

## The 5<sup>th</sup> Money Laundering Directive as it relates to trusts

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### INTRODUCTION

The EU's 5<sup>th</sup> 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 4<sup>th</sup> Money Laundering Directive ("4MLD"), which itself was transposed into UK law on 26 June 2017.

On 15 July 2020, the report on the government's consultation on the implementation of the Fifth Money Laundering Directive as it relates to trusts was published.

### 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.

### 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 10 March 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 10 March 2020.

### 'EXPRESS TRUSTS'

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

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

### NON-EU RESIDENT EXPRESS TRUSTS ACQUIRING UK LAND OR PROPERTY

The government envisages that the TRS registration obligation arising from the acquisition of UK land or property should mirror the existing registration criteria set by each of the UK's constituent parts. For example, in England the Land Registry requires freehold estates or estates with a leasehold estate over seven years to register, and the TRS would follow this requirement.

### 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 that is connected with the professional activities of an obliged entity and which is expected, at the time when the contract is established, to have an element of duration"*

The government's latest consultation has confirmed that this means that any non-EU resident express trust, which has at least one UK resident trustee, and receiving services such as banking, accountancy, tax or legal advice on an ongoing basis from an obliged entity based in the UK, will be required to register on the TRS. Previously it was thought that all non-EU trusts entering into a business relationships with a UK obliged entity would be required to register, and the outcome of the consultation represents a significant relaxation of the regime.

The government proposes to define 'an element of duration' to encompass a relationship which is expected at the outset to last 12 months or more.

## TRUSTS EXEMPT FROM REGISTRATION

The government responded to queries to confirm the following types of trust (amongst others) that, in general, will be exempt from registration with the promise of further guidance to follow.

- Trusts imposed by statute, where these do not result from the clear intention of the settlor. For example, a statutory trust arising on intestacy
- UK registered pension trusts
- Charitable trusts regulated in the UK
- Pure protection life insurance policies and those paying out on critical illness or disablement, including group policies
- Trusts used by government and other UK public authorities
- Trusts for vulnerable beneficiaries or bereaved minors
- Personal injury trusts
- Trusts set up to enable employment-related Save as You Earn share schemes and Share Incentive Plans
- Maintenance fund trusts
- Certain trusts incidental to commercial transactions
- Certain trusts used as part of financial markets infrastructure
- Authorised unit trusts
- Co-ownership trusts, where the trustees and beneficiaries are the same persons
- Will trusts created on death that only receive assets from the estate and trusts that only receive death benefