ICAEW
REPRESENTATION 62/19

TRANSPOSITION OF THE FIFTH MONEY LAUNDERING DIRECTIVE

Issued 6 June 2019

ICAEW welcomes the opportunity to comment on the consultation on the Transposition of the Fifth Money Laundering Directive published by HM Treasury on 15 April 2019, a copy of which is available from this link.

This ICAEW response of 6 June 2019 reflects consultation with the Money Laundering Sub-Committee, part of the Business Law Committee. The Money Laundering Sub-Committee includes representatives from public practice. The Business Law Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 150,000 chartered accountant members in over 160 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

ICAEW is a supervisory body recognised by HM Treasury for the purposes of the Money Laundering Regulations 2007 dealing with approximately 13,000 member firms.

KEY POINTS

1. ICAEW welcomes the opportunity to comment on the consultation on the Transposition of the Fifth Money Laundering Directive. We are disappointed however that for such a major consultation the response period is only eight weeks.
2. We welcome the inclusion of crypto-currencies within the regulatory framework, but further thought is needed to ensure that security and utility tokens would also be within scope based on the proposed definitions. The government should also consider including mixer and tumbler services within the regulations, given their role in obfuscating the source of funds.
3. As obliged entities, Chartered Accountancy firms acknowledge their responsibility to report discrepancies in beneficial ownership data on PSC registers. However this will form a small part of the wider move for Companies House to verify the identity of company directors and beneficial owners of limited companies, as proposed in the BEIS consultation on Corporate Transparency and Register Reform. The outcome of any such reform must be that obliged entities are entitled to rely on the veracity of the data held on the PSC and other beneficial ownership registers. The responsibilities of company directors for the accuracy of the information on the registers should also not be overlooked in this respect.
4. We have a number of wide ranging concerns on the extension of the scope of TRS to all express trusts. We fear that the true extent of the resulting registrations could be vast and result in a huge and disproportionate regulatory and administrative burden on trustees, companies, and individuals. This is especially concerning given the problems that occurred with the introduction of the existing TRS system. We urge the government to thoroughly and robustly test the new TRS system prior to launch to prevent a repeat of these problems.
5. In particular, we recommend that the government seek evidence of what is regarded as an express trust in other EU countries. We note that other jurisdictions tend to use contractual arrangements for situations where a trust would be used in the UK. We would urge the government to seek to address this imbalance by limiting the situations in which a UK trust should be made to register on TRS and in particular adopt a definition that refers to entities rather than arrangements. Consideration also needs to be given to ensure that empty non-operational trusts such as pilot trusts used for life insurance proceeds or pension distributions on death, do not have to register.
6. We also have concerns on the proportionality of a national register of bank account ownership, and the very grave impact on the public should this highly sensitive personal and financial data fall into the hands of hackers or other criminals.
7. We would welcome the opportunity to work further with the government on the development of the key proposals within this consultation.

ANSWERS TO SPECIFIC QUESTIONS

Expanding the scope in relation to tax matters

Question 1. What additional activities should be caught within this amendment?

8. We note that the expanded definition appears to widen the scope to indirect provision of tax advice, and to also cover material aid and assistance with another person's tax affairs. While the current interpretation of what constitutes tax advice would normally include tax compliance services, the extension to indirect provision of tax advice could greatly widen the scope of the tax services provided by obliged entities that would become subject to the regulations.

Question 2. In your view, what will be the impact of expanding the definition of tax advisor? Please justify your answer and specify, where possible, the costs and benefits of this change.

9. As commented above, the extension of the scope of tax services to include those provided indirectly 'by way of arrangement with other persons' could catch many unwary providers of tax services. It is fairly common that an accountancy firm would be asked to provide tax advice in relation to some specific facts by another firm of accountants or lawyers. Under the current AML guidance for the accountancy sector, the firm is generally only required to perform KYC where there is significant contact with the underlying client of the other firm, or where a business relationship has been established with the underlying client. The extension of the definition of tax adviser to include indirect tax advice would therefore bring all of these arrangements within the scope of the regulations and require KYC to be undertaken when it would not currently be required. This would be an increased cost for accountancy firms, which may have to be passed on to clients. Where the underlying client of the third party firm is already subject to KYC by the third party firm (as an obliged entity), we would question the benefit of requiring the tax adviser to re-perform this KYC.

Letting agents

Questions 3-11

10. No comments on this section.

Cryptoassets

Question 12. 5MLD defines virtual currencies as 'a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically'. The Government considers that all relevant activity involving exchange, security and utility tokens should be captured for the purposes of AML/CTF regulation, and seeks views on this approach. Is the5MLD definition appropriate or does it need to be amended in order to capture these three types of cryptoassets (as set out in the Cryptoassets Taskforce's framework)? Further, are there assets likely to be considered a virtual currency or cryptoasset which falls within the 5MLD definition, but not within the Taskforce's framework?

11. We welcome the government's proposal to include all three types of crypto-assets within the scope of AML/CTF regulation. While the definition within 5MLD of virtual currencies appears sufficient for crypto-currencies (i.e. payment tokens), we consider that it should be expanded further to include security and utility tokens. We would define a security token as a digital representation of a crypto-asset designed as an investment opportunity with characteristics associated with traditional financial instruments. We would define a utility token as a crypto-asset which entitles the contributor to use a function, product or service provided by a particular organisation or business e.g. loyalty points. An overall definition of crypto-asset would need to be added to clarify that this broader term of crypto-asset includes crypto-currencies (or virtual currencies), security tokens and utility tokens.

