

NECESSARY COMPONENTS AND CONSIDERATIONS FOR A PUBLICLY ACCESSIBLE, PAN-CANADIAN COMPANY REGISTRY OF BENEFICIAL OWNERS

REGISTRATION VERSUS REGULATION

Review of the Persons of Significant Control (PSC) Register in the United Kingdom suggests that its effectiveness is limited by the role that Companies House plays in administering the registry. Companies House is a registrar, not a regulator: it does not verify the information provided by persons with significant control. A lack of regulatory oversight offers the opportunity for misspellings of business names or incomplete fields to be exploited by persons with significant control for their own benefit. As such, the registry contains unverified and flawed information, rendering it less effective than it could be.

A study by Global Witness revealed serious problems with registration where there were over 58,000 problems with registration reports and a variety of misspellings of the word “British,” all of which were reported by the public through individual searches.¹ Regulatory oversight also helps ensure that gaps in disclosure or incorrect disclosure of information—including disclosing that there is no identifiable PSC—do not prevent law enforcement, journalists, or interested members of the public from receiving disclosure of beneficial ownership information. A regulatory mandate for a Canadian registry would mitigate these problems by ensuring the information contained in the register is accurate, readily available, and reliable.

SOCIAL INSURANCE NUMBERS

Publicly accessible registers of beneficial ownership make information available in some countries that might raise privacy concerns in other jurisdictions. Policy on beneficial ownership in Canada should address this issue, as debates on a public register propose the disclosure of personally identifying data for natural persons as well as ownership over 25%.² For example, tax identification numbers are publicly available in Sweden and Ukraine; however, in the Canadian context, confidential financial information like Social Insurance Numbers (SINs)³ should be given special consideration as its disclosure is legally required in limited circumstances and it is not considered public information. Should a register of beneficial ownership require the collection of SINs, that information should remain available to only law enforcement and regulatory bodies and restricted from access by other parties. In lieu of SINs being used as a single identifier, a substitute single identifier to link UBOs across businesses should be considered.

A SINGLE IDENTIFIER TO LINK UBOS ACROSS BUSINESSES

Recent reviews of the PSC register suggest that its effectiveness is hampered by the inability to link individual owners to other businesses.⁴ Misspelled business entities, and other data entry errors limit the effectiveness of such registries. A single identifier attached to a natural person with significant control, akin to a student number in a university or a bank account number, would improve the work of law enforcement in connecting beneficial owners across business entities. A single identifier would also make it easier for interested members of civil society to obtain information about beneficial ownership for persons who may have a significant interest in multiple businesses.

IDENTITY VERIFICATION

The ultimate goal of a public register is to reveal the identities of individuals who wish to distance themselves from the

1 Global Witness, “Getting the UK’s House in Order”, May 2019. https://www.globalwitness.org/documents/19717/Getting_the_UKs_House_in_Order_xZZxobR.pdf

2 Parliament of Canada, House of Commons Standing Committee on Industry, Science, and Technology. Number 045, 42nd Parliament, 1st Session. “Evidence”. <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-45/evidence>

3 Employment and Social Development Canada. “The Social Insurance Number Code of Practice, Section 2—SIN holders’ responsibilities”. April 24, 2019. <https://www.canada.ca/en/employment-social-development/services/sin/reports/code-of-practice/section-2.html>

4 Global Witness, “What does the UK’s beneficial ownership data show us?” 22 November 2019. <https://www.globalwitness.org/en-gb/blog/what-does-uk-beneficial-ownership-data-show-us/>

operations of a business while still benefitting from its profitability. Verification of the identity of beneficial owners is crucial to achieving this goal, and document identification is required to hold bank accounts, drive cars, and to obtain travel documentation. Ultimate beneficial owners should be required to submit colour copies of relevant identity documents, subject to federal or provincial limitations. Examples of such documents include passports, driver's licenses, or provincially issued identification cards with photo. These documents are part of an accepted process of due diligence undertaken to obtain financial services or other identity documents and can be submitted in addition to a SIN.

