

NEW DISCLOSURE RULES FOR FOREIGN OWNERS OF UK LAND

The UK has adopted new rules that will require overseas entities acquiring UK land to disclose their beneficial owners. The new rules will also require the disclosure of beneficial owners by overseas entities that own land in England or Wales that was acquired in the last 20 years. The Economic Crime (Transparency and Enforcement) Act 2022 received Royal Assent on 15 March 2022 after being fast-tracked through the legislative process in response to the situation in Ukraine. Investors in and lenders to UK real estate will quickly need to consider how to comply with the new rules and to address the impact on transactions.

The new Act requires Companies House to set up and maintain a new public register of the beneficial owners of overseas entities owning UK land (the Overseas Entities Register). The UK Government will need to adopt regulations to implement some of the new rules and is giving the Registrar of Companies additional funding to set up the new register. The Government has stated that Companies House will now begin work to implement the new register as quickly as possible, working closely with the UK's land registries.

What is the objective of the new rules?

It has been estimated that there are 95,000 UK properties held by 32,000 overseas companies. The new rules respond to long-standing concerns about the lack of transparency around who ultimately owns land in the UK, where an overseas entity is listed as the registered owner of the land. The aim is to prevent and combat the use of land in the UK by overseas entities to launder money or invest illicit funds and to increase transparency and public trust in overseas entities engaged in land ownership in the UK.

The Government committed in 2016 to establish a public register of beneficial owners of non-UK entities that own or buy land in the UK and consulted on a draft Bill in 2018. The Act is based on the 2018 draft Bill albeit with some significant changes.

The Act is part of a wider landscape of transparency measures aimed at revealing beneficial owners of assets and entities. UK companies already must disclose their beneficial owners to Companies House under the regime requiring the disclosure of people with significant control (PSC) that was introduced in 2016 and an expanded requirement to register beneficial ownership of trusts will apply from 1 September 2022, which will include non-UK trusts which acquire UK land after 6 October 2020.

Key issues

- Economic Crime (Transparency and Enforcement) Act 2022 received Royal Assent on 15 March 2022
- New requirement for overseas entities owning UK land to disclose beneficial ownership on register at Companies House
- Existing overseas owners must register within a 6-month transition period after rules are in force
- Overseas entities disposing of land between 28 February 2022 and the end of the transition period must also register
- Registered overseas entities must update the register at least annually
- Rules will apply in England and Wales to freeholds and leases longer than 7 years acquired since 1 January 1999
- Entities failing to register or update the register prevented from transferring, leasing or charging their property
- Criminal sanctions for contraventions, including imprisonment, fines and daily penalties of £2,500
- Registrar of Companies may also impose administrative financial penalties for contraventions
- New rules will come into force quickly once Companies House has set up the new register
- New regime will have a significant impact on UK real estate transactions involving overseas entities

Due to the practical difficulties of enforcement against overseas entities, the Act will change land registration procedures to impose restrictions that prevent dealings with the relevant land. These will significantly strengthen the incentive on overseas entities and those dealing with them to ensure compliance with the Act but raise potential issues that are not present when dealing with UK landowners.

Will the new rules apply across the UK?

Yes. However, there will be differences between the new rules in England and Wales, Scotland and Northern Ireland mostly reflecting differences in their land registration requirements. Critically, the rules in England and Wales apply retroactively to land acquired on or after 1 January 1999 while the rules in Scotland apply with respect to land acquired on or after 8 December 2014 and the rules in Northern Ireland only apply to land acquired after the new rules come into effect. These dates reflect the date from which the respective land registries began to identify overseas ownership of property. This briefing focuses on the new rules as they apply in relation to land in England and Wales.

Who must comply with the new rules?

The new rules will apply to 'overseas entities' owning UK land (see Box 1). The definition includes non-UK banks and other companies operating through a branch in the UK.

The new rules will not apply to foreign individuals owning UK land, but if those individuals are trustees, they may be required to register the beneficial ownership of the trust under the new trust registration rules coming into effect on 1 September 2022. Foreign individuals must of course be named as beneficial owners where the criteria are met (see below) and a last-minute amendment also closed a loophole so that beneficial owners who are themselves trustees must disclose details of the trust and who they are holding on trust for.

When will the obligation to register arise for new transactions?

Overseas entities who acquire land will need to register on the Overseas Entities Register before they apply to HM Land Registry to become the registered proprietor of a 'qualifying estate', i.e.,

- a freehold estate in land; or
- a leasehold estate in land granted for a term of more than seven years.

Will existing owners have to register?

Yes. Overseas entities that became registered as the proprietor of a qualifying estate pursuant to an application on or after 1 January 1999 will have a six-month transition period to apply for registration on the Overseas Entities Register. The Secretary of State also has powers to serve a notice on such an overseas entity requiring it to apply for registration.

Box 1:

What is an overseas entity?

Under the new rules:

'overseas entity' means a legal entity that is governed by the law of a country or territory outside the United Kingdom; and

'legal entity' means a body corporate, partnership or other entity.

Can overseas entities avoid registration by disposing of land before the end of the transition period?

No. Where any disposition occurs on or following 28 February 2022, the overseas entity will be required to deliver details of the beneficial ownership position immediately prior to that disposition for inclusion on the Overseas Entities Register. This prevents overseas entities disposing of land ahead of full implementation of the Act to avoid identification of the beneficial owners.

What changes are being made to land registry rules and why are they important?

Transfers of freehold interests and grants of leases for more than seven years do not have legal effect until registered at HM Land Registry and HM Land Registry will not allow such registration unless the overseas entity registers on the Overseas Entities Register. This will present issues for the overseas entity itself (which will not become a legal owner), its counterparty (which may find itself inadvertently holding on trust for the overseas entity) and any lender financing the acquisition (whose charge will not be capable of registration either).

In addition, when an overseas entity is registered as the registered proprietor, the new rules will require HM Land Registry to enter a restriction against transfers, charges and leases of more than seven years. This will prevent the registration of these dispositions (and them taking legal effect) unless the overseas entity is registered with an up-to-date registration on the Overseas Entities Register at the time of that disposition.

Due to the length of time that it can take for a land registry application to complete, there are also saving provisions in the Act that require HM Land Registry to refuse to register a relevant disposition where an overseas entity has acquired land and then further disposed of it before becoming the registered proprietor, unless the overseas entity has first registered on the Overseas Entities Register.

During the six-month transition period, the Land Registry will also enter the same form of restriction referred to above on the registered titles of properties currently held by overseas entities and which were registered pursuant to an application since 1 January 1999. These restrictions will not take effect until the end of the transition period.

In addition to the registration consequence, it will also be a criminal offence for an overseas entity to make a disposition if it would be prohibited by any of these restrictions.

Will there be any exemptions?

The Secretary of State will be able to grant exemptions from the new rules to overseas persons in the interests of national security or for the purposes of preventing or detecting serious crime.

In addition, the land registry restriction against registration of relevant dispositions will not apply where:

- the disposition is made in pursuance of a statutory obligation or court order, or occurs by operation of law;
- the disposition is made in pursuance of a contract made before the restriction is entered in the land register;
- the disposition is made in the exercise of a power of sale or leasing conferred on the proprietor of a registered charge or a receiver appointed by such proprietor;
- the disposition is made by an insolvency practitioner in circumstances to be prescribed by regulations.

The Secretary of State may also consent to the registration of a disposition that would otherwise be prohibited by a restriction if satisfied:

- that at the time of the disposition the person to whom it was made did not know, and could not reasonably have been expected to know of the prohibition, and
- that in all the circumstances it would be unjust for the disposition not to be registered.

When will the new rules come into force?

The new rules will come into effect on a day to be specified by regulations. There will need to be some delay to give Companies House time to set up the new register and for the Government to adopt the necessary implementing regulations, but the Government has said that it will look to do this as soon as practically possible. The regulations may create additional transitional provisions.

What information will overseas entities have to disclose?

Applications by overseas entities for registration will have to contain:

- one of the statements set out in Box 2;
- required information about the overseas entity including its name, country of incorporation or formation and address;

Box 2:

Required statements on beneficial ownership

1. A statement:

- (a) that the entity has identified one or more registrable beneficial owners and that it has no reasonable cause to believe there are others, and
- (b) that the entity is able to provide the required information about each registrable beneficial owner it has identified.

2. A statement that the entity has no reasonable cause to believe that it has any registrable beneficial owners.

3. A statement:

- (a) that the entity has reasonable cause to believe that there is at least one registrable beneficial owner that it has not identified,
- (b) that the entity is not able to provide the required information about one or more of the registrable beneficial owners it has identified, or
- (c) that paragraphs (a) and (b) both apply.

- required information about any identified registrable beneficial owners including:
 - for individuals, name, date of birth, nationality and address; and
 - for entities (including government entities and public authorities), name, registered office, legal form and governing law;
- a statement that the entity has complied with the new duty to take steps to identify registrable beneficial owners;
- further information verifying the registrable beneficial owners and managing officers (see below) of the overseas entity (these requirements are to be set out in implementing regulations); and
- the name and contact details of a contact individual.

Where a registrable beneficial owner is a trustee, the application must include required information about the trust (or so much of that information as the overseas entity has been able to obtain) and a statement as to whether the entity has any reasonable cause to believe that there is required information about the trust that it has not been able to obtain. The required information includes the name of the trust, when it was created and its beneficiaries.

Who is a registrable beneficial owner?

An individual, legal entity or a government or public authority will be registrable if it is a direct or indirect 'beneficial owner' of the overseas entity and is not exempt. The definitions and exemptions are based on the disclosure regime applying to UK companies in respect of PSCs (see Box 3). For example, an individual will be a registrable beneficial owner if it holds, directly or indirectly, more than 25% of the shares or voting rights in an overseas entity. Companies (but not governments or public bodies) may be exempt where they are subject to their own disclosure requirements.

Overseas entities will have to take reasonable steps to identify their beneficial owners and will have powers to require other persons to provide information to it for this purpose. Where the overseas entity either has no registrable beneficial owners or it has not been able to identify all registrable beneficial owners and/or provide all the required information for them, then, it must instead provide required information about each managing officer (being a director, manager or secretary) of the entity.

What are the duties to update the register?

Overseas entities must update the register at least annually.

Box 3:

Who is a beneficial owner?

A person ("X") is a "beneficial owner" of an overseas entity or other legal entity ("Y") if one or more of the following conditions are met.

- **Ownership of shares:** X holds, directly or indirectly, more than 25% of the shares in Y.
- **Voting rights:** X holds, directly or indirectly, more than 25% of the voting rights in Y.
- **Right to appoint or remove directors:** X holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of Y.
- **Significant influence or control:** X has the right to exercise, or actually exercises, significant influence or control over Y.
- **Trusts, partnerships, etc:** Both:
 - the trustees of a trust, or the members of a partnership, unincorporated association or other entity, that is not a legal person under the law by which it is governed meet any of the conditions specified above (in their capacity as such) in relation to Y, and
 - X has the right to exercise, or actually exercises, significant influence or control over the activities of that trust or entity.

What are the consequences of failing to comply?

As well as the fetters on registration of dispositions referred to above, failure to comply with the obligations under the Act may have other consequences.

- providing false or misleading information, failing to register an existing interest, failing to comply with a notice requiring registration or making a disposition in breach of a restriction are criminal offences which may result in imprisonment and an unlimited fine;
- failing to update the register or failing to provide beneficial ownership information as required following a disposition by an overseas entity before the end of the transition period are criminal offences which may result in daily default fines of up to £2,500;
- the Registrar of Companies may impose administrative financial penalties on persons contravening the Act (the scope of these will be set out in further regulations which will also provide for amounts owed to be protected by way of a charge registered against the property, though it is currently unknown whether this charge will rank ahead of other registered charges); and
- there may be other consequences under anti-money laundering rules for the overseas entity and other parties.

The officers and 'shadow directors' of a company may also be liable where the company commits an offence under the Act.

A breach of the restriction on dispositions does not affect the validity of the disposition, but, under existing land law, a failure to register a disposition will prevent legal title from passing and can ultimately render certain dispositions void.

What will be the impact on transactions?

The combination of preventing registration of acquisition of land by non-compliant overseas entities, the imposition of restrictions on dispositions by overseas entities and the ongoing requirement to keep the register updated means that this issue cannot be ignored. We have set out below some implications for a variety of common scenarios. The issues may be particularly acute in long-dated transactions which are common in real estate, such as purchases of land subject to obtaining planning permission, the exercise of contractual renewal rights under leases or off-plan purchases of property under development.

Disposal by overseas entities: To comply with the restriction on dispositions by overseas entities, the parties must ensure that the overseas seller is properly registered on the Overseas Entities Register. As a result, it may be that up-to-date registration of the beneficial ownership of the overseas entity under the new rules should be a condition precedent to completion. However, there will still be a risk to both parties that difficulties in completing or updating the Overseas Entities Register may delay or derail completion, particularly as there does not appear to be a way to cure failure to properly register if it is not done at the time of the disposition.

Acquisition by overseas entities: An acquisition by an overseas entity will not be registered unless that entity properly registers on the Overseas Entities Register. Sellers would not want to be left as the legal owner of the property after completion of the acquisition had taken place. Whilst a condition precedent requiring proper registration would protect the seller from completing and becoming stuck in limbo, it does potentially offer the buyer a way out of the transaction and therefore sellers may prefer to deal with UK registered entities and/or seek full deposits to protect against these risks.

Leasing from overseas entities: Where an overseas entity is a landlord and enters into an agreement to grant a lease with a tenant, the tenant can only check the proper registration of the overseas entity at the point it enters into the agreement for lease. If the landlord fails to update the Overseas Entities Register as required, the tenant may find that when it is time to grant the lease that it cannot be registered at HM Land Registry. The tenant could make updating the register a condition precedent to the grant of the lease but this will not help a tenant who needs to take the space, and indeed that tenant may have already gone into occupation to fit out the premises at significant expense.

Joint venture involving an overseas entity: Many joint ventures are structured with the property held by an overseas entity. That overseas entity will be required to comply with the new rules on provision of information about its beneficial owners. This may give rise to difficulty in the property holding entity obtaining or verifying beneficial ownership in complex ownership structures or where intermediate or ultimate owners do not cooperate in the process (particularly where existing joint ventures may not include express requirements on parties to provide that information).

What are the implications for lenders?

Lenders that have already lent money to overseas entities secured by an existing registered legal charge over land should be protected even if the overseas entity fails or is unable to register under the new rules. The new rules should allow the lender to exercise its right of sale under the charge (although the ability of an insolvency practitioner to sell the land will depend on implementing regulations).

Lenders making new loans to overseas entities to fund the acquisition of land may wish to specify that up-to-date registration under the new rules is a condition precedent to drawdown to ensure that they can register their legal charge over the land. After registration of their charge, they should then be protected in a similar way to existing lenders even if the overseas entity fails or is unable to keep its registration up to date in accordance with the new rules. However, they may still wish to impose contractual obligations on the borrower to ensure that it does comply with the requirements under the Act, particularly as a failure to do so could have a wide range of significant consequences for the borrower (including financial penalties, potential criminal liability for directors and potentially impacts on property cashflow if tenants cannot register leases and therefore refuse to complete – see above). In addition, as noted above, administrative financial penalties could be secured by a charge on property and further details of the ranking of that against a lender's security is awaited.

What should market participants do now?

Existing investors in UK land through structures using an overseas entity need to consider the steps to comply with the registration requirement. For many investors, this could be straightforward particularly where they hold investments in the UK through similar ownership structures but using UK structures, as they will already be familiar with the PSC regime, although there may be differences between the two regimes, in particular because the new rules include new verification requirements (but the Government's Companies House registration reform whitepaper proposes to change the PSC regime to include similar requirements). For others, compliance will be more complex and they may need to consider whether to change their ownership structure in advance of the new rules (although any disposition of the land after 28 February 2022 will still trigger the requirement to deliver information to the Overseas Entity Register).

Overseas entities that have made a disposition since 28 February 2022 should check that they can provide any required information to the Overseas Entity Register within the relevant timescale, even if they have completed the disposal and no longer have any interest in the property.

Parties to existing transactions involving overseas entities that may complete or require registration of a disposition after the new rules come into force will need to consider the potential impact of the new rules on their transactions. Parties to new transactions will need to consider the issues presented by the new rules and adjust transaction structures or documentation accordingly, as market practice evolves in the light of the new rules. The new regime may result in a further shift to the use of UK structures to own land, especially as some of the tax advantages of overseas ownership ended in 2019.

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