

# Beneficial Ownership Act 2017: Tips for the wary and traps for the unwary.

The Isle of Man prides itself on being responsive to international needs but at the same time maintaining a business-centric approach.

In line with its long-standing policy of positive engagement with international initiatives and standards, the Isle of Man Government made a commitment to the United Kingdom in 2016 to enhance arrangements to share information about the beneficial ownership of legal entities. This commitment was made in an agreement signed by all Crown Dependencies and Overseas Territories.

The product of this commitment is the Beneficial Ownership Act 2017 (the "Act")<sup>1</sup>, which received Royal Assent in April 2017. Further information on the specific requirements of the Act are available on the Isle of Man Government's website<sup>2</sup> but, in brief, any individual who ultimately owns or controls more than 25% of a legal entity to which the Act applies (whether directly or indirectly and whether through ownership or control of shares or voting rights or otherwise) will have certain details added to the Isle of Man Government's beneficial ownership database.<sup>3</sup>

Much has been said and written about the manner in which the Crown Dependencies and Overseas Territories were required to sign up to this commitment, as well as the regimes that have been established in the Isle of Man and elsewhere as a result. We do not intend to repeat that here. Instead, Part B of this article summarises the criminal offences that can be committed under the Isle of Man regime before Part C goes on to offer practical guidance on the steps that can be taken to avoid committing those offences.<sup>4</sup>

## B: What offences could I be liable for?

The Act creates a wide range of offences<sup>5</sup>, ranging from the unsurprising offence of furnishing information to the authorities that is known to be false to the slightly less predictable offence of failing to submit information using a specific website.

A number of miscellaneous offences under the Act can be committed by a variety of persons. These are summarised in Part B6 below. Anybody who has any involvement (whether directly or indirectly) with Isle of Man businesses or legal entities should familiarise themselves with these offences.

However, many of the offences can only be committed by a specified class of persons. Accordingly, before considering the general offences, we have summarised the specific offences in Part B1 to B5 below according to the categories of person who can be liable for them.

It should be noted that, if any of the offences described in this article are committed by a body corporate, and it is proved that one or more of its officers authorised, permitted, participated in or failed to take all reasonable steps to prevent the commission of the offence, that officer (or those officers), as well as the body corporate, will be guilty of the offence and liable to the penalty provided for the offence.<sup>6</sup>

## 1: Legal entities

The Act applies to a broad range of legal entities, including companies to which the Companies Acts 1931-2004 apply, companies to which the Companies Act 2006 applies, limited liability companies to which the Limited Liability Companies Act 1996 applies and limited partnerships to which section 48B of the Partnership Act 1909 applies.<sup>7</sup> For the purpose of this article, we use the term "**legal entity**" to refer to a legal entity to which the Act applies.

The table below lists the offences that can be committed by legal entities (in their capacities as such) under the Act, as well as the sanction for committing each such offence. The Act is amended in respect of legal entities that receive corporate services constituting Class 4 regulated activity from a licensed corporate services provider. We consider these changes in the Appendix to this article.

Provision	Offence	Sanction
Section 6(9)	A legal entity commits an offence under this section if it fails to have a nominated officer that is (a) an individual who is resident in the Island or (b) the holder of a licence to provide corporate services under section 7 of the Financial Services Act 2008 and it is not otherwise exempt. <sup>8</sup>	On conviction on information: a fine  On summary conviction: a fine not exceeding £5,000  (section 6(10))
Section 7(7)	A legal entity commits an offence under this section if it (a) did not appoint its first nominated officer and give notice complying with the requirements of section 7(2) of the Act to the Companies Registry by 21 July 2017 or (b) does not give notice complying with the requirements of section 7(5) of the Act to the Companies Registry within one month after a change in the details of its nominated officer or any appointment of, or change to, its nominated officer. <sup>9</sup>	On conviction on information: a fine  On summary conviction: a fine not exceeding £5,000  (section 7(8))
Section 8(3)	A legal entity commits an offence under this section if it fails to keep a record of the details of the nominated officer specified in section 8(1) of the Act, including the nominated officer's written consent to act in such capacity.	On conviction on information: a fine  On summary conviction: a fine not exceeding £5,000  (section 8(4))
Section 27(5)	This offence can be committed by a variety of persons, so please see our discussion in Part B6 below. We have flagged this offence here since it applies to persons who access information under section 26(2)(a) to (d). Section 26(2)(d) permits legal entities to access the Database for specified purposes, so this offence is particularly relevant to legal entities.	On conviction on information: up to 2 years in prison or a fine (or both)  On summary conviction: up to 6 months in prison or a fine not exceeding £5,000 (or both)  (section 27(6))

## 2: Legal owners

The term "legal owner" is defined in section 3 of the Act. It means, in relation to a legal entity, a person who directly owns or controls shares or voting rights or other ownership interest in that legal entity or who exercises direct control via other means whether or not that person is also the beneficial owner of that interest. This definition raises a number of questions, which are outside the scope of this article. However, it is clear that this definition is not limited to the shareholders of record that are entered on a legal entity's register of members (or the equivalent for a limited partnership or foundation).

The table below lists the offences that can be committed by legal owners (in their capacities as such) under the Act, as well as the sanction for committing each such offence.

