

# LEGAL UPDATE

## The introduction of a regime to register the beneficial owners of Cayman Islands' companies and LLCs takes effect on 1 July 2017

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### Introduction

In line with the transparency and compliance efforts that made the Cayman Islands one of the early adopters of the Common Reporting Standard (CRS) and FATCA, and which contributed to the continued success of the Cayman Islands as one of the premier offshore financial centres, an enhanced beneficial ownership regime will be implemented starting with 1<sup>st</sup> July 2017<sup>1</sup>. The new rules are set out in a new Part XVIIIA (Beneficial Ownership Registers) of the Companies Law (2016 Revision) (the “**Companies Law**”). The same rules also apply for limited liability companies (LLCs)<sup>2</sup>. All companies and LLCs incorporated or registered by way of continuation in the Cayman Islands are collectively referred to herein as “**Companies**”.

In summary, an additional corporate registry will be created for Companies covered by the new regime, to be maintained at each company's registered office in the Cayman Islands<sup>3</sup>, in which beneficial ownership information will be required to be kept current (the “**BO Register**”). Entries from the BO Register will have to be periodically uploaded onto a centralized search platform (the “**Beneficial Ownership Platform**”) which will be maintained by the Cayman Islands government authorities and accessible under certain conditions. The following is a summary of the new regime, including some useful insights for our clients and partners.

### 1. Which Companies will be impacted by the new regime?

*Companies required to maintain a BO Register will mainly be those that are not already subject to some form of direct regulatory oversight (e.g. subject to regulatory oversight in the Cayman Islands) or indirect regulatory oversight (e.g. subject to regulatory oversight by a competent authority in a Schedule 3 country). In any case, limited partnerships and foreign companies will not be subject to the new regime.*

**Investment Funds** - Effectively Companies which are structured as Cayman Islands investment funds, whether hedge funds or private equity funds, and general partners of private equity funds, real estate funds, or other investment funds, will not have to maintain a BO Register provided they fall within one of several exemptions contained in the Companies Law.

**Exemptions from the new BO Register regime** - All Companies will be concerned<sup>4</sup>, except for those Companies which:

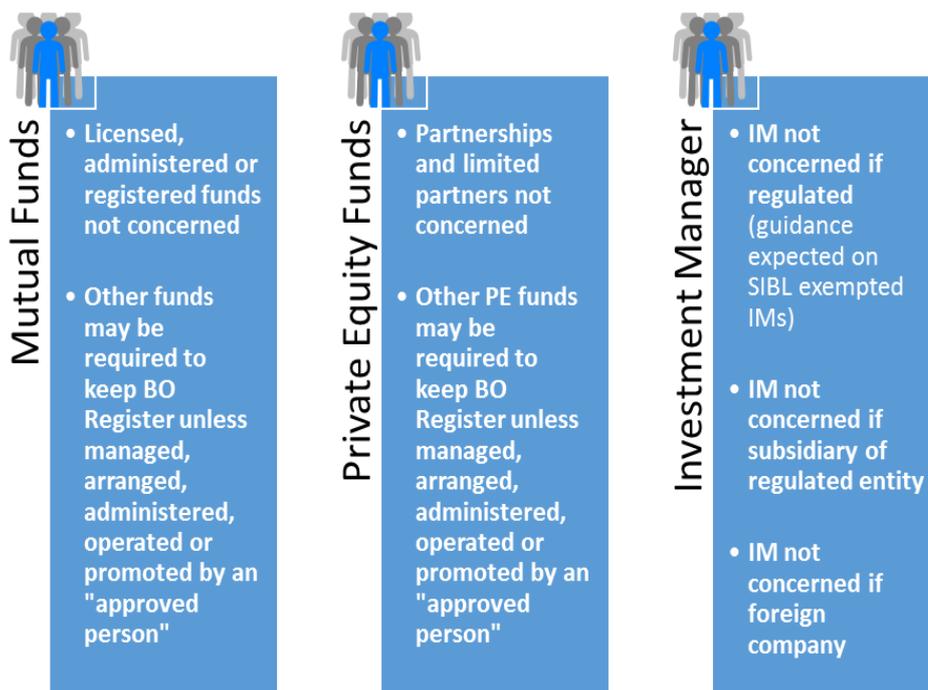
- (a) are listed on the Cayman Islands Stock Exchange (CSX) or an “approved stock exchange”<sup>5</sup>;
- (b) are registered or holding a licence under a “regulatory law”<sup>6</sup> (regulatory law includes the Mutual Funds Law);

