REAL ESTATE IMPLICATIONS OF THE ECONOMIC CRIME (TRANSPARENCY AND ENFORCEMENT ACT) 2022

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Real Estate Alert

By: Jonathan Lawrence, Bonny Hedderly

SUMMARY

We have previously informed you about the new Economic Crime (Transparency and Enforcement) Act 2022 (ECTEA) - read our alert here.

During the summer (12 July 2022), the government announced that the new Register of Overseas Entities (ROE) created under the ECTEA would come into force on 1 August 2022. The parts of ECTEA that create the ROE have now been implemented.

The ECTEA requires overseas entities (OEs) that own UK property or are intending to acquire property in the United Kingdom to register with Companies House, unless they are exempt, and to provide information about their beneficial owners or managing officers and to update this information annually. There are complex rules which determine whether someone is a registrable beneficial owner. To summarize briefly, a person will be registrable if, in relation to the OE, they (or a trust or firm which they control) own more than 25% of the shares or voting rights, have the right to appoint or remove a majority of the board of directors, or they have significant influence or control over the OE.

It will, in some circumstances, be difficult to determine who the registrable beneficial owners are, particularly where ownership structures are complex in nature. The process is more challenging because of requirements that the information submitted about the registered beneficial owners has to be in English and must be independently verified by a UK-based agent that is supervised under the Money Laundering, Terrorist Financing, and Transfer of Funds Regulations 2017. The verification obligations are also complex and whilst lawyers are permitted to act as verification agents, the Law Society of England and Wales has cautioned against doing so. This means that there is a current period of uncertainty whilst external verification providers emerge.

On registration at the ROE, Companies House allocates a unique OE ID (the OE ID) for each OE. The new register is part of the UK Government's strategy to combat economic crime, while ensuring that businesses that are legitimate continue to be able to transact in the United Kingdom. There will be severe sanctions for those who do not comply, including restrictions on buying, selling, transferring, leasing, or charging their land in the United Kingdom.

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WHAT SHOULD CLIENTS DO NOW AND NEXT?

Failure to comply with the ECTEA promptly may well expose OEs and their officers to criminal sanctions.

If you are, or any company in your group is, an OE and own, have recently disposed of, or are contemplating any transaction in relation to affected real estate, you should give consideration now to whether you need to register with Companies House, and collect the information needed in relation to beneficial ownership.

You must then decide who you should use to provide the required verification statement to Companies House, and obtain any confirmations needed from the beneficial owners.

WHAT REAL ESTATE TRANSACTIONS DOES THE ECTEA APPLY TO?

The ECTEA 2022 applies to the following types of applications and dispositions:

- Transfers of a qualifying estate to an OE;
- Transfers of a qualifying estate by an OE;
- Registrable leases for a term of more than seven years from the date of grant to an OE, which are granted out of a qualifying estate;
- Registrable charges by an OE;
- Applications for first registration of a qualifying estate where the applicant is an OE; and
- Adverse possession applications to register an OE as proprietor of a qualifying estate.

OEs must provide a valid OE ID or, if applicable, specify which permitted exception (see Exceptions and exemptions) they are relying on when applying to register a disposition by an OE caught by the ECTEA.

The ECTEA amends the Land Registration Act 2002 (LRA 2002) by inserting a new Schedule 4A. This comes into force on 5 September 2022, five weeks after the ECTEA 2022 provisions commenced which permit OEs to apply for an OE ID. The provisions of Schedule 4A LRA 2002 will prevent HM Land Registry from registering an OE as proprietor of a 'qualifying estate' unless the OE has first obtained an OE ID. In some instances, an OE will need an OE ID before it makes a disposition.

For the purposes of ECTEA and Schedule 4A to LRA 2002, “qualifying estate” means a freehold estate in land or a leasehold estate in land granted for a term of more than seven years from the date of the grant.

The Land Registry has issued a guide (Practice Guide 78) which sets out how to comply with the ECTEA when applying to register an OE as proprietor of a qualifying estate, or a disposition by an OE of a qualifying estate. There have been some amendments to Land Registry documents and forms, which will impact on transactions due to the drafting changes of the prescribed forms and prescribed form of lease to allow for the OE ID to be provided or for confirmation when this is not required.

THE TRANSITIONAL PERIOD AND TIMESCALES

The ECTEA provides a transitional period beginning on 1 August 2022 and ending on 31 January 2023 during which OEs can dispose of their property without having to register with Companies House, although section 42 of

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the ECTEA 2022 provides for details of the disposition and beneficial ownership of the OE to be given to Companies House.

Any OEs which already own affected real estate will have six months from 1 August 2022 to register. This obligation also applies to OEs that have disposed of affected real estate since 28 February 2022 and they are required to disclose such disposals as part of their registration.

OEs wishing to acquire affected real estate after 5 September 2022 will also need to register before they can become the registered legal owner of that real estate.

APPLICATIONS TO REGISTER AN OE AS PROPRIETOR MADE BETWEEN 1 AUGUST 2022 AND 5 SEPTEMBER 2022

If an application is lodged to register an OE between 1 August 2022 and 4 September 2022 (inclusive) it is not necessary to provide an OE ID, but a restriction will be added to the title of the OE on or after 5 September 2022. This is because Schedule 4A places an obligation on the Land Registrar to enter a restriction where an OE is registered as proprietor on or after 1 August 2022. The restriction will take effect immediately from when it is entered. If the OE has obtained an OE ID during this period, it may be included with an application and it will be entered in the register.

IMPACT ON TRANSACTIONS

In broad terms, UK Land Registries will refuse to register certain property transactions (including sales and purchases, long term leases, and the grant of security over affected real estate) unless the relevant OEs are registered on the Register. OEs and their officers may also commit a criminal offence if they attempt to dispose of affected real estate without being registered.

This is likely to present significant challenges to some transactions in the coming months, and parties will need to be mindful to ensure that contractual documents reflect the possible pitfalls (such as failure to register at Companies House). Drafting will need to be incorporated to address any concerns.

TRANSACTION SCENARIOS

If you are a UK entity but considering entering a transaction with an OE which will involve affected real estate then you will need to determine whether the OE should be registered. If the OE needs to be, but is not, the OE will not be able to become the registered legal owner of the affected real estate and this could have adverse consequences for you. Care will need to be taken with drafting when dealing with OEs.

A restriction may appear on the title register after exchange. If the completion date falls after the transitional period ends in January 2023, registration of the transaction will not be possible without compliance with the restriction.

If a seller transfers a property to the buyer in breach of the ECTEA (where the seller is an OE not registered in the ROE at Companies House), then this is a criminal offence by the seller and the completion money may be the proceeds of crime.

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FURTHER RESOURCES AND GUIDANCE:

- Economic Crime (Transparency and Enforcement) Act 2022
- Register of Overseas Entities (Verification and Provision of Information) Regulations 2022
- Register of Overseas Entities (Delivery, Protection and Trust Services) Regulations 2022

KEY CONTACTS



JONATHAN LAWRENCE
PARTNER & ASSISTANT GENERAL COUNSEL

LONDON
+44.20.7360.8242
JONATHAN.LAWRENCE@KLGATES.COM



BONNY HEDDERLY
PROFESSIONAL SUPPORT LAWYER

LONDON
+44.20.7360.8192
BONNY.HEDDERLY@KLGATES.COM

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