

Beneficial Ownership Regulations 2016: A Practical Guide

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1. What do the Regulations relate to and from when do they apply?

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 (the Regulations) came into operation on 15 November 2016 and are in force in Ireland from that date.

The Regulations transpose into Irish law the first sub-paragraph of Article 30(1) of the Fourth Anti-Money Laundering Directive (4AMLD), the purpose of which is to combat money laundering and terrorist financing.

The first sub-paragraph of Article 30(1) of 4AMLD requires corporate and other legal entities incorporated within Ireland (In-Scope Entities) to 'take all reasonable steps' to obtain and hold 'adequate, accurate and current information' on the beneficial ownership by individuals of such In-Scope Entities. The deadline for fully transposing 4AMLD into Irish law is 26 June 2017.

Previously, the identity of the beneficial owners of Irish companies could remain largely private and so the Regulations represent a significant development for certain companies and corporate structures.

2. To whom do the Regulations apply?

As noted above, the Regulations apply to In-Scope Entities, being Irish incorporated corporate and other legal entities, including all types of Irish incorporated companies, limited partnerships and ICAVs (but not trusts, which will become subject to similar regulation over the coming months).

Beneficial owners of such In-Scope Entities also have obligations under the Regulations.

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3. To whom do the regulations not apply?

The Regulations apply to every In-Scope Entity except those:

- (a) listed on a regulated market that is subject to disclosure requirements consistent with EU law (the Regulations do not exempt Irish incorporated subsidiaries of such listed companies); or
- (b) subject to equivalent international standards which ensure adequate transparency of ownership information.

4. What beneficial ownership data must be recorded?

Essentially, certain data must be recorded for the purposes of enabling the determination of the ultimate beneficial owners of an In-Scope Entity. In-Scope Entities will now need to collect necessary beneficial ownership data and to record this data in their own corporate beneficial ownership registers (BOR). Once the remainder of 4AMLD is transposed by Ireland in June 2017, such data will also need to be recorded in a central register of beneficial ownership (Central Register).

The requirement to collect and record this data has important implications for companies and corporate groups with complex ownership structures and/or trust structures in place, as the ultimate beneficial owners of such companies/groups will now need to be identified. This may be straightforward for some In-Scope Entities but may be problematic for others, particularly those which are subsidiaries of multi-layered international groups.

5. What is a beneficial owner of an In-Scope Entity under the Regulations?

In the Regulations, 'beneficial owner' is given the meaning provided by Article 3(6)(a) of the 4AMLD. Beneficial ownership of an In-Scope Entity is defined in the 4AMLD as any natural person(s) who ultimately owns or controls such entity and/or the natural person(s) on whose behalf a transaction or activity is being conducted.

A person is a beneficial owner if that person ultimately owns or controls the In-Scope Entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in it, or through control via other means.

A shareholding of 25% plus one share or an ownership interest of more than 25% in the In-Scope Entity held by a natural person shall be an indication of direct ownership. A shareholding of 25% plus one share or an ownership interest of more than 25% in the In-Scope Entity held by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s), shall be an indication of indirect ownership.

6. Will the information on the beneficial ownership register of In-Scope Entities be publicly accessible?

The Regulations transpose the first sub-paragraph of Article 30(1) of 4AMLD. The rationale for transposing just this provision in advance of the rest of 4AMLD is so that the Central Register (required by Article 33(3) of 4AMLD) can be effective from as early a date as possible after full transposition of 4AMLD. Work has begun on the Central Register which is likely to be held by the Companies Registration Office but we understand that it is unlikely to be in place until at least mid 2017.

At a minimum, competent authorities and financial intelligence units, entities carrying out certain types of due diligence and those who can demonstrate a "legitimate interest" in the ownership information will be able to access the Central Register.

While the Regulations do not specifically deal with this issue, the beneficial ownership information in the Central Register may well become publicly accessible when the Central Register is established and 4AMLD is fully transposed into Irish law in June 2017.

Currently, under 4AMLD, Member States have discretion regarding a number of matters, including as to the extent of accessibility of the Central Register and, while the Dept of Finance sought feedback on this point in its consultation earlier this year, the intended approach of the Irish government with

regard to public accessibility of the Central Register is still not clear.

The European Commission has recently proposed a number of changes to 4AMLD, including removal of the above discretion from Member States such that information regarding beneficial ownership of companies and trusts engaged in business activities would be required to be publicly accessible (most likely via the Central Register) and certain other related changes. These changes are scheduled for vote in January 2017 and, if adopted, are likely to be transposed by Ireland, together with the rest of 4AMLD, in June 2017.

On 8 November 2016, as part of a number of measures introduced in the wake of the April 2016 Panama Papers revelations, the Council of the EU agreed on a proposal granting access to tax authorities to information held by authorities responsible for prevention of money laundering, including a requirement for EU Member States to enable access to information on the beneficial ownership of companies with effect from 1 January 2018. The Council is due to adopt this Directive once the European Parliament's opinion on it has issued.

7. What do In-Scope Entities now need to do

In-Scope Entities should act now to ensure that they comply with the new Regulations. Failure to comply with the Regulations is a criminal offence. We have outlined briefly at paragraph 8 below the key steps that should be taken by In-Scope Entities to ensure compliance.

8. Obligation on In-Scope Entities to establish and maintain a Beneficial Ownership Register (BOR)

Every In-Scope Entity must take all reasonable steps to obtain and hold adequate, accurate and current information in respect of its beneficial owners, such as, name, date of birth., nationality, address, statement of nature and extent of interest held by each beneficial owner, date on which he/she became or ceases to be a beneficial owner, and to maintain that information within the In-Scope Entity's records on a BOR.