Question 13. 5MLD defines a custodian wallet provider as 'an entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies'. The Government considers that all relevant activity involving exchange, security and utility tokens should be captured for the purposes of AML/CTF regulation, and seeks views on this approach. Is the EU Directive definition appropriate or does it need to be amended in order to capture these three types of cryptoassets (as set out in the Cryptoassets Taskforce's framework)? Further, are there wallet services or service providers

likely to be considered as such which fall outside this Directive definition, but should come within the UK's regime?

12. We agree that all relevant activity involving exchange, security and utility tokens should be captured on the basis proposed.

Question 14. Should the FCA be assigned the role of supervisor of cryptoasset exchanges and custodian wallet providers? If not, then which organisation should be assigned this role?

13. In our view the FCA would be the most appropriate entity to supervise crypto-asset exchanges and custodian wallet providers.

Question 15. The government would welcome views on the scale and extent of illicit activity risks around cryptoassets. Are there any additional sources of risks, or types of illicit activity, that this consultation has not identified?

14. In addition to the use of crypto-assets in laundering proceeds of predicate crime, we note that a large proportion of Initial Coin Offerings in recent years have found to be fraudulent, and have been designed to defraud investors rather than to create a token for investment.

Question 16. The government would welcome views on whether cryptoasset ATMs should be required to fulfil AML/CTF obligations on their customers, as set out in the regulations. If so, at what point should they be required to do this? For example, before an 'occasional transaction' is carried out? Should there be a value threshold for conducting CDD checks? If so, what should this threshold be?

15. We would welcome the introduction of AML/CTF obligations for crypto-asset ATMs as they are currently a large gap in the UK's AML defences. We would suggest that a low threshold value should be set, for example £500, and that the host for the physical ATM should be required to perform client due diligence on the customers using the crypto-asset ATM.

Question 17. The government would welcome views on whether firms offering exchange services between cryptoassets (including value transactions, such as Bitcoin-to-Bitcoin exchange), in addition to those offering exchange services between cryptoassets and fiat currencies, should be required to fulfil AML/CTF obligations on their customers.

16. We would welcome the introduction of AML/CTF obligations for all providers of exchange services whether the exchanges are between crypto and crypto, or between fiat and crypto as exchange between currencies can make tracing transactions and source of funds even more complex. Other mechanisms that further obscure the source of funds are mixer and tumbler services. We would recommend that the government consider introducing AML/CTF obligations for these services also.

Question 18. The government would welcome views on whether firms facilitating peer to-peer exchange services should be required to fulfil AML/CTF obligations on their users, as set out in the regulations. If so, which kinds of peer-to peer exchange services should be required to do so?

17. We would welcome the introduction of AML/CTF obligations for all providers of exchange services whether the exchanges are between crypto and crypto, or between fiat and crypto.

Question 19. The government would welcome views on whether the publication of open-source software should be subject to CDD requirements. If so, under which circumstances should these activities be subject to these requirements? If so, in what circumstances should the legislation deem software users be deemed a customer, or to be entering into a business relationship, with the publisher?

18. Any reference to open-source software should be clarified to restrict the scope to software related to exchange of value, and not all open-source software.

19. Whether CDD requirements should be applied to the publication of open-source software should depend on whether the software user is the beneficial owner of the crypto-assets, rather than say the custodian wallet provider. To the extent that the software provider has access to the details of the beneficial owner of the crypto-asset and the details of the individual transactions then it would be advantageous to apply CDD provisions.

Question 20. The government would welcome views on whether firms involved in the issuance of new cryptoassets through Initial Coin Offerings or other distribution mechanisms should be required to fulfil AML/CTF obligations on their customers (ie, token purchasers), as set out in the regulations.

20. Given the anonymous nature of crypto-assets, and the potential for their use to obscure illicit activity, we believe it would be helpful for firms issuing new crypto-assets to fulfil AML/CTF obligations on their customers. If the funds being invested via the ICO are not subject to KYC at the time of investment, it is very difficult for those in the regulated sector to carry out acceptable KYC afterwards.

21. We would also refer to our earlier comment about the proportion of fraudulent ICOs that have occurred, and would urge the government to consider ways to protect potential investors in such fund raises.

Question 21. How much would it cost for cryptoasset service providers to implement these requirements (including carrying out CDD checks, training costs for staff, and risk assessment costs)? Would this differ for different sorts of providers?

22. No comments.

Question 22. To what extent are firms expected to be covered by the regulations already conducting due diligence in line with the new requirements that will apply to them? Where applicable, how are firms conducting these due diligence checks, ongoing monitoring processes, and conducting suspicious activity reporting?

23. No comments.

Question 23. How many firms providing cryptoasset exchange or custody services are based in the UK? How many firms provide a combination of some of these services?

24. No comments.

Question 24. The global, borderless nature of cryptoassets (and the associated services outlined above) raise various cross-border concerns regarding their illicit abuse, including around regulatory arbitrage itself. How concerned should the government be about these risks, and how could the government effectively address these risks?

25. In our view the borderless nature of crypto-assets is of great concern, and the government should seek to work with FATF and other governments to address the cross-border regulatory gaps.

Question 25. What approach, if any, should the government take to addressing the risks posed by 'privacy coins'? What is the scale and extent of the risks posed by privacy coins? Are they a high-risk factor in all cases? How should CDD obligations apply when a privacy coin is involved?

26. We note that there has been no definition provided of a privacy coin. However on the basis that privacy coins use a number of different techniques to give users a truly anonymous and private means of exchanging value, we consider that they are a high-risk factor.

