

# PSC Registers: Are you in Control?

June 2016

**PSC Registers and the legal obligations on funds and fund managers who are persons with significant control.**

## A new transparency regime goes live

Most UK incorporated companies and LLPs are now required to hold a register of people with significant control ("**PSC register**"). From 30 June 2016 entities that are subject to this requirement ("**PSC Register Entities**") will be required to pass this information to Companies House as part of their annual confirmation statement, which replaces the annual return. Many UK financial services firms are caught by the new requirement and have been busy setting up their own PSC register.

Authorised firms are already required to monitor the identity of their controllers under the controllers regime established under Part 12 of the Financial Services and Markets Act 2000. Although the concepts and thresholds for determining whether someone is a controller or a PSC differ, firms will be able to adapt their current monitoring programmes to help them comply with the new PSC Register obligations.

### ... and new monitoring requirements arise

However, there has been less focus on the requirement for those who qualify as a PSC of a PSC Register Entity to notify that entity of this fact. **All financial services firms involved with investments in UK companies, or in groups which might include UK companies of LLPs, must consider whether their involvement is disclosable under this new regime.**

If an individual or legal entity has a notifiable involvement in a PSC Register Entity that should be registered on the entity's PSC register, they must inform the entity and give the entity the relevant information for inclusion in its PSC Register. Failure to do so constitutes a criminal offence, punishable by up to two years' imprisonment or an unlimited fine (or both). The penalties for this offence extend to directors of the legal entity in default. In addition, failure to notify the PSC Register Entity could also lead to transfer, voting and dividend restrictions being placed on the relevant shares or LLP interest.

Both UK and overseas investment funds and products, and firms having a role in relation to investment funds and products, may therefore need to monitor the investments made in UK companies. If they should appear on a UK company's PSC Register, and the company does not contact them, they will have an obligation to contact the company.

There are important exceptions to where the reporting is required. It is not required where the investment is in or via companies that are required to comply with DTR 5 (UK and some non-UK entities with voting shares traded on a regulated market, and entities with shares traded on a prescribed market such as AIM and ISDX Growth companies), or which have voting shares admitted to trading on a regulated market in any EEA state or on specified markets in Switzerland, the USA, Japan and Israel. These companies are not required to hold a PSC register and their UK subsidiaries do not need to disclose any indirect interest held through them. Therefore, funds and products will not need to adapt their monitoring programmes if they invest solely in such companies.

However, many funds will invest in a wider range of traded companies than this list would allow. It should be noted, for example, that eligible markets for the purposes of COLL (the FCA's Collective Investment Scheme's Sourcebook) include other EEA markets, and COLL also allows investment in companies traded on other markets where these markets are specified in the fund's prospectus. Of course companies subject to such overseas trading arrangements are probably unlikely themselves to be UK companies but they may have UK subsidiaries which are PSC Register Entities.

Where investments are made (directly or indirectly) in UK unquoted companies or companies not traded on one of the specified markets, each entity involved with the fund or product should ascertain whether it is potentially registrable on a PSC Register.

# Are you in Control?

## How the legislation works

The idea behind the legislation is to be able to trace individuals who are regarded as having significant control of a PSC Register Entity and thus are "Persons with Significant Control ("PSCs"). Where there is a chain of ownership via legal entities, the rules are designed to allow interests to be traced up a corporate group. Accordingly there is a requirement for legal entities that are regarded as having significant control to appear on the PSC register - but only if they themselves are required to keep a PSC register or subject to other certain other reporting requirements that are regarded as providing equivalent transparency. Legal entities that do not fall within this category are not required to appear on the register, and are not obliged to initiate the provision of information about their holdings or involvement, but will still be obliged to answer enquiries from the PSC Register Entity to help it identify PSCs.

Therefore whether an individual or a corporate investor is caught by the obligation to initiate the provision of information depends on four things:

- (a) **Whether the entity in question is a PSC Register Entity.** The requirement to keep a PSC Register applies to all UK registered companies (including companies limited by shares, companies limited by guarantee, unlimited companies and to *societas Europaea* registered in the UK) except where the company is required to comply with DTR 5 (UK and some non-UK entities with voting shares traded on a regulated market, and entities with shares traded on a prescribed market such as AIM and ISDX Growth companies) ("**DTR 5 Companies**"); or has voting shares admitted to trading on a regulated market in any EEA state or on specified markets in Switzerland, the USA, Japan and Israel ("**traded on a Specified Market**"). It also applies to all UK registered LLPs. We set out as Appendix A a table showing what entities would be registrable in relation to typical fund structures.
- (b) **Whether you are regarded as having "significant control" of the PSC Register Entity.** Please see the box below for more details about what is meant by "significant control".
- (c) **Whether you are an individual or a relevant legal entity.** Only individuals having significant control (PSCs) and relevant legal entities ("**RLEs**") may be entered in an entity's PSC Register. A legal entity will be 'relevant' if it is itself subject to a requirement to disclose details of those who control it, either because it is required to keep its own PSC Register or because it is a DTR 5 Company or is traded on a Specified Market.
- (d) **Whether you are "registrable" as a PSC or RLE in relation to the PSC Register Entity.** An individual or RLE should not be entered in an entity's PSC Register if it is not 'registrable' in relation to that entity. To avoid having to duplicate information in PSC Registers at each level of a chain of legal entities, an individual or RLE will not be registrable in relation to an entity if its only interest in that entity is an

indirect interest held through another one or more legal entities, at least one of which is an RLE. Only the first RLE up the chain will be registrable. If there is no RLE in the chain, only an individual with a majority stake in the last RLE in the chain will be registrable.

## What is significant control?

You are regarded as having significant control of a company if any of the following conditions applies:

- You hold, directly or indirectly, more than 25% of the nominal value of its shares (**Condition 1**);
- You hold, directly or indirectly, more than 25% of the voting rights at general meetings, excluding rights held by the company (**Condition 2**);
- You hold the right, directly or indirectly, to appoint or remove a majority of the board of directors (**Condition 3**);
- You have the right to exercise, or actually exercise, 'significant influence' or 'control' over the company (**Condition 4**);
- You have the right to exercise, or actually exercise, 'significant influence' or 'control' over a trust, or a firm which is not a legal person, that itself meets any of the above conditions (**Condition 5**).

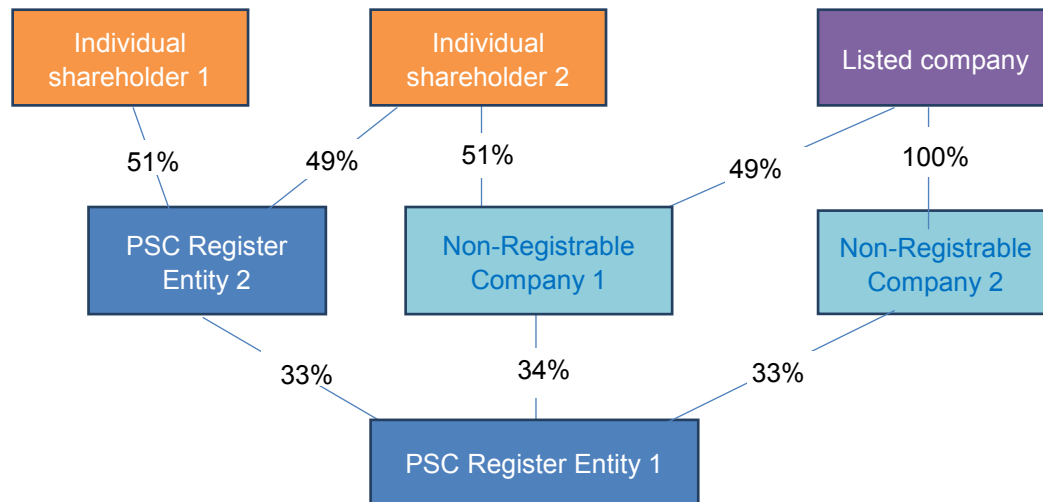
There are similar tests as to the significant control of an LLP based on holding directly or indirectly more than 25% of any surplus assets of the LLP on a winding up; more than 25% of the members' voting rights; the right to appoint or remove the majority of those entitled to take part in the management of the LLP; as well as similar 'significant influence' or 'control' tests.

