ICAEW
REPRESENTATION 04/20

FIFTH MONEY LAUNDERING DIRECTIVE AND TRUST REGISTRATION SERVICE

Issued 21 February 2020

ICAEW welcomes the opportunity to comment on the Fifth Money Laundering Directive and Trust Registration Service Technical consultation document published by HM Revenue & Customs on 24 January 2020 a copy of which is available from this link.

We welcome the efforts by government to narrow the scope of express trusts that would have a registration requirement under the extended TRS. However, there are a number of additional trusts that warrant exclusion from registration, including trusts set up under wills, insurance policies that pay out otherwise than on death or critical illness, and small charities.

The money laundering and terrorist financing risks of different kinds of bare trusts needs to be considered further so that a disproportionate administrative burden is not imposed on low risk family arrangements. Additional clarity is also needed on exactly which types of employment related trusts and trust used for joint holding of property will be exempt from registration.

We are concerned about the proposed registration requirement for all trusts who enter into a business relationship with UK obliged entities. The broader scope of registration for non-UK trusts not only seriously damages the competitiveness of the UK accountancy profession and others, it could also have a detrimental effect on correct tax compliance. Non-UK trustees may be deterred from appointing UK advisers to provide UK tax services, for fear of having beneficial ownership information publicly disclosed.

We are concerned about the loss of privacy for trust beneficiaries that will result from disclosure of data to third parties under the legitimate interest provisions. The appropriate organisations to be undertaking investigations into suspected illicit activity are the relevant law enforcement agencies, not journalists or campaigners.

While we welcome the intent to protect vulnerable beneficiaries and those at risk of harm from having their data disclosed, we have serious concerns with how such protection will be afforded in practice, and how government will be aware on a real time basis if individuals are at risk of kidnap, harassment and fraud.

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This response reflects consultation with the Business Law Committee and the Tax Faculty.

The Business Law Committee includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

Internationally recognised as a source of expertise, the Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business.

KEY POINTS

SCOPE OF REGISTRATION

1. We welcome the efforts by government to narrow the scope of express trusts that would have a registration requirement under the extended TRS. However, there are a number of additional trusts that warrant exclusion from registration, including trusts set up under wills, insurance policies that pay out otherwise than on death or critical illness, and small charities.
2. The money laundering and terrorist financing ('ML/TF') risks of different kinds of bare trusts needs to be considered further so that a disproportionate administrative burden is not imposed on low risk family arrangements. Additional clarity is also needed on exactly which types of employment related trusts and trust used for joint holding of property will be exempt from registration.
3. We are concerned about the proposed registration requirement for all trusts who enter into a business relationship with UK obliged entities. The broader scope of registrations for non-UK trusts not only seriously damages the competitiveness of the UK accountancy profession and others, it could also have a detrimental effect on correct tax compliance. Non-UK trustees may be deterred from appointing UK advisers to provide UK tax services, for fear of having beneficial ownership information publicly disclosed.

PRIVACY AND SAFETY CONCERNS

4. We are concerned about the loss of privacy for trust beneficiaries that will result from disclosure of data to third parties under the legitimate interest provisions. The appropriate organisations to be undertaking investigations into suspected illicit activity are the relevant law enforcement agencies, not journalists or campaigners.
5. While we welcome the intent to protect vulnerable beneficiaries and those at risk of harm from having their data disclosed, we have serious concerns with how such protection will be afforded in practice, and how government will be aware on a real time basis if individuals are at risk of kidnap, harassment and fraud.

ANSWERS TO SPECIFIC QUESTIONS

Question 1

Are there any other express trusts that should be out of scope? Please provide examples and evidence of why they meet the criteria of being low risk for money laundering and terrorist financing purposes or supervised elsewhere.

Express trusts

6. We welcome the government's proposal to exempt a number of types of express trusts from the TRS registration requirement. We agree that the types of trust proposed for exemption are likely to pose a low risk of ML/TF activity and their exclusion is proportionate to that risk.
7. We note that the intention of the government is to not bring into scope trusts where their purposes and structure mean payments to beneficiaries are predetermined and highly controlled, or they are already supervised by HMRC or other regulatory bodies. We support these principles and in particular welcome the exclusion of trusts for joint ownership of a home, and joint ownership of bank accounts and shareholdings.
8. We welcome the proposal to exclude from registration, trusts to hold life insurance policies, income protection policies or those for the payment of retirement death benefits. However, we note that these trusts are only exempt from registration where payment is not made until the death or terminal illness of the insured. In many cases, payments from protection policies are made in situations other than death or terminal illness, such as critical illness, and it would be disproportionate to require registration of these kinds of policies. The exclusion of pre-paid funeral plans structured using trust arrangements should also be considered.