27. We also note the lack of reference to mixer services, which obfuscate the origin of crypto-assets and impede investigations into potential money laundering.

Art intermediaries

Questions 26-36

28. No comments on this section.

Electronic money

Question 37. Should the government apply the CDD exemptions in 5MLD for electronic money (e-money)?

29. We note that 5MLD limits the exemption from CDD such that the exemption only applies when the maximum amount stored electronically is EUR150, the instrument is not reloadable, and the maximum monthly payment transaction limit is EUR 150; among other conditions. On the basis of the stricter exemption terms within 5MLD, we consider that the government should apply the CDD exemption available in 5MLD.

Question 38. Should e-money products which do not meet the criteria for the CDD exemptions in Article 12 4MLD as amended be considered for SDD under Article 15?

30. Given the relatively low risk of e-money products, it may be appropriate to consider them for SDD, although adopting a risk based approach may be better.

Question 39. Should the government exclude any e-money products from both the CDD exemptions in Article 12, and from eligibility for SDD in Article 15?

31. Were the government to identify that particular e-money products are at an elevated risk of use for ML/TF then action should be taken to remove exemptions in Article 12 and eligibility for SDD at that time. However we are not aware of any particular products where this is applicable.

Question 40. Please provide credible, cogent and open-source evidence of the risk posed by electronic money products, the efficacy of current monitoring systems to deal with risk and any other evidence demonstrating either high or low risk.

32. No comments.

Question 41. What kind of changes, if any, will financial institutions and credit institutions have to implement in order to detect whether anonymous card issuers located in non-EU equivalent states are subject to requirements in their national legislation which have an equivalent effect to the MLRs?

33. No comments.

Question 42. Should the government allow payments to be carried out in the UK using anonymous prepaid cards? If not, how should anonymous prepaid cards be defined?

34. While we agree that where there is evidence of misuse of products for ML/TF then proportionate restrictions should be applied, it is equally important not to restrict business and personal freedoms. Therefore, we consider that the government should continue to allow anonymous pre-paid cards, which are mostly used by consumers. A limit on the value of anonymous pre-paid cards that are permitted would be sensible, subject to the proportionate risk of their use in ML/TF.

Question 43. The government welcomes views on the likely costs that may arise for the e-money sector in order to comply with 5MLD.

35. Those businesses within the e-money sector would be best placed to comment on the likely costs.

Customer due diligence

Question 44. Is there a need for additional clarification in the regulations as to what constitutes 'secure' electronic identification processes, or can additional details be set out in guidance?

36. To aid clarity for those in the regulated sector, we would welcome additional clarification in the regulations as to what constitutes secure electronic identification processes and the level of reliance that can be placed on it.

Question 45. Do you agree that standards on an electronic identification process set out in Treasury-approved guidance would constitute implicit recognition, approval or acceptance by a national competent authority?

37. We do agree that Treasury-approved guidance would constitute implicit recognition/approval/acceptance by a national competent authority, albeit not of any particular product or process. However we would urge the government to proactively and explicitly include such information within the regulations rather than relying on other parties to draft guidance at a later date.

Question 46. Is this change likely to encourage firms to make more use of electronic means of identification? If so, is this likely to lead to savings for financial institutions when compared to traditional customer onboarding? Are there any additional measures government could introduce to further encourage the use of electronic means of identification?

38. If sufficient clarity is provided within the regulations then we expect that this would encourage firms to make more use of electronic identification processes. We would expect this to lead to cost savings in the medium term, although probably not in the short term. It is likely that the cost savings would mainly benefit banks, rather than accountancy firms, as many accountancy clients are companies rather than individuals.

Question 47. To what extend would removing 'reasonable measures' from regulation 28(3)(b) and (4)(c) be a substantial change? If so, would it create any risks or have significant unintended consequences?

39. The underlying principle of client due diligence is that it is risk based, and the term 'reasonable measures' is an articulation of the risk based approach. If the term 'reasonable measures' is removed from regulation 28(3)(b) and (4)(c) then the risk based approach would be removed from these aspects of client due diligence, which would be a significant change to the CDD requirements and would necessitate comprehensive guidance for obliged entities.

40. However we would welcome clarification that the identity of the directors of a company should be verified as well as their names, on a risk based approach.

41. If 'the law to which the body corporate is subject' means any legal regime to which the company is subject, then this may not always be identifiable, making compliance with these regulations very difficult, without the reasonable measures carve out

Question 48. Do you have any views on extending CDD requirements to verify the identity of senior managing officials when the customer is a body corporate and the beneficial owner cannot be identified? What would be the impact of this additional requirement?

42. Where there is no means for the beneficial owner to be identified, it may be of some use to at least verify the identity of the senior managing official. The CDD that would be required for a body corporate may in some cases extend to the senior managing official in any event, so this may not always lead to additional work. We would consider it best practice under current rules to verify the identity of the senior managing official as part of the CDD process.

43. Where there is no beneficial owner, it may be acceptable to verify the identity of the senior managing official. However if the beneficial owner cannot be identified because this information has been obscured, an obliged entity should be very wary about proceeding to act for the entity.

Question 49. Do related ML/TF risks justify introducing an explicit CDD requirement for relevant persons to understand the ownership and control structure of customers? To what extent do you already gather this information as part of CDD obligations?

44. The extent to which the ownership and control structure is assessed should be derived from the risk assessment of the customer, and should therefore in many cases already be part of the CDD process, because this would usually be necessary in order to understand who the ultimate beneficial owner of the customer is. That said, there would be no harm in making this requirement explicit.

Question 50. Do respondents agree we should clarify that the requirements of regulation 31 extend to when the additional CDD measures in regulation 29 and the EDD measures in regulations 33-35 cannot be applied?

45. We would welcome the proposed clarification that regulation 31 would extend to these circumstances.

Question 51. How do respondents believe extending regulation 31 to include when EDD measures cannot be applied could be reflected in the regulations?

46. We would suggest that Reg 31(1) is amended to refer to only Reg 28 and 29. A new regulation could then be introduced at the end of Chapter 2, that repeats Reg 31 but amends it to link back to the firm's own policies and procedures in respect of EDD required under Reg 19 (2)(c).

Question 52. Do respondents agree the requirements of regulation 31 should not be extended to the EDD measures which already have their own 'in-built' follow up actions?

47. We agree that this is not necessary, given the existing follow up actions for PEPs.

Obliged entities: beneficial ownership requirements

Question 53. Do respondents agree with the envisaged approach for obliged entities checking registers, as set out in this chapter (for companies) and chapter 9 (for trusts)?

48. We agree that the onus should be on the trust or company to provide proof of registration to the obliged entity, upon the request of the obliged entity. It may be however that some transitional arrangements are required for trusts, as it may take some time for the registrations to be processed, and obliged entities will need to continue providing services to trusts without breaching money laundering regulations.

Question 54. Do you have any views on the government's interpretation of the scope of 'legal duty'?

49. We support the government's interpretation of the scope of legal duty in this context.

Question 55. Do you have any comments regarding the envisaged approach on requiring ongoing CDD?

50. We agree it is appropriate for the obliged entity to conduct ongoing CDD when they have a legal duty in a calendar year to review the customer's beneficial ownership information.

Enhanced due diligence

Question 56. Are there any key issues that the government should consider when defining what constitutes a business relationship or transaction involving a high-risk third country?

51. In our view the key aspects to include in the definition are where there are parties to a transaction, or assets/financial instruments that originate from, are located in, or are passing through, that territory.

52. The government should bear in mind that using the term 'involving' may change the EDD requirement mid-way through an engagement, for example, if the obliged entity identifies that a client has a supplier in a high-risk jurisdiction, and EDD then becomes necessary.

Question 57. Are there any other views that the government should consider when transposing these Enhanced Due Diligence measures to ensure that they are proportionate and effective in combatting money laundering and terrorist financing?

53. The commercial rationale for involving these territories in the business activity or transaction should be considered, so that the measures applied are proportional.

Question 58. Do related ML/TF risks justify introducing 'beneficiary of a life insurance policy' as a relevant risk factor in regulation 33(6)? To what extent is greater clarity on relevant risk factors for applying EDD beneficial?

54. No comments.

Politically exposed persons: prominent public functions

Question 59. Do you agree that the UK functions identified in the FCA's existing guidance on PEPs, and restated above, are the UK functions that should be treated as prominent public functions?

55. We agree that the list of UK functions identified by the FCA is appropriate.

Question 60. Do you agree with the government's envisaged approach to requesting UK headquartered intergovernmental organisations to issue and keep up to date a list of prominent public functions within their organisation?

56. On the basis that this applies only to intergovernmental organisations as detailed in paragraph 7.11, we agree with the envisaged approach. The government could consider using the FATF definition:

    'International organisations are entities established by formal political agreements between their Member States that have the status of international treaties; their existence is recognised by law in their member countries; and they are not treated as resident institutional units of the countries in which they are located. Examples of international organisations include the United Nations and affiliated international organisations such as the International Maritime Organisation; regional international organisations such as the Council of Europe, institutions of the European Union, the Organization for Security and Co-operation in Europe and the Organization of American States; military international organisations such as the North Atlantic Treaty Organization, and economic organisations such as the World Trade Organisation or the Association of Southeast Asian Nations, etc.'

Mechanisms to report discrepancies in beneficial ownership information

Question 61. Do you have any views on the proposal to require obliged entities to directly inform Companies House of any discrepancies between the beneficial ownership information they hold, and information held on the public register at Companies House?

57. To increase the likely accuracy and reliability of the information held on the beneficial ownership registers, Companies House should be required to verify the information it receives on initial registration of an entity onto the register, as well as on any subsequent updates to that information. We note the proposals in the consultation on Corporate

Transparency and Register Reform, and we strongly support those related to the verification of the identity of limited company directors by Companies House.

58. Many companies will not have an accountant or other obliged entity acting for them so there would be no verification of their beneficial ownership data. The role of obliged entities should be to act as a double check of information that has already been subject to a due diligence process by Companies House, rather than as the main party undertaking due diligence.

59. The government should also clarify whether the proposal means that obliged entities would have an obligation to check the register, because each obliged entity will currently decide how it verifies beneficial ownership information, which may not involve looking at the PSC register, on the basis that obliged entities cannot rely on the data. Also, those individuals within obliged entities that carry out the CDD may not be the individuals who review the register (a back office team may do the CDD; the person looking at the register could be a frontline client service staff member, who may not know the CDD says something different - at least until the next periodic review). If the proposed requirement to report discrepancies is actually an obligation to check the PSC register, we would question whether the additional compliance burden is justified.

60. The responsibility for accuracy of the PSC register should remain with the directors of the company and sanctions should reflect this fact. In particular, sanctions against obliged entities should only take effect if they knowingly and wittingly fail to report inaccuracies that lead to money laundering/economic crime etc. Simply not notifying an inaccuracy owing to a genuine error, or not noticing that inaccuracy, should not be severely penalised.