A person is regarded as holding a share or right '**indirectly**' if it has a "majority stake" in a legal entity which holds the share or right or which is part of a chain of legal entities, each holding a majority stake in the one below, and the last of which holds the share or right.

'**Majority stake**' in relation to a legal entity means:

- holding a majority of the voting rights in the legal entity;
- being a member of the legal entity and having the right to appoint or remove a majority of its board of directors;
- being a member of the legal entity and controlling alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the legal entity; or
- having the right to exercise, or actually exercising, dominant influence or control over the legal entity.

## PSC Reporting Requirements: Example



### The persons who should appear on the register of PSC Register Entity 1 are:

- PSC Register Entity 2 – as it holds more than 25% of the nominal value of its shares and voting rights
- Individual Shareholder 2 – as he is deemed to hold, indirectly, the stake held by Non-Registrable Company 1 (which is a more than 25% stake) and that company is not eligible to appear on the PSC Register
- Listed Company – as it is deemed to hold, indirectly, the stake held by Non-Registrable Company 2 (which is a more than 25% stake) and that company is not eligible to appear on the PSC Register

### The persons who should appear on the register of PSC Register Entity 2 are:

- Individual Shareholders 1 and 2 as they both hold more than 25% of the nominal value of its shares

Although the 25% shareholding threshold is relatively high, and may not be permitted under diversification obligations applying to authorised funds, there are various ways in which funds and their managers may be caught by these tests:

- financial services firms may need to aggregate investments held, or voting rights controlled, on behalf of multiple funds and products
- it is not unusual for a private equity fund to reach this level and private equity funds may also trigger the other tests relating to rights over board appointments and rights to exercise control through, for example, veto rights in investment agreements
- property funds and other forms of fund structure may use UK SPVs to which the reporting obligation applies.

## Deeming provisions and guidance

There are various deeming provisions in the legislation and in statutory guidance. Some of the most important points are that:

- If shares or rights in a PSC Register Entity are held by a nominee, they should be treated as if they were held by the person for whom the nominee is acting (and not by the nominee).
- If the same shares or rights are held jointly by more than one person, each such person must be regarded as holding all those shares or rights.
- Where an individual or legal entity controls a right, he/it will be treated as holding that right (to the exclusion of the person who in fact holds the right, unless that person also controls it).

- Where a person exercises a function under an enactment, for example, as a regulator or a liquidator or receiver he should not be regarded as having control or significant influence.
- A person will not be regarded as having control or significant influence over a PSC Register Entity if he is performing an "excepted role" including in the role of a director or employee. This confirms the position under the general law that the acts of a director or employee on behalf of a company are regarded as the acts of the company rather than those of the director.
- A person providing "advice or direction" in a professional capacity, including as an investment manager, would not on its own result in the investment manager being considered to be exercising significant influence or control over a PSC Register Entity or over the activities of a trust or firm. Thus where an investment company appoints a professional investment manager, that manager will not (in the absence of other factors) be regarded as having a significant interest over that company, even though it does in effect control its main business.

However, last piece of guidance only applies to the investment manager's position vis a vis the appointing company and deals only with the question of significant interest or control under Conditions 4 and 5. In our view this does not prevent the operation of the deeming provision that a person that controls rights is thereby deemed to hold those rights and as a result could be regarded as a PSC under Conditions 2 or 3 in respect of an investee company.

# Are you in Control?

## Position of investment managers and advisers

In our view investment managers who control on a discretionary basis the voting rights attaching to shares exercisable at general meetings of UK companies in which investments have been made will be treated as holding those voting rights for the purposes of Conditions 2 and 3. Voting rights controlled for different funds and products would need to be aggregated. Note that a parent company of a manager, applying the test to itself, would need to aggregate the holdings controlled by management companies within the group. It is possible also that pure investment advisers could be similarly caught if as a matter of fact they do exercise significant influence or control over an investee company.

## Position of an ACD of an ICVC

As an ACD of an ICVC is legally acting as a director on behalf of that entity, in our view an ACD of an ICVC should not normally be regarded as having control or significant influence over a PSC Register Entity that is an investee company.

