

Hong Kong's First Bill on Register of Significant Controllers

The Companies (Amendment) Bill 2017 (“**Bill**”) which requires Hong Kong companies to keep and maintain a register of significant controllers (“**SC Register**”) was gazetted on 23 June 2017.

The Bill was published together with the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017. The intention is to bring Hong Kong's regulatory regime up to date in line with international requirements as promulgated by the Financial Action Task Force (FATF), an inter-governmental body that sets international standards on combating money laundering and terrorist financing. This article discusses only the Companies (Amendment) Bill 2017.

Scope of Application

As the short title of the Bill suggests, only companies “formed and registered” under the Hong Kong Companies Ordinance, with limited exceptions, will be caught. Non-Hong Kong companies, despite having registered in Hong Kong, are not required to keep a SC Register. This echoes the position stated in the Hong Kong Government's Consultation Conclusion of April 2017, which says “... *as regards foreign companies registered in Hong Kong, we are mindful that they may be subject to disclosure requirements of the jurisdictions in which they are incorporated. To place these companies under the proposed regime may dissuade them from coming to Hong Kong for fear of regulatory overlap...*” (paragraph 2.8).

At this juncture, it should be noted that as a result of FATF's continued efforts, many countries are putting in place similar legal framework to collect and maintain beneficial ownership information. For instance, the British Virgin Islands has just promulgated a new law (which took effect on 30 June 2017) compelling registered agents to create a

beneficial ownership database. Corporations using Hong Kong and foreign corporate vehicles should keep abreast of the global implementation of the FATF standards.

The other exceptions to the requirement of keeping a SC Register under the Bill are listed companies (which are yet subject to disclosure requirements under the Securities and Futures Ordinance) or companies that fall within a type or class of companies exempted by future regulation. In other words, save for the mentioned exceptions, dormant companies, financial institutions, charitable organisations and any other types of companies incorporated in Hong Kong (“**applicable companies**”) will each be required to keep a SC Register.

Meaning of Significant Control

The conditions for determining whether a person has significant control over a company are set out in a new Schedule 5A (which the Financial Secretary of Hong Kong may amend by way of issuing a notice in the Gazette). A person has significant control if it:

1. holds, directly or indirectly, **more than 25% of the shares**;
2. holds, directly or indirectly, **more than 25% of the voting rights**;
3. holds, directly or indirectly, the right to appoint or remove a **majority of the board** of directors;
4. has the right to exercise or actually exercises, **significant influence or control**; OR
5. has the right to exercise or actually exercises, **significant influence or control** over a trust or firm which is not a legal person, but whose trustees or members meets one or more of the conditions specified above.

Conditions 1 to 3 are to a large extent factual. However, the reference to “significant influence or control” (which is not defined) in Conditions 4 and 5 leaves much scope for interpretation and is far from being certain. The Hong Kong Companies Registry is expected to issue draft guidelines on the application of Conditions 4 and 5. We will keep you posted of any new development in due course.

On interpretation, the bill makes no distinction between voting or non-voting shares. Accordingly, if an applicable company issued to X one voting share and 99 non-voting shares to Y, both X and Y would be caught under Conditions 2 and 1 respectively. A person holds a share (or right) indirectly if it is held through a chain of intermediaries with each holding a majority stake in the entity below except the last one which holds the share (or right). Joint owners of shares (or rights) are each regarded as a holder of such interest.

For rights attached to shares by way of security, it is provided that if the person granting the security (say, for instance, the borrower) retains control of the shares and the lender is only allowed to exercise its right for the purpose of “realising or preserving the values of the security”, such security right is regarded

