

Kelly Tolhurst MP
Minister for Small Business, Consumers and Corporate Responsibility,
Department for Business, Energy and Industrial Strategy,
1 Victoria St, London,
SW1H 0ET

3 September 2019

Dear Kelly,

I am writing in my capacity as former Chair of the Joint Committee on the draft Registration of Overseas Entities Bill. I would like to thank you and your team for a considered, comprehensive, and timely response to the Committee's report.

I was very pleased to note that the Government has, in various places, adopted the Committee's recommendations for changes to the draft Bill. Particularly welcome are the proposed adoption of the affirmative resolution procedure for regulations exempting types of entities from the Bill's requirements under Clause 30(6); the Government's acceptance that "equivalent" registers should be publicly accessible, and relevant entries signposted; the suggestion that "flagging" mechanisms will highlight suspicious information; and the Government's commitment to publish how many times the power to suppress information is used.

I appreciate that some of the Committee's recommendations will require further consideration, or that they may be contingent upon other developments (most notably the ongoing reform of Companies House). However there are several areas where, based upon the evidence that the Committee received, I retain concerns, and other areas where I would welcome further clarification.

The Committee heard that the definition of "legal entity" contained within the Bill could be interpreted as including individuals. I note that the accompanying Explanatory Notes will clarify that this is not the intention of the Bill but could you explain why the Government has decided not to make this clarification on the face of the Bill?

The Committee heard: "It is easy to anticipate that... situations will arise in foreign jurisdictions where it will not be clear whether or not an entity is a legal entity."¹ While I concede that, as the response suggests, the concept of legal personality "is generally well understood globally",² could you outline the Government's response should confusion arise about the legal personality of entities in foreign jurisdictions?

The Committee recommended a pre-clearance mechanism to confirm to entities and third parties in advance of a transaction whether they would fall under the scope of the Bill. The response argued that such a mechanism was unnecessary because professionals acting on behalf of entities and third parties would alert their clients that they came under the Bill's scope. A minority of third parties might choose, however, to act without representation, and might therefore be unaware of how they might be affected. How does the Government plan to mitigate this risk?

¹ Para 45 of the Committee's report

² Page 4 of the Government response

The Government response states that “it is not appropriate for a UK agency such as one of the land registries or Companies House to ‘make decisions’ on the legal personality of a foreign entity.”³ If an entity does not register with Companies House (perhaps because it does not recognise that it is a legal entity), the Keeper/Registrar is required to refuse to register land title. This requirement means that Land Registries are obliged to identify parties as registrable entities, and therefore, in effect, to make decisions about legal personality. In the absence of an advance pre-clearance mechanism to clarify which entities are in scope, could you outline what recourse there will be for entities which do not believe that they are in scope, but whose registration of land title is refused by the Land Registries?

The Committee was concerned about the exemptions contained within the draft Bill. We recommended that entities exempted under Clause 30(6) should still be required to provide the Government with the requisite information, albeit privately. The Government response suggests that it might be impossible to determine beneficial ownership for some classes of entities (such as foreign governments). What consideration have you given to the merits of our recommendation in the case of other types of entities, aside from foreign governments? The response also suggests that such entities will probably be subject to modified application requirements. Where will these requirements be laid out?

Powers in Clause 16 allow the Government to exempt the beneficial owner of an entity from the requirement to register if there are special reasons to do so. Given the lack of Parliamentary scrutiny of this exemption, the confirmation that “the intention and expectation is that this power will be used very rarely and only in the interests of national security, the economic wellbeing of the UK, or for the prevention or detection of serious crime”⁴ is welcome. The response commits to considering whether to describe this context on the face of the Bill. What would prevent the Government from doing so? I would welcome an update on your eventual decision.

Many of our witnesses were concerned that without comprehensive checks on the veracity of information submitted to the Register, entities could provide inaccurate information, thereby seriously undermining the Register’s efficacy. Ongoing Companies House reform may provide some of the answers to the concern; for this reason the report made several recommendations that Companies House be provided with sufficient resources to undertake its additional tasks. Another verification method that was proposed was for professionals dealing with entities to verify the information themselves. In response to the proposal, you referred to the consultation on Companies House which suggests that professionals will be required to pass on information about any existing checks. This does not, however, meet the aims of our recommendation – to require professionals actively to verify the information held by the Register.

The explanation of how AML frameworks will affect trusts is welcome. I appreciate the complexity of these frameworks and how difficult it will be to amalgamate them. I know that you are considering whether to require entities acting on behalf of trusts to declare this relationship to Companies House; this requirement should create helpful links between information held on the different registers. I would therefore be grateful for an update on your deliberations?

I note also the proposal that those with a “legitimate interest” in accessing the Trust Registration Service should be able to provide evidence to show that a trust is involved with money laundering or terrorist financing. Where will this evidence come from, if not from a public register, and why should a person with such evidence also be required to demonstrate “active involvement in anti-money laundering or counter-terrorist financing activity”?⁵

The response outlines the Government’s intention to publish guidance on these issues, and “the circumstances in which we would expect overseas entities holding property on behalf of a trust to register”.⁶ Will this expectation be underpinned by legal requirements to register?

³ Page 4 of the Government response

⁴ Page 10 of the Government response

⁵ Page 16 of the Government response and <https://www.gov.uk/government/consultations/transposition-of-the-fifth-money-laundering-directive>

⁶ Page 17 of the Government response (my italics)

I acknowledge that the legislation must contain a workable definition of beneficial ownership, and I do not underestimate the difficulty of determining suitable thresholds. The Committee's recommendation was that the Government consider the case for lowering the proposed threshold, currently 25 per cent. The response referred, in large part, to the Financial Action Task Force's finding that a 25 per cent threshold was acceptable, and that this threshold was used in many beneficial ownership directives. However, the Government has also describes this legislation as "world-leading".⁷ Such ambition is welcome, but why has the Government not been similarly ambitious in setting thresholds? Why has it not taken this opportunity to exceed, rather than replicate, the "acceptable" international standard?

The Committee concluded that the current drafting of Schedules 3 to 5 could mean that incorrect information on the Register could affect dispositions by third parties. While the Government's acknowledgement that "land registries and applicants seeking to register are entitled to rely on information contained in this Register as correct"⁸ is welcome, can you confirm that third-party purchasers from entities which have entered incorrect information on the Register will be able to register title? Please also clarify why the Government has not decided not to include this protection on the face of the Bill.

As it stands, the draft Bill will not require entities which registered title to land before certain dates (when information began to be collected by the relevant Land Registries) to register their beneficial ownership information. The Committee recommended that retrospective time limits be removed to ensure that there was true transparency about who owns UK land. The Government has committed to considering whether the Secretary of State should be entitled to require registration of entities that would otherwise be out of scope in certain limited circumstances. What would these circumstances be? Would they not create more inequity than the Committee's suggestion of removing time limits for all entities?

I very much look forward to welcoming this Bill when it is introduced, and I commend once again the detailed response to the former Committee's report. The response will provide Members of both Houses ample information to scrutinise thoroughly the draft Bill.

I look forward to receiving your reply to the above questions before the Bill is introduced.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Edward Faulks". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Lord Edward Faulks QC

Former Chair of the Joint Committee on the draft Registration of Overseas Entities Bill

⁷ Page 1 of the Government response

⁸ Page 26 of the Government response