9. It would be helpful if the definition of trusts under draft regulation 45ZA (2)(d) were widened to include trusts that hold one or more policies, or insure more than one individual, and to allow a pay-out on the cancellation of the policy, of an amount not exceeding the premiums paid on that policy.
10. In light of the regulatory regime that exists for charities, and their low inherent risk of money laundering or terrorist financing activity, we agree that they should not be required to register. However, particularly small charities may neither be registered with one of the UK charity regulators, nor exempt or excepted from registration. In line with the draft regulations 45ZA these small charities would have a TRS registration obligation which would be inconsistent and unnecessary.
11. Similarly, registered pension schemes are subject to detailed regulation and oversight and are likely to be low risk for ML/TF activity. We welcome their exclusion from registration on this basis.
12. Although the consultation document implies that no decision has yet been made about whether bare trusts should be within scope of registration, the draft regulation 45ZA (2) does not include bare trusts as those which are excluded from scope. Therefore, we understand that bare trusts will for the time being, be within scope of registration on TRS. We would urge government to consider the issue of bare trusts further before the extended TRS requirements come into force, to prevent the registration obligation falling upon those bare trust arrangements where the risk of ML/TF activity is low. There are a number of situations in which bare trusts are used where the risks are low, and there is little rationale for registration. For example, bare trusts for minors or elderly relatives in the UK. We propose that an exemption should be provided for these and other low risk bare trusts.
13. If all bare trusts remain in scope of registration, it could significantly increase the numbers of trusts required to register, and non-compliance for registration would likely be high, as bare trustees may not be aware of TRS. The trustees may not even recognise that they are a trustee, especially where the bare trust has arisen in a straight forward family situation.
14. The EU's concept of an express trusts appears to focus on entities rather than bare trusts and nominee arrangements. We would expect that most EU countries would not recognise nominee arrangements as express trusts.
15. We note that there is no proposed exclusion for trusts created by will, or pilot trusts. We would query the proportionality of registration for will trusts, or pilot trusts with very low asset values such as pilot trusts set up many years ago with £5 to receive the Nil Rate Band legacy under a will.

Employment related trusts

16. We note that trusts imposed or required by an Act, and in particular approved share option and profit sharing schemes will be excluded from scope of registration. However these terms may not provide sufficient clarity on the exact types of employment related trusts that would be excluded. As establishing an employee share plan is a voluntary commercial decision on the part of an employer, it may be that any trust established in conjunction with that plan cannot meaningfully be said to be imposed or required by legislation.
17. We therefore recommend that the amended regulations exclude from the definition of 'type A trusts':
    - Trusts of a profit sharing scheme approved under ICTA 1988, Schedule 9;
    - Qualifying employee share ownership trusts within the meaning of FA 1989, Schedule 5;
    - Trusts that meet the requirements of ITEPA 2003, Schedule 2, Part 9;
    - Trusts that meet the requirements of TCGA 1992, section 236J; and
    - Other trusts to which IHTA 1984, section 86 applies.
18. Excluding employee share plan trusts from the definition of 'type A trusts' will – assuming that no other liabilities to relevant UK taxes arise – only prevent them being brought within the scope of the TRS if the relevant shares are listed on AIM (and so exempt from Stamp Duty Reserve Tax 'SDRT') or issued by a company registered outside the UK.

19. Given the policy aim in limiting the scope of the definition of 'type A trusts' is to prevent trusts being within the TRS where that would not be proportionate to the relevant ML/TF risks, we would encourage the government to consider removing SDRT from the list of relevant taxes in regulation 45(14) given that, other than in relation to off-market transactions in dematerialised shares, SDRT is accounted for by the securities dealer, and not self-assessed by the trust.
20. We suggest that draft regulation 45ZA(2)(d) be amended to make clear that it also applies to income protection policies, and that this exclusion also extends to healthcare trusts (see EIM21772).

