



UK GOVERNMENT PUBLISHES DRAFT
LEGISLATION TO IDENTIFY OVERSEAS
BENEFICIAL OWNERS OF UK PROPERTY

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WHO REALLY OWNS AND CONTROLS THAT PROPERTY? UK GOVERNMENT PUBLISHES DRAFT LEGISLATION TO IDENTIFY OVERSEAS BENEFICIAL OWNERS OF UK PROPERTY

Two years ago David Cameron announced plans to introduce a public register of beneficial ownership of overseas entities owning property/land in the UK (the "Register"). Those plans are gradually coming to fruition as the Department for Business, Energy and Industrial Strategy ("BEIS") has recently published its draft Registration of Overseas Entities Bill (the "Bill"). You can access the Bill, the impact assessment and the government's overview document on how the Register will work at:

<https://www.gov.uk/government/consultations/draft-registration-of-overseas-entities-bill>

We outline below the reasons for introducing the Register, its key features and its potential impact on property and real estate finance transactions in England and Wales.

The **key takeaway** point is the new regime will require overseas entities to register details of their beneficial owners if they want to own, let or dispose of land in the UK, with pretty severe penalties for non-compliance.

THE BACKGROUND: WHY DO WE NEED THE REGISTER?

The UK has a global reputation as an open and transparent place to do business. That said, and as the government's overview document notes, there has been some concern about the lack of transparency around:

- who ultimately owns land in the UK where land is registered to an overseas company or other entity; and
- whether overseas entities are investing in the UK property market (especially in London) to hide and launder the proceeds of bribery, corruption and financial crime.

The concern has arisen because information currently available about overseas owners of land (or registered leaseholders) in the UK is pretty scarce, often just the entity's name and jurisdiction of incorporation. So it is not clear who really owns and controls the entity and, by extension, the property/land itself.

So the primary objective of the Bill and the Register is to identify and record overseas entities who transact in UK real estate to prevent and combat those entities from investing illicit funds into, or laundering money via, the UK property market.

It is also fair to say that the introduction of the Register is consistent with the government's general policy to try to discourage the ownership of UK property through offshore companies, as well as the wider international climate about the use of offshore locations and low tax jurisdictions by companies and individuals to structure, own and manage their wealth and finances.

The government has requested comments on the draft legislation by 17 September 2018 and expects to introduce the Bill formally to Parliament in 2019. It is intended that the Register will go live in 2021.

HOW WILL THE LEGISLATION ACHIEVE ITS PRIMARY OBJECTIVE?

The key features of the Bill include:

- a wide ranging definition of what is an “overseas entity”, i.e. a legal entity that is governed by the law of a country or territory outside the UK and includes bodies corporate, partnerships and other entities that are legal persons under the law by which they are governed
- any overseas entity that wishes to own “land” in the UK (i.e. freehold interests or leasehold interests granted for more than 7 years) has to:
 - take steps to identify its beneficial owner(s)
 - register them (subject to some limited exceptions) whereupon those overseas entities will be given registration numbers
- a beneficial owner (“X”) of an overseas entity (“Y”) is defined as a person or other legal entity that satisfies one or more of the following conditions:
 - condition 1 – X holds, directly or indirectly, more than 25% of the shares in Y
 - condition 2 – X holds, directly or indirectly, more than 25% of the voting rights in Y
 - condition 3 – X holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of Y
 - condition 4 – X has the right to exercise, or actually exercises, significant influence or control over Y
 - condition 5 – (a) the trustees of a trust, or the members of a partnership, unincorporated association or other entity, that is not a legal person under the law by which it is governed, meet any of the conditions above (in their specified capacity as such) in relation to Y and (b) X has the right to exercise, or actually exercises, significant influence or control over the activities of that trust or entity

The beneficiaries of trusts will not be named on the Register as noted in the government’s impact assessment. This decision was made for confidentiality reasons, and because the information is, or ought to be, already available to government authorities through other trust related disclosure legislation.