The identifying documents submitted for verification, such as passport numbers, SIN, or driver's licences, should be openly available to law enforcement or regulatory bodies, yet restricted from access by the general public in order to mitigate against the risk of problems such as identity theft. In authenticating this information, digital data verification procedures should be considered.

OPT-OUT PROVISIONS FOR EXPOSED PERSONS

Publicly accessible registers provide a means for individuals concerned about personal safety to request that their status as beneficial owners is not disclosed to the public. Some national registers in the European Union give consideration for individuals who demonstrable risk of victimization from fraud, kidnapping, blackmail, or extortion. Other national registries give consideration for individuals under the age of majority, or who are legally disabled.⁵

In the European Union's Fifth Anti-Money Laundering Directive (5AMLD), decisions to make UBO information private are made on a case-by-case basis and are reserved for exceptional circumstances, or where the UBO is a legal minor or an individual who is "otherwise legally incapable".⁶ Furthermore, applications may result in only some of the UBO's identifying information to remain private. In circumstances where UBOs would face a "disproportionate risk"⁷ such as kidnapping, violence or intimidation, harassment, extortion, blackmail. The goal of these opt-out provisions is to strike a balance between transparency and the risk of victimization faced by a very small percentage of ultimate beneficial owners.

One category of person *not* identified under national registers of beneficial ownership for the privacy exemption mentioned above are heads of international organizations (HIOs), foreign politically exposed persons (FPEPs), and domestic politically exposed persons (PEPs), as well as specified family members and close associates.⁸ Canadian legislation draws a distinction between PEPs and HIOs and FPEPs.⁹ Through the offices they hold, FPEPs, HIOs, and PEPs are entrusted with considerable authority and autonomy with respect to resource allocation and decision making in economic, social, legal, and political matters, and are therefore vulnerable to corruption. In Canada, FPEPs are automatically treated as high-risk clients, and PEPs and HIOs are subject to enhanced due diligence procedures.¹⁰

Although HIOs and PEPs may be at increased risk of victimization in some circumstances, individuals identified as HIOs and PEPs should not be automatically considered under opt-out provisions on the basis of this status. Allowing opt-out provisions solely on the basis of HIO or PEP status would undermine the value of a public registry because business dealings of individuals who hold these offices already place them at an increased risk for bribery and corruption.

TIMELINES FOR UPDATING WITH REGISTRAR OR REGULATOR

Up-to-date and accurate information is crucial for a register of beneficial ownership to be effective. Out of date information hampers law enforcement activity, due diligence procedures undertaken by reporting entities, and the work of journalists and other members of civil society who benefit from an open, searchable registry. Businesses should report changes to beneficial ownership status (for example, acquisition of beneficial ownership status or the sale of shares and termination of beneficial

5 PriceWaterhouseCooper, "The UBO Register: An Update." December, 2018. <https://www.pwc.nl/nl/assets/documents/ubo-register-update-december-2018.pdf>

6 Ibid.

7 Directive (EU) 2018/843.

8 Department of Finance. Reviewing Canada's Anti-Money Laundering Regime. February 7, 2018. <https://www.fin.gc.ca/activity/consult/amlatfr-rpcf-eng.asp>

9 Proceeds of Crime (Money Laundering) and Terrorist Financing Act - S.C. 2000, c. 17 (Section 9.3).

10 <https://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/Guide12/12-eng>

ownership status) within 30 days of the change in beneficial ownership taking place. Failure to disclose this change should be subject to a publicly disclosed administrative monetary penalty. Such a penalty is in keeping with Canada's approach to accountability with respect to money laundering.