Question 62. Do you have any views on the proposal to require competent authorities to directly inform Companies House of any discrepancies between the beneficial ownership information they hold, and information held on the public register at Companies House?

61. We consider that competent authorities (such as relevant law enforcement agencies) should be required to directly inform Companies House of discrepancies they identify, subject to restrictions from ongoing investigations. The responsibility to attain an accurate register should not lie solely with obliged entities.

Question 63. How should discrepancies in beneficial ownership information be handled and resolved, and would a public warning on the register be appropriate? Could this create tipping off issues?

62. In the event that a discrepancy is reported to Companies House, they should require documentary evidence to be provided by the registered company to prove what the correct data is. Once this has been established then the register should be updated accordingly. Whether it is appropriate to place a public warning on the register should be considered on a case by case basis depending on the sensitivity of the situation. Companies House should also consider the ability for reports of discrepancies to be made anonymously, as long as the reporter has evidence to support their claim of a discrepancy.

Trust registration service

Question 64. Do respondents have views on the UK's proposed approach to the definition of express trusts? If so, please explain your view, with reference to specific trust type. Please illustrate your answer with evidence, named examples and propose your preferred alternative approach if relevant.

63. We recommend that the definition of express trust should follow the fiscal definition of settled property at IHTA 1984 s43 in order to reduce the scope of the TRS registration requirements.

64. We are concerned that the proposed definition of express trusts is too broad and will catch a number of trusts that are not appropriate for registration. In particular, many types of joint

ownership and nominee arrangement or bare trust may be caught, which is unlikely to have been the EU's intention. Trusts that could potentially be caught are those created when land is jointly owned, or a parent holding a bank account on behalf of a minor child. Our concern, which is widely shared, is that the existence of standard documentation, such as a Land Registry form (England and Wales), a share transfer form or bank mandate may have the effect of converting a joint ownership arrangement into an express trust.

65. Frequently, clubs such as golf clubs are owned by their members and the property may be registered in the names of committee members; the proposed definition of an express trust would seem to include such arrangements.

66. We strongly recommend that the government seeks advice from experienced chancery counsel on what constitutes an express trust, prior to drafting any regulations. As the legal systems of Scotland and Northern Ireland are different to that of England and Wales, separate advice will need to be obtained for those parts of the United Kingdom.

67. We recommend that the government seek evidence of what is regarded as an express trust in other EU countries. We note that other jurisdictions tend to use contractual arrangements for situations where a trust would be used in the UK. We would urge the government to seek to address this imbalance by limiting the situations in which a UK trust should be made to register on TRS and in particular adopt a definition that refers to entities rather than arrangements.

68. If the definition of express trust is not narrowed, the TRS could be overwhelmed with registrations, which would defeat the objective of the TRS to capture beneficial ownership information of trust entities. There is also the issue that the general public are unlikely to realise in many cases where an express trust exists so non-compliance with TRS registration could be high.

69. We would also expect clear and authoritative guidance to be published on the registration process either before or at the same time as the register becomes live.

Question 65. Is the UK's proposed approach proportionate across the constituent parts of the UK? If not, please explain your view, with reference to specific trust types and their function in particular countries.

70. We note that the consultation document assumes that trusts are treated in the same way throughout the UK, which is not the case for Scotland. Separate consultation should be undertaken with Scottish trust experts.

Question 66. Do you have any comments on the government's proposed view that any obligation to register an acquisition of UK land or property should mirror existing registration criteria set by each of the UK's constituent parts?

71. We would expect the acquisition of UK land or property by a non-EU trust would be very rare as such purchases are more likely to take place via a corporate entity.

72. In the interests of consistency we welcome the proposed mirroring of existing registration criteria. In particular, any new requirements under the 5MLD regime should be harmonised with existing requirements when registering on the UK Land Registry, and also with the new proposals to introduce a register of beneficial ownership of UK land.

Question 67. Do you have views on the government's suggested definition of what constitutes a business relationship between a non-EU trust and a UK obliged entity?

73. We are concerned that the current definition of business relationship is too broad. There would also be difficulties in assessing whether a business relationship is going to last for longer than 12 months. For example, in the situation where an obliged entity has done work for a trust in the past and the trustees approach the entity to perform additional work, would that constitute a new business relationship?

74. In our view, there should be a greater threshold of connecting factors with the UK, in addition to offshore trustees engaging a UK advisor, before registration on the TRS is required. There should be sufficient substance from the business relationship for a UK nexus to be created, for example the trustees engaging in business in the UK.

75. We are concerned that if merely appointing a UK advisor is sufficient to generate a registration requirement for an offshore trust on the TRS, there could be a damaging effect on UK business. It would make the use of UK advisers unattractive compared to those in other jurisdictions where no such registration obligation would arise. We would query why obtaining professional advice in the UK should trigger TRS registration requirements; this seems to be a disproportionate burden. The UK advisers would still be required to undertake KYC and to report any suspicions of ML/TF in relation to these clients, so adding the requirement for the trust to register on TRS seems a superfluous additional requirement.

76. As a wider point, the government should consider the implications in other contexts for a business relationship being defined as one with a duration of greater than 12 months.

Question 68. Do you have any comments on the government's proposed view of an 'element of duration' within the definition of 'business relationship'?

77. Please see our comments in response to question 67 above.

Question 69. Is there any other information that you consider the government should collect above the minimum required by 5MLD? If so, please detail that information and give your rationale.