Business relationships

21. We are concerned that the scope of non-UK resident express trusts who will be obliged to register has been widened compared to the criteria in the original consultation. Paragraph 9.19 of the consultation on transposition of 5MLD says that registration would only "apply to non-EU resident express trusts that are deemed to be administered in the UK by virtue of having one or more UK trustee." However the draft regulation 45ZA(b) includes all non-UK trusts who enter into a business relationship in the UK with a relevant person, or acquire an interest in land in the UK.
22. In addition to the broader scope of non-UK trusts in scope for registration, there will 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?
23. 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. 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 significantly 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 client due diligence 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. Measures to further improve the client due diligence work of obliged entities would be a more effective way to prevent inadvertent involvement of these firms in illicit activity.
24. The broader scope of registration for non-UK trusts not only damages the competitiveness of the UK accountancy profession and others, it could also have a detrimental effect on correct tax compliance. Non-UK trustees may be deterred from appointing UK advisers to provide UK tax services, for fear of having beneficial ownership information publicly disclosed.
25. All EU countries who have committed to transpose 5MLD into national legislation should in time have an equivalent TRS system for express trusts. We would agree that duplicate registration in more than one EU country should be avoided. It would be helpful for the government to provide a transitional exemption for trusts that would have a registration obligation in another EU state, to take into account delays these other jurisdictions may have in establishing an equivalent TRS. We are aware that many EU jurisdictions have as yet failed to implement the requirements of 4MLD so it may be some time before 5MLD is transposed in full across Europe.

Question 2

Do the proposed definitions and descriptions give enough clarity on those trusts not required to register? What additional areas would you expect to see covered in guidance?

26. We note that the draft regulations do not cross-refer to an existing definition of a trust. It may be useful if the initial definition of an express trust is in line with the English law definition of settled property. In the absence of such cross-reference to an existing definition, the guidance published by government must clearly explain which trusts do and do not have to register.

27. In particular, additional clarity is needed on the registration position in a number of areas:

- Precisely which trusts for joint ownership of property will be exempt;
- Bare trusts that will fall within scope of registration;
- Critical illness policies, life endowment policies, or other similar policies that pay out during lifetime;
- Small charities not registered with one of the charity regulators or otherwise exempt or excepted.

28. We note that government intend to provide guidance on how to assess if an element of duration exists in a business relationship, and we welcome this proposed clarity.

29. In addition to guidance there are a number of practical aspects that need to be considered before the replacement TRS goes live. The implementation of the current iform service was problematic and it is still not fit for purpose. It is vital that the new service which is being developed is fully tested with agents and trustees and is fully functional before further trusts are required to register. The full functionality needs to include, for example, the ability to save and retrieve partly completed information, the ability to send a copy of the information to a client or other interested party to approve before submission, the ability to view the information that has been submitted and to make changes to that information and the functionality to confirm the information annually.

30. In particular, we would urge the government and HMRC to encourage the development of commercial software that can deal with trust registration. We understand that, in accordance with its strategy, HMRC has explored the possibility of developing APIs that would facilitate the development of commercial software for the TRS but that there has been insufficient interest from the software industry. We suggest that this possibility be explored much more actively. The lack of interest may have been due to lack of capacity in the industry, resources being allocated to Making Tax Digital as being higher priority and the fact that implementation of the requirements to update the register and confirm the details annually was deferred. A commercial software solution would provide a much better experience for anyone that acts for a number of trusts. In particular it would make it easier to control access within a firm to confidential information about trust clients.

31. The existing service is used both for registering a trust on the TRS and, if applicable, to also register a trust for income tax self assessment. There have been some reports of trusts being incorrectly registered for self assessment when they register under the TRS. If the new system is also to be used to register trusts for specific tax regimes it must do so accurately.

32. We understand that, as required by equalities legislation, an alternative service will be provided for trustees that are digitally excluded. We would welcome the opportunity to discuss how HMRC will establish eligibility for the alternative service and how it will be provided.

33. The introduction of the current service was hampered by the decision that agent access would be provided through the agent services account rather than the existing agent portal. This decision appeared to have been made at a fairly late stage in the design and we understand that it was the reason for the service being made available to agents several months after it was available to trustees. The TRS was the first live HMRC service to be provided through the agent services account and the need for agents to register for an agent services account which had not been fully developed (e.g., it was not at that time available to overseas agents) caused considerable difficulty and delay.

34. We understand that the new TRS system is also to be used to trial an untried HMRC process: the requirement for the client to interact digitally to authorise their agent, known as a digital handshake. The proposed process was described in the Trusts and Estates newsletter in August 2019 (we understand that a slight change has been made and any

trustee will be able to complete the digital handshake). We understand that HMRC will not recognise existing agent authority and even trusts that are already registered will have to complete this digital handshake. This requirement is causing very significant concern amongst trustees and agents; clients expect to be able to complete a paper authorisation form and leave all interaction with HMRC to their agent. They do not expect to have to set up a digital account, which they may never access again, solely to authorise their agent. We recommend that HMRC continues to recognise form 64-8 as agent authority for the new TRS.

35. Thought may also be needed on the practicalities of the trustee login process, including what happens when the trustee who has set up the account retires as trustee, and where a trustee acts for numerous trusts but has only one email address.

