

Hong Kong companies to increase transparency through mandatory register of beneficial ownership

Beneficial owners of Hong Kong companies will be required to make their identities known to the company under proposals recently tabled by the Hong Kong Government. The Companies (Amendment) Bill 2017 (“**Bill**”) proposes to introduce an obligation for companies to maintain a ‘significant controllers register’ containing up-to-date information on their beneficial ownership. The register will not be accessible to the general public.

Context

The abuse of cross-border company structures to commit crimes such as money laundering, tax evasion and terrorist financing has led to coordinated international efforts to ensure greater transparency of company ownership. The Financial Action Task Force (“**FATF**”) - an inter-governmental body - has spearheaded these efforts by setting international standards and developing recommendations for combating money laundering and terrorism financing.

One of the FATF’s recommendations is for countries to impose a legal requirement on companies to keep a record of their beneficial owners. Despite its membership of FATF, Hong Kong does not comply with this recommendation. To date only Hong Kong-listed companies are required to keep a register of those who hold an interest (including a beneficial interest) of at least 5% in any class of voting shares. Other companies only need to maintain a register of legal, not beneficial, membership. The purpose of the proposed Bill is to stop this gap in Hong Kong’s compliance regime.

Hong Kong is thus aligning itself with the general trend currently seen in other parts of the world of increasing the level of transparency in corporate structuring. For instance, with effect from 1 August of this year, France has introduced rules similar to the ones now proposed by the Hong Kong Bill that require companies to disclose information on beneficial ownership.

Which companies must keep a register?

The proposed obligation will apply to “applicable companies”, which are companies incorporated in Hong Kong that are not:

- listed companies; or
- companies that are exempted from maintaining a significant controllers register by regulations made by the Financial Secretary of Hong Kong.

Non-Hong Kong companies registered in Hong Kong (including those with registered branches or representative offices in Hong Kong) are not applicable companies.

Who must be registered?

Applicable companies must keep a register of ‘significant controllers’. A significant controller of a company is:

- *a natural person or government entity*, which has significant control (not through a listed company) over that company; or
- *a legal entity* (other than a government entity), which is a member and has significant control over that company.

The meaning of ‘significant control’

A person has “significant control” over a company if the person

- (a) holds, directly or indirectly:
 - more than 25% of the issued shares in that company;
 - the right to share in more than 25% of the capital or profits of a company with no share capital;
 - more than 25% of the voting rights in that company; or
 - the right to appoint or remove a majority of the board of directors of that company; or
- (b) has the right to exercise, or actually exercises, significant influence or control over:

- that company; or
- the activities of a trust or firm, which is not a legal person provided its trustees or members meet one or more of the conditions specified in paragraph (a) above.

What must a company register in the significant controllers register?

The Bill imposes a number of obligations on companies relating to the maintenance of the register as well as the degree in which they need to be proactive in ascertaining who their significant controllers are. A company is thus required to:

- keep a significant controllers register: particulars of the significant controllers including name, address and nature of the significant controller's control of the company must be recorded in the significant controllers register.
- investigate and obtain information about its significant controllers: a company must ascertain whether there is any significant controller of the company and identify each of them. Within seven days after a company becomes aware or has reasonable cause to believe that a person is, or knows who is, a significant controller, it must send to the person a notice to request confirmation and information.
- keep information of the significant controllers register up-to-date: if a company knows, or has reasonable cause to believe that there is a change in the details of a significant controller that are required to be contained in the significant controllers register, it must give notice to that significant controller.

Failure to comply with the above obligations may expose a company and every responsible person of that company to a fine.

Obligations of significant controllers

A person who has received from a company a notice referred to in the previous section must reply and comply with the request within one month from the date of the Notice. Failure to comply will be regarded as an offence by that person and,

in the case of a company, every related person of the company. A fine of up to HKD 25,000 may be imposed. The only defence available to those who are found not to have complied with a notice request is to prove that the request was frivolous or vexatious.

Stiff penalties are reserved for those who in reply to a notice, knowingly or recklessly made a false statement or provided information that is misleading, false or deceptive in a material particular. They may incur a fine of up to HKD 300,000 and face imprisonment of up to two years.

Inspection of the significant controllers register

The significant controllers register will not be accessible to the general public. It will, however, be open to inspection by the following persons who may also request a copy of the register:

- persons whose name are entered in the significant controllers register; and
- law enforcement officers including those of the Companies Registry, the Hong Kong Police Force, the Inland Revenue Department and the Independent Commission Against Corruption.

If a company does not allow law enforcement officers to inspect and make a copy of the register, the officers may apply to the Court for an order to do so. Non-compliance with law enforcement officers' request for access to the register will expose a company, and every responsible person of such company, to a fine of up to HKD 25,000.

Next Step

The new rules are currently planned to come into operation from 1 March 2018. Once the Bill is passed, companies should prepare for the implementation of the new regime by ascertaining who their known significant controllers are and making arrangements for the establishment of a significant controllers register. They should also formulate a compliance manual setting out guidelines for maintaining compliance with the new obligations.

Nicolas Vanderchmitt

HONG KONG

Partner

T : +852 2907 7882

Mail : nvanderchmitt@lpalaw.com

Erik Leysens

HONG KONG

Of counsel

T : +852 2907 7882

Mail : eleysens@lpalaw.com.hk

Ryan Tsoi

HONG KONG

Associate

T : +852 2907 7882

Mail : rtsoi@lpalaw.com.hk