Provision	Offence	Sanction
Section 9(7)(a)	A legal owner commits an offence under this section if it fails, without reasonable excuse, to (a) ascertain the beneficial owner of its interest or (b) give notice to the legal entity's nominated officer of the required details <sup>10</sup> in respect of each beneficial owner of the legal owner's interest, accompanied by information from a reliable and independent source verifying the required details, within one month after the date on which it receives a written notice from the nominated officer under section 9 of the Act. <sup>11</sup>	On conviction on information: a fine  On summary conviction: a fine not exceeding £5,000  (section 9(9))
Section 9(7)(b)	A legal owner commits an offence under this section if, without reasonable excuse, it knowingly or recklessly makes a statement to the legal entity's nominated officer that is false, deceptive or misleading in a material particular.	On conviction on information: up to 2 years in prison or a fine (or both) On summary conviction: up to 6 months in prison or a fine not exceeding £5,000 (or both)  (section 9(10))
Section 12(4)	A legal owner commits an offence under this section if it fails to give notice complying with section 12(3) to the legal entity's nominated officer within one month after it learns of a relevant change <sup>12</sup> or first has reasonable cause to believe that a relevant change has occurred.	On conviction on information: a fine On summary conviction: a fine not exceeding £5,000  (section 12(5))

### 3: Beneficial owners

The term "beneficial owner" is defined in section 4 of the Act<sup>13</sup>. The question of whether a person is a beneficial owner is often a complicated question that must be determined on a case-by-case basis. A detailed analysis of the meaning of this term is outside the scope of this article, but the Isle of Man Financial Services Authority (the "FSA") has published a helpful guidance note to help people determine if they are a beneficial owner.<sup>14</sup> Anybody who is uncertain as to whether it is a beneficial owner should seek legal advice to determine if that is the case.

The table below lists the offences that can be committed by beneficial owners (in their capacities as such) under the Act, as well as the sanction for committing each such offence.

Since the fundamental purpose of the Act is to identify the beneficial owners of legal entities, it may come as a surprise to see how few obligations are imposed on beneficial owners. This is explained in part by the fact that many beneficial owners will not be based on the Isle of Man, meaning they are outside the jurisdiction of the FSA and the Isle of Man courts. This also helps to explain why much of the burden under the Act falls on nominated officers (who must be Isle of Man residents), as can be seen from Part B5 below.

Provision	Offence	Sanction
Section 10(3)	A beneficial owner of an interest in a legal entity (who is not also the legal owner of that interest) commits an offence under this section if it fails to assist the legal owner of that interest to ascertain the beneficial owner of that interest or to notify the legal owner of any changes to the beneficial ownership of that interest. <sup>15</sup>	On conviction on information: a fine  On summary conviction: a fine not exceeding £5,000  (section 10(5))

The inclusion of the word "to" before the word "notify" in the third line of section 10(2) of the Act appears to be erroneous, since its effect is to require the beneficial owner to assist the legal owner to notify itself of a change to the beneficial ownership of the relevant interest. It is possible that the word "to" should be ignored, with the result that beneficial owners are required to notify the legal owner of any change to the beneficial ownership. However, it is also possible that the word "to" was included intentionally but the term legal owner should be replaced with the term legal entity<sup>16</sup>. We think the former is more likely.

### 4: Intermediate owners

The term "intermediate owner" is defined in section 10(1)(b) of the Act. It means any person who has an interest in a legal entity but who is not the beneficial owner or the legal owner of that interest. In most cases, this is likely to be an intermediate holding company through which the beneficial owner holds its interest in the relevant legal entity.

The table below lists the offences that can be committed by intermediate owners (in their capacities as such) under the Act, as well as the sanction for committing each such offence.

Provision	Offence	Sanction
Section 10(3)	An intermediate owner of an interest in a legal entity commits an offence under this section if it fails to assist the legal owner of that interest to ascertain the beneficial owner of that interest or to notify the legal owner of any changes to the beneficial ownership of that interest. <sup>17</sup>	On conviction on information: a fine  On summary conviction: a fine not exceeding £5,000  (section 10(5))

Our observation in Part B3 above on the inclusion of the word "to" before the word "notify" in the third line of section 10(2) applies equally in the context of intermediate owners.

In addition, there are likely to be many situations where the intermediate owner will not be aware of a change to the beneficial ownership, so it seems unduly onerous to impose an absolute obligation on intermediate owners to notify legal owners of such changes.

Although a defence is available under section 10(4) if the intermediate owner can show that he/she/it took reasonable steps to avoid commission of the offence, the term "reasonable steps" is ambiguous (see our discussion in Part C4 below). It would have been helpful for intermediate owners if section 10(2) had clarified that intermediate owners only become obliged to notify the legal owner of changes to the beneficial ownership once they have actual knowledge of those changes.

## 5: Nominated officers

In many cases, the legal owners and beneficial owners of a legal entity will live outside the Isle of Man (and therefore will be outside the jurisdiction of the Island's law enforcement agencies). Since the nominated officers have to be based on the Isle of Man, the nominated officers are the category of persons who are subject to the majority of the offences under the Act. While the fairness (or otherwise) of this outcome is a matter for debate, this is outside the scope of this article.

The term "nominated officer" is defined in section 3 of the Act as a person appointed in accordance with section 6. However, the term is in fact broader than that. The following persons are also deemed to be nominated officers for the purpose of the Act, and all such persons should familiarise themselves with the offences in the table below (and the related discussion in Part C5 below):

1. A nominated officer of a legal entity that had a nominated officer under the Companies (Beneficial Ownership) Act 2012 on 21 June 2017, if such nominated officer has consented in writing to continue its appointment under the Act<sup>18</sup>;
2. A registered agent of a legal entity that had a registered agent (within the meaning of the Companies Act 2006, the Limited Liability Companies Act 1996 or the Foundations Act 2011) on 21 June 2017, if such registered agent has consented in writing to act as a nominated officer for the purposes of the Act<sup>19</sup>; and
3. A licensed corporate services provider (a "CSP") who provides corporate services constituting Class 4 regulated activity to a legal entity<sup>20</sup>. The Appendix to this article considers how the Act applies to (a) legal entities who receive corporate services constituting Class 4 regulated activity from a CSP and (b) CSPs that provide corporate services constituting Class 4 regulated activity to legal entities.

The table below lists the offences that can be committed by nominated officers (in their capacities as such) under the Act, as well as the sanction for committing each such offence.