Question 3

Do the proposed registration deadlines and penalty regime have any unintended consequences that would lead to unfair outcomes for specific groups?

36. We support the proposed date of registration of 10 March 2022 for trusts that exist at 10 March 2020. By giving two years' notice, the affected trustees may be aware of the registration obligation in time to be compliant. We would encourage the government to issue a full publicity campaign to raise awareness of the new requirements, including clarity on exactly which types of trust will be required to register, as soon as possible.
37. We are concerned that the proposed 30 day deadline for trusts that are set up on or after 10 March 2022 is far too short. Many trusts are created between family members with no or minimal input from a professional adviser, and no funds to pay professional fees. 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 are aware there can also be problems with identifying some beneficiaries, and these extenuating circumstances will need to be taken into account.
38. There are also issues with a trust deed being executed, but the trust not actually being funded until some time later when a bank account is created. A delayed registration deadline triggered by the trust becoming funded would be more appropriate in this instance.
39. We welcome the structure of the proposed penalty regime in terms of nudge letters to trustees for first offences, reflecting the probable lack of awareness of many trustees of the registration obligation. We also support the principle of stricter penalties for trustees who have failed deliberately to register on time or update details on the register. Further clarity is needed on who will decide whether a failure has been deliberate, and the criteria for assessment that will be used to ensure this is applied fairly.

Question 4

Do you consider that the revised definitions and application process for legitimate interest and third country entity requests set the right boundaries for access to the register? If not, please provide specific examples of where you consider this not to be the case.

40. We are concerned about the loss of privacy for trust beneficiaries that will result from disclosure of data to third parties under the legitimate interest provisions. We note that the government's proposed criteria for a legitimate interest request include the following:
    - Whether the person is involved in an investigation into ML or TF activity.
    - Whether the person is making the request for accessible information in order to further an investigation into a specified suspected instance of ML or TF.
    - Whether the disclosure of the information is likely to prejudice any criminal investigation or proceedings or other investigations.
    - Whether it is reasonable for the person making the request to suspect that the trust is being used for ML or TF.

41. However, the appropriate organisations to be undertaking such investigations in most instances are the relevant law enforcement agencies, not journalists or campaigners. In a great number of cases, such articles written by such journalists and campaigners are incorrect and can be extremely damaging to the subjects of the stories. While there are occasionally issues that are only brought to light by investigative journalists, a referral should in the first instance be made to law enforcement to consider through the existing investigative frameworks. While it might be interesting for the public to have access to the data, we do not believe it is in the public interest and we would query the need for wider access.
42. If access to data is to be given through legitimate interest requests, the definition of investigation needs to be considered carefully and should be more than people undertaking 'fishing expeditions' on TRS data. We agree that any parties applying for access to the register should have to provide evidence to support their claim.
43. A proper mechanism is needed to determine if the enquirer has evidence underpinning their belief, and whether the evidence is sufficient to warrant disclosure of information. We also 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.
44. It is concerning that the criteria for access to beneficial ownership information are weaker in the case of trust that holds a controlling interest in a non-EEA legal entity. 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. In particular, there should not be more information available on a non-EEA company than would be available for a UK company on the Persons with Significant Control register.

Question 5

Does the proposed handling of exemptions for legitimate interest and third country requests provide the right access to the beneficial ownership data whilst protecting owners from potential risk of harm?

45. We welcome the intent of the exemptions for access to the beneficial ownership information on the register where there would be a disproportionate risk to the beneficial owner due to the risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation; or the individual is a minor or otherwise legally incapable. However, we question how government will adequately assess whether a beneficiary is at risk. Will these individuals be invited to declare their concerns at point of registration on TRS? Such a one-off declaration of status would not capture changes in an individual's private life, or regime change in their country of residence/origin which may significantly increase the individual's risk of harm. Sadly, this risk may only become apparent to the government once actual harm has occurred to these individuals. It may even be the access to the individual's data on TRS that is the cause of the harm. The risk of harm may be particularly high for beneficiaries of non-UK resident trusts, given the hurdle for access to their personal data is much lower than for UK trusts.
46. A wider issue for all beneficiaries 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. There is a significant risk that wealthy families will move their assets and investments offshore in order to protect their privacy and safety.
47. We would encourage the government to ensure there is a process where trustees are notified if a request is made for access to data pertaining to their trust.

Question 6

Are there any instances where the above proposals would not give investigators access to the information they require to follow a specific lead in suspected money laundering or terrorist financing? Please be specific and provide examples.

48. Any suspicions of ML/TF activity should be dealt with by law enforcement investigators rather than third party individuals or organisations. On the basis that law enforcement already have access to the information on TRS, we see no need for access by other parties.