## Position of trustees, custodians and depositaries

As mentioned above, if shares or rights in a PSC Register Entity are held by a nominee, they should be treated as if they were held by the person for whom the nominee is acting (and not by the nominee). There is no statutory definition of "nominee". The ordinary usage of the term nominee would cover a bare trust (or where someone is registered as a holder but has no powers or discretions to deal with the matter).

It is possible also that the term nominee might extend to other forms of arrangement where someone is "nominated" to act for another, such as an agent who has been empowered to exercise a vote (for example someone with a proxy or power of attorney authorising them to vote at a meeting) but not, we would suggest, where the person has discretion as to how to use the vote.

Generally speaking custodians and depositaries will be regarded as bare trustees and will be nominees under this definition.

Other fiduciaries such as trustees of unit trusts cannot be regarded as nominees or as "bare trustees". They will generally not be regarded as holding the rights attaching to the shares, as these are deemed instead to be held by the manager under the unit trust, who has control of those rights under the normal form of unit trust deed. However they would still be seen as holding the shares themselves. Note that a trustee holding shares for a number of unit trusts would need to aggregate these holdings.

## Special rules for limited partnerships

In relation to limited partnerships, the guidance states: "*A limited partnership, registered under the Limited Partnership Act 1907, is an example of a firm. A person who controls the management or activities of a limited partnership would be considered a person with significant influence or control over the firm. In most cases*

*this would be the general partner.*"

Conversely there is a provision in the legislation that a limited partner of a limited partnership will not meet Conditions 1 to 3 by virtue only of being a limited partner.

Note that the rules may apply slightly differently for English and Scottish limited partnerships as the latter is deemed to have legal personality.

## The obligation to supply PSC information to companies in which investments are made

The regime requires PSC Register Entities to take reasonable steps to find out whether there are persons who are registrable PSCs or RLEs and provides for the entity to serve notice on people and firms it believes may be in such categories, or may have information about persons in such categories, or about persons who may have information about such persons. It is a criminal offence to fail to respond to such a notice.

Registrable PSCs or RLEs are also obliged to supply the necessary information to the entity within a further month if their particulars do not appear on the PSC register of the PSC Register Entity and they have not been served with such a notice within a month of their being aware (or when they should reasonably be aware) that they are registrable PSCs or registrable RLEs.

Failure to comply is a criminal offence and may lead to transfer, voting and dividend restrictions being placed on the relevant shares or LLP interest.

## What is on the PSC Register and who can see it?

Where an entity is required to keep a PSC register the register must include details of each individual and legal entity that has significant control over the firm and is registrable in relation to the entity.

