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City of London Law Society Company Law Committee response to the Department for Business, Innovation and Skills Consultation Paper on *The Register of People with Significant Control*

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response in respect of the Consultation Paper on **The Register of People with Significant Control** has been prepared by the CLLS Company Law Committee.

In addition to responding to the specific questions in the consultation paper we have also included in the second part of our response a number of additional comments on the draft regulations.

A. Response to specific questions

Q1 Do you have any comments on the impact assessments covering the protection regime and the costs of making registers publicly available?

No.

Q2 Do you agree with the proposed exemptions?

Yes, subject to our response to Q4.

Q3 Should other companies be exempted and why?

Yes – see our response to Q4.

Q4 Should an exemption be applied to issuers on any of the regulated markets outside the EEA? If so, which markets and why?

We do not believe that the exemption should be limited to companies that have voting shares admitted to trading on regulated markets in EEA states. Section 790B(2) requires the Secretary of State to have regard to the extent to which companies are bound by disclosure and transparency rules (in the UK or elsewhere) which are broadly similar to DTR5. In order to comply with this obligation it would

appear that the Secretary of State is obliged to assess the scope of the disclosure and transparency regimes in, at the very least, the major stock exchanges around the world.

We attach a note prepared by Skadden, Arps, Slate Meagher & Flom LLP in relation to the shareholding disclosure requirements under the US Securities Act of 1934. We have not taken formal legal advice in relation to other regimes but it is our clear understanding that a number of other regimes do have broadly similar disclosure and transparency rules. These include in relation to other regimes the Hong Kong Stock Exchange, the Singapore Stock Exchange and the Australian Stock Exchange. There may well be others.

As a minimum we suggest that companies with shares listed on the New York Stock Exchange and NASDAQ should be exempt as this is likely to cover the vast majority of UK companies listed outside the EEA.

Q5 Are there any entities not included in this list which you believe to be subject to very similar disclosure and transparency rules as DTR5 issuers? If so, please explain with reference to relevant legislation.

See our response to Q4. Section 790C(11) also requires the Secretary of State to have regard to the extent to which companies are bound by disclosure and transparency rules (in the UK or elsewhere) which are broadly similar to DTR5, so this should not be limited to EEA states. At least, the regimes listed by the FCA as being equivalent to DTR5 under DRT 5.11.6 should be included in this list.

Q6 Do you agree with the proposed dual approach for recording the relationship between the PSC and the company, showing which condition or conditions are met and to what extent? If not, what alternative would you propose?

Where a person satisfies, or may satisfy, more than one condition we consider that it should be sufficient to notify, and include in the register, just one condition. This will avoid unnecessary analysis where, for example, a person holds more than 25% of the shares but it is not clear whether this gives the right to exercise significant influence or control.

Q7 Are the proposed 25% bands for share ownership and voting rights too narrow, too broad or and at the right level? Is there merit in a separate category for 100% control?

We believe the proposed bands are appropriate but agree that there should be an additional separate category for 100% ownership.

Q8 Would it be simpler to require companies to state the exact proportion of shares or voting rights controlled? If so, do you have any views on how the impact might be mitigated for the small percentage of companies whose register would be subject to frequent updating?

An obligation to state the exact proportion of shares/voting rights controlled would be administratively burdensome for the admittedly small number of companies which are not exempt but whose shares are frequently traded. We therefore favour the approach of using relatively wide bands.

Q9 Do you agree with the proposed approach for requiring companies to note other information on their register? If not, please explain why.

Yes, subject to our comments on regulation 8 made below.

Q10 Which fee structure, Option 1 or Option 2, do you prefer and why?

We favour Option 2 (Fixed Fee) as this will be simpler and should not be burdensome as we assume that only a company with more than a few entries will maintain an electronic register.

Q11 Do you think the level of the fees in the options is correct? If not, please explain why.

Yes.

Q12 Do you think the definition of 'an entry' in the draft regulations is correct? If not, please explain why.

We favour Option 2 so hope that this question will not be relevant. We note, however, that there might be more than one matter noted under Regulation 8 and therefore are not clear why Regulation 6(3)(c) refers to "any one additional matter".

Q13 Is the process for protecting residential addresses from credit reference agencies appropriate and complete?

