

## INFORMATIVE COMMERCIAL FLASH AUGUSTA ABOGADOS

### OBLIGATION TO IDENTIFY THE REAL OWNER: THE NEW REQUIREMENT IN THE ANNUAL ACCOUNTS' DOCUMENTATION

Due to the approval and effectiveness of the Ministerial Order JUS/319/2018, of 21<sup>st</sup> March ("**Ministerial Order**"), the new models for the preparation of the annual accounts for those entities obliged to their submission and publication have been approved. According to such Ministerial Order, specific modifications in the documentation for the mentioned annual accounts' submission have been introduced, being the most important one **the obligation to include a document which identifies the real owner/s of each entity. The latter document will be perceptive for all those annual accounts that must be submitted in the Commercial Registry, and which belong to all those financial years closed after the 1<sup>st</sup> of January 2017.**

The other two (2) modifications introduced by the Ministerial Order in the annual accounts' submission forms belonging to the financial year of 2017 are, (i) a change in the instructions for the calculation of the entities which may use the "abridged" model, and (ii) the entities' ability, in the submission of the "normal" form, of incorporating a report regarding non-financial information separated from the management report.

***As a reminder...***

***The term "real owner" refers to the/those natural person/s who ultimately possess/es or control, directly or indirectly, a percentage higher than a 25% of the capital or of the rights to vote within an entity, or who own the control, directly or indirectly, of the company's management.***

***In the event there is no possible identification of the "real owner", the members of the companies' administration body will be regarded as "real owners assimilated natural persons".***

The most relevant aspects which need to be considered for the submission of such new document are the following:

- All the entities which deposit their annual accounts in the Commercial Registry must include the real owner's identification in the submitted documentation ("**Real Ownership Declaration**"), regardless of the form under which they are drafted; meaning, "normal", "abridged" and "of SMEs".
- All listed companies, for clear reasons, are exempted from the submission of the Real Ownership Declaration; being exempted of such submission neither those entities listed in the alternative stock market nor the listed entities' subsidiaries.

- The Real Ownership Declaration document must be mandatorily included in the entities' individual annual accounts submission normalized forms and not in the consolidated accounts which, when appropriate, may be submitted.
- The Real Ownership Declaration document shall be completed for the annual accounts regarding the financial years closed after the 1<sup>st</sup> of January 2017 (not being perceptive for those annual accounts which belong to financial years before the mentioned date).
- According to the information included in the Ministerial Order, once the Real Ownership Declaration document is submitted for the first time, it shall only be necessary to include it in the documentation of annual accounts of subsequent financial years had any change in the entity's real owner/s occurred.
- Under what has been foreseen by the Ministerial Order, the filling of the Real Ownership Declaration shall only be carried out by those entities whose real owner is a single or several natural persons (either directly or indirectly); being able to refer to the Commercial Registry books those entities with do not have a real owner and, therefore, which must complete the section referring to the "real owners assimilated natural persons".
- The Real Ownership Declaration document should be included in the documentation issued by the official programs (for those accounts submitted electronically or in a digital support (CD)). Nonetheless, we suggest a revision of such circumstance if the submissions are done in paper format, as currently some official models do not include the aforesaid document (in which case you should find the Real Ownership Declaration in the Official Gazette (BOE) published on Tuesday 27<sup>th</sup> March 2018).
- The submission of the individual annual accounts without the Real Ownership Declaration will be declared defective by the Commercial Registry.

The requirement of additional information included in the Ministerial Order is a consequence of the implementation of the measures adopted by the European Union, and which are included in Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ("**Directive**"). This Directive establishes that each Member State shall assure that the data regarding the natural persons' real ownership shall be included in a public registry.

So far, the regulation issued by the European Union for the same purpose had been transposed in Spain through Law 10/2010, of 28 April, on the prevention of money laundering and terrorist financing, and through Royal Decree 304/2014, of 5 May, by which is approved the Regulation of the mentioned Law 10/2010, which obliges Notaries and Registrars to identify the entities' real owners when carrying out their roles. However, there must be no misunderstanding between the obligation carried out by notaries and registrars (the "*Actas de Titularidad Real*" should continue being granted before notaries) and the new obligation introduced by the Ministerial Order, as the latter must be complied with directly by the entities' when submitting their annual accounts before the Commercial Registry.

What is sought by this new implementation is to grant access to information regarding the real owner to (i) the competent authorities and the financial information units, to (ii) the obliged entities, and to (iii) any person or organization which can demonstrate a legitimate interest. The Directive establishes that those which are under the abovementioned section may have a minimum access to specific information (for example, name and surname, month and year of birth, nationality and resident country of the real owner, as well as the nature and purpose of the real participation).

Nowadays, both the measure's implementation and the scope of all the previously pointed out, especially, the access of third parties which demonstrate a legitimate interest to the information regarding the real owner, and the effects of the Ministerial Order, remain uncertain. Accordingly, last 7<sup>th</sup> of May, the Notary General Council and the business association CEPYME brought, jointly, a contentious-administrative appeal before the National High Court (*Audiencia Nacional*) ("**CA Appeal**") demanding, as a precautionary measure, the suspension of the Ministerial Order for considering that the exposure of the real owner meant "*a serious attempt to the right of privacy of the small and medium entrepreneurs*" had, according to their believes, "*a severe impact*", and subdued the entrepreneurs to "*gratuitous risks*". Furthermore, it was added to the appeal the current existence of a notarial database where all the data regarding the real ownership is already stored.

When it comes to the referred CA Appeal, the Registry Association has defended that (i) it is for them to guard the real ownership's information (under the Ministerial Order and due to the fact that it will be the registrars who will warn of the existence, when appropriate, of the legitimate interest alleged by third parties), and that (ii) Spanish registrars are duly equipped with intercommunication programs which connect them to all other registries around Europe; those are circumstances that, in their believes, shall benefit the cooperation to fight against money laundering and terrorism financing.

Notwithstanding the foregoing, and while the *Audiencia Nacional* has not issued its judgement yet, we point out that the obligation to submit the Real Ownership Declaration introduced by the Ministerial Order is still in force, reason why all the entities which submit the annual accounts of the financial years closed after the 1<sup>st</sup> of January 2017 must comply with it.

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