Provision	Offence	Sanction
Section 13(8)	A nominated officer commits an offence under this section if it fails to comply with section 13.  Section 13 requires nominated officers (a) to maintain the required details and the verifying information in the Island and (b) to preserve them for at least 5 years <sup>21</sup> .	On conviction on information: a fine  On summary conviction: a fine not exceeding £5,000  (section 13(9))
Section 15(7)(a)	A nominated officer commits an offence under this section if it fails to disclose information that it holds in respect of the beneficial ownership of a legal entity in accordance with a notice from a competent authority <sup>22</sup> that complies with section 15(4).	On conviction on information: a fine  On summary conviction: a fine not exceeding £5,000  (section 15(8))
Section 15(7)(b)	A nominated officer commits an offence under this section if it knowingly or recklessly makes a statement, in response to a notice from a competent authority that complies with section 15(4), which is false, deceptive or misleading in a material particular.	On conviction on information: up to 2 years in prison or a fine (or both)  On summary conviction: up to 6 months in prison or a fine not exceeding £5,000 (or both) (section 15(9))
Section 18(1)	This offence can be committed by a variety of persons, so please see our discussion in Part B6 below. We have flagged this offence here since it applies when a nominated officer receives a notice from a competent authority under section 15 so it is particularly relevant to nominated officers.	On conviction on information: up to 2 years in prison or a fine (or both)  On summary conviction: up to 6 months in prison or a fine not exceeding £5,000 (or both)  (section 18(2))
Section 20(8)(a)	A nominated officer commits an offence under this section if it fails to comply with section 20(1), (3), (4), (5), (6) or (7).  In short, these sections require nominated officers to (a) take all reasonable steps necessary to ascertain whether a legal entity has a registrable beneficial owner <sup>23</sup> and (b) submit the required details (and details of any relevant changes) or, if applicable, a confirmation that a legal entity has no registrable beneficial owners to the Companies Registry within a specified time frame <sup>24</sup> .	On conviction on information: a fine On summary conviction: a fine not exceeding £5,000  (section 20(9))

Provision	Offence	Sanction
Section 20(8)(b)	A nominated officer commits an offence under this section if it knowingly or recklessly makes a statement to the Companies Registry that is false, deceptive or misleading in a material particular.	On conviction on information: up to 2 years in prison or a fine (or both)  On summary conviction: up to 6 months in prison or a fine not exceeding £5,000 (or both)  (section 20(10))
Section 22(4)	A nominated officer commits an offence under this section if it fails to use the required website to submit information to the Companies Registry. <sup>25</sup>	On summary conviction: a fine not exceeding £5,000  (section 22(5))

## 6: General offences

As noted above, the offences listed below can be committed by a variety of persons, which could (in certain cases) include persons falling within one or more of the above categories. Accordingly, anybody who has any involvement (whether directly or indirectly) with Isle of Man businesses or legal entities should familiarise themselves with these offences.

Provision	Offence	Sanction
Section 18(1)	A person who knows or suspects that a competent authority has issued a notice under section 15 of the Act in respect of a legal entity commits an offence under this section if the person discloses information that could prejudice criminal/civil/regulatory investigations or proceedings anywhere in the world that are connected with the issue of the notice. <sup>26</sup>	On conviction on information: up to 2 years in prison or a fine (or both)  On summary conviction: up to 6 months in prison or a fine not exceeding £5,000 (or both)  (section 18(2))
Section 27(5)	A person commits an offence under this section if it discloses information accessed under (a) section 26(2)(a) to (d) other than for the purposes specified in those paragraphs or (b) section 26(2)(e) other than with the consent of the nominated officer of the relevant legal entity.	On conviction on information: up to 2 years in prison or a fine (or both)  On summary conviction: up to 6 months in prison or a fine not exceeding £5,000 (or both)  (section 27(6))
Section 29(1)	A person who knows or suspects that information on the Database has been or is proposed to be accessed commits an offence under this section if the person discloses information that could prejudice criminal/civil/regulatory investigations or proceedings anywhere in the world that are connected with the access to the information on the Database <sup>27</sup> .	On conviction on information: up to 2 years in prison or a fine (or both)  On summary conviction: up to 6 months in prison or a fine not exceeding £5,000 (or both)  (section 29(2))
Para 7 (1), Sch 1	There appears to be a problem with the drafting of this paragraph <sup>28</sup> , so it is difficult to analyse the offence created by this paragraph with any certainty. However, it appears to make it an offence for any person to: <ul style="list-style-type: none"> <li>- Falsify, alter, conceal, destroy or dispose of information known or suspected to be relevant to an inspection or investigation or that the person knows or suspects might be requested by the FSA (or to cause or permit another person to do so);</li> <li>- Furnish or send documents to the FSA under the Act known to be false or misleading in a material particular;</li> <li>- Recklessly furnish or send documents to the FSA under the Act that are false or misleading in a material particular;</li> <li>- In furnishing information to the FSA under the Act, (a) make a statement known to be false or misleading in a material particular or (b) recklessly make a statement that is false or misleading in a material particular; or</li> <li>- Fail, without reasonable excuse, to furnish information that he/she/it is required to furnish to the FSA under the Act.<sup>29</sup></li> </ul>	On conviction on information: up to 2 years in prison or a fine (or both)  On summary conviction: up to 6 months in prison or a fine not exceeding £5,000 (or both)  (para 7(5), Sch 1)

Provision	Offence	Sanction
Para 7(3)(a), Sch 1	A person commits an offence under this paragraph if it fails, without reasonable excuse, to comply with a requirement imposed on the person under paragraph 3 of Schedule 1 to the Act (which provides the FSA with certain powers to require information in connection with its oversight function under the Act).	On conviction on information: a fine  On summary conviction: a fine not exceeding £5,000  (para 7(4), Sch 1)
Para 7(3)(b), Sch 1	A person commits an offence under this paragraph if it intentionally obstructs a person exercising powers conferred by any of:  - Paragraphs 1(2), 1(3) or 1(4) of Schedule 1 to the Act (which provide the FSA with certain powers to inspect, take possession of and copy documents and enter and access property in connection with its oversight function under the Act); or - Paragraphs 4(2) or 4(3) of Schedule 1 to the Act (which set out the powers of any person named in a search warrant issued by a High Court judge under paragraph 4(1) of Schedule 1 to the Act).	On conviction on information: up to 2 years in prison or a fine (or both)  On summary conviction: up to 6 months in prison or a fine not exceeding £5,000 (or both)  (para 7(5), Sch 1)
Para 7(3)(c), Sch 1	A person commits an offence under this paragraph if it fails, without reasonable excuse, to take the action specified in a report made by the FSA under paragraph 6 of Schedule 1 to the Act within the timescale specified in the report.	On conviction on information: a fine  On summary conviction: a fine not exceeding £5,000  (para 7(4), Sch 1)

## C: How can I reduce the risk of committing these offences?

As can be seen from Part B above, a wide range of offences can be committed under the Act. This Part C sets out some practical steps that each category of person identified in the Act can take to minimise the likelihood of committing an offence under the Act.

