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Hong Kong

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## BVI BENEFICIAL OWNERSHIP SECURE SEARCH SYSTEM ACT 2017

The BVI's *Beneficial Ownership Secure Search System Act 2017 (BOSS System Act)* was gazetted on 12 June 2017, and came into force on 30 June 2017, to establish a secure search system facilitating the effective and efficient storage and retrieval of beneficial owner information for all corporate and legal entities using the system. The Act also gives effect to the Exchange of Notes between the BVI and the UK regarding the sharing of beneficial ownership information.<sup>1</sup>

This is part of a worldwide trend of countries enacting domestic laws to increase disclosure of beneficial ownership of legal entities, such as companies. The Beneficial Ownership Secure Search system represents a major expansion in international cooperation in preventing and detecting illicit activity.

BVI's BOSS System Act establishes an electronic platform or system, which provides access to information contained in RA databases. Registered agents are under a duty to establish and maintain an **RA database** for each relevant corporate and legal entity, in which they are required to enter the particulars of prescribed information, including details of each beneficial owner. Beneficial owners include natural persons who ultimately own or control 25% or more of the shares or voting rights, or who otherwise exercise control over the management of the company. Registered agents must take reasonable steps to identify beneficial owners, and corporate and legal entities are required to identify and supply details to registered agents of beneficial owners. Beneficial ownership information

must be kept up to date. Only designated persons may execute a search of the Beneficial Ownership Secure Search System.

Currently, the UK's National Crime Agency – Financial Intelligence Unit is the only foreign authority who can request the BVI authorities to undertake a search of the Beneficial Ownership Secure Search system. The legislation also provides for an extension of the search power to be applied on behalf of other jurisdictions, but this requires the approval of the Cabinet of the BVI.

The BOSS System Act applies to corporate and legal entities as defined under section 3 of the BVI Business Companies Act 2004.

### Establishment of Beneficial Ownership Secure Search System

Under the BOSS System Act, a Beneficial Ownership Secure Search system is maintained by the BVI's Financial Investigation Agency, which is the financial intelligence unit of the BVI. The Beneficial Ownership Secure Search system provides a platform for access to information contained in RA databases.

The Beneficial Ownership Secure Search System will be accessible only by designated persons and only from a designated secured location within the BVI. There is an obligation under the beneficial ownership system to keep confidential the fact that a search is being made or has taken place except where the designated competent authority expressly discloses such communication.

<sup>1</sup> Exchange of Notes between the Government of the United Kingdom and the Government of the Virgin Islands in respect of the sharing of beneficial ownership information, 8 April 2016.

Designated persons may be able to search simultaneously all RA databases connected to the Beneficial Ownership Secure Search System by either an individual's name or a corporate and legal entity's name.

### Beneficial Owners

Under the BOSS System Act, a beneficial owner is defined as the natural person who ultimately owns or controls a corporate or legal entity and includes, without limitation:

- a) in the case of a legal person other than a corporate and legal entity whose securities are listed on a recognised stock exchange, a natural person who ultimately owns or controls, whether directly or indirectly, 25% or more of the shares or voting rights in the legal person;
- b) in the case of a legal person, a natural person who otherwise exercises control over the management of the legal person; or
- c) in the case of a legal arrangement:
  - i) the partner or partners who control the partnership;
  - ii) the trustee or other person who controls the legal arrangement; or
  - iii) the settlor or other person by whom the legal arrangement is made.

A beneficial owner may also include a liquidator, administrator or administrator receiver of a corporate and legal entity, a creditor who appoints a receiver over 25% of the shares or voting rights in a corporate or legal entity, or an executor or a personal representative of a deceased's estate where the deceased would have been a beneficial owner as a shareholder in the corporate and legal entity.

A person is not considered a beneficial owner only by reason of:

- a) having the benefit of a security interest over shares or voting rights in a corporate and legal entity; or

- b) having a commercial exposure to the financial performance of a corporate and legal entity pursuant to financial derivatives or similar contractual arrangements.

