

New Obligation for Hong Kong Companies to Maintain a Significant Controllers Register

Hong Kong incorporated companies are required to maintain a register of significant controllers and should take reasonable steps to identify its significant controllers.

Summary

From 1 March 2018, all Hong Kong incorporated companies (except for companies listed on the Hong Kong Stock Exchange) are required to maintain a register of significant controllers (the SCR), which will be accessible to persons whose names are entered in the register or on demand made by any law enforcement officer. Even if a company does not have a significant controller, the company is still required to keep an SCR. The regime does not apply to any non-Hong Kong incorporated companies, even if they are registered as a Part 16 non-Hong Kong companies under the Companies Ordinance (Cap. 622 of the Laws of Hong Kong) (the Companies Ordinance).

Key actions that Hong Kong incorporated companies should take as a result of this new regime include, but are not limited to, the following:

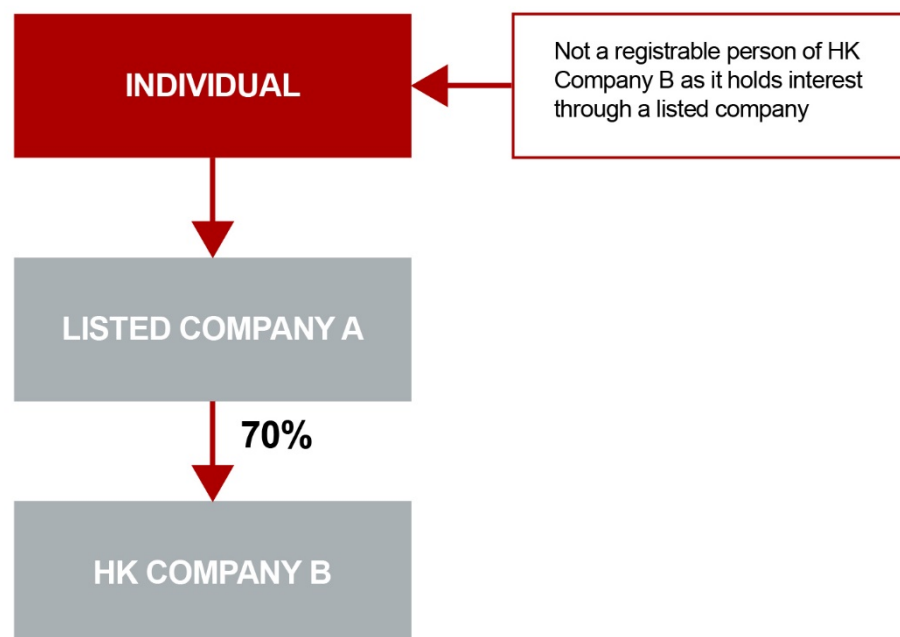
- Ascertaining whether there is any significant controller(s), and if yes, take reasonable steps in identifying the company's significant controllers. This includes reviewing all documents readily available such as register of members, constitutional documents, shareholder agreements, or other covenants or agreements.
- Sending notices to any person who is believed to be a significant controller to obtain the required information from them.
- Preparing the SCR and entering the required particulars of the company's significant controllers in the SCR.
- Designating a representative to assist law enforcement officers regarding the SCR.
- Keeping the company's SCR up-to-date.

Significant Controller

A significant controller of a company includes both:

- A natural person or government/local authority that has significant control over the company (a registrable person)
- A legal entity that is a member of the company and has significant control over the company (a registrable legal entity)

However, the person or entity which holds such interest through a company listed on the Stock Exchange of Hong Kong will not be considered a registrable person.



A person has significant control of a company if any of the below apply:

- Holds, directly or indirectly, more than 25% of the shares (or capital/profits, as the case may be)
- Holds, directly or indirectly, more than 25% of the voting rights in the company
- Holds, directly or indirectly, the right to appoint or remove a majority of the company's board of directors
- Has the right to exercise, or actually exercises, significant influence or control over the company
- Has the right to exercise, or actually exercises, significant influence or control over the activities of a trust or firm which is not a legal person, but whose trustees or members meet one or more of the conditions specified above

The Companies Registry has issued guidelines on the keeping of significant controllers registers by companies (the Guidelines). In particular, the Companies Registry provides guidance on the interpretation of “significant influence or control” under the fourth condition outlined in the above section. The Guidelines provide that:

- If a person can ensure that a company generally adopts the activities which the person desires, this would indicate “significant influence.”
- If a person can direct a company’s activities, this would indicate “control.”

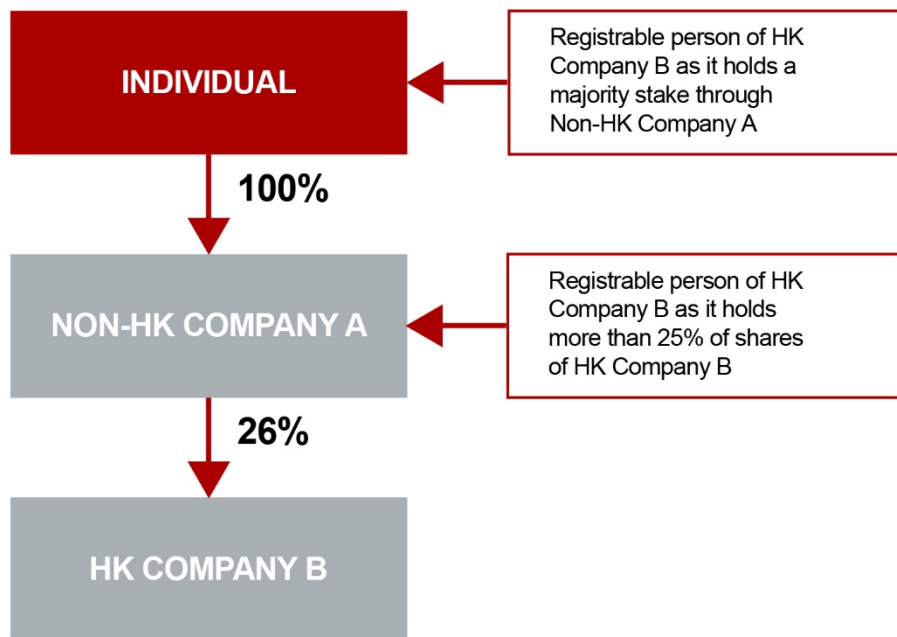
The Guidelines outline a list of situations in which a person may have significant influence or control over a company, if that person has absolute decision rights or veto rights over certain decisions. These include adopting or amending a company’s business plan, changing the nature of a company’s business, making any additional borrowing from lenders, and appointing or removing a CEO. In assessing whether or not a person exercises significant influence or control over a company, all relationships that the person has with the company or other members of the management team will be taken into account. Examples of persons exercising significant influence or control over a company are:

- A person who is not a director but is regularly consulted on board decisions and whose views influence the board’s decisions, such as a “shadow director.”
- A person whose recommendations are always followed by shareholders who hold the majority of voting rights.

Indirect Holdings

A person is treated as indirectly holding shares or voting rights in a company in two instances. First if the person holds a “majority stake” in that company itself, or second through a chain of legal entities, providing that each of those legal entities (other than the last one in the chain) has a “majority stake” in the entity immediately below it, and the last entity in the chain holds such shares or rights in the company. An individual or a legal entity is considered to have a “majority stake” if that individual or entity:

- Holds a majority of voting rights
- Is a member and has the right to appoint or remove a majority of the board of directors
- Is a member and controls alone a majority of voting rights pursuant to an agreement with other members
- Has the right to exercise, or actually exercises, dominant influence or control over that entity



Reasonable Steps to Identify Significant Controllers

Companies that are subject to this new regime must take reasonable steps to identify their significant controllers. This includes reviewing all documents and information readily available (such as the company's register of members, articles of association, shareholder agreements, or other relevant covenants or agreements), considering interests held by individuals, legal entities, trusts or firms, considering any evidence of joint arrangements, and any other actions that the company may have to take depending on that company's circumstances.

Once a company has identified its significant controllers, the company must send notices to those who it knows, or has reasonable cause to believe, they are the significant controllers within seven days of such knowledge or belief. However, if the company has already confirmed that a person is a significant controller and all the required particulars have been provided to the company, there is no need to send a notice. If the company knows or has reasonable cause to believe that person knows the identity of a significant controller, the company must also send a notice to such third party. The company must then enter the required SCR particulars in the register within seven days after the details have been confirmed, or after the details come to the company's notice.

The SCR should never be left blank. If a company does not have any significant controller, the company must state this in the SCR.

Access to the SCR

A company must make its SCR available to significant controllers whose names have been entered in the SCR, and also upon demand by law enforcement offices, such as officer of the Companies Registry, Hong Kong Monetary Authority, Hong Kong Police Force, Independent Commission Against Corruption, and Securities and Futures Commission.

Location of the SCR

A company must keep the SCR at either the company's registered office or at a prescribed place in Hong Kong. The company must notify the registrar of the SCR's location, if it is not kept at the company's registered office, or where the company's register of members has been kept immediately before 1 March 2018 and the company has already informed the registrar of the location of its register of members.

Updating the SCR

If a company knows or has reasonable cause to believe that a person ceases to be a significant controller, or a change renders a significant controller's SCR particulars incorrect or incomplete (a registrable change), the company must give notice to the significant controller within seven days of such knowledge or belief, except where the company has already been informed of the change, and in the case of a registrable person, where the information has already been provided to the company by him or with his knowledge. The company must then enter the particulars of the registrable change into the SCR within seven days after the registrable person confirms them, or that particular change comes to the notice of the company in the case of a registrable legal entity.

Designated Representatives

A company must designate at least one person as its representative to provide assistance to a law enforcement officer relating to the company's SCR. A designated representative for this purpose must be one of the following:

- A member, director, or an employee of the company who is a natural person resident in Hong Kong
- An accounting professional, a legal professional, or a trust or company service provider licensee registered in Hong Kong

Conclusion

Hong Kong incorporated companies should take reasonable steps to identify the company's significant controllers and to familiarize themselves with the obligations under this new regime to keep an SCR. Companies should carefully consider the company's ownership structure to ascertain and identify whether or not a person is a significant controller. Failure of the company to comply with its SCR obligations will result in criminal offence of the company and every responsible person of the company, liable to a fine of HK\$25,000 and if applicable, a further daily fine of HK\$700.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

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