Yes.

Q14 Is the process set out in draft regulations 25-36 appropriate and complete?

Yes.

Q15 Are the grounds for making an application clearly defined? If not, please explain.

We are unclear what circumstances would be covered by the second limb of Regulation 27(2) ("that a particular characteristic or attribute…") which would not be covered by the first limb. The second limb may, therefore, be superfluous. If the second limb is retained it would be helpful if the guidance were to include some examples of the type of circumstances which are intended to be covered.

Q16 Are the transitional arrangements appropriate?

Yes, subject to our response to Q17.

Q17 Is the 28 day limit for an individual to cease to be a PSC appropriate? If not, please explain why not.

We assume that the purpose of the 28 day limit is to allow an individual who does not want to appear on the PSC Register to dispose of his/her shares. It is, however, a very short period in which to dispose of shares for which there is unlikely to be a ready market. We would suggest a period of 3 months.

Q18 Is the mandated content of the warning and restrictions notices useful? Are the notices too detailed or are there elements that can be omitted?

In our view the mandated content is useful and not too detailed. An immaterial error should not, however, invalidate a notice and we would suggest therefore that the court should have discretion to hold a notice to be valid if an error is not material. Alternatively, one could dispense with the mandated content and use the guidance to make proforma notices available.

We note that section 790D(9) envisages that the regulations may include provisions as to the manner in which notices must be given. We think this would be helpful and suggest that notices should be required to be in writing, in hard copy rather than electronic, and delivered to the company's registered office.

Q19 Do you agree that capacity to respond should be the only factor a company must take into account in considering reasons for non-compliance? If not, please indicate what other factors a company should take into consideration and in what circumstances this would be appropriate.

As we do not know what the guidance on "capacity" to respond will include or exclude it is difficult to express a view on this. If the guidance is narrowly drawn eg to cover only someone who does not have capacity to respond because of a mental or other illness, we think there are other circumstances that a company should be required to take into account, such as when the person to whom the notice was addressed actually received the notice.

B. Additional Comments on Draft Regulations

Regulation 5(3): We question whether a definition of "part" is required. Notwithstanding the reference to "any part" in Section 790O(2), we assume that in practice a person would ask for a copy of the entire register rather than part of it. If a definition of "part" is retained, we suggest it would be clearer if Regulation 5(3)(c) referred to "each additional matter" rather than "any one additional matter".

Regulation 8(1): This should be expressed in the negative – "where a company has no reasonable cause to believe that there is any registerable person …"

Regulation 8(3): We suggest that where not all the required particulars of a person have been confirmed, the company should have to state which particulars have been confirmed and which have not (rather than just saying that not all the details have been confirmed).

Regulation 8(4): This should only apply where a company has reasonable cause to believe that there is a registrable person but has not yet completed taking reasonable steps to identify that person. As drafted it appears to require an entry even when the company has no reason to believe that there is a registrable person.

Regulation 8(8): In line 3 the words "the addressee of the notice is complied with after the time…" should read "the addressee of the notice has complied with it after the time…".

Regulation 8(9): It may be relevant to note on what time on a particular day a restriction notice is lifted. We suggest therefore that each reference in Regulation 8(9)(a)(ii) and (b)(ii) to "the date" should read "the date and time".

Regulation 10(a): Consistent with our comment on Regulation 8(9), we suggest that the restriction notice should specify at what time on the relevant date it takes effect.

Regulation 10(b): We suggest that it be made clear whether or not the copy of the warning notice has to include a copy of the notice given under Section 790D or 790E (see Regulation 9(b)).

Regulation 13(2): We note that while subparagraph (a) refers to "rights would have been exercisable" and subparagraph (c) refers to "payment would have been made", subparagraph (b) refers to "shares could have been issued." Is this intentional?

We assume that if there had been a reorganisation of share capital during the restrictions period (such as a share split or consolidation), then the shares which are the subject of the restrictions notice would be subject to that reorganisation. It would be helpful if that were made clear.

We also assume that where rights are exercisable over a period of time which straddles the withdrawal of the restrictions notice (eg a right to participate in an open offer or share repurchase tender) then, if there is sufficient time available, the shareholder should still be able to exercise the right once the restrictions period has ended. Again it would be helpful if that were made clear.

