MACFARLANES

SCOTTISH PARTNERSHIPS NOW SUBJECT TO THE PSC REGIME

From 26 June 2017, the regime for recording persons with significant control (PSCs), sometimes known as the beneficial ownership register regime, has been extended to certain kinds of Scottish partnership.

Scottish partnerships that are now subject to the PSC regime must identify all persons who have "significant control" over them. From 24 July 2017, they will need to provide details of their PSCs to Companies House.

Although the Government had previously hinted at some of the detail, it published the final regulations setting the full regime out on 26 June, giving businesses and advisers little time to prepare.

We have set out below the key aspects of the new regime, as well as how it may interact with existing investment structures.

It is important to note that, although often involved in transactions governed by English law, Scottish partnerships are a creature of Scottish law. It is therefore essential to involve Scottish legal advice when analysing the position of a Scottish partnership under the PSC regime. This note should not be taken as advice on matters of Scottish law.

Which partnerships will the regime apply to?

The new regime will apply to **all Scottish limited partnerships (SLPs)**. This includes SLPs designated as private fund limited partnerships (PFLPs).

The regime also applies **to all Scottish qualifying partnerships (SQPs).** These are Scottish partnerships that fall within the definition of "qualifying partnerships" under accounting legislation. Most commonly this refers to a partnership all of whose members are limited companies (although it also includes a partnership all of whose members are unlimited companies, if the members of each of those unlimited companies are also all limited companies).

The legislation refers to SLPs and SQPs collectively as "eligible Scottish partnerships".

How do Scottish partnerships identify their PSCs?

From 26 June, eligible Scottish partnerships are under an obligation to take reasonable steps to identify their PSCs. To this end, they have a statutory power (and, in some circumstances, an obligation) to send notices to their known or suspected PSCs to require them to confirm their status and details. These mirror the powers already available to companies and limited liability partnerships (LLPs).

They will also have statutory powers to send notices to other people who they suspect know the identity of any of the partnership's PSCs.

Companies and LLPs might know these as "section 790D notices", although, under the regime for Scottish partnerships, they might more properly be called "regulation 10 notices".

Who are a Scottish partnership's PSCs?

A person will be a PSC of an eligible Scottish partnership if he or she meets one of five conditions. These are broadly similar to the five conditions that currently apply to LLPs. They are:

1. Holding (directly or indirectly) the right to more than 25% of the partnership's surplus assets on a winding-up.

2. Holding (directly or indirectly) more than 25% of the partnership's voting rights.

3. Holding (directly or indirectly) the right to appoint or remove a majority of the members of the partnership who are entitled to take part in its management. This includes not only a majority **in number** of those "managing members", but also a majority according to how many **voting rights** they hold at management meetings.

4. Having the right to exercise, or actually exercising, significant influence or control over the partnership.

5. Broadly speaking, having the right to exercise, or actually exercising, significant influence or control over a trust or firm that satisfies one of the previous four conditions in relation to the partnership.

As for companies and LLPs, the Government has produced statutory guidance elaborating on the meaning of "significant influence or control" for conditions 4 and 5 above. This states that a person is also likely to be a PSC of an SLP/SQP under condition 4 if he or she has the right to receive more than 25% of the partnership's profits.

Finally, again as with companies and LLPs, in some cases an eligible Scottish partnership will need to identify a **legal entity** as its controller, rather than a natural person (under the conditions above). However, this is only possible if that legal entity is itself required to file details of its PSCs at Companies House, or if its voting shares are admitted to one of various securities exchanges.

What happens once a Scottish partnership identifies its PSCs?
Unlike companies and LLPs, eligible Scottish partnerships will not have to keep their own internal PSC register. This reflects the fact that, under partnership law, there is no general requirement for partnerships to keep statutory books.

Instead, the partnership will need to file details of its PSCs at Companies House. Broadly, the partnership will need to do this within 14 days of the date on which all of the PSC's required particulars have been confirmed. Normally, this will be the day on which the PSC confirms that the particulars are correct, but there are other methods of confirming these details.