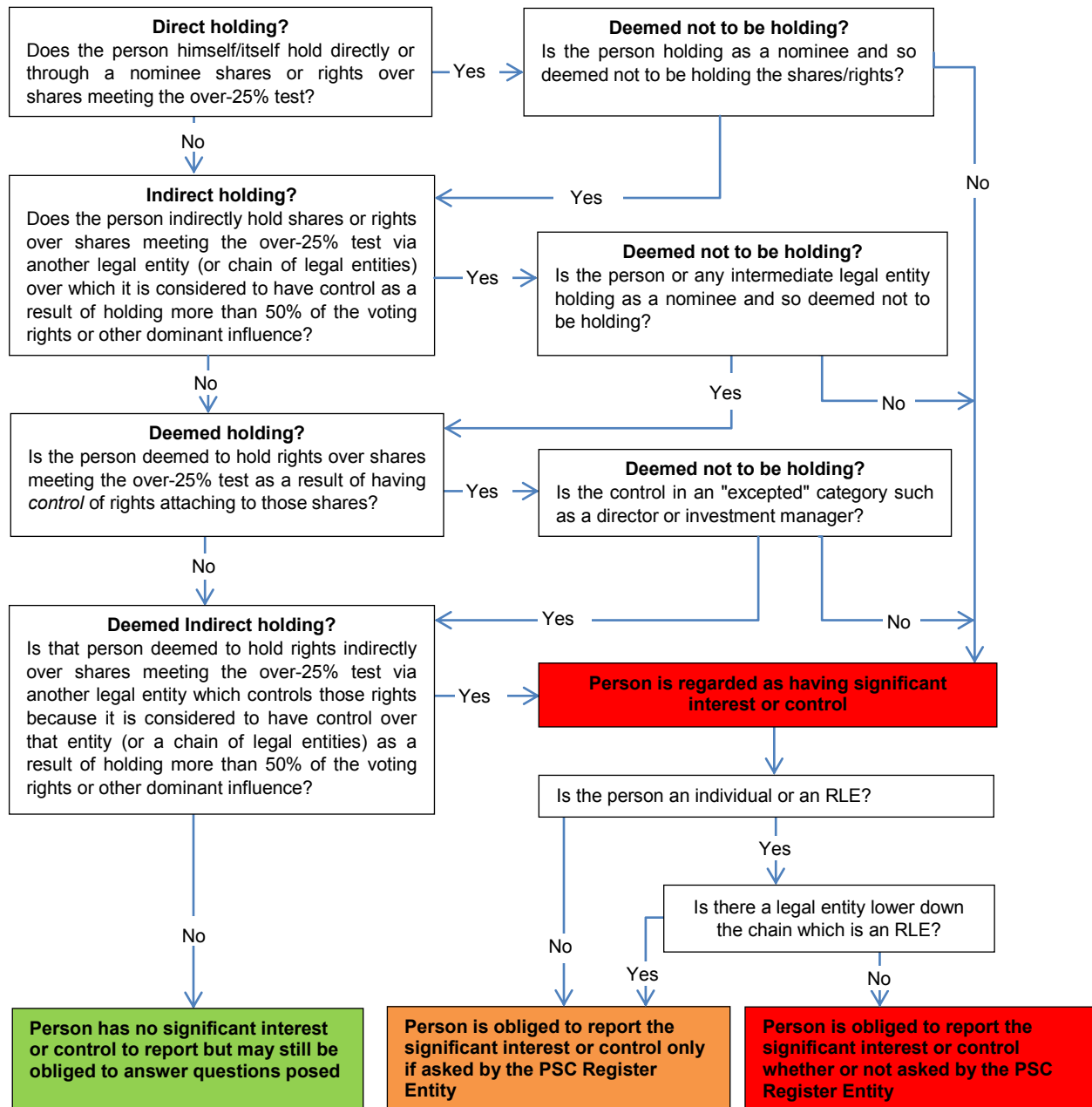
The PSC Register must be open to public inspection and, from 30 June 2016, the information will also be passed to Companies House (as part of the annual confirmation statement which is replacing the annual return) and placed on the public Register. Failure to comply with the new requirements in relation to the PSC Register is an offence punishable by imprisonment or a fine.

## How does this play out in typical fund structures?

The rules around direct and indirect holdings, for the recognition of significant influence and control and the deeming rules as to what constitute "holding" an interest or right provide an interesting interplay when applied to typical fund structures.

The following decision tree may be helpful in working out how the rules apply to an individual or legal entity that has some connection to the shares in a PSC Register Entity:

## Must I report?: Decision Tree



The outcome of these considerations in relation to some of the common positions relating to UK Funds is considered in Appendix B below. It must be stressed that this is a general guide only as the position is highly fact-specific.

## Conclusion: Help is at hand

The rules are more complex and subtle than they appear at first sight and there are many grey areas. However in view of the potential criminal and other sanctions, Funds should be ensuring they have the systems and controls to deal with this new regime.

Fieldfisher can help by offering advice on this topic, to help you determine whether you should be reporting where there are cases

in the grey areas, or by providing training on this subject. For any queries please refer to **Nicholas Thompsell** or **John Dooley** at Fieldfisher LLP or your regular contact.