Regulation 13(3): See our previous comments on Regulations 8(9) and 10(a). We think it would be useful if the restrictions period were to start and finish at a specified time rather than simply on a specific day.

If you have any questions regarding this submission please contact Andrew Pearson (Andrew.Pearson@hoganlovells.com).

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US Public Company Disclosure Obligations

Shareholders of a US public company must comply with Sections 13(d) and 13(g) of the US Securities Act of 1934 (the "Act") and Section 16 of the Act with respect to public disclosure of their shareholdings. Sections 13(d) and 13(g) of the Act apply to domestic US issuers as well as foreign private issuers, while Section 16 of the Act applies to domestic companies only and not foreign private issuers[1].

Sections 13(d) and 13(g)

Any person who is directly or indirectly beneficial owner of more than 5% of any class of voting equity securities of a US publicly traded company must file reports with the US Securities and Exchange Commission (the "SEC") under Sections 13(d) and 13(g) of the Act. These reports are publicly available on the SEC's website (www.sec.gov) upon filing.

Regulation 13D-G under that Act generally requires each person (or group of persons acting together for the purpose of acquiring, holding, voting or disposing of securities), within ten days after the 5% threshold is crossed, to file a report on Schedule 13D with the SEC and send copies to the issuer and relevant securities exchange. Schedule 13D requires substantial disclosure regarding the identity of the acquirer, the source and amount of funds used to acquire the securities, the purpose of the acquisition, the amount and percentage of securities held by the acquirer, and related details about the acquirer's involvement with the securities.

An amended Schedule 13D must be filed by the reporting person upon the occurrence of any material change in the facts set forth in the original Schedule 13D, such as, but not limited to, a material increase or decrease in the percentage of the class of equity securities the reporting person beneficially owns. For purposes of this rule, an acquisition or disposition of securities in an amount equal to at least 1% of the class of securities constitutes a "material" change. The amended Schedule 13D must be filed "promptly." While this term is undefined, the SEC will consider the facts and circumstances surrounding the materiality of the change in information in determining whether the filing was made promptly.

Instead of Schedule 13D, certain investors are permitted to report their beneficial ownership positions on the less burdensome Schedule 13G (i.e., certain types of regulated institutional investors, such as U.S. banks and broker-dealers (or their foreign counterparts)). Reports on Schedule 13G must be filed within 45 days after the end of the calendar year in which the acquisition occurred. Certain other non-regulated investors that acquire beneficial ownership

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[1] "Foreign private issuer" under the US securities laws means any issuer incorporated or organized under the laws of a jurisdiction outside of the United States, unless:

- more than 50% of its voting securities are held of record by United States residents, either directly or indirectly, and
- one of the following is true:
    - the majority of its executive officers or directors are United States citizens or residents;
    - more than 50% of its assets are located in the United States; or
    - Its business is administered principally in the United States.

of less than 20% of a class of securities and that hold such securities without the purpose or effect of changing or influencing the control of the issuer may qualify to file under Schedule 13G within 10 days of such acquisition.

Schedule 13G must generally be amended within 45 days after the end of each calendar year if, as of the end of the calendar year, there are any changes in the information reported in the previous filing. In certain circumstances, Schedule 13G must be amended within 10 days after the end of the first month in which the reporting person's direct or indirect beneficial ownership increases or decreases by more than 5% of the class of equity securities.

Section 16

Corporate insiders – meaning a US public company's officers and directors, and any beneficial owners of more than 10% of a class of the company's US-listed equity securities – must file with the SEC a statement of ownership regarding those securities.

The initial filing is on Form 3. An insider of an issuer must file this Form within ten days of becoming an officer, director or beneficial owner of more than 10% of a class of the company's US-listed equity securities.

Subject to certain exceptions, any changes in ownership of the insiders (without de minimis) must be reported on Form 4 within two business days.

Form 3 and Form 4 reports focus on disclosing the information surrounding the transaction being disclosed (i.e., the nature of the transaction, consideration exchanged and any other pertinent information). It does not contain disclosure obligations similar to Schedule 13D described above.

Form 3 and Form 4 reports are publicly available on the SEC's website (www.sec.gov) upon filing.