78. We do not believe that any additional information should be collected.

Question 70. What is the impact of this requirement for trusts newly required to register? Will there be additional costs, for example paying agents to assist in the registration process, or will trustees experience other types of burdens? If so, please describe what these are and how the burden might affect you.

79. There will certainly be additional costs for trusts who are newly required to register. This is likely to include the cost of advice from a professional on what their obligations are, and potentially to also submit the registration on the trust's behalf. The administrative cost for some trusts could also be a burden, depending on the complexity of the group of beneficiaries for example, which would mean corresponding with a whole range of individuals. This would then raise the added issue of where potential beneficiaries in a class are unaware that they are a beneficiary of the trust.

80. Many of the trusts required to register under 5MLD will not have any funds and so will be unable to pay for the advice and services required.

81. A trust is only required to register once, so consideration should be given as to whether entities, for example registered pensions funds and registered charities, have already given all the required information elsewhere and so do not have to repeat the information on the TRS. If more information would be required under the 5MLD/TRS could the option be given to add that extra information onto the appropriate register to avoid the need of a completely new entry on the TRS.

82. We were very concerned by the 'gold plating' of the 4MLD requirements and are very pleased to note 'the government is not currently minded to continue to collect the full range of information currently required within the existing version of TRS'.

83. A wider issue is the unwarranted removal of privacy for trusts and the resulting disclosure of potentially sensitive arrangements for family members. While law enforcement access to private/family trust details would be proportionate where there are suspicions of ML/TF activity, in all other circumstances the right to privacy of these individuals should take precedence.

Question 71. What are the implications of requiring registration of additional information to confirm the legal identity of individuals, such as National Insurance or passport numbers?

84. Should additional information such a passport number or National Insurance number be required, the administrative burden outlined above would be even greater, especially for trusts with complex fact patterns. In some cases it may be very difficult to collect this specific data from beneficiaries. Given that many trusts have been in existence for some time, it will not be uncommon for the settlor to be deceased, so their details may no longer be available. There are also many individuals in the UK who were never issued a National Insurance number (as they were not in employment) or do not hold a passport.

85. In our view it would be entirely disproportionate to require these additional details. In particular we favour a system that only requires such information to be obtained and held when a beneficiary is in actual receipt of a distribution or deemed benefit.

86. Should Employee Benefit Trusts and pension schemes be within the scope of the register, there could be very large classes of beneficiaries, for example where the employing company has more than 100,000 current and past employees.

Question 72. Does the proposed deadline for existing unregistered trusts of 31 March 2021 cause any unintended consequences for trustees or their agents? If so, please describe these, and suggest an alternative approach and reasons for it.

87. The proposed deadline for existing unregistered trusts would be acceptable, providing that sufficient notice is given to existing trustees through a full publicity campaign, and that the IT system of the register itself operates well enough that trustees can use it as required. We note that there have been significant problems with the operation of the existing TRS system.

Question 73. Does the proposed 30 day deadline for trusts created on or after 1 April 2020 cause any unintended consequences for trustees or their agents? If so, please describe these, and suggest an alternative approach and reasons for it.

88. We are concerned that the proposed 30 day deadline is far too short. Many trusts are created between family members with no or minimal input from a professional adviser. Further, the trust may not have anyone regularly involved in the trust administration; it may be on a more ad hoc basis. Depending on the exact scope of which trust arrangements are caught, there could be situations where some parties to the trust are unaware that the trust even exists, so there would be no awareness of their registration obligations. We consider that there should be some transitional arrangements, at least for the first year, to give trustees sufficient opportunity to identify and understand the registration requirements. Any penalty regime should also be light touch for the initial years.

89. We understand there is an error in the consultation as it appears there are no registration requirements for trusts created between 11 March and 31 March 2020.

Question 74. Given the link with tax-based penalties is broken, do you agree a bespoke penalty regime is more appropriate? Do you have views on what a replacement penalty regime should look like?

90. We agree that a bespoke penalty regime would be more appropriate. However, we would urge the government to be proportionate with any penalty regime. The omission from registration would in the vast majority of cases be due to an administrative oversight by law abiding individuals, and should not warrant harsh penalties.

91. There must also be a consistent penalty regime between those trusts that are tax paying and those that are not. Given that the current penalty regime is tax based, an overall re-think of the trust penalty regime will be required. We suggest the penalty regime should be along the same lines as the one for late filings at Companies House.

Question 75. Do you have any views on the best way for trustees to share the information with obliged entities? If you consider there are alternative options, please state what these are and the reasoning behind it.

92. The simplest method would be for the trustees to provide proof of registration to the obliged entity directly, if trustees are given access to the register so that they can ensure their entry is complete and correct. However, there should be a facility for obliged entities to raise queries with the registrar on the information the trustees had provided. If the obliged entity was unable to obtain proof of registration from the trustees, there should be a fall back mechanism for them to obtain proof from the registrar. It will be important however for the registrar to have means to verify that the obliged entity is entitled to that data, and that the registrar can process these verification requests promptly to avoid costly delays to businesses.

Question 76. Do you have any comments on the proposed definition of legitimate interest? Are there any further tests that should be applied to determine whether information can be shared?