### 1: Legal entities

In order to avoid committing the offences summarised in Part B1 above, every legal entity should take the following steps immediately (to the extent that it has not already done so):

1. Unless it is exempt (see endnote 8 below), appoint a nominated officer that is (i) an individual who is resident in the Island or (ii) the holder of a licence to provide corporate services under section 7 of the Financial Services Act 2008;
2. Unless section 45(1) or 45(3) of the Act applies, notify the Companies Registry of the appointment of its nominated officer, specifying the date of the appointment; and
3. Keep a written record of the items specified in section 8(1) of the Act in relation to its nominated officer.

Once the legal entity has taken these initial steps, it should establish procedures to ensure compliance with its continuing obligations under the Act. Practically speaking, this should include the following steps:

- Consider requesting that any contract pursuant to which it appoints a nominated officer requires a successor nominated officer to have been appointed before the nominated officer can resign (or at least includes a notice period of sufficient duration to enable the legal entity to seek to appoint a new nominated officer before the outgoing nominated officer's resignation becomes effective). This is because section 6 of the Act requires a legal entity to have a nominated officer at all times;
- Establishing procedures to actively monitor the nominated officer's continuing appointment and the continued accuracy of the details in its record of its nominated officer (ideally this should be done at least once a month since the legal entity is required to notify the Companies Registry within one month of any change<sup>30</sup>); and
- Designating a director or senior officer responsible for monitoring compliance with the Act and the legal entity's procedures. Among other things, this person should:
  - be responsible for keeping a record of the items required under section 8(1) of the Act; and
  - be designated as the sole representative of the legal entity with authority to access the beneficial ownership information submitted to the Database in relation to that legal entity (to minimise the possibility of an inadvertent breach of section 27(5) of the Act).

## 2: Legal owners

To the extent it has not already done so, any legal owner of an interest in a legal entity that is not also the beneficial owner of that interest should take the following steps to ensure compliance with its continuing obligations under the Act (whether it is an individual or a body corporate):

- a.** Immediately take steps to ascertain who the beneficial owner of that interest is. Even if the legal owner thinks it knows who the current beneficial owner is, a change in the ownership structure might have occurred without being notified to the legal owner, so the legal owner should contact the last-known beneficial owner to confirm that there have been no such changes. This is particularly important where the ownership structure is complex (for example, where it involves nominee arrangements or trusts or holding companies in countries outside the Isle of Man);
- b.** Consider seeking an express written undertaking from the beneficial owner or any intermediate owner to notify the legal owner promptly of any change in (i) the required details or (ii) the beneficial ownership of the legal owner's interest, accompanied by verifying information from a reliable and independent source<sup>31</sup>;
- c.** Establish a direct line of communication with any identified beneficial owners and intermediate owners;
- d.** Respond promptly (and in any event within one month) to any written notice received from the legal entity's nominated officer, as required by section 9(3) of the Act, specifying the required details in respect of each beneficial owner, accompanied by verifying information from a reliable and independent source;
- e.** Notify the legal entity's nominated officer within one month after it learns of a relevant change or first has reasonable cause to believe that a relevant change has occurred;
- f.** Since it will not always be easy to prove when a legal owner first "learns of" or "has reasonable cause to believe that there has been" a change to the required details in relation to the beneficial owner of its interest, it would be prudent to actively monitor the continued accuracy of such details (ideally this should be done at least once a month since the legal owner is required to notify the legal entity's nominated officer of any change to such details within one month);
- g.** Ensure the accuracy of any statement made to the legal entity's nominated officer; and
- h.** If the legal owner is a body corporate, in addition to the steps described above, it should consider establishing procedures to ensure that the above steps are taken (within the relevant time frames, where applicable).

## 3: Beneficial owners

It is relatively straightforward for beneficial owners to avoid committing an offence under section 10(3) of the Act. They should:

- a.** Assist the legal owner to ascertain their identity. This is likely to be a reactive obligation requiring beneficial owners to respond promptly, accurately and fully to any queries from the legal owner (or any intermediate owner) regarding the beneficial ownership of the legal owner's interest in the legal entity<sup>32</sup>; and
- b.** Notify the legal owner of any changes to the beneficial ownership of the legal owner's interest in the legal entity. In practice, this should involve the beneficial owner establishing a direct line of communication with the legal owner so it can notify the legal owner promptly of any change in (i) the required details or (ii) the beneficial ownership of the legal owner's interest.

As noted in Part B3 above, the question of whether a person is a beneficial owner is often a complicated question that must be determined on a case-by-case basis. Any person who has cause to believe that it might be a beneficial owner should seek legal advice to ascertain if that is the case.

## 4: Intermediate owners

The offences that can be committed by intermediate owners are similar to those that can be committed by beneficial owners. As such, to avoid committing an offence under section 10(3) of the Act, intermediate owners should take the steps outlined in Part C3 above for beneficial owners.

Of course, an intermediate owner's ability to take those steps will depend, to an extent, on the beneficial owner complying with its own obligations. Perhaps for this reason, the Act provides a defence if the intermediate owner can show that he/she/it took reasonable steps to avoid committing the offence (as noted in endnote 17 below).