In-Scope Entities must keep the BOR up to date.

The Regulations give no guidance on the frequency with which an In-Scope Entity must check to see that ownership information is "current".

An In-Scope Entity must take measures to update its BOR where it has reasonable cause to believe that there has been a "relevant change", meaning either:

- (a) a person listed as a beneficial owner on its BOR has ceased to be a beneficial owner, or
- (b) there has been a change as a result of which the particulars set out in the BOR are incorrect or incomplete.

Specifically, where an In-Scope Entity has reasonable cause to believe that a relevant change has occurred, it must give notice to the individual concerned requiring the addressee: (i) to confirm whether or not the change concerned has occurred, and (ii) if it has occurred, to state the date of the change, and confirm or correct the particulars included in the notice and supply any that are missing from the notice.

9. How is beneficial ownership information to be obtained by In-Scope Entities?

The Regulations impose an obligation on In-Scope Entities to 'take all reasonable steps' to obtain and hold 'adequate, accurate and current information' on the beneficial ownership by individuals. While neither the Regulations nor 4AMLD define what constitutes 'all reasonable steps', they do set out certain steps which In-Scope Entities are obliged to take in this regard:-

- (a) If an In-Scope Entity has been informed by or on behalf of an individual that he/she is a beneficial owner of that In-Scope Entity and given the necessary details by or on behalf of such person, then the In-Scope Entity should enter the required information in its BOR;
- (b) If an In-Scope Entity has reasonable cause to believe that an individual is a beneficial owner of that In-Scope Entity, it is required to serve notice on that individual requesting receipt of his/her confirmation that he/she is a beneficial owner within one month and requesting confirmation or correction of the details set out in such notice within that period;

(c) If an In-Scope Entity believes that a third party has information about a beneficial owner or another person who may have information about a beneficial owner, then it is entitled to serve a similar notice on such person requesting such information and the recipient may, if relevant, choose not to disclose such information on the basis of legal professional privilege.

10. What are the In-Scope Entity's obligations where beneficial ownership cannot be ascertained?

In the context of obtaining information, where all reasonable steps have been taken by an In-Scope Entity for determining its beneficial owner(s) to no avail and, provided there are no grounds for suspicion by the In-Scope Entity, or in circumstances where there is any doubt that any individual identified is a beneficial owner of the In-Scope Entity, the names of the senior managing officials of the In-Scope Entity (including directors and CEO) must be added to the BOR instead, even where those senior managing officials do not hold an interest (legal or beneficial) in the In-Scope Entity. The In-Scope Entity must keep records of the actions taken in order to identify its beneficial ownership in such cases.

11. Do beneficial owners have any obligations under the Regulations?

Certain positive obligations are also imposed on beneficial owners of In-Scope Entities under the Regulations as outlined below.

A duty is imposed upon a person who is a beneficial owner or who ought to know that they are one to notify an In-Scope Entity that they are a beneficial owner (i) if the In-Scope Entity's BOR does not contain the relevant details regarding that person, or (ii) if they have not received a notice from the In-Scope Entity under the Regulations requesting this information.

The duty to notify the In-Scope Entity arises where the above circumstances have continued for a period of at least one month. The individual then has one month in which to send the notice in which he or she must confirm his or her status (as beneficial owner), the date on which the person acquired that status and the information required under the Regulations. There is also a duty on individuals, in certain circumstances, to notify relevant changes in beneficial ownership.

12. What are the potential penalties for non-compliance with the Regulations?

Failure by an In-Scope Entity to (i) obtain and hold information on beneficial ownership, (ii) create and maintain a BOR, (iii) serve notice on individuals believed to be beneficial owners when required to do so under the Regulations, and/or (iv) confirm any change in a beneficial owner's details, may result in a criminal offence. An In-Scope Entity that commits such an offence can be liable for a fine of up to €5,000.

Where a person (including a beneficial owner) has received a notice under the Regulations in respect of beneficial ownership, it is an offence if that person either (i) fails to comply with the notice or (ii) makes a statement that is false in a material way, knowing or being reckless as to whether this is the case. A person that commits such an offence can be liable for a fine of up to €5,000.

The Irish High Court has the power to order rectification of the BOR and to determine disputes as to whether a party in fact holds a beneficial interest.

At present, no specific statutory inspection rights are set out in relation to BORs.

13. How can ByrneWallace assist In-Scope Entities in complying with the Regulations?

As the Regulations are now in force, In-Scope Entities need to take prompt steps to ensure compliance. We can assist In-Scope Entities with their compliance requirements under the Regulations by:

- (a) assisting with the creation and maintenance of a BOR for any In-Scope Entities;
- (b) advising on the steps necessary to obtain the requisite information on beneficial ownership, and advising on the extent of an In-Scope Entity's obligations under the Regulations and compliance with the Regulations generally;
- (c) assisting in analysing the ownership and control structure and in establishing if a control or ownership interest brings the holder within the scope of the 'beneficial owner' definition in 4AMLD;

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(d) drafting and issuing all statutory notices required to be issued by In-Scope Entities under the Regulations; and

(e) preparing and advising on any ancillary corporate documentation required in relation to these obligations, e.g. board minutes, directors' resolutions etc.

We can also assist beneficial owners in understanding and navigating their obligations under the Regulations.

We will continue to monitor and to issue updates on key developments relating to the Regulations, the Central Register and transposition of 4AMLD. Please contact any member of our [Corporate Governance and Compliance Group](#) or your [usual ByrneWallace contact](#) if you need assistance in understanding and complying with your new legal obligations under the Regulations or 4AMLD.

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