# Are you in Control?

## Appendix A. Requirements for fund structure bodies to keep a PSC Register

Are you required to keep a PSC Register?	
<b>Financial services groups:</b> each entity in the group will need to consider whether it is required to set up a PSC Register	
<b>Holding companies, administration companies, companies set up to act as corporate director of other group companies</b>	Each of these entities will, if it is a UK incorporated company (including a UK incorporated <i>societas Europaea</i> ) or LLP, be required to set up a PSC Register, unless it is a DTR 5 Company or traded on a Specified Market
<b>Asset manager and fund manager group entities, including authorised corporate directors of ICVCs</b>	
<b>Trustee companies, depositaries and custodians</b>	
<b>Investment products and related entities</b>	
<b>Investment trust</b>	A UK investment trust company will not be required to set up a PSC Register as it will be a DTR 5 Company (or have voting shares traded on a regulated market in order to obtain investment trust tax status)
<b>Investment company with variable capital (ICVCs)</b>	An ICVC formed under the Open Ended Investment Company Regulations 2001 does not fall within the scope of the requirement to set up a PSC Register and there is currently no indication that the PSC Register requirement will be extended to them
<b>Limited partnership</b>	A private equity, property or other fund established as a limited partnership (English or Scottish) under the Limited Partnerships Act 1907 will not itself be required to set up a PSC Register
<b>General partner of a limited partnership</b>	A general partner will, if it is a UK incorporated company or LLP, be required to set up a PSC Register
<b>Limited partner of a limited partnership</b>	A limited partner will, if it is a UK incorporated company or LLP, be required to set up a PSC Register



## Appendix B. Fund structure bodies obliged to register on a PSC Register

**Key:**

**Hold** = holding shares in the PSC Register Entity itself, including through a nominee

**Indirect hold (majority voting rights)** = holding shares in the PSC Register Entity indirectly as a result of holding a majority of the voting rights in an intermediate company

**Indirect hold (dominant influence)** = holding shares in the PSC Register Entity indirectly as a result of having dominant influence over an intermediate legal entity

**Control** = controlling voting rights in relation to the shares of the PSC Register Entity

**X** = Not regarded as having an interest in the PSC Register Entity as a result of this heading

**✓** = Regarded as having an interest in the PSC Register Entity as a result of this heading

**-** = Category not applicable

		Investment Trust (separate Manager)	Investment Trust (self managing)	Unit Trust	ICVC	LP	SLP
51% holder of shares/units in the fund	Hold	X	X	X	X	X	X
	Indirect hold (majority voting rights)	✓	✓	X	✓	X	X
	Control	X	X	X	X	X	X
General Partner of a Limited Partnership itself managing the LP	Hold	-	-	-	-	✓	X ??
	Indirect hold (dominant influence)	-	-	-	-	X	??
	Control	-	-	-	-	✓	✓
General Partner of a Limited Partnership where control has been delegated to an external manager	Hold	-	-	-	-	✓	X ??
	Indirect hold (dominant influence)	-	-	-	-	X	??
	Control	-	-	-	-	X ??	X ??
Investment manager	Hold	X	-	X	X	X	X
	Indirect hold (dominant influence)	X	-	X	X	X	X
	Control	✓	-	✓	✓	✓	✓
Trustee	Hold	-	-	✓	-	-	-
	Indirect hold	-	-	X	-	-	-
	Control	-	-	X	-	-	-
Separate Custodian / Depository	Hold	X	X	X	X	X	X
	Indirect hold	X	X	X	X	X	X
	Control	X	X	X	X	X	X
Fund entity	Hold	✓	✓	-	✓	-	✓ ??
	Indirect hold	X	X	X	X	X	X
	Control	✓	✓	X	X	X	X

The table above sets out, in relation to the normal participants in the fund structures listed, what we would expect normally to be the result of applying the main tests that might lead to that participant being deemed to be interested in shares or rights of a PSC Register Entity that is an investment of the relevant fund. If there is a tick in any of the boxes pertinent to that type of fund participant participating in that type of fund that participant will normally be considered as being interested in those shares or rights.

The participant will be deemed to have a reporting obligation if

those shares or rights, aggregated with any others which that participant is considered to hold or control, meet the over-25% test and the participant is itself an individual or an RLE and (in relation to indirect holdings) there is no RLE lower down the chain. If the participant is a legal entity but not an RLE, the position of anyone with a majority stake in that entity will need to be considered.

Please note these issues are extremely fact specific and the table above should be used as a general guide only and not relied upon in any particular case.

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