The term "reasonable steps" is fairly ambiguous, so it is not possible to list exhaustively the steps that must be taken for this defence to be available. However, at a minimum, we think intermediate owners should take the following additional steps:

- a.** Consider including in any contract between the intermediate owner and the beneficial owner (or any other intermediate owner that sits between the first intermediate owner and the beneficial owner in the ownership chain) an obligation on the beneficial owner (or the other intermediate owner, as applicable) to notify the first intermediate owner promptly of any change in (i) the required details or (ii) the beneficial ownership of the underlying legal owner's interest;
- b.** Establish a direct line of communication with the beneficial owner and any other intermediate owners; and
- c.** Periodically monitor the continued accuracy of (i) the required details and (ii) the beneficial ownership of the underlying legal owner's interest.

Although beneficial owners must by definition be individuals, intermediate owners can be bodies corporate. Where this is the case, in addition to the steps described above, intermediate owners should consider establishing procedures to ensure that the above steps are taken (within the relevant time frames, where applicable).

## 5: Nominated officers

The vast majority of nominated officers will not be individuals, so the discussion that follows is intended for nominated officers who hold a licence to provide corporate services under section 7 of the Financial Services Act 2008. Nominated officers who are individuals should follow broadly the same procedures, although they can ignore any that by their nature apply only to bodies corporate.

To avoid committing the offences summarised in Part B5 above, all nominated officers should (to the extent they have not already done so) take the following steps, at a minimum, in respect of each legal entity in respect of which they act in such capacity:

- a. Immediately take steps to ascertain if that legal entity has a registrable beneficial owner. This is particularly important where the ownership structure is complex (for example, where the ownership structure involves nominee arrangements or trusts or holding companies in countries outside the Isle of Man). The nominated officer's obligation is to take "all reasonable steps" necessary to ascertain this, and the meaning of this obligation is not entirely clear. We discuss this further under the sub-heading "All reasonable steps" on the next page;
- b. Maintain and preserve the required details of any beneficial owner, and the information verifying those details, in the Island for the relevant time period<sup>33</sup>;
- c. Establish a direct line of communication with the legal owner(s) of that legal entity;
- d. Respond promptly to any written notice received from a competent authority that complies with section 15(4) of the Act;
- e. Ensure the accuracy of any statement made (i) in response to such a notice or (ii) to the Companies Registry as part of a submission under section 20 of the Act;
- f. Limit the number of persons who will be made aware of the receipt of such a notice (to minimise the possibility of committing the tipping-off offence created by section 18(1) of the Act); and
- g. Submit the required details (and details of any relevant changes) for that legal entity or, if applicable, a confirmation that it has no registrable beneficial owners to the Companies Registry online using the required website within the specified time frame<sup>34</sup>.

All nominated officers should establish policies and procedures to ensure compliance with their continuing obligations under the Act. Many nominated officers, as FSA licence holders, will already have implemented such policies and procedures. They should consider reviewing them (to the extent they have not already done so) to determine if any changes should be made to cater for the Act. Such changes might include some or all of the following:

- A policy regarding the retention of the required details and verifying information;
- A procedure to be followed if the nominated officer receives a notice from a competent authority that complies with section 15(4) of the Act. This could include procedures for (i) controlling who is made aware of the notice, (ii) ensuring that the notice is responded to promptly and (iii) monitoring the accuracy of any such response (this could include, for example, (1) a process for reviewing the continued accuracy of the required details and the verifying information held by the nominated officer before responding and (2) a requirement for a senior manager to approve the form and content of any such response);
- A procedure to be followed when the nominated officer receives information under section 9 or section 12 of the Act. This could include procedures for (i) ensuring that the relevant information is notified to the Companies Registry promptly (and, in any event, within the specified time frame), (ii) monitoring the accuracy of any such notification (this could include, for example, a requirement for a senior manager to review any verifying information and to cross-check it against any proposed notification to the Companies Registry) and (iii) submitting the relevant information to the Companies Registry using the designated website;
- Staff training on all of the above procedures; and
- Designating a director or senior officer responsible for monitoring compliance with the Act and the nominated officer's procedures.

### "All reasonable steps"

As noted above, section 20(1) of the Act ("Section 20(1)") requires nominated officers to take all reasonable steps necessary to ascertain whether a legal entity has a registrable beneficial owner so as to enable compliance with section 20(3) of the Act. The term "all reasonable steps" is fairly ambiguous, so it is not possible to list exhaustively the steps that a nominated officer must take to discharge its obligations under this provision.

A few observations can be made in this regard:

- First, the requirement under Section 20(1) can be distinguished from section 10(4) of the Act<sup>35</sup>, which provides a defence for beneficial owners or intermediate owners who take "reasonable steps" to avoid the commission of an offence. "All reasonable steps" is a higher standard than "reasonable steps", so it is clear that - rightly or wrongly - nominated officers are held to a higher standard under the Act than the beneficial owners themselves;
- Secondly, section 20(2) clarifies that a nominated officer will not discharge its burden under Section 20(1) simply by giving a notice under section 9 of the Act to the legal owner(s) of the relevant legal entity;
- Thirdly, the obligation is to take all reasonable steps necessary so as to enable compliance with section 20(3) of the Act (emphasis added). Section 20(3) is continuing in nature; it requires nominated officers to submit details of any relevant changes. As such, given the inherent ambiguity in the drafting of Section 20(1), nominated officers should consider sending periodic (perhaps annual) requests to the legal owner(s) of the relevant legal entity under section 9 of the Act asking them to confirm that there have been no relevant changes (or, where there has previously been no registrable beneficial owner, asking the legal owner(s) to confirm that this is still the case); and
- Finally, since a nominated officer will not discharge its obligations under Section 20(1) simply by giving a notice under section 9 of the Act, nominated officers should consider what steps they will take if a legal owner (i) fails to respond to such a notice or (ii) makes a statement that the nominated officer believes to be false, deceptive or misleading in a material particular. A nominated officer would have a few options in this situation:



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- Give notice to the legal entity under section 14(1) of the Act. The legal entity would then be obliged to notify the legal owner (and the beneficial owner of the legal owner's interest) that it has received such a notice, giving them 14 days to make representations to the legal entity. After considering any such representations, the legal entity would be empowered (but not obliged) to place restrictions on the rights attaching to the legal owner's interest or to cancel the legal owner's interest. The nominated officer itself has no power under the Act to place restrictions on the rights attaching to a legal owner's interest or to cancel a legal owner's interest in a legal entity;
- If the nominated officer is aware (from its "customer due diligence" checks or otherwise) of the identity of any intermediate owner, the nominated officer should consider attempting to contact such intermediate owner, asking the intermediate owner to help the nominated officer to ascertain whether the relevant legal entity has a registrable beneficial owner. If the intermediate owner does not cooperate, the nominated officer should consider reminding the intermediate owner of its obligations under the Act (and the possible criminal liability for failing to discharge those obligations); and
- In an exceptional situation, the nominated officer could request the FSA to apply for the legal entity to be wound up in the public interest using its powers under paragraph (d) of the proviso to section 164(1) of the Companies Act 1931.

In summary, therefore, although the requirement in Section 20(1) is not clearly framed, we think a nominated officer would satisfy its obligations by (i) sending periodic (perhaps annual) requests to the legal owner(s) of the relevant legal entity under section 9 of the Act asking them to confirm that there have been no relevant changes (or, where there has previously been no registrable beneficial owner, asking the legal owner(s) to confirm that this is still the case) and (ii) notifying the legal entity if a legal owner fails to respond to such a notice or makes a statement that the nominated officer believes to be false, deceptive or misleading in a material particular.

In exceptional cases (for example, if a legal entity does not receive any representations under section 14(3)(c) of the Act but fails to take any action under section 14(4) of the Act), a nominated officer should consider whether its obligations under Section 20(1) require it to discuss with the FSA whether a public interest winding-up might be justified.

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## 6: General offences

Since the general offences summarised in Part B6 above all require a degree of dishonesty or recklessness, there is little that can be said by way of practical guidance. To avoid committing these general offences, people should take care when disclosing any information relating to the beneficial ownership regime and should cooperate with, and not attempt to mislead, obstruct or conceal information from, the competent authorities.

For more  
information  
please contact



Scott Leonard-Morgan  
Director  
+44 1624 638364  
[scott.leonard-morgan@cains.com](mailto:scott.leonard-morgan@cains.com)

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T: +44 1624 638300 | E: [law@cains.com](mailto:law@cains.com) | Cains, Fort Anne, Douglas, Isle of Man IM1 5PD

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## Appendix

### Analysis of the Beneficial Ownership Act (Nominated Officer Exemption) (Class 4 Regulated Activity) Order 2017

As noted in Part B5 of this article, a licensed corporate services provider (a “CSP”) that provides corporate services constituting Class 4 regulated activity (“Class 4 Services”) to a legal entity is deemed to be that legal entity’s nominated officer for the purposes of the Act. This is specified by article 5(h) of the Beneficial Ownership Act (Nominated Officer Exemption) (Class 4 Regulated Activity) Order 2017 (the “Order”).

In paragraph A below, we consider how the Order amends the Act for legal entities that receive Class 4 Services from a CSP. Paragraph B then considers what this means for CSPs.

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## A: What impact does the order have on CSP managed entities?

As its name suggests, the Order’s primary purpose is to exempt legal entities to which the Act applies from the requirement to have a nominated officer if they are in receipt of Class 4 Services from a CSP (which the Order defines as a company that is licensed by the FSA under section 7 of the Financial Services Act 2008 to carry on the regulated activity of corporate services within the meaning of the Regulated Activities Order 2011). We refer to this as the “NO Exemption”.

The NO Exemption is set out in article 4(1) of the Order, and in this Appendix we refer to legal entities that benefit from the NO Exemption as “Exempt Legal Entities”.

The Order also makes certain consequential modifications to the Act for Exempt Legal Entities. We consider the scope of the NO Exemption and those consequential modifications in the following paragraphs.

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## 1: How broad is the NO Exemption?

Technically the NO Exemption is very narrow. The only thing that is exempt is the obligation of an Exempt Legal Entity to have a nominated officer. This means that, for so long as a legal entity benefits from the NO Exemption, it is not required to appoint a nominated officer and it cannot commit the offence created by section 6(9) of the Act (described in Part B1 of this article).

Article 5 of the Order also makes a number of consequential amendments to the Act in respect of Exempt Legal Entities, which are considered in paragraph 2 below.

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## 2: How else is the Act amended if the NO Exemption applies?

Article 5 of the Order makes a number of consequential amendments to the Act if the NO Exemption applies. The most important of these is set out in article 5(h). As noted above, this provides that all references to a nominated officer in the Act (with a few technical exceptions) are deemed to refer to the CSP that provides the Class 4 Services. This is a significant provision, the effect of which is that, **for so long as a legal entity benefits from the NO Exemption, its CSP will be subject to all the obligations of a nominated officer under the Act (and can be liable for all of the offences listed in Part B5 of this article that can be committed by a nominated officer).**

**Article 5 of the Order also makes the following modifications to the Act for Exempt Legal Entities:**

- Section 7(1) of the Act is amended so that an Exempt Legal Entity is not required to appoint its first nominated officer and give notice complying with the requirements of section 7(2) to the Companies Registry by 21 July 2017. Instead, it requires the CSP that provides Class 4 Services to the Exempt Legal Entity to (a) confirm receipt of its unique identification to allow it to access the Database (its “enrolment code”) from the Companies Registry and request activation of that code and (b) specify to the Companies Registry the names of any legal entity listed in the CSP’s “client list” for which the CSP does not undertake any role or responsibility for which a nominated officer is responsible under the Act. Each CSP was required to specify this information to the Companies Registry within one month after the date on which the Companies Registry issued its enrolment code. A “client list” is a list of legal entities provided by the Companies Registry to a CSP specifying the legal entities for which the Companies Registry believes the CSP undertakes or will undertake any role or responsibility for which a nominated officer is responsible under the Act.