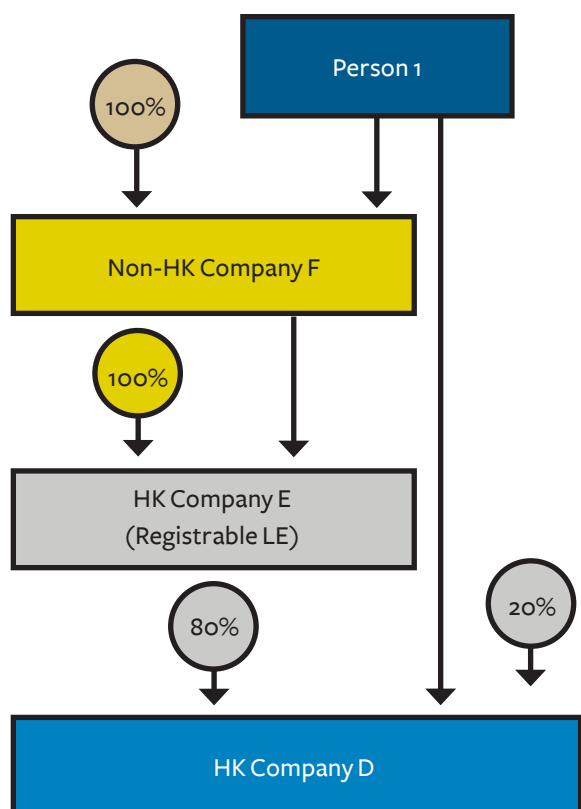
as being held by, in this instance, the borrower. However, if the lender which takes security over shares beyond the 25% threshold, arranges to have the shares registered in its name (or the name of its nominee), the lender would need to be included in the SC Register. Careful drafting of the share mortgage is therefore required to avoid any added burden of the lender being considered a significant controller.

Obligations of applicable companies

KEEPING OF THE SC REGISTER WITH REQUISITE PARTICULARS

Breach of the requirement is an offence. However, not all persons having significant control are required to be included in the SC Register. A natural person (or government body) which satisfies any of the five conditions mentioned above, but holds such interest through a listed company is not “registrable”. A legal entity (but not a natural person or government body), which satisfies any of the five conditions but is not a member of the applicable company is also not “registrable”. For a company which does not have a significant controller, it is still required to keep a SC Register.

As illustration, in a chain company structure below (an example set out in the Hong Kong Government’s Consultation Paper):



Only Companies D and E are each required to keep a SC Register.

For Company D, its SC Register should include particulars of: (i) Person 1 (indirect interest held through Companies E and F and its direct interest); and (ii) Company E. Company F, not being a member, is not a registrable legal entity for the purpose of Company D’s SC Register.

For Company E, its SC Register should include particulars of: (i) Person 1 (indirect interest held through Company F); and (ii) Company F.

Company F, being a non-HK company, needs not keep a SC Register.

DUTY TO INVESTIGATE, VERIFY AND KEEP THE INFORMATION UP-TO-DATE

The company is under an active obligation to ascertain the identity of any significant controller (or any change in particulars) and send out a notice (“**Notice**”) to relevant person seeking confirmation (or required information) within seven days after first knowing or having reasonable cause to believe that such person is (or knows the identity of) a significant controller (or that there is change in particulars). Breach of the requirement is an offence.

DUTY TO SUPPLY INFORMATION

SC Register is **not** public record and is only available for inspection (or provision of copies) by persons whose names are entered in the SC Register or on demand by any law enforcement officer (including but not limited to an officer of the Police, Independent Commission Against Corruption, Securities and Futures Commission or Inland Revenue Department). Refusal to comply with the officer’s demand is an offence.

Obligations of persons having significant control

DUTY TO RESPOND

Unlike the position in the UK, a person having significant control over an applicable company is **not** under any legal obligation to notify the company its status or any of its particulars which should be included in the SC Register. However, upon receipt of the company’s Notice, the addressee must respond and comply with requirements within one month from the date of Notice (save on the grounds of legal professional privilege). Failure to do so is an offence.

OFFENCE FOR FALSE INFORMATION

If a person, in purported compliance with the Notice, knowingly or recklessly makes a statement or provides any information that is misleading, false or deceptive in a material particular, it will be guilty of an offence.

Conclusion

The Bill is the first move to enhance transparency of beneficial ownership of Hong Kong companies. More detailed statutory and/or non-statutory guidelines are expected to be issued in due course. The key at this stage is to keep aware of the development and carefully consider the impact of the SC Register of a Hong Kong company on the disclosure requirement of the whole group.

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