- (c) are managed, arranged, administered, operated or promoted by an **approved person** as a special purpose vehicle, private equity fund, collective investment scheme or investment fund;
- (d) are a general partner of a vehicle, fund or scheme referred to in paragraph (c) that is managed, arranged, administered, operated or promoted by an **approved person**; or
- (e) are exempted by the Beneficial Ownership (Companies) Regulations, 2017.

In this context, “**approved person**” means a person or a subsidiary of a person that is **regulated, registered or holding a licence** in the Cayman Islands under a “regulatory law” or regulated in a jurisdiction listed in Schedule 3 of the Money Laundering Regulations (2015 Revision), or listed on the CSX or an “approved stock exchange”.

All exempted companies, ordinary non-resident companies and companies registered as special economic zone companies (SEZC) under the Special Economic Zones Law, 2011, are required to engage a corporate services provider (CSP) to assist them to establish and maintain their BO Registers<sup>7</sup>. Ordinary resident companies may either engage a CSP or the Registrar of Companies of the Cayman Islands may assist them<sup>8</sup>.

In practice, Cayman registered agents and other corporate services providers (CSPs) will be contacting and informing the Companies concerned of the new reporting obligations prior to 1<sup>st</sup> July 2017. For the investment funds industry, the Cayman Islands counsel may need to be involved in order to determine whether a fund, a general partner of a fund or an investment manager are subject to the requirement to keep a BO Register.



## 2. Requirement to take “Reasonable Steps” to identify Registrable Persons.

***Companies required to maintain a BO Register will need to take reasonable steps to identify the individuals and the legal entities which fall under the definitions of beneficial owners and relevant legal entities.***

In connection with the BO Register, Companies concerned are required to take “reasonable steps” to identify (i) any individual who is a beneficial owner of the company or LLC, and (ii) all relevant legal entities that exist in relation to the company or LLC. Together, (i) and (ii) are defined as “registrable persons”.

### 3. Determining which person(s) constitutes a “beneficial owner”

A person is a “beneficial owner”<sup>9</sup> of a company or LLC if he/she holds, directly or indirectly:

- (a) more than 25% of the shares in the company or interests in the LLC; or
- (b) more than 25% of the voting rights in the company or LLC; or
- (c) the right to appoint or remove a majority of the board of directors of the company or managers of the LLC.

If no person meets the conditions (a), (b) or (c) above, then a person who has the absolute and unconditional legal right to exercise, or actually exercises, significant influence or control over the company or LLC (through the ownership structure or otherwise), other than solely in the capacity of a director, professional advisor or professional manager<sup>10</sup>, will be deemed a beneficial owner.

A “relevant legal entity” is a legal entity that (a) is incorporated, formed or registered (including by way of continuation or as a foreign company) in the Cayman Islands; and (b) would be a beneficial owner of the company if it were an individual<sup>11</sup>. Foreign legal entities are therefore not registrable persons.

Further guidance is provided to help a company to identify its beneficial owners as follows:

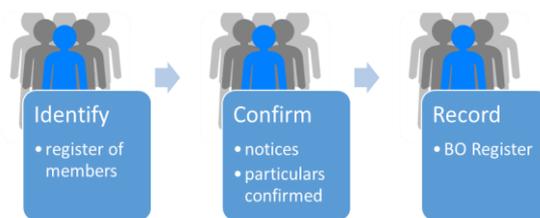
**Direct interest:** To directly own shares, voting rights, or the right to appoint or remove any member of the board of directors, the right to exercise significant influence or control directly over the company, or to actually exercise significant influence, or the right to exercise, or to actually exercise, significant influence or control directly over the activities of a trust, partnership or other entity the trustees or members of which hold an interest in a company directly<sup>12</sup>.

