

The 5th Money Laundering Directive as it relates to trusts

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INTRODUCTION

The EU's 5th Money Laundering Directive ("5MLD") was transposed into UK law on 10 January 2020. 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.

On 17 May 2021, HMRC's 'Trust Registration Service Manual' was released and this note includes the guidance therein.

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 compared to 4MLD.

WHICH TRUSTEES WILL BE REQUIRED TO REGISTER UNDER 5MLD?

- All UK resident 'express trusts';
- Non-EU resident express trusts that acquire UK land or property either on or after 6 October 2020; and
- Non-EU resident express trusts with at least one UK resident trustee that enter into a new business relationship with an obliged entity on or after 6 October 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 now published guidance within their manuals on what constitutes an 'express trust'. Within the TRS Manual an 'express trust' is a trust created deliberately by a settlor, usually in the form of a document such as a written deed or declaration of trust. HMRC contrasts 'express trusts' to trusts that come in to being through the operation of the law. Non-express trusts therefore do not result from the clear intent or decision of a settlor to create a trust or similar legal arrangement. Further guidance on HMRC's definition of an 'express trust' is available within the TRS manual.

NON-EU RESIDENT EXPRESS TRUSTS ACQUIRING UK LAND OR PROPERTY

HMRC has set out guidance on when the trustees of a non-UK express trust are considered to have acquired UK land. This definition requires that one or more of the trustees become registered with the Land Registries of either England and Wales, Scotland or Northern Ireland as the owner of UK land (whether they have an interest in the freehold or a leasehold with a term of more than seven years). In order to meet the definition, the trustees must own the land directly. This suggests that trustees that hold UK land via an underlying company would not be caught by the registration rule on the basis of owning UK property.

There is not a requirement to have UK resident trustees in this case; even trusts with wholly non-UK resident trustees would need to register.

NON-EU EXPRESS TRUSTS WITH AT LEAST ONE UK RESIDENT TRUSTEE ENTERING INTO A BUSINESS RELATIONSHIP WITH A UK OBLIGED ENTITY

'Business relationship' is defined under 5MLD as:

"a business, professional or commercial relationship between a relevant person and a customer; which arises out of the business of the relevant person, and is expected by the relevant person, at the time when contact is established, to have an element of duration."

HMRC's manuals have given guidance to state that a UK 'relevant person' includes:

- Credit institutions;
- Financial institutions;

- Auditors;
- Insolvency practitioners;
- Accountants;
- Tax advisers;
- Legal professional;
- Trust or company service providers;
- Estate agents;
- Letting agents;
- High value dealers;
- Casinos;
- Art market participators;
- Crypto asset exchange providers; and
- Custodian wallet providers.

The organisations described above will be a UK relevant person for these purposes if their registered or head office is in the UK and the day to day management of the business is the responsibility of that office, or another UK registered office, or the business is carried out in the UK.

This regulation has been relaxed slightly from the initial proposal, such that only those trusts with at least one UK resident trustee are required to register. This means that non-UK trusts with no UK resident trustees do not need to register solely on account of appointing a UK relevant person, although may of course need to register for other reasons.

'An element of duration' is not defined in the legislation and it was previously thought that the government would define this to be a relationship that is expected at the outset to last at least 12 months. However, HMRC manuals suggest that HMRC's view is that an element of duration is much shorter than that being anything that 'goes beyond a one-off, short lived transaction'. HMRC goes further to suggest that even the instruction of professionals to assist in the purchase of land may constitute an 'element of duration.' Non-UK trusts with a UK resident trustee should consider their position carefully before taking on the services of UK professional if the trust would not otherwise be required to register with HMRC.

TRUSTS EXEMPT FROM REGISTRATION

HMRC guidance confirms that the following types of trust will be exempt from registration as per Sch 3A of The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, provided that they do not have a UK tax liability:

- Trusts created by will for a period of two years from the date of death provided that at no time in that period the trust receives property from outside of the estate;

- Trusts for bereaved minors that meet the conditions of section 71A of the IHTA 1984;
- Age 18-25 trusts that meet the conditions of section 71D IHTA 1984;
- Trusts imposed by statute, where these do not result from the clear intention of the settlor. For example, a statutory trust arising on intestacy;
- Trusts holding insurance policies during the lifetime of the person assured;
- Trusts holding pay-outs from insurance policies received on the death of the person assured;
- Trusts arising from a personal injury payment;
- Employee share scheme trusts;
- Co-ownership trusts holding jointly held property where the trustees and beneficiaries are the same persons. This is intended to exempt property held directly as tenants in common as this creates an express trust under English law rather than any more complex structure involving a company or partnership that holds property;
- Charitable trusts;
- UK registered pension trusts;
- Trusts solely for the benefit of disabled persons;
- Historic pilot trusts in existence before 6 October 2020 holding assets valued at less than £100, unless or until further assets are added; and
- Trust arising in the finance markets infrastructure including:
 - o Trusts to limit systematic, insolvency and other risks arising from participants' default in the financial markets;
 - o Trusts to evidence and protect the interests of holders of foreign securities; and
 - o Trusts to segregate client assets from those of a segregating entity, including central counter-parties and central securities depositories.