In other words, for so long as a legal entity benefits from the NO Exemption, it cannot commit the offence created by section 7(1) of the Act (described in Part B1 of this article). However, the CSP that provides Class 4 Services to that legal entity would have committed an offence (under section 7(7) of the Act) if it failed to comply with its obligations under the amended provision of the Act within the relevant time frame.

- Section 7(4)(c) is replaced so that it does not require an Exempt Legal Entity to notify the Companies Registry of a subsequent appointment of a nominated officer. Instead, the substituted section 7(4)(c) requires legal entities formed or incorporated after 21 June 2017 that benefit from the NO Exemption to give notice complying with the requirements of section 7(5) of the Act to the Companies Registry within one month after the appointment of a CSP (and such a legal entity will commit an offence under section 7(7) of the Act if it fails to do so).

- Sections 8(1)(a) and (c) of the Act do not apply. The effect of this is that, for so long as a legal entity benefits from the NO Exemption, it cannot commit the offence created by section 8(3) of the Act (described in Part B1 of this article) insofar as it relates to a failure to comply with section 8(1)(a) or section 8(1)(c). Importantly, however, section 8(1)(b) continues to apply. This means an Exempt Legal Entity is still required to keep a record of its nominated officer's (i.e., its CSP's) corporate or firm name and its registered office or place of business in the Island (and it will commit an offence under section 8(3) of the Act if it fails to do so).
  - Section 45 of the Act does not apply. As discussed in Part B5 of this article, this provision requires nominated officers under the Companies (Beneficial Ownership) Act 2012 and registered agents of legal entities to be treated as nominated officers for the purposes of the Act if they consented in writing to act in such capacity. This is not relevant to Exempt Legal Entities, since the CSP will be deemed to be the nominated officer (as discussed above).
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### 3: Does the NO Exemption ever not apply to a legal entity that receives Class 4 Services from a CSP?

Article 4(5) makes it clear that a legal entity can appoint a nominated officer even if it receives Class 4 Services from a CSP. We do not expect many (if any) legal entities to do so. However, if any legal entity elected to do so, article 4(5) provides that the NO Exemption, and the modifications made to the Act by the Order (discussed in paragraph 2 above), would not apply to that legal entity.

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### 4: What happens if a legal entity ceases to benefit from the NO Exemption?

Under article 4(4) of the Order, the NO Exemption ceases to be available to a legal entity if it ceases to receive Class 4 Services from a CSP. In those circumstances, article 6(1) of the Order requires the legal entity to appoint a nominated officer and give notice of that appointment to the Companies Registry within one month of becoming subject to section 6 of the Act.

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## B: What does it mean for Corporate Service Providers?

The key point for CSPs to bear in mind is that the NO Exemption is primarily an exemption from the requirement for a legal entity to appoint a nominated officer. A CSP that provides Class 4 Services to an Exempt Legal Entity is treated as the nominated officer of that Exempt Legal Entity for the purposes of the Act.

Accordingly, all CSPs should familiarise themselves with the criminal offences created by the Act that can be committed by nominated officers, since all of these offences could potentially be committed by CSPs. In particular, a CSP that provides Class 4 Services to an Exempt Legal Entity must (among other things):

- Take all reasonable steps necessary to ascertain whether that Exempt Legal Entity has a registrable beneficial owner (section 20(1) of the Act). See our related discussion in Part C5 of this article;
- Submit the required details (and details of any relevant changes) in respect of that Exempt Legal Entity or, if applicable, a confirmation that it has no registrable beneficial owners to the Companies Registry within the specified time frame (section 20(5) of the Act);
- Maintain the required details and the verifying information in the Island and preserve them for at least five years (section 13 of the Act); and
- Disclose all information that it holds in respect of the beneficial ownership of that Exempt Legal Entity in accordance with any notice it receives from a competent authority that complies with section 15(4) of the Act (section 15(2)).

Part B5 of this article summarised all of the offences that could be committed by nominated officers. We have also set out some practical steps that can be taken to avoid committing those offences in Part C5.

The Order contains one other noteworthy provision, which relates to the situation when a legal entity ceases to receive Class 4 Services from a CSP.

When a CSP terminates its relationship with a client legal entity, it would be fair for that CSP to assume that it would automatically cease to be obliged to undertake the roles and responsibilities for which that legal entity's nominated officer would be responsible under the Act. However, this will not necessarily be the case. Article 6(4) of the Order contains a (potentially quite important) clarification of when the CSP will be relieved of that obligation.

As noted in paragraph A4 above, the NO Exemption ceases to be available to a legal entity in these circumstances, and article 6(1) of the Order requires the legal entity to appoint a nominated officer and give notice of that appointment to the Companies Registry within one month of becoming subject to section 6 of the Act. However, Article 6(4) of the Order requires the CSP to continue to undertake any role or responsibility for which a nominated officer is responsible under the Act in relation to the legal entity until the Companies Registry receives notice from the legal entity or the CSP that the legal entity has ceased to receive Class 4 Services from a CSP.

As a result, all CSPs should consider updating their client termination procedures to include a requirement to notify the Companies Registry under article 6(4) of the Order when they cease to provide Class 4 Services to a legal entity. This will help the CSP to determine with certainty when it ceases to be obliged to undertake the roles and responsibilities for which the legal entity's nominated officer would be responsible under the Act.