**Indirect interest:** To have a **majority stake** in a legal entity which holds the shares or right directly or as part of a chain of other legal entities, with a “majority stake” defined as: (i) holding a simple majority of voting rights; or (ii) as a member, having the right to appoint or remove a simple majority of the board of directors; or (iii) as a member, controlling alone a simple majority of voting rights pursuant to a joint agreement with other shareholders or members; or (iv) having the right to exercise or exercising dominant direct influence or control<sup>13</sup>.

**Joint Interest:** If two or more persons each hold a share or right jointly, each of them is treated as holding that share or right. If shares or rights held by a person and shares or rights held by another person are the subject of a joint arrangement between those persons, each of them is treated as holding the combined shares or rights of both of them<sup>14</sup>.

### 4. A Step-by-Step Process.

***Concerned Companies will need, starting with 1<sup>st</sup> July 2017, to maintain a BO Register. A specific step-by-step process of how companies should (i) identify (starting with the register of members but often looking beyond it), (ii) confirm, and (iii) record beneficial owners is detailed in the Companies Law and related Regulations. Specific instructions as to what the BO Register should include are also provided.***



- a. At first, it is expected that concerned Companies will be working on identifying any registrable persons. During this period of time, the BO Register should state “*enquiries pending*”.
- b. If from the outset or following investigation, the company or LLC knows or has reasonable cause to believe that there is no registrable person, then the BO Register should state “*no registrable person identified*”.
- c. Once the potential registrable persons are identified, the concerned company or LLC is required to give them notice in writing<sup>15</sup>, asking them, within one month of the date of receipt of the notice:
  - (a) to confirm whether or not they are registrable persons; and
  - (b) if they are registrable persons, to confirm or correct any required particulars that are included in the notice and supply any required particulars that are missing.

During this period of time, the BO Register should state “*confirmations pending*”.

**What “particulars” are required?**

The following information, once confirmed, will be required to be provided by each company and LLC to the CSP (or the Registrar, as the case may be), to be entered into the BO Register:

- for an individual<sup>16</sup>, the full legal name, residential address and, if different, an address for service of notices, date of birth, information identifying the individual from their passport, driver’s licence or other government-issued document, including identifying number, country of issue and date of issue and of expiry;
- for a corporation sole, a government or government department of a country or territory or a part of a country or territory, an international organization whose members include two or more countries or territories (or their governments), or a local authority or local government body<sup>17</sup>, name, principal office, and the legal form of the person and the law by which the person is governed; and
- for a relevant legal entity<sup>18</sup>, the corporate or firm name, the registered or principal office, the legal form of the entity and the law by which it is governed, the register of companies in which it is entered and its registration number (if applicable), In each case, the date on which the individual or entity became or ceased to be a registrable person is also required.

If the company or LLC has not identified all potential registrable persons but knows or has reasonable cause to believe that a shareholder or another legal entity knows the identity of a registrable person<sup>19</sup>, the company or LLC may also give notice to these persons, asking them:

- (a) to state whether or not they know the identity of a registrable person or any person likely to have that knowledge; and

(b) if so, within one month of receipt of the notice, to supply, at the expense of the company, any required particulars respecting such registrable persons that are within the addressee's knowledge, and to state whether the particulars are being supplied with or without the knowledge of the person concerned.

Finally, a company is not required to give a notice if:

- (a) the company knows that the individual or entity is not a registrable person; or
  - (b) the company has already been informed of the individual's or entity's status as a registrable person in relation to it, and has received all the required particulars.
- d. Particulars are deemed confirmed and the notices process stops<sup>20</sup> when the company has reasonable grounds to believe that:
- (i) the particulars were supplied or confirmed by the individual or entity to whom the particulars relate; or
  - (ii) if another person supplied or confirmed the particulars, this was done with the knowledge of the individual or entity to whom the particulars relate; or
  - (iii) if the particulars were included in a statement of initial significant control delivered to the Registrar by subscribers wishing to form a company.