Many of these exemptions come with caveats and so even if you believe a trust falls into one of these categories it would be worth checking HMRC's detailed guidance or asking your adviser to confirm.

Notably absent from the above list are nominee and bare trust arrangements. This includes nominee arrangements where there is no deed but where there has been a deliberate settlement such as where a grandparent (settlor) opens a bank account in the name of their grandchild (beneficiary) with the parents (trustees) as signatories of the account or where a school (trustee) holds monies (trust assets) received from parents (settlers) on behalf of their pupils (beneficiaries) which are then paid out to the pupils gradually on a discretionary basis to allow the pupils to pay for school lunches. Many of these

common and everyday nominee and bare trust arrangements are deliberately entered into and as such are caught by the rules and reporting will be required based on HMRC's current guidance. As these arrangements are quite common, it seems unlikely that HMRC would wish to receive trust registrations in these circumstances but, as yet, HMRC have not issued any guidance to the contrary. Therefore, trustees of such arrangements should be prepared to make disclosure whilst we wait for further guidance from HMRC.

These regulations may well reduce the creation of new pilot trusts as any new pilot trusts created after 6 October 2020 to hold assets after a future event are not exempt from registration.

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

For the purpose of these regulations, 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;
- Date of death, if settlor and trust set up after settlor's death;
- Countries of nationality and residence;
- 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;
- Mental capacity;
- Contact details, if lead trustee; 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;
- Country of residence;
- The Unique tax Reference, if registered in the UK;
- Contact details, if lead trustee; and
- The nature of the entity's role in relation to the trust.

Where a trust is registering because it has incurred a tax liability in the UK the above is required along with details of the general administration of the trust, its tax liability and the assets that the trust holds including their types and values.

When a trust is registering for a reason other than incurring a tax liability in the UK the information required above is slightly relaxed in that National Insurance numbers and/or Unique Tax References are not required to be disclosed.

This data will be held by HMRC for 10 years even if later updated and for 10 years after a trust is closed.

REGISTRATION DEADLINES

The legislation had a registration deadline of 10 March 2022 for unregistered express trusts without a tax liability which are already in existence and meet the new registration requirements. HMRC has announced an extension to this deadline until 1 September 2022 to give trustees sufficient time to register.

Any changes or updates to the details held by HMRC should be reported to HMRC within 90 days of the trustee becoming aware of the change.

Non-taxable express trusts created after 6 October 2020 must register within 90 days of being created or 1 September 2022, whichever is the later.

In the meantime, new trusts that are required to register because they have a UK tax liability should comply with the existing timescale, i.e. registration by 5 October after the end of the relevant tax year if the trust is liable to income tax and/or capital gains tax, or otherwise by 31 January after the end of the tax year in which the (non-income/capital gains) tax liability arises.

PENALTIES

HMRC have not yet given full details of the penalty framework for failing to register or update the details on the register. However, for inadvertent failures HMRC are currently suggesting that they will only write to the trustees to remind them of their obligations for the first failure, and there will be a penalty of £100 for any subsequent failures. For deliberate failures there will be more significant penalties but HMRC are yet to provide details.

The existing penalty framework based on Self-Assessment will be withdrawn.

WILL THE TRUST REGISTER BE AVAILABLE PUBLICALLY?

The Money Laundering Regulations currently allow data sharing requests from third parties to be made from 10 March 2022 in line with the trust registration deadline, however, as mentioned above HMRC will be extending that deadline and will give more details later in 2021.

Information can be requested when the person making the request can demonstrate 'legitimate interest', which HMRC have indicated will mean the requestor must be looking into a specified specific instance of money laundering or terrorist financing and that it is reasonable for the requestor to have that suspicion.

Alternatively, information will be available "on request" where certain trusts hold a controlling interest in a non-UK entity established in a territory which does not have a corporate beneficial ownership register. However, the requestor will have to identify the specific non-UK company in question and its relationship with the trust and demonstrate that the request is connected with the detection or prevention of money laundering or terrorist financing. Curiosity will not be considered an adequate reason to be provided with information.

Some information may be exempt from being supplied where the beneficial owner is a minor, lacks mental capacity or where the supply could expose the beneficial owner to a disproportionate risk of harm. No information on the assets of the trust will be released.

From 2022, relevant persons will be required to check the trust register when they enter into a business relationship with a trust. Trustees themselves should handle these requests by downloading an excerpt from the HMRC TRS.

It is still currently the case that law enforcement agencies can be given information by HMRC on request from those authorities. This includes regional and national police forces, the National Crime Agency, the Financial Conduct Authority and the Serious Fraud Office.

CONCLUSIONS

This technical bulletin is a summary of the most important concepts of 5MLD as it applies to trusts and has been updated for HMRC latest guidance.

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 implication, 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.

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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