## Endnotes

1. This is available at [https://legislation.govim/cms/images/LEGISLATION/PRINCIPAL/2017/2017-0003/BeneficialOwnershipAct2017\\_1.pdf](https://legislation.govim/cms/images/LEGISLATION/PRINCIPAL/2017/2017-0003/BeneficialOwnershipAct2017_1.pdf).
2. <https://www.govim/categories/business-and-industries/companies-registry/beneficial-ownership/>.
3. This is a secure central private database, maintained as part of the Companies Registry and overseen by the Isle of Man Financial Services Authority. Information held on this database is not public and can only be accessed by a small number of designated officials in a limited number of Isle of Man authorities and, on request to the Island's Financial Intelligence Unit, by the intelligence and law enforcement agencies of countries with which the Isle of Man has a beneficial ownership sharing agreement (currently only the UK).
4. A number of other enforcement options exist under the Act, such as the power of a company to impose restrictions on the rights attaching to its shares, the power of the FSA to impose civil penalties and the power of the Companies Registry to strike off non-compliant companies, but this article focuses on criminal offences.
5. The Act itself specifies 20 new offences, and it also creates three new offences by consequential amendments to the Companies Act 1931, the Companies Act 2006 and the Limited Liability Companies Act 1996.
6. Section 35 of the Act. An "officer" is broadly defined for this purpose (see section 35(3)).
7. The full list of such legal entities is set out in section 5 of the Act.
8. Section 6(5) empowers the Treasury to exempt a legal entity or legal entities from this requirement. The only such exemption at the date of writing relates to legal entities that receive corporate services comprising Class 4 regulated activity from a licensed corporate services provider, who may undertake the role or responsibility for which a nominated officer is responsible. See Part B5 of this article and endnote 20 below for further information.
9. No offence will be committed if (a) the nominated officer appointed under the repealed Beneficial Ownership Act 2012 has consented in writing to continue to be the nominated officer under the Act (see section 45(1)) or (b) the legal entity has a registered agent that has consented in writing to act as the nominated officer under the Act (see section 45(3)). In either case, the legal entity does not have to give notice of the appointment of the nominated officer under section 7(1) (see section 45(6)). However, it will have to give notice of any change in the details of its nominated officer or any change of nominated officer (see section 45(7)).
10. This is defined in section 11 of the Act.
11. A defence is available under section 9(8) if the legal owner can show that it took reasonable steps to avoid commission of the offence.
12. This is defined in section 3 of the Act as any change to the required details provided to the nominated officer under section 9(3).
13. The full definition is "a natural person who ultimately owns or controls a legal entity to which this Act applies, in whole or in part, through direct or indirect ownership or control of shares or voting rights or other ownership interest in that entity, or who exercises control via other means".
14. This is available at <http://www.tynwald.org.im/business/opqp/sittings/Tynwald%2020162018/2017-GC-0003.pdf>.
15. A defence is available under section 10(4) if the beneficial owner can show that he/she took reasonable steps to avoid commission of the offence.
16. That subsection would then read as follows: "A beneficial owner and an intermediate owner must assist a legal owner to ascertain the beneficial owner of the legal owner's interest in the legal entity and to notify the legal entity of any changes to the beneficial ownership of that interest" (emphasis added).
17. A defence is available under section 10(4) if the intermediate owner can show that he/she/it took reasonable steps to avoid commission of the offence.
18. See section 45(8).
19. As above.
20. See article 5(h) of the Beneficial Ownership (Nominated Officer Exemption) (Class 4 Regulated Activity) Order 2017. This Order amends the provisions of the Act for a legal entity that receives services constituting Class 4 regulated activity from a licensed corporate services provider (the key amendment being that such legal entities are exempt from the requirement to appoint a nominated officer). However, the Order deems all references in the Act to a "nominated officer" to be references to the corporate services provider providing the services constituting Class 4 regulated activity, so the corporate services provider has all the obligations of a nominated officer under the Act and can be liable for all of the offences listed in Part B5 of this article.
21. This is extended under section 13(3)(b) if the nominated officer is aware that an investigation is being carried out under the Act or any other enactment.
22. This is defined in section 15(3) of the Act.
23. This is defined in section 3 of the Act as any beneficial owner who owns or controls more than 25% of the beneficial ownership of a legal entity.
24. Section 20(4) of the Act requires this information to be submitted online in accordance with section 22 unless secondary legislation provides otherwise.
25. A nominated officer is exempt from complying with this requirement if (a) secondary legislation so provides or (b) having applied to the Companies Registry, it is given an express exemption from this requirement (see section 22(3) of the Act).
26. Section 18(3) clarifies that a professional legal adviser can still disclose information (a) to its client (or one of its representatives) in connection with legal advice being given to that client or (b) to any person in contemplation of or connection with legal proceedings for the purpose of those proceedings (in either case, unless disclosed with a view to furthering any criminal purpose). A defence is also available under section 18(5) if the person can prove that it did not know or suspect that the disclosure was likely to prejudice the relevant investigation or proceeding.
27. Section 29(3) clarifies that an advocate or other legal adviser can still disclose information (a) to its client (or one of its representatives) in connection with legal advice being given to that client or (b) to any person in contemplation of or connection with legal proceedings for the purpose of those proceedings (in either case, unless disclosed with a view to furthering any criminal purpose). A defence is also available under section 29(5) if the person can prove that it did not know or suspect that the disclosure was likely to prejudice the relevant investigation or proceeding.
28. For example, sub-paragraphs (a) to (f) are set out in the alternative (so each sub-paragraph should create a stand-alone offence), but sub-paragraph (a), read in isolation, appears to make it an offence to know or suspect that the FSA is carrying out, or is likely to carry out, an inspection under paragraph 1 of Schedule 1 to the Act, which cannot have been Tynwald's intention.

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29. A defence is available under paragraph 7(2) of Schedule 1 to the Act if the person can show that he/she/it had no intention of concealing facts disclosed by the information from persons carrying out an inspection or investigation or requesting such information.
30. Section 7(3) of the Act. Note that, unlike the obligation of a legal owner under section 12 of the Act, this obligation is triggered by the occurrence of the change itself, not the legal entity learning of the change.
31. Any person who acts as a legal owner by way of business (*e.g.*, professional trust and nominee companies) should consider amending its standard terms of business to include such an undertaking.
32. Beneficial owners should bear in mind the general offences described in Part B6 of this article when responding to such queries.
33. See section 13(3) of the Act.
34. See sections 20(6) and 20(7) of the Act.
35. Discussed in part C4 above.