**In general, it is accepted that a company will be entitled to rely, without further enquiry, on the response of a person to a notice in writing sent in good faith by the company, unless the company has reason to believe that the response is misleading or false<sup>21</sup>.**

- e. If a company or LLC becomes aware of a **relevant change**, with respect to a registrable person or its particulars, which would cause the company's BO Register to be materially incorrect or incomplete, then the company is required to give notice to the registrable person requesting confirmation of the change<sup>22</sup>. If the change is confirmed, the BO Registrar will need to be updated accordingly.

**It should be noted that details of a previous registrable person can only be deleted from the BO Register after the expiration of five years from the date on which the person ceases to be a registrable person<sup>23</sup>.**

- f. If a mistake is made, any person listed as a registrable person in relation to the company may apply to the Grand Court<sup>24</sup> for rectification of the company's BO Register.

## 5. Compliance Issues.

***Concerned Companies will have a one year "grace period" commencing on 1<sup>st</sup> July 2017 during which they are required to work with the relevant Cayman registered agent in order to identify registrable persons and create the BO Register before sanctions are applicable.***

**Reminder:** If the Companies fail to comply with its obligations without reasonable excuse or makes a statement that is false, deceptive or misleading in respect of a material particular in the BO Register, the CSP helping the company or LLC to maintain the BO Register is required to

give notice to the company or LLC<sup>25</sup>, and the company or LLC is then required to provide the missing particulars, as well as a justification or correction of any statements identified as false, deceptive or misleading.

**Sanctions:** After 1<sup>st</sup> July 2018<sup>26</sup>, a company or LLC that knowingly and wilfully contravenes its obligations with respect to the BO Register will be liable to a fine of CI\$25,000 (US\$30,487.80), plus CI\$500 (US\$609.76) for each day during which the offence continues, up to a maximum of CI\$25,000 (US\$30,487.80)<sup>27</sup>. Directors and officers may be guilty of the same offence and liable to the same penalty if non-compliance happens with their consent or connivance, or is attributable to their wilful default<sup>28</sup>. Sanctions also apply to registrable persons that knowingly and wilfully fail to comply with the notice received from the company or LLC, or that knowingly and wilfully make a statement that they know to be false in a material particular, or recklessly make a statement that is false in a material particular. In this case, the sanctions are imprisonment for two years or a fine of CI\$10,000 (US\$12,195.12), or both (or, on summary conviction, imprisonment for twelve months or a fine of CI\$5,000 (US\$6,097.56), or both)<sup>29</sup>.

**Dealing with Non-Cooperative Shareholders:** If the company or LLC does not receive the information from the registrable persons within a month of requesting them, a **restrictions notice**<sup>30</sup> may be issued to the registrable persons whose particulars are missing, with a copy to the competent authority<sup>31</sup>. If the company or LLC has sent a restrictions notice<sup>32</sup>, then until it is withdrawn:

- (i) any transfer or agreement to transfer the interest held by the person having received the restrictions notice, or to transfer a right to be issued with any shares, or a right to receive payment of any sums due from the company, is void (other than in a liquidation);
- (ii) no rights are exercisable in respect of the interest (including the right to vote or appoint a proxy), no shares may be issued and, except in a liquidation, no payments may be made of sums due from the company, whether in respect of capital or otherwise; and
- (iii) the BO Register will state ““*restrictions notice issued*” and the date of issue of the notice<sup>33</sup>.

Restrictions may be withdrawn by the company or LLC, if the company or LLC is satisfied with information and/or explanations received, or if the rights of a third party are being unfairly affected by the restrictions notice<sup>34</sup>. The restrictions may also be removed by the Court upon application by an interested party. Finally, a company or LLC may apply to the Court that interests subject to restrictions be sold, with the proceeds to be paid into the Court for the benefit of the beneficial owners<sup>35</sup>.

