

# BRIEFING MEMO

# Beneficial Ownership Register

## Overview

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Beneficial ownership has loomed as a global issue for years as regulators have sought to eliminate “secret” registers of company owners, seeking to preserve privacy, anonymity and even protection from taxation and legal inquiry.

Since 2014, negotiations over a public record of registers have arrived at a compromise whereby beneficial owners will be named on a centralized list, searchable only by a local “competent authority,” and released only to U.K. law enforcement. Our jurisdiction views this as a positive and constructive compromise striking a sensible balance by enabling law-enforcement authorities to have access to the information they need in cases where people abuse the corporate veil, while continuing to protect the privacy of legitimate commercial interests and individuals.

On 7<sup>th</sup> April 2017, the Cayman Islands introduced new legislation and regulations requiring all companies and limited liability companies (**LLCs**) registered in Cayman (and their subsidiaries) to establish and maintain a beneficial ownership register (**BOR**), unless they are ‘exempted’. The legislation does not apply to Cayman exempted limited partnerships (**ELPs**).

## The Nature of the BOR

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The BOR is a register of information of a company’s beneficial owners that is accessible to a competent authority. The ‘competent authority’ designated by the Minister of Financial Services will be allowed access to BOI held on a company’s BOR. The information will not be held on a public register. That competent authority will set up a secure ‘search platform’ by which it will be able to access the BOI held on all BORs. It will only do so in response to:

- (a) a request from a designated official in a jurisdiction that has entered into an agreement with the Cayman government to share BOI with Cayman, or

- (b) a request from a specified law enforcement body if the request is in compliance with the legislation governing the affairs of such body.

Only the competent authority will be able to access the information and the platform must prevent information being communicated to any person that a search is being or has been made, other than when, in what are likely to be very limited circumstances, it expressly decides to disclose that information.

#### WHO IS CLASSED AS A BENEFICIAL OWNER?

The BOR has to include 'registrable persons', which may be individuals or entities. Working out who is included has to be determined by applying the Regulations (Part 4 of **The Beneficial Ownership (Companies) Regulations, 2017** and Part 4 of **The Beneficial Ownership (Limited Liability Companies) Regulations, 2017**).

As a general guide, under both the Companies Law and LLC Law, for an individual to be classed as a beneficial owner they must hold, directly or indirectly, more than either:

- a. 25% of the shares in company,
- b. 25% of the voting rights in company, or
- c. the right, directly or indirectly, to appoint or remove a majority of the board of directors.

If no individual meets those conditions in a-c above then an individual or trust or partnership or other non-legal person may be classed as a beneficial owner if it has the absolute and unconditional legal right to exercise (or actually exercises) significant influence or control over the company or LLC through an ownership structure or interests described in a-c above, other than solely in the capacity of a director, professional advisor or professional manager. As a general guide, companies or other 'relevant legal entities' can be registrable persons if they are incorporated, formed or registered in Cayman and would be a beneficial owner of the company if they were an individual.

#### WHERE IS THE INFORMATION HELD?

The BOI will be held at the company or LLC's registered office (**RO**). The BOR itself will be established and maintained either by a CSP or the Cayman Registrar of Companies (**Registrar**). (The Registrar will charge for this service.)

#### WHO HAS TO KEEP A BOR?

Except for those companies which are exempt – see below – all companies and LLCs incorporated in Cayman which are registered under either the Companies Law (2016 Revision) (the **Companies Law**) or the Limited Liability Companies Law, 2016 (the **LLC Law**) including foreign companies registered under that law. This includes:

- a) Cayman exempted companies;
- b) LLCs;
- c) Ordinary non-resident companies; and
- d) Special Economic Zone Companies.

#### WHO IS EXEMPT FROM KEEPING A BOR?

Companies or LLCs (or their subsidiaries) which are exempted from keeping a BOR are those which are:

- a) listed on the Cayman Stock Exchange or one approved in Schedule 4 of the Companies Law;
- b) registered or holding a licence under a ‘regulatory law’ as defined in s. 2 of the Monetary Authority Law (2016 Revision);
- c) managed, arranged, administered, operated or promoted by an approved person as a special purpose vehicle, private equity fund, collective investment scheme or investment fund;
- d) a general partner of a vehicle, fund or scheme referred to in paragraph (c) that is managed, arranged, administered, operated or promoted by an approved person; or
- e) exempted by the Regulations (which currently do not provide for any other exemptions).

