of those they think may be beneficial owners or who may have relevant knowledge; and
- » put in place internal processes and systems to ensure that they can comply with the reporting requirements when they come into effect next year.

Companies with beneficial owners who are not registered shareholders may also wish to give them advance notice that their details will soon have to be made available on a publicly accessible register.

Key Contacts

If you have any queries on the operation of the Register and/or the impact that it may have on you and your business, please speak to your usual contact in Walkers or contact:



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