93. We support the government's proposed definition of legitimate interest as detailed in paragraph 9.45 (we assume that all three legs have to be satisfied not just one) and further support that personal data on vulnerable individuals and minors will receive special consideration, but the definition needs to go further. More clarity is needed for example as to who has an active involvement in money laundering, would a journalist have an active involvement? We agree that any parties applying for access to the register should have to provide evidence to support their claim. It should be clarified however who will determine if the enquirer has evidence underpinning their belief, and whether the evidence is sufficient to warrant disclosure of information. The rules should not allow people to make 'fishing expeditions' on the TRS data.

94. We seek clarification on which organisation or party would make the ultimate decision in the event that an applicant appeals the finding of no legitimate interest to access the register data.

Question 77. Do the definitions of 'ownership or control' and 'corporate and other legal entity' cover all circumstances in which a trust can indirectly own assets through some kind of entity? If not, please set out the additional circumstances which you believe should be included, with rationale and evidence.

95. We believe that these definitions would cover most circumstances in which a trust would indirectly own assets, but there are highly likely to be some other bespoke arrangements.

Question 78. Do you have any views on possible definitions of 'other legal entity'? Should this be defined in legislation?

96. To provide clarity to trustees, 'other legal entity' should be defined within the legislation. We note that trustees may need to make a self-declaration of whether their holdings qualify as 'controlling interests in any corporate or legal entity' so it will be imperative that they can assess whether they meet the definition.

Question 79. Does the proposed use of the PSC test for 'corporate and other legal entity', which are designed for corporate entities, present any difficulties when applied to non-corporate entities?

97. We consider the proposed use of the PSC test may not be relevant to the operation of many non-corporate entities, especially those which are not in business or do not have a profit motive. The test would need to be made wider to include those who make significant decisions about the entity's transactions or future structure/existence.

Question 80. Do you see any risks or opportunities in the proposal that each trust makes a self-declaration of its status? If you prefer an alternative way of identifying such trusts, please say what this is and why.

98. While there may be risks of some trusts making inaccurate self-declarations, we would question the proportionality of requiring all trustees with non-EEA holdings to undertake a formal process to verify the details of their holdings, and the resulting threats to privacy, and imposition of additional costs.

Question 81. The government is interested in your views on the proposal for sharing data. If you think there is a best way to share data, please state what this is and how it would work in practice.

99. We are concerned that requests under these provisions could be used to circumvent the legitimate interest provisions, and could pose a risk to privacy and personal security of those involved in the trust. There should not be a presupposition that any trust controlling a non EEA company/other legal entity has criminal or unethical activity. It would appear unjust that more information would be available about the control of non-EEA corporates and other legal entities than would be available for EEA entities.

100. We consider that the only practical way of protecting the rights of the controlling persons of the trusts involved would be to minimise the data that is collected from the trustees, and to require those applying for access to the data to provide their personal details, and pay a reasonable fee for accessing the information.

101. As there is no need to demonstrate a legitimate interest in the case of a trust holding a controlling interest in non-EEA company/other legal entity it must be incumbent on the enquirer to provide the name of the trust and the name of the company in order to obtain information to avoid this being used as a backdoor for fishing expeditions.

National register of bank account ownership

Question 82. Do you agree with, or have any comments upon, the envisaged minimum scope of application of the national register of bank account ownership?

102. We note that the policy rationale for a national register of bank accounts is to facilitate financial investigations, including possible terrorist financing; however we would question whether a national register of this scope is proportionate to the risk that it is seeking to address.

103. While we agree that such a register if implemented would need to include details of the person's name, address and date of birth; we would question whether collecting passport number or national insurance number is necessary and even possible in some cases where individuals do not have National Insurance numbers or a passport.

104. We would agree that only bank/payment accounts which are open on the date the Directive is transposed should be registered.

105. Access to NI and passport numbers should be severely restricted to minimise the risk of fraud. We would urge the government to not underestimate the potential damage of hackers or other criminals accessing such a huge repository of sensitive personal and financial data.

Question 83. Can you provide any evidence of the benefits to law enforcement authorities, or of the additional costs to firms, that would follow from credit cards and/or prepaid cards issued by e-money firms; and/or accounts issued by credit unions and building societies that are not identifiable by IBAN, being in scope of the national register of bank account ownership?

106. The financial services businesses affected would be best placed to comment on this.

Question 84. Do you agree with, or have any comments upon, the envisaged scope of information to be included on the national register of bank account ownership, across different categories of account/product?

107. Please see our response to question 82 above.

Question 85. Do you agree with, or have any comments upon, the envisaged approach to access to information included on the national register of bank account ownership?

108. We support the envisaged approach to accessing the information on the register, as detailed in paragraph 10.10, which we agree restricts access to this sensitive date in a proportionate way.

Question 86. Do you have any additional comments on the envisaged approach to establishing the national register of bank account ownership, including particularly on the likely costs of submitting information to the register, or of its benefits to law enforcement authorities?

109. No further comments.

Question 87. Do you agree with, or have any comments upon, the envisaged frequency with which firms will be required to update information contained on the register? Do you have any comments on the advantages/disadvantages of the register being established via a 'submission' mechanism, rather than as a 'retrieval' mechanism?

110. We consider that the 'submission' mechanism would be a more appropriate method than a 'retrieval' one, and offers greater protection to personal data.

Requirement to publish an annual report

Question 88. Do you think it would still be useful for the Treasury to continue to publish its annual overarching report of the supervisory regime as required by regulation 51 (3)?

111. We support the Treasury's proposal to continue publishing their annual report on the supervisory regime. We would encourage the Treasury to comment on the threats and vulnerabilities in the supervisory regime, addressing matters identified through the FATF Mutual Evaluation, the Economic Crime Plan and any findings identified by OPBAS. We welcome transparency and regular communication on the government's priorities for additional improvements to the supervisory regime.