- the Register is to be kept by Companies House and is to be available for public inspection (subject to limitations on the disclosure of certain sensitive information)
- once registered, an overseas entity will be under a duty to update the Register every year
- two key methods of enforcement:
 - restrictions on the overseas entity's ability to acquire and dispose of freehold property and leasehold interests granted for more than 7 years
 - criminal liability for breach of registration and/or updating requirements

As you will have gathered, the Register broadly follows the same approach as the register of “persons with significant control” (aka “PSC register”) which is already in force in relation to UK corporate entities.

The regime will apply across the UK; however, it applies differently in each of England and Wales, Northern Ireland and Scotland due to the three jurisdictions’ differing regimes for registering ownership of land.

IMPACT ON REAL ESTATE FINANCE TRANSACTIONS

The Register will have an impact for lenders and borrowers involved in existing and new UK real estate finance transactions, including:

- **Ownership restrictions:** an overseas entity cannot become the registered proprietor of land in England and Wales unless it has complied with the overseas entity registration regime. This may slow up acquisitions. Once an overseas entity is registered as owner of land at HM Land Registry, then a restriction will be automatically placed on the title by HM Land Registry.
- **Enforcement restrictions:** an overseas entity will not be able to deal with its land if it has failed to comply with the registration requirements. This may hamper repayment of the loan and enforcement of the lender's security over the property to secure repayment. This concern is particularly acute for existing financings. As a result, the Loan Market Association has urged that existing loans made to overseas entities secured by UK real estate are carved out from the regime to prevent issues with historic transactions.
- **New lending:** once the Register is introduced, it will not be possible to register a new charge against land held by an overseas entity if that entity has not complied with the registration requirements. Lenders will need to ensure that they have a valid registration number for their overseas entity borrower. At this stage it is not clear how long the registration process will take, so this is something which lenders should request at the outset of a deal.
- **Borrower entities:** a large number of UK properties are held by foreign unincorporated ownership structures such as REITs and partnerships. Consequently, the practical implementation of registration is likely to prove a challenge, potentially resulting in restructuring of existing deals and delays to completions on new transactions.
- **Ownership structure changes:** the new regime may prompt a desire on the part of borrowers to change their existing ownership structures which, in turn, may require review and amendment of existing loan facilities.
- **Compliance burden?:** both lenders and borrowers may feel that compliance with the Register could create additional burdens for them from a time, cost and/or administration perspective.
- **Loan agreement provisions:**
 - **Day 1 compliance:** the borrower should confirm compliance with the regime as a condition precedent to the transaction, so as to ensure that, among other things, a lender's security over the property can be registered.
 - **Ongoing representations and covenants:** most loan agreements contain representations and covenants about compliance with laws. But lenders are likely to request borrowers give specific confirmations about the Register and its requirements, in a similar vein to "restrictions notices" and "warning notices" confirmations that are now commonly included in loan agreements to cover the PSC regime.
 - **Event of default:** non-compliance should be an event of default (possibly with no grace period) to allow a lender to take immediate action to protect its position.

New deals will probably seek to include these kinds of provisions and lenders may want to amend existing deals to incorporate them.

COMMENT

Andrew Steele, Head of Real Estate at Stevens & Bolton, comments:

"The new beneficial ownership of overseas entities registration regime is an important piece of legislation, which will keep the UK at the forefront of tackling money laundering and financial crime. But at the same time we should be mindful of how the new regime will affect existing real estate finance deals and how it might affect the availability of legitimate third party finance to borrowers and investors in the UK property market, which oils the wheels of UK property transactions and stimulates economic growth and development. Striking the right balance between these two things will be crucial to the implementation and success of the regime."

KEY CONTACTS

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The information contained in this guide is intended to be a general introductory summary of the subject matters covered only. It does not purport to be exhaustive, or to provide legal advice, and should not be used as a substitute for such advice.

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