If the partnership is able to identify a legal entity as its controller, it will need to file that entity's particulars within 14 days of the date on which it has obtained all of those particulars. There is no need to wait for confirmation from the legal entity.

The details to be filed include the date on which the person in question became a PSC. However, if that date was before 26 June 2017, the filing will simply state "26 June 2017" instead.

The obligation to file PSC details at Companies House does not begin until 24 July 2017. Even then, an eligible Scottish partnership may not be able to file details of its PSCs, as it may not have identified its PSCs by that date or it may not have received confirmation of their particulars.

However, the partnership will have to file a "holding statement" with Companies House setting out the status of its investigations. This may be a statement that investigations are still on-going, or that the partnership has identified a PSC but is awaiting confirmation of his or her particulars. Partnerships should file a holding statement within 14 days of 24 July 2017 (in other words, by 9 August 2017).

If there is a change in a Scottish partnership's PSCs or any of those PSC's details, the partnership will need to send a notice to the PSC(s) in question within 14 days of becoming aware of the change. For companies and LLPs, this is commonly called a "section 790E notice", although, under the Scottish partnerships regime, a more accurate name would be a "regulation 11 notice". Once the partnership has confirmation from the PSC, it will then have a further 14 days to notify Companies House.

Which details of a PSC will be made public?
The details to be filed at Companies House are the same as for PSCs of companies and LLPs. These include the PSC's name, service address, country of residence, nationality, date of birth and residential address, as well as the nature of the PSC's control over the partnership. However, the PSC's residential address and the "day element" of his or her date of birth will not appear to the public.

Can a PSC stop his or her details from being made public?
Again, as with companies and LLPs, PSCs can apply to court to stop their details from appearing on the public register. However, the court will only allow an application of this kind if the PSC can show that making his or her details available would put him or her at serious risk of violence or intimidation. This may not always be an easy test to satisfy.

If the application is successful, those details will not appear at Companies House and cannot be disclosed to anyone, other than to credit institutions and financial institutions (for the purpose of customer due diligence) and to certain specified public authorities. If it is not successful, the PSC's details will appear on the public record.

In the same way as when the PSC regime was originally introduced for companies and LLPs, PSCs of Scottish partnerships can start making applications now to protect their information. If they are not successful, they will have **12 weeks to dispose of their "control"** over the partnership. If they do so, they will never appear on the public record. This "grace period" is designed to allow people to avoid public disclosure if they so wish.

New registration requirements
In order to file PSC information publicly, a Scottish partnership first needs to be registered with Companies House. All SLPs will already be registered with Companies House, because registration is a pre-condition to becoming a limited partnership.

Until now there has been no requirement for SQPs to register with Companies House. However, this has now changed and **SQPs will be required to register with Companies House.**

Partnerships that are already SQPs on 24 July 2017 will have 14 days from that date to register themselves with Companies House. (New SQPs will need to register with Companies House within 14 days of becoming an SQP. This could be when the partnership is formed, or if it becomes an SQP due to a change in its members.) If the partnership ceases to be an SQP at any point, it will also need to let Companies House know.

In addition, from 24 July 2017, both **SLPs and SQPs will be required to file annual confirmation statements** at Companies House, in the same way that companies and LLPs already do. These will effectively state that all of the partnership's required filings, including details of PSCs, but also any other filings, have been made and are up to date.

Who is affected by these changes?

Clearly this will affect SLPs and SQPs which trade and do business as independent entities. These partnerships will need to embark on identifying their PSCs from scratch by examining their partnership agreement and other arrangements and (potentially) sending notices to suspected PSCs. They may also be looking at revealing the identity of their ultimate controllers for the first time.

Separately, Scottish partnerships are frequently used in corporate structures because (unlike English partnerships) they have separate legal personality and can hold property in their own name, but (like English partnerships) they are tax-transparent for most purposes. They also benefit from more flexibility than companies when it comes to returning capital and structuring capital participation.

