Transparency and Trust Team
Department for Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET

By email: transparencyandtrust@bis.gsi.gov.uk

17 July 2015

Dear Sirs,

Re: BVCA response to the informal consultation on the application of the register of people with significant control to limited liability partnerships

The British Private Equity and Venture Capital Association ("BVCA") is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 500 firms, the BVCA represents the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers.

Our members have invested £30 billion in over 3,900 UK-based companies over the last five years. Companies backed by private equity and venture capital in the UK employ around 790,000 people and almost 90% of UK investments in 2013 were directed at small and medium-sized businesses. As major investors in private companies, and some public companies, our members have an interest in reporting matters, the conduct and information presented by such companies, and the burdens placed on the management of such companies.

We have submitted a number of representations and held meetings with the Department of Business, Innovation and Skills ("BIS") over the last year to discuss the Small Business, Enterprise and Employment Act (the "Act") and remain grateful for the continued dialogue.

1. Are you content to the references to 'designated member' as the equivalent to an 'officer' of a company?
   a. Are the circumstances when other members should be included in this definition?

The duties in relation to the PSC register seem to fall within the types of duties assigned to designated members.

2. Do you have any concerns about omitting references to 'shadow director' in regulation 31J (2)(d)?
   a. Or should a "shadow member" be treated as a "designated member" or "member" of the LLP for these purposes?

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For the purposes of the offences, if those responsible are the designated members, we do not see why a shadow member should be held responsible for defaults.

3. Are the six specified conditions in Part 1 of Schedule 1A appropriate and equivalent to those for companies? a. Is the second condition, the right to share in profits, an appropriate measure of control as opposed to economic interest? b. If not, which conditions would be more effective and why?

The first and second conditions

We have the following concerns in relation to the first and second conditions:

- The first and second conditions (shares in capital and profits) seem to go much further than the company equivalents in that they will require disclosure of information on economic rights as well as control.

- We appreciate that the first and second conditions appear to be intended to replicate the "ownership" condition for companies, i.e. holding more than 25% of a company's shares. However, with regard to LLPs, we do not consider an LLP member's interests in capital and profits to be an analogous test of ownership. The nearest equivalent to share ownership is membership itself.

- The economic rights of members of LLPs have always been a confidential matter for the agreement between the members, a benefit which is attractive for many legitimate business structures that previously were obliged to form a general partnership. Requirements to make disclosure of these arrangements in excess of what is required for companies (including DTR issuers) may act as a disincentive to use this structure.

- Aside from confidentiality concerns, the compliance impact of conditions 1 and 2 on LLPs will be disproportionate, in particular given that rights to capital and profits may be complex and highly variable for any individual member depending on the circumstances specified by the LLP agreement. In addition, as the relevant calculations as to a member's entitlements may take place at the end of a year, calculations would not be able to be done on a current basis.

- The extension of disclosure rights to economic interests seems particularly disproportionate given that the requirements of DTR5 are deemed equivalent to the PSC regime, and are based entirely on control.

- Ownership of shares in companies is itself often not linked to proportionate rights to capital or profits, which can be highly variable.

- Even if it were possible to come up with a definition of capital or profits, these might not be readily ascertainable for any given LLP, particularly if the agreement employed different measurement bases. An alternative test based on capital contributions may have merits but capital contributions are not analogous to share capital.

- The relevance to this issue of paragraph 13 of the new Schedule 1A of the Companies Act 2006 will need to be considered.

The third condition

- The third condition is consistent with the specified conditions for companies, but see our comments on question 5 (definition of voting rights).

The fourth condition

- Please see our comments on question 5.

4. Are the provisions on right to share in capital and profits in paragraph 14 of Schedule 1A correct?
   a. Is more explanation needed about how these should be calculated?
   b. Which method(s) of calculation should be used instead and why?

See our comments on the first two specified conditions.

5. Do the provisions on voting rights in paragraphs 15 to 17 of Schedule 1A apply effectively to LLPs?
   a. Does it matter that there will be a specific definition for voting rights for LLPs in paragraph 15, but none in the primary legislation(paragraph 14) that might be used where an LLP is part a chain of legal entities?
   b. Does it matter that there is no explicit provision in the PSC Regulations for LLPs?

Paragraph 15 – it is unclear why the test for voting rights should be "rights conferred on members of LLPs who are entitled to take part in the management of the LLP and to vote on ordinary matters". This seems uncertain and to be more equivalent to requiring disclosure in companies of board votes. As regards the third specified condition, and references to voting rights generally, the definition in paragraph 16 would appear more appropriate.

The fourth condition requires clarification. Currently the definition of voting rights in paragraph 15 applies. It is unclear what is intended by this condition, and what is meant by "members of LLPs who are entitled to take part in the management of the LLP".

6. Are there instances where the rights to capital or profits are held / exercised by a nominee and a specific provision included (as per Shares held by nominees as in paragraph 19 Schedule 3 SBEE Act 2015)?

See our comments above in relation to conditions 1 and 2. We consider that the concept of a nominee does not readily translate to LLPs and it would be unusual for membership to be separated from an interest in the LLP. The fifth condition and Regulation 21 should in any case provide sufficient protection.

7. Is security ever given over any of the rights relevant to this Schedule?
   a. Do we need an equivalent provision to rights attached to shares held by way of security as in paragraph 23 of Schedule 1A?

We believe this is highly unusual because of the nature of membership in an LLP, but it is possible in some circumstances, so a failsafe provision may be appropriate.

8. Can an interest in an LLP ever be sold? Cf Paragraph 8 of Schedule 1B (Orders for Sale)

In theory, yes, but it would be highly unusual for such an interest to be separable from membership itself. See our comments in reply to question 9 below.

9. Do the provisions that contain a restrictions and warning notice regime, allowing an LLP to impose restrictions on the interest a person holds, as set out in paragraphs 1 to 11 to Schedule 1B as applied by regulation 31M work?
   a. Are you concerned that these provisions interfere with the contractual freedoms / private arrangements of LLPs?
   b. Are there alternative means of ensuring enforcement, particularly against overseas PSCs / RLEs?

In general, we are concerned that the regulations attempt to apply provisions designed for the particular circumstances of companies limited by shares to LLPs. We consider it is disproportionate and unnecessary to legislate in this manner for LLPs and that the members of LLPs should be free to agree the sanctions for non-compliance between themselves, given that LLP agreements are always bespoke and tailored to the specific requirements of the members.

In particular, the regime is particularly inflexible with regard to the effects of a restrictions notice, as there is limited ability to waive restrictions, or to restore lost rights if a PSC subsequently complies with its requirements. We consider that LLPS should have the flexibility to put in place bespoke sanctions for non-compliance, within the existing requirement to take reasonable steps to obtain PSC information.

10. Are the particulars required as to the nature of control appropriate to LLPs?
    a. If not, which Particulars would be effective in measuring the approximate extent and weight of control?

Please see our reply to question 3.

11. Are there any other issues with the drafting as it applies to LLPs that you wish to raise?

There does not seem to be any language requiring updating of PSC information at Companies House as is required in the Companies Act provisions on the new confirmation statement — presumably this would require amendment of the provisions of the 2009 LLP Regulations which apply the annual report provisions of the Companies Act to LLPs.

Please feel free to contact Gurpreet Manku at the BVCA if you have any queries on this response.

Yours faithfully

Simon Witney
Chairman, BVCA Legal & Technical Committee