## 6. Confidentiality and Access to Information.

Information regarding beneficial owners is protected under the Confidential Information Disclosure Law, 2016<sup>36</sup>. The **Beneficial Ownership Platform** will be accessible, however, by the Cayman Islands Government Minister with responsibility for Financial Services<sup>37</sup> upon formal request by the Financial Intelligence Unit, the Financial Reporting Authority, the Cayman Islands Monetary Authority, the Tax Information Authority, or another body monitoring compliance with money laundering regulations<sup>38</sup>, or by the Financial Crime Unit of the Royal Cayman Islands Police Service in response to a request from a jurisdiction that has entered into an agreement with the

Cayman Islands respecting the sharing of beneficial ownership information. Currently, only the UK is deemed to be such a jurisdiction.

**This is not intended to be a substitute for specific legal advice or a legal opinion.**

**For specific advice, please contact:**

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<sup>1</sup> The Beneficial Ownership (Companies) Regulations, 2017, the Companies (Amendment) Law, 2017, the Companies Management (Amendment) Law, 2017, Limited Liability Companies (Amendment) Law, 2017, Beneficial Ownership (Limited Liability Companies) Regulations, 2017, are scheduled to become effective on 1<sup>st</sup> July 2017.

<sup>2</sup> Limited Liability Companies (Amendment) Law, 2017, Beneficial Ownership (Limited Liability Companies) Regulations, 2017, the provisions of which are fairly similar.

<sup>3</sup> Section 252(1) of the Companies Law

<sup>4</sup> Section 245 of the Companies Law

<sup>5</sup> As listed in Schedule 4 of the Companies Law

<sup>6</sup> Section 2 of the Monetary Authority Law (2016 Revision), which refers to (i) Banks and Trust Companies Law (2013 Revision); (ii) Building Societies Law (2014 Revision); (iii) Companies Management Law (2003 Revision); (iv) Cooperative Societies Law (2001 Revision); (v) Insurance Law, 2010; (vi) Money Services Law (2010 Revision); (vii) Mutual Funds Law (2015 Revision); and (viii) Securities Investment Business Law (2015 Revision).

<sup>7</sup> Section 252(2) of the Companies Law

<sup>8</sup> Section 252(3) of the Companies Law

<sup>9</sup> Section 247 of the Companies Law

<sup>10</sup> Section 247(4) of the Companies Law

<sup>11</sup> Section 248 of the Companies Law

<sup>12</sup> Section 11 of the Beneficial Ownership (Companies) Regulations, 2017

<sup>13</sup> Sections 12-13 of the Beneficial Ownership (Companies) Regulations, 2017

<sup>14</sup> Section 15 of the Beneficial Ownership (Companies) Regulations, 2017

<sup>15</sup> Section 249(1) of the Companies Law

<sup>16</sup> Section 254(1) of the Companies Law

<sup>17</sup> According to Section 244(2) of the Companies Law, such entities should be treated as an individual for the purposes of determining if they are a beneficial owner.

<sup>18</sup> Section 254(3) of the Companies Law

<sup>19</sup> Section 249(3) of the Companies Law

<sup>20</sup> Section 254(4) of the Companies Law

<sup>21</sup> Sections 247(2) and 248(2) of the Companies Law

<sup>22</sup> Section 255(1) of the Companies Law

<sup>23</sup> Section 258 of the Companies Law

<sup>24</sup> Section 259 of the Companies Law

<sup>25</sup> Section 256(1) of the Companies Law

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<sup>26</sup> Section 5 of the Companies (Amendment) Law, 2017

<sup>27</sup> Section 274 of the Companies Law

<sup>28</sup> Section 278 of the Companies Law

<sup>29</sup> Sections 275 and 276 of the Companies Law

<sup>30</sup> Section 256(3) of the Companies Law

<sup>31</sup> According to Section 246(1) of the Companies law, the competent authority is the Minister charged with responsibility for Financial Services.

<sup>32</sup> Section 266(1) of the Companies Law

<sup>33</sup> Section 7(2) of the Beneficial Ownership (Companies) Regulations, 2017

<sup>34</sup> Section 273 of the Companies Law; in this case, the BO Register will state “restrictions notice withdrawn”.

<sup>35</sup> Sections 271(1) and 272(1) of the Companies Law

<sup>36</sup> Section 264 of the Companies Law

<sup>37</sup> Section 260(1) of the Companies Law

<sup>38</sup> Section 262(1) of the Companies Law