For this reason, Scottish partnerships are often found in investment structures, particularly in the **private equity and venture capital sectors**. Here they are frequently used as carried interest vehicles, executive co-investment vehicles, "feeder" vehicles and as the principal fund vehicle for funds of funds and secondaries funds. SLPs have also recently found a role in structures designed to allow pension trustees to place their funds in **employer-related investments.** Normally trustees cannot invest more than a small proportion of the pension fund's resources in assets relating to the employer's business, but, by using SLPs, it is possible to remain outside this prohibition.

In some cases, the new regime may not require organisations to undertake significant new investigations. If the Scottish partnership currently sits within a structure above a company, it may simply be a case of "swapping out" the existing PSC in the company's register and entering the Scottish partnership in the register instead. The person previously listed in the company's PSC register will now become the Scottish partnership's PSC.

However, the position may not always be so clear and it is important to seek legal advice in each case.

In particular, whilst the PSC regime for companies and LLPs contains a "carve-out" from registration for limited partners, this does not appear in the regime for Scottish partnerships. This gives rise to various potential issues:

- Limited partners of an SLP will usually be entitled to participate in the SLP's surplus assets on a winding up. If an individual limited partner is entitled to more than 25% of the SLP's surplus assets on a winding-up, that partner would appear to be a PSC under the new regime.

- The regulations state that a person has more than 25% of an SLP's voting rights if they can "block changes" to its constitution. In some cases, an individual limited partner may have a veto right over changes to an SLP's partnership agreement and therefore might be a PSC under this condition. However, conversely, statutory guidance issued by the Government suggests that this alone is not sufficient to give a person "significant influence or control" over an SLP.

- Partnership agreements often give limited partners rights to remove the general partner, either "for cause" or in a "no fault divorce". Limited partners together holding a certain percentage of committed capital to the SLP are typically able to exercise these rights. As it is the general partner who manages an SLP (and who typically appoints any FCA-authorised manager of the SLP), it may be that a limited partner whose committed capital exceeds the specified percentage (and who can therefore effectively remove the general partner) is a PSC under the new regime.

The effect of this may be that limited partners of an SLP will need to be disclosed as controllers of the partnership. In addition, because of the specific nature of the details that an SLP needs to provide, it may be that arrangements in the partnership agreement (including profit share, capital rights and veto rights) become, in effect, a matter of public record. This may be a concern for many investors who participate in fund structures set up as SLPs.

These are some of the various issues that will need to be examined on a case-by-case basis alongside Scottish lawyers to decide who needs to be disclosed as an SLP's controllers.

What should you do now?

As mentioned above, at this stage Scottish partnerships are not required to make any filings at Companies House. This obligation comes into effect on 24 July 2017.

SLPs and SQPs should start examining their partnership agreements now to understand the allocation of surplus assets, voting rights and profits and the right to participate in management decisions. This will give a good indication of their likely PSCs.

However, this will not be the end of the investigations. **Other documentation may also affect the analysis.** For example, a partnership may have issued side letters awarding "points" or "units" to individual partners representing their entitlement to participate in the partnership's profits. This may indicate that a person is a PSC of the partnership under condition 4. These partnerships may wish to examine any service agreements or letters of engagement with their employees and partners.

Likewise, SLPs involved in fund and private equity structures will need to examine their agreements with operators, managers and advisers to see where the real control over the SLP lies. If voting rights or day-to-day business has been ceded to someone else (as may well be the case if the SLP is a collective investment scheme or an alternative investment fund), that person may well be a PSC.

SLPs and SQPs should also consider involving their legal advisers, including Scottish lawyers, in their PSC analysis in order to understand the extent of information that may need to be made public.

Finally, **companies and LLPs that already keep a PSC register should check to see whether they now need to record a Scottish partnership** in their register, rather than their existing PSC(s). This could affect any company or LLP but it is particularly relevant for holding companies sitting within private equity or venture capital backed groups.

If those companies and LLPs do need to record a Scottish partnership, they will need to decide whether to send any information notices under the Companies Act 2006, update their PSC register accordingly and make appropriate filings at Companies House within 14 days.

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