### Exempt Person

The BOSS System Act provides for exempt persons, which are defined as:

- a) a corporate and legal entity which is recognised, registered or otherwise approved as a mutual fund under the Securities and Investment Business Act 2010, or a subsidiary of such corporate and legal entity;
- b) a corporate and legal entity the securities of which are listed on a recognised stock exchange, or a subsidiary of such corporate and legal entity; or
- c) a licensee.

A corporate and legal entity is a subsidiary of another corporate and legal entity if the parent holds, directly or indirectly, a beneficial interest in 75% or more of the shares, or more than 75% of the voting rights, in the subsidiary.

An exempt person is not subject to the duties imposed on registered agents to identify beneficial owners and registrable legal entities, and is also not subject to the duties imposed on corporate and legal entities to identify and notify registered agents of the beneficial owners and registrable legal entities (please see section "Duty of registered agent to identify beneficial owners" below).

Further, exempt persons are exempt from the prescribed information requirements applicable to beneficial owners and registrable legal entities (please see section "Duty to maintain RA database" below).

### Registrable Legal Entities

The BOSS System Act also includes the concept of a "registrable legal entity".

A registrable legal entity in relation to a corporate and legal entity is a legal entity which would be a beneficial owner if it were an individual, and one of the following applies:

- a) it is a legal entity which is an exempt person;

- b) it is a legal entity the securities of which are listed on a recognised stock exchange;
- c) it is a licensee or a foreign regulated person; or
- d) it is a sovereign state or a wholly owned subsidiary of a sovereign state.

A registered agent has a limited duty in relation to a registrable legal entity. In relation to a registered agent's duty to identify beneficial owners (please see section "Duty of registered agent to identify beneficial owners" below), a registered agent is not required to identify any beneficial owner of a corporate and legal entity who holds its interest, directly or indirectly, in the corporate and legal entity through a registrable legal entity provided that the registered agent identifies that registrable legal entity for that purpose.

### **Duty of registered agent to identify beneficial owners**

Registered agents are persons who hold: (a) a licence to conduct company management business under the Company Management Act 1990; or (b) a licence under the Banks and Trust Companies Act 1990 authorising it to provide registered agent services.

Registered agents are required to take reasonable steps to: (a) identify the beneficial owners and registrable legal entities of each corporate and legal entity for which they act as registered agent; and (b) collect the prescribed information (discussed under section "Duty to maintain RA database" below). The "reasonable steps" requirement is satisfied where the registered agent takes steps to identify and verify the identity of the beneficial owners in compliance with its obligations under the AML/CFT legislation. This legislation includes the Proceeds of Criminal Conduct Act 1997, the Anti-money Laundering Regulations 2008 and the Anti-money Laundering and Terrorist Financing Code of Practice 2008.

Corporate and legal entities must identify any person who is a beneficial owner or a registrable legal entity and notify the registered agent within 15 days of identification.

Where a registered agent, or a corporate or legal entity, does not comply with its obligations without reasonable cause, an offence is committed, which is punishable by a fine in the case of a registered agent, or a fine and/or imprisonment in the case of a corporate or legal entity.

### **Duty to maintain RA database**

A registered agent is required to establish and maintain an RA database for each corporate and legal entity for which it acts as registered agent, and must enter the particulars of the prescribed information into the RA database. The prescribed information includes particulars of corporate and legal entities, and specified information on beneficial owners, registrable legal entities and exempt persons.

Particulars of a corporate and legal entity include the name, the incorporation number, date of incorporation, status and registered address. The prescribed information in relation to beneficial owners includes the name, residential address, date of birth and nationality.

There is also prescribed information in relation to a registrable legal entity, such as the same particulars as applicable to corporate and legal entities, as well as its jurisdiction of formation and the basis upon which it is designated as a registrable legal entity.

The prescribed information in relation to an exempt person includes the particulars that would apply if it was a corporate and legal entity, as well as the basis upon which the person is exempt.

Where a registered agent fails to comply with these requirements without reasonable cause, it commits an offence and is liable on conviction to a fine.

### **Retention Period**

Information must be maintained on an RA database for five years following the dissolution of the corporate and legal entity, or five years after the corporate and legal entity ceases to be a corporate and legal entity.

Registered agents are not required to maintain information in relation to a corporate and legal entity that has ceased to be a corporate and legal entity, or has been struck off the Register of Companies prior to 1 January 2016.

### **Duty to keep beneficial ownership information up to date**

A corporate and legal entity must within 15 days of becoming aware of a change of any of the prescribed information, notify its registered agent of such changes. A registered agent must within 15 days of being notified by a corporate and legal entity

of a change or otherwise becoming aware of a change of any of the prescribed information cause the updated information to be included on the RA database.

Where a corporate and legal entity, or registered agent, fails to comply with its requirements without reasonable cause, it commits an offence and is liable on conviction to a fine.

### Designated person to use the search system

Only designated persons may have access to the Beneficial Ownership Secure Search System to conduct a search of an RA database or access any data on the system.

Designated persons must pass security vetting tests, be fit and proper, subscribe to the Oath of Confidentiality, and be designated by the Minister by Order.

Designated persons are under a legal obligation to execute a search of the Beneficial Ownership Secure Search System if requested by a senior officer of the following BVI competent authorities – the Financial Investigation Agency, the Financial Services Commission, the International Tax Authority or the Attorney General's Chambers.

A search can only be executed with certification that the request for the search: (a) is proper and lawful and in compliance with the legislation governing the affairs of the authority making the request and any international agreement administered by it; or (b) is in response to a request from a designated law enforcement authority, namely the UK's National Crime Agency – Financial Intelligence Unit.

A designated person is required to provide the results of any search of the Beneficial Ownership Secure Search System within 15 days of a request, unless the request is urgent, where information must be provided within one hour or the time agreed between the relevant authority and the designated person.

A designated person who fails to comply with the requirements under this section commits an offence and is liable on conviction to a fine and/or imprisonment.

### Confidentiality

The particulars of and all matters in relation to a request made under the BOSS System Act must be treated as confidential. A designated person is prohibited from disclosing the fact of the

receipt of a request or any particulars required or information supplied to any other person, except in accordance with the BOSS System Act.

All information maintained on each RA database is confidential, and may only be accessible by a designated person through the Beneficial Ownership Secure Search System, and the relevant registered agent.

A person who breaches these confidentiality requirements commits an offence and is liable on conviction to a fine and/or imprisonment.

A person who discloses information or produces documents as required by the BOSS System Act is not in breach of any law, agreement or professional code of conduct only by reason of complying with the requirements of the BOSS System Act, and cannot be subject to any civil, criminal or disciplinary proceedings in relation to such disclosure or production.

### Protection for Registered Agents

Where the prescribed information has been collected by a registered agent under the laws of the BVI or includes information on the RA database not specified in the BOSS System Act, the collection of and inclusion of such information shall be treated as in compliance with the BOSS System Act, and the registered agent would not be considered to be in breach of any agreement, professional code of conduct or law.

### Giving False or Misleading Information

A registered agent who intentionally provides false information regarding a corporate and legal entity on the RA database commits an offence, and is liable on conviction to a fine and/or imprisonment.

A corporate and legal entity which intentionally provides false information when notifying the registered agent of a beneficial owner or a registrable legal entity and of any changes to the prescribed information in relation to a beneficial owner or a registrable legal entity, commits an offence, and is liable on conviction to a fine and/or imprisonment.

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**Hong Kong Office**

Dominion Centre

12th Floor

43-59 Queen's Road East

Hong Kong

**Tel:** + (852) 2905 7888

**Fax:** + (852) 2854 9596

[www.charltonslaw.com](http://www.charltonslaw.com)