

Insights

CHANGES TO THE REGISTER OF OVERSEAS ENTITIES REGIME – THE IMPACT OF THE ECONOMIC CRIME AND CORPORATE TRANSPARENCY ACT 2023 ON REAL ESTATE

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SUMMARY

The Economic Crime and Corporate Transparency Act 2023 (ECCTA) received Royal Assent on 26 October 2023, with the provisions of ECCTA to be brought in by secondary legislation in stages throughout 2024 and 2025.

It was widely thought that the provisions of ECCTA that effect changes to The Register of Overseas Entities regime (originally introduced by the Economic Crime (Transparency and Enforcement) Act 2022 (ECTEA)) would follow later this year, but the Economic Crime and Corporate Transparency Act 2023 (Commencement No. 2 and Transitional Provision) Regulations 2024 have effected certain changes to the regime as of 4 March 2024, which we will discuss further in this Insight.

BACKGROUND

By way of reminder, the Register of Overseas Entities (ROE) is a register of beneficial owners of overseas entities that own qualifying estates – in England & Wales, that is freeholds and leases granted for more than 7 years. The ROE is maintained by Companies House and is accessible by the public. When overseas entities have sought to register themselves on the ROE, they will provide specified information on the overseas entity and each of its registrable beneficial owners. A beneficial owner is an individual, legal entity or government or public authority that meets any one or more of 5 conditions as set out in the legislation (broadly that they have over 25% of shares or voting rights, they have certain powers or they have significant influence or control over the entity). For a beneficial owner to be registrable on the ROE, it will be subject to its own disclosure requirements and will not otherwise be exempt from registration. This has meant that where control is held indirectly, the overseas entity need only enter in the ROE the first registrable beneficial owner(s) (if any) above it in the chain of ownership. Any ultimate beneficial owner will then be identifiable from that person's PSC register or ROE, or if there is one, a PSC register or ROE further up the chain.

Pursuant to the Land Registration Act 2002 (as amended by ECCTA), the Land Registry entered restrictions on the title registers of qualifying estates where an overseas entity became the registered proprietor on or after 1 January 1999. These restrictions prevent the overseas entity from disposing of its property unless the entity is a 'registered overseas entity' at the time the disposition is made (or certain other limited circumstances apply, which are beyond the scope of this note).

ECCTA has introduced a number of new or extended obligations relating to registration on the ROE. We look at the significant changes which are now in force (as of 4 March 2024) below.

1. Registered Overseas Entity

Until recently, an overseas entity was a 'registered overseas entity' for the purposes of satisfying the Land Registry restriction if it appeared on the ROE (it had an Overseas Entity ID number that will be included in any transaction documentation effecting dispositions) and it had complied with its annual duty to update (see further commentary on the duty to update in [this BCLP Insight](#)). For the purposes of due diligence, checking whether a counterparty has complied with its duty to update is easily achieved by looking at the Companies House website which sets out when the entity's next update is due. To the extent that the update deadline has been missed, there will be a warning in red font that the latest update is overdue.

However, ECCTA has extended the definition of a 'registered overseas entity' to now include an obligation to comply with the duty to provide information to Companies House following the issue of a notice by the registrar to require information under the Companies Act 2006. This notice requires a person to provide information to enable it to determine whether: (i) a person has complied with a statutory obligation to deliver a document to Companies House; or (ii) information contained in a document delivered to it should form part of the ROE. Where a notice has not been complied with, the overseas entity will no longer meet the criteria of a 'registered overseas entity' and therefore it will not be able to deal with its property interests.

Parties transacting with an overseas entity will need to be confident as to the registered status of that entity to ensure that the Land Registry will accept the dealing. It isn't clear yet how counterparties will be able to establish whether a overseas entity has failed to respond to the notice referred to above as it is thought that this information will not be made publicly available (unlike the fact that an update is overdue). Enquiries with Companies House are ongoing but in the meantime, transaction documentation should include appropriate warranties in this regard.

2. Applications for Removal

An overseas entity will only be able to remove itself from the ROE where it is no longer registered as the proprietor of any interest in land, and where there are no updates pending. An update will be pending where either: (i) the update period for the entity has ended and the entity has not complied with its updating duty for that period; or (ii) the entity is required to deliver information to Companies House but has not yet done so.

This change may cause difficulties for those overseas entities looking to wind themselves up shortly after disposing of their property. It is feasible that an overseas entity could be obligated to carry out an annual update or respond to a Companies House notice during the period after the disposition has completed and before the buyer's Land Registry application to register the disposition completes, such that that entity will no longer be the registered legal owner of the property.

3. Expansion of meaning of Registered Beneficial Owner – Trusts

Pursuant to ECTEA, if an individual or legal entity that is a registrable beneficial owner is a trustee, the ROE will show that the trustee meets a beneficial ownership condition by virtue of being a trustee. In addition, the overseas entity will be required to include with its registration application specified 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 overseas entity has reasonable cause to believe that there is required information about the trust it has not been able to obtain. Notably a lot of overseas entity structures with trusts further up the ownership chain would not need to disclose trust structures on the ROE because there was a registered beneficial owner at some point further down the chain between the overseas entity and the trustee. This was widely criticised and ECCTA sought to tackle this perceived inadequacy.

ECCTA now provides that trustee beneficial owners of an overseas entity will constitute registrable beneficial owners regardless of: (i) whether they are subject to their own disclosure requirements; and (ii) where they sit within a group structure. Point (i) closes a loophole whereby private corporate trustees could avoid becoming registrable beneficial owner because they were not subject to their own disclosure requirements. Point (ii) is more significant as where a trustee indirectly owns the overseas entity, it will always be a registrable beneficial owner for the purposes of disclosure, and therefore the information on that trust would also need to be disclosed as part of the registration application.

The protection of information required to be disclosed under this new provision remains the same as before: while details of the trustee will be publicly visible on the register, details of the trust itself, its beneficiaries and any settlor will not be made public.

4. Expansion of meaning of Beneficial Owner - Nominees

Previously ECTEA has focused on the legal owner of land, meaning that for cases involving the holding of land by a nominee, only the beneficial owners of that nominee would need to be registered. There was widespread criticism that this did not go far enough as it did not capture the beneficial owner of the entity for whom the overseas entity acted as nominee. ECCTA has addressed this gap by increasing the scope of the definition of beneficial owners to include nominees. Notably there is no definition of nominee in the legislation so it is assumed that this will be a bare trust arrangement where there is no economic interest.

ECCTA provides that a person (X) will be treated as a beneficial owner of an overseas entity if the overseas entity both: (i) is the registered proprietor of a qualifying estate and (ii) holds that qualifying estate as nominee for: (a) X directly or (b) an entity of which X is a beneficial owner of (applying the other five conditions of ECCTA requiring a minimum of a 25% shareholding or equivalent control). Notably the control tests do not apply to (a) where the overseas entity nominee holds the interest for the beneficial owner directly. There is no de minimis expressed in the legislation so, on this basis, it would appear that a beneficial owner of a nominee that owns as little as 0.1% of the land would need to be disclosed.

EFFECT OF POINTS 3 AND 4 ON NEW REGISTRATIONS AND UPDATING DUTIES

The amendments made to ECCTA in respect of trusts and nominees will apply to any overseas entity registering for the first time from 4 March 2024.

For any overseas entity that was allocated an overseas entity ID before 4 March 2024, the amendments will only apply when that overseas entity delivers the statements and information required by the annual updating duty on the first occasion after 4 June 2024.

OTHER CHANGES EXPECTED IN 2024

A number of the provisions in ECCTA relating to the ROE are yet to come into force, but are expected later this year. These include:

- a requirement to provide all title numbers owned by Overseas Entities on registration and for each annual update;
- additional information in respect of the beneficial owners of settlors and grantors of trusts (as at the date that the trust was settled);
- provision of retrospective beneficial ownership details for overseas entities where there were changes to beneficial owners between 28 February 2022 and 31 January 2023.

RELATED PRACTICE AREAS

- Real Estate
- Real Estate Sector
- Corporate Real Estate and Funds

MEET THE TEAM



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