This means that an investment fund which is licensed by or registered with the Cayman Islands Monetary Authority (the **CIMA**) is exempted along with any Cayman company which is registered as an Excluded Person under the Securities Investment Business Law 2015 Revision (**SIBL**) (typically a Cayman investment manager). It also means that an investment fund which is managed by an Excluded Person under SIBL is also exempted even if the investment fund is not registered or licensed with CIMA. Further, given the scope of what is defined as an ‘approved person’, any investment fund which is managed by a non-Cayman manager is

regulated in the USA, EU or in any of the other countries listed in Schedule 3 of the Money Laundering Regulations (2015 Revision) or listed on a recognized stock exchange, will also be exempt.

## The BOR Registration Process

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Both the Companies Law and LLC Law require Companies and LLCs to identify and compile information on ‘registrable persons’, which are defined as beneficial owners of companies or LLCs, or relevant legal entities to be recorded in the BOR. The beneficial owners must be given written notice asking them to confirm their status and correct any inaccurate information before it goes on the BOR. The beneficial owners must reply to this written notice within a month. This is a tight timeframe and there are significant penalties for default (see below). Beneficial owners are also obliged to supply that information and notify the company or LLC of their status as a registrable person and when they became one. Essentially the information required is the same under each law:

<b>For individuals</b>	<b>For entities</b>
full legal name	corporate or firm name
residential address and, if different, an address for service of notices	registered or principal office
date of birth	the legal form of the entity and the law by which it is governed
information identifying the individual from their passport, driver’s licence or other government-issued document including –  (i) identifying number  (ii) country of issue and  (iii) date of issue and of expiry and	if applicable, the register of limited liability companies in which it is entered and its registration number in that register and

the date on which the individual became or ceased to be a registrable person in relation to the LLC or company in question.	the date on which it became or ceased to be a registrable person in relation to the LLC or company in question.
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## The Enforcement

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The new **Companies Management (Amendment) Law, 2017** gives power to CIMA to revoke licences or impose other licensing sanctions for contraventions of the Companies Law and LLC Law. It also alters the definition of the '*business of company management*' under the Companies Management Law (2003 Revision) to include the service of establishing and maintaining BORs and enabling them to be searched by the 'competent authority'. It also adds ascertaining whether the BOR laws have been contravened to the list of purposes for which CIMA may seek a search warrant from a magistrate or a judge.

### CONSEQUENCES FOR NON-COMPLIANCE

- 1) If a beneficial owner fails to respond to a valid notice from the company or LLC within a month of receiving it and has not given a valid reason for not responding, the company or LLC can apply a 'restrictions notice' to the beneficial owner's interest. The effect of such a notice is to void certain disposals (such as any transfer or agreement to transfer the interest), restrict the issue of shares and remove the ability to exercise rights associated with the interest. It is possible to apply to the Cayman Grand Court for restrictions to be lifted in certain circumstances, but if any person deals with a restricted interest or if the company or LLC issues shares in respect of that interest, such a person, company or LLC commits an offence and may be liable to a fine on summary conviction of CI\$5,000.
- 2) Other offences for failure to comply with the legislation (such as not keeping a BOR) include fines of CI\$25,000 (for each offence) and where the offence is continuing a fine of CI\$500 for each day or part of a day during which the offence continues, up to a maximum of another CI\$25,000.
- 3) A beneficial owner who knowingly and willfully ignores a notice from a company or LLC or knowingly or recklessly provides information which they know to be false in a material particular commits an offence punishable by up to two year's imprisonment and a fine of up to CI\$10,000 or both.
- 4) Unauthorised searching or disclosing information on a company or LLC's BOR is also an offence punishable by up to one year's imprisonment and a CI\$5,000 fine.

- 5) Where a company or legal entity commits an offence and it is proved that the offence was committed with the consent or connivance of, or was attributable to wilful default on the part of a director or other officer concerned in its management then that director or other officer is guilty of the same offence and liable to the same penalty as the company or legal entity.

## Next Steps for Cayman Registered Companies & LLCs

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If you have a Cayman registered company or LLC then you will need to establish and maintain a BOR unless the company or LLC is exempt (see below). As soon as possible, you should appoint a Corporate Service Provider (**CSP**) to establish and maintain the company's BOR (including an 'information technology solution' by which the competent authority can access that information). At present, there is no published deadline, but we consider it would be prudent for those companies and LLCs affected to have established their BORs by no later than 30 June 2017 (the last date for Cayman to comply with its obligations under its Beneficial Ownership Information (**BOI**) agreement with the United Kingdom).

## How JACOB LAW Can Help

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We can advise any LLC or company affected by this new legislation and the related Regulations and work with your nominated CSP or the Registrar to help you establish your company or LLC's BOR and advise on its maintenance thereafter. Our team would be happy to provide further assistance, please contact us on:

[info@jacoblaw.ky](mailto:info@jacoblaw.ky)

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**DISCLAIMER** This document is intended to provide a brief overview and general information and should not be construed or relied upon as legal advice.