

The 5th Money Laundering Directive as it Relates to Trusts

31 July 2019

INTRODUCTION

The Government recently published a consultation, 'Transposition of the Fifth Money Laundering Directive', which considers the proposals to transpose the EU's 5th Money Laundering Directive ("5MLD") into UK law.

The Directive affects all UK express trusts and many non-UK express trusts, and extends the reach of the 4th Money Laundering Directive ("4MLD"), which itself was transposed into UK law on 26 June 2017. 5MLD must be transposed into UK law by 10 January 2020, and the Government has committed to introduce these rules irrespective of whether the UK has left the EU before that date, and with or without a Brexit deal.

BACKGROUND

As part of the continuing global effort to enhance tax transparency and combat tax evasion, the EU passed 4MLD in 2015. The Directive set out a requirement for Member States to establish a central register containing information about the beneficial ownership of trusts. Under these regulations, trustees of certain trusts were required to maintain accurate and up-to-date records in writing of all the beneficial owners of the trusts, including potential beneficiaries.

The UK register is maintained by HM Revenue & Customs ("HMRC") and is administered through HMRC's online Trust Registration Service ("TRS").

5MLD significantly extends the application of the TRS, and it is estimated that up to ten times as many trusts will be affected. This includes shareholder protection, life insurance policy and discounted gift trusts, as well as many other forms of trust not previously caught under 4MLD.

WHICH TRUSTEES WILL BE REQUIRED TO REGISTER?

- All UK resident 'express trusts';
- Non-EU resident express trusts that acquire UK land or property either on or after 10 March 2020; and
- Non-EU resident express trusts that enter into a new business relationship with an obliged entity on or after 10 March 2020.

'EXPRESS TRUSTS'

A trust is 'express' if it was deliberately settled as opposed to having been created through either statute or court order. The onus will be on the trustees to determine whether an express trust exists.

HMRC have undertaken to provide technical guidance later in the year, which will contain more detailed information regarding how to determine whether an express trust exists. In the meantime, the consultation document does provide examples of UK trusts which are likely to fall within the definition of an express trust.

WHAT DETAILS ARE THE TRUSTEES REQUIRED TO HOLD ON THE BENEFICIAL OWNERS?

For the purpose of these regulations (and 4MLD), beneficial owner includes:

- The settlor;
- The trustees;
- The protector (if any);
- The beneficiaries or class of beneficiaries; and
- Any individual who has effective control over the trust (usually by having the power to direct the trustees).

Trustees of relevant trusts must hold the following details in relation to each beneficial owner and any other individual who is referred to as a potential beneficiary in a document from the settlor, such as a letter of wishes.

In relation to an individual:

- Name;
- Date of birth;
- National Insurance number (NINO) or Unique Taxpayer Reference;
- If the individual does not have a NINO, the individual's usual residential address. If this is outside the UK, their passport or ID card number, expiry date and country of issue; and
- The nature of the individual's role in relation to the trust (e.g. settlor, beneficiary, etc.).

In relation to a corporate entity:

- The legal entity's corporate or firm name;
- The registered office of the legal entity; and
- The nature of the entity's role in relation to the trust.

REGISTRATION DEADLINES

The government currently proposes a filing deadline for unregistered trusts already in existence of 31 March 2021. For trusts created on or after 1 April 2020, the government proposes that the trust should be registered with HMRC within 30 days of its creation.

PENALTIES

HMRC will consult on a suitable penalty framework for failing to register, or registering after the relevant deadline, in a later technical consultation.

The current penalties for non-compliance (under 4MLD) are £100 for late registrations within three months of the deadline, increasing up to a maximum of the higher of £300 or 5% of the total tax liability for the relevant year for trustees who fail to register within six months of the deadline. It is anticipated that these penalties will change under 5MLD.

WILL THE TRUST REGISTER BE AVAILABLE PUBLICALLY?

Under 5MLD, the Government will be required to disclose specific data about a trust and its beneficial owners to law enforcement agencies and obliged entities (i.e. regulated businesses entering into a new business relationship with the trust), in line with existing registration requirements under 4MLD. It also widens access to any person who can show 'legitimate interest'.

The Government must consider any request to share information about a trust (or a beneficial owner of a trust) registered on TRS from anyone who has a 'legitimate interest' in accessing that information. 'Legitimate interest' is not defined within 5MLD. It is therefore for the government to determine an appropriate definition for use within the UK.

Current understanding is that the Government shall consider a person to have legitimate interest if they:

- Have active involvement in anti-money laundering or counter-terrorism financing activity;
- Have reason to believe that the trust or person who is the subject of a legitimate interest enquiry is involved with money laundering or terrorist financing; in other words, speculative enquiries into all or multiple trusts will not be deemed legitimate; and

- Have evidence underpinning that belief.

CONCLUSIONS

This technical update is a summary of the most important concepts of 5MLD as it applies to trusts.

5MLD extends the beneficial ownership reporting requirements to many more forms of trust, even trusts which do not necessarily give rise to a UK tax consequence. Furthermore, access to the trust register is widened to include any person who can show a legitimate interest.

The implications, in particular for non-professional trustees of settlements which do not give rise to a tax liability, is a far higher burden of reporting than was previously the case. The potentially severe penalties for non-compliance will be an additional cause for concern.

We can assist trustees in compiling and maintaining records, and submitting the necessary details to HMRC in line with statutory filing deadlines. Please get in touch with your usual Dixon Wilson contact for further details.

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Dixon Wilson
22 Chancery Lane
London
WC2A 1LS

T: +44 (0)20 7680 8100
F: +44 (0)20 7680 8101
DX: 51 LDE

www.dixonwilson.com
dw@dixonwilson.co.uk