Other changes required by 5MLD

Question 89. Are you content that the existing powers for FIUs and competent authorities to access information on owners of real estate satisfies the requirements in Article 32b of 4MLD as amended?

112. We consider that these requirements are already met through current powers of the FIU and competent authorities.

Question 90. Are you content that the government's existing approach to protecting whistle-blowers satisfies the requirements in Article 38 of 4MLD as amended?

113. We agree that the government's existing approach meets these obligations.

Pooled client accounts

Question 91. Are there differences in the ML/TF risks posed by pooled client accounts held by different types of businesses?

114. In our view there are vast differences in the ML/TF risks posed by pooled accounts operated by lawyers, who may handle very large sums of money for transactions; and those operated by accountants which tend to only deal with small amounts of client money that are not linked

to large commercial transactions. For example, lawyers often have funds for property purchases and sales pass through their accounts which are six or seven figures, whereas accountants typically receive client's tax refunds from HMRC which are often only three or four figures and originate from a government department.

Question 92. What are the practical difficulties banks and their customers face in implementing the current framework for pooled client accounts? Which obligations pose the most difficulties?

115. For most pooled client accounts held by accountants, simplified due diligence would be appropriate for the bank, and therefore the obligations are generally not too arduous.

Question 93. If the framework for pooled client accounts was extended to non-MLR regulated businesses, what CDD obligations should be undertaken by the bank?

116. The banks would be best placed to comment on the CDD obligations.

Additional technical amendments to the MLRs

Question 94. Do you agree with our proposed changes to enforcement powers under regulations 25 & 60?

117. We have no objections to the proposed changes for FCA and HMRC to publish written notices.

Question 95. Do you agree with our proposed amendment to the definition of 'officer'?

118. We have no objections to the proposed changes.

Question 96. Do you agree with our proposed changes to information-sharing powers of regulations 51, 52?

119. The OPBAS Regulations allow OPBAS to share information with Treasury and the supervisory authorities. The MLRs should only be amended to create information channels where they don't already exist through existing legislation.

Question 97. Do you have any views on this proposed new requirement to cooperate?

120. The OPBAS Regulations allow OPBAS to require information from the supervisory authorities. The MLRs should only be amended to create information channels where they don't already exist through existing legislation.

Question 98. Do you agree with our proposed changes to regulations 56?

121. We have no objections to the proposed changes.

Question 99. Does your sector have networks of principals, agents and sub-agents?

122. ICAEW does not supervise any firms where there are principal/agents. ICAEW only supervises firms that meet the definition of an ICAEW member firm – where the ownership and control rests with ICAEW members. It is not possible to 'sub-contract' that ownership/control out to an agent or sub-agent. There are cases where firms will use sub-contractors to assist in delivering accountancy services to clients but the work of those sub-contractors is supervised via the main firm.

Question 100. Do complex network structures result in those who deliver the business to customers not being subject to the training requirements under the MLRs?

123. No, as we set out in Q99, there are cases where firms will use sub-contractors to assist in delivering accountancy services to clients but the work of those sub-contractors is supervised via the main firm and ICAEW will ensure that the sub-contractors are included in training on MLR17.

Question 101. Do complex network structures result in the principal only satisfying himself or herself about the fitness and propriety of the owners, officers and managers of his or her directly contracted agents, and not extending this to sub-agents delivering the business?

124. This is not applicable to ICAEW firms, as already set out.

Question 102. If you operate a network of agents, do you already provide the relevant training to employees? Do you ensure the agents who deliver the service of your regulated business are 'fit and proper'?

125. This is not applicable to ICAEW firms, as already set out.

Question 103. What would be the costs and benefits to your business of the regulations clarifying intention to extend requirements to layers of agents and subagents?

126. This is not applicable to ICAEW firms, as already set out.

Question 104. Do the proposed requirements sufficiently mitigate the risk of criminals acting in regulated roles?

127. We welcome greater clarity over the exact evidence required as part of an application to act as a beneficial owner, officer or manager (BOOM) under Regulation 26. Currently, the MLRs give the supervisory authority the power to determine their own application process yet HM Treasury has made it clear, through private correspondence that self-declaration is insufficient and we must review original criminal record check certificates for any BOOMs in the firms we supervise. We suggest HM Treasury is more explicit in setting out the requirement to check criminal record certificates, or other searches on criminal records data (such as via the ACRO Criminal Records Office, DBS or equivalent).

128. However, having reviewed a large number of the DBS certificates for our existing BOOMs, we have not yet found any evidence of any BOOMs holding relevant criminal convictions. We therefore believe there is little risk in our supervised population.

Question 105. Should regulation 19(4)(c) be amended to explicitly require financial institutions to undertake risk assessments prior to the launch or use of new products, new business practices and delivery mechanisms? Would this change impose any additional burdens?

129. We believe the financial sector is better placed to respond to these comments

Question 106. Should regulation 20(1)(b) be amended to specifically require relevant persons to have policies relating to the provision of customer, account and transaction information from branches and subsidiaries of financial groups? What additional benefits or costs would this entail?

130. It is not clear whether the proposed change will impact only financial groups or all relevant persons. FATF Recommendation 18 applies to financial institutions but also applies to DNFPBs through Recommendation 23.

131. The financial sector can better comment on whether it is appropriate to amend Regulation 20 to require policies in these areas. However, we don't believe this change should apply to the accountancy sector – who don't hold account and transaction information on their clients.