Canada assesses both criminal and administrative monetary penalties against businesses for noncompliance with FINTRAC reporting requirements. Administrative monetary penalties are the standard in practice, and with respect to failing to meet record-keeping requirements or failure to provide assistance or information during a compliance examination, the relevant penalties include fines up to \$500,000 and/or a term of imprisonment up to five years.¹¹ Restrictions could also be placed on business operations, following the model adopted by Portugal where profit disbursement is prevented until businesses comply with UBO register requirements.¹²

PENALTIES FOR NON-COMPLIANCE WITH INFORMATION DISCLOSURE

Publicly accessible registers require compliance from business entities who must disclose information about their UBOs. While reporting entities may make mistakes in good faith, others may willfully fail to disclose information or provide incorrect details to obscure the identities of their beneficial owners. Reporting entities who make mistakes in good faith should be given the opportunity to correct data entry errors and ensure that the information contained in the register is correct. However, failure to correct data that have already been identified by the registrar, regulator, or by law enforcement in a timely manner should be subject to a monetary penalty.

The challenge then remains as to how to handle businesses and beneficial owners that deliberately disclose false information or fail to disclose information altogether. Businesses that are set up specifically for criminal purposes are unlikely to be compliant with disclosure requirements, and penalties set too low may be considered part of the 'cost of doing business.'

The appropriate penalties to levy against individuals for willful noncompliance should be carefully considered and treated separately from errors made in good faith. In jurisdictions with public registries such as the Netherlands and Norway, noncompliance with registration can result in criminal sanctions such as six months maximum imprisonment or community service (Netherlands), or one-year maximum imprisonment (Norway).¹³ Failure to comply can result in financial penalties in both the Netherlands and in Poland. Additionally, there are fines against the business in question, as well as operating restrictions that prevent the business from distributing profits, holding government contracts, and accessing EU and other government funds.¹⁴ Sweden also punishes noncompliance via fine.¹⁵ Fines for willful nondisclosure in EU jurisdictions run as high as €1,000,000 in Germany, and generally range from €50,000 to €200,000 for noncompliance, as well as terms of imprisonment in Gibraltar, Malta, the Netherlands, and Norway.¹⁶

THRESHOLD AND NATURE OF CONTROL

Most jurisdictions with registers of beneficial ownership—public or private—identify beneficial owners (in part or in whole) as natural persons having a stake of 25% or more of company shares. Jurisdictions with beneficial ownership registers have begun to consider the importance of identifying individuals who have a controlling, directing, or influencing role notwithstanding the 25% threshold, considering that voting blocks, veto power, or decision-making on behalf of other individuals can exert considerable control over a business regardless of one's actual share.¹⁷

11 Financial Transactions and Analysis Reports Centre of Canada. Obligations: Penalties for non-compliance. August 28, 2018. <https://www.fintrac-canafe.gc.ca/pen/1-eng>

12 *Supra*, note 5.

13 *Supra*, note 5.

14 *Ibid*.

15 Swedish Companies Registration Office. "How to Register Beneficial Ownership Information". February 5, 2018. <https://bolagsverket.se/en/us/about/beneficial-ownership-register/how-to-register-beneficial-ownership-information-1.15230>

16 *Supra*, note 5.

17 For example, this is the case in Belgium, Sweden, Finland; it is also the case in Argentina, Colombia, and Costa Rica, where senior managers may be considered beneficial owners in specific circumstances. See Knobel, A., Harari, M., and M. Meinzer. "The state of play of beneficial ownership registration: a visual overview". The Tax Justice Network. June 27, 2018. <https://publications.iadb.org/publications/english/document/Regulation-of-Beneficial-Ownership-in-Latin-America-and-the-Caribbean.pdf>.

When compared with EU standards, the threshold amounts in some Latin American and Caribbean countries are lower. In these jurisdictions, beneficial ownership thresholds are set at 20% in Argentina and Dominican Republic, 15% in Uruguay and Costa Rica, 10% in Bahamas, Barbados, Belize and Chile, and 5% in Colombia.^{18,19} A lower threshold than 25%, as well as consideration for the type of control an individual exerts over business decisions, can improve transparency of beneficial ownership.

FEES FOR SERVICE AND REGISTRATION FOR ACCESS

The value of a publicly searchable registry of beneficial ownership should not be undercut by fees for service, nominal or otherwise, or by requirements to register an account to access information. Registries in other jurisdictions collect nominal fees from businesses pursuant to their registration. For instance, in Sweden, the cost is SEK250,²⁰ while in the UK the size of the business influences the cost of registration, with median costs ranging from approximately £228 for small firms to £1497 for large firms.²¹

A reasonable registration fee would help offset the costs of implementing the register, as would a small fee for annual compliance updates. It is crucial that the registry remain open and publicly available, as registering for an account or requiring individuals to pay for access curtails transparency in identifying beneficial owners. 4AMLD requires that the costs for accessing service not exceed the costs of administration of the service;²² 5AMLD specifies that costs can include the development and maintenance of the register.²³

FORMAT OF PUBLIC REGISTER

The register should be online and publicly searchable. An online registry serves several purposes: it limits the cost of setting up and maintaining a paper-based register; it facilitates compliance with the register, including initial registration and annual compliance reporting, as well as changes to beneficial owner status; and it facilitates use by interested parties.

An electronic database may be cheaper to administer than a physical registry,²⁴ and automated reminders can be sent electronically to beneficial owners by SMS or email to promote compliance, whereby changes to beneficial ownership can be executed conveniently online. Moreover, the publicly available data within the PSC Register was put to great use by Global Witness in its assessment of the effectiveness and limitations of the register itself,²⁵ demonstrating the broader utility of the registry with respect to transparency.

PUBLIC DISCLOSURE OF FALSE INFORMATION OR CORRUPTION AND TIP-LINE.

In the instances of corruption or bribery related to UBOs, it is important for the registry to have an option for whistleblowers to flag and disclose false, or missing information for companies. In addition, a reporting portal or a tip-line can help whistleblowers tie corruption and bribery (or other financial crimes, including money laundering, tax evasion, or terrorist financing) to ultimate beneficial owners and the business they control.

18 Knobel, A. "Regulation of Beneficial Ownership in Latin America and the Caribbean". Institutions for Development Sector, Innovation in Citizen Services Division. Technical Note IDB-TN-134. November 2017. <https://publications.iadb.org/publications/english/document/Regulation-of-Beneficial-Ownership-in-Latin-America-and-the-Caribbean.pdf>.

19 *Supra*, note 14. These countries do not all have publicly available, open, free registers of beneficial ownership.

20 Swedish Companies Registration Office, "What is beneficial ownership?" Beneficial Ownership Register". February 5, 2018. <https://bolagsverket.se/en/us/about/beneficial-ownership-register/beneficial-ownership-register-1.15237>

21 Department for Business, Energy, and Industrial Strategy. "Review of the Implementation of the PSC Register." BEIS Research Paper Number 2019/005. March 2019. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822823/review-implementation-psc-register.pdf

22 Directive (EU) 2015/849, article 30(5).

23 *Supra*, note 6, article 1(15)(d).

24 *Supra*, note 14. Access to UBO registers in Latin America and the Caribbean by law enforcement and interested parties has been impeded by registers that exist in physical form only, due partly to problems of lack of ease in accessing registers located in government buildings, and by register information that is illegible or incorrectly recorded by hand. An electronic register that is publicly searchable eliminates these issues.

25 *Supra*, note 1.

CONCLUSION

To ensure the effectiveness of a Canadian UBO registry, specific components should be considered in order to maximize accountability, transparency, and to address privacy concerns. These components include:

1. Ensuring the UBO registry has a regulatory mandate;
2. Considerations regarding the use of social insurance number;
3. The use of a single identifier to link beneficial owners across business entities;
4. Opt-out provisions for exposed persons;
5. Timelines for updating information in the register;
6. Penalties for noncompliance;
7. Considerations regarding beneficial ownership thresholds;
8. Fees for access;
9. The format of the registry itself;
10. Public disclosure of false information or corruption and tip-line.

In short, without regulatory oversight and attention paid to the lessons learned from UBO registers implemented elsewhere and consideration for Canada's unique needs regarding privacy of personal information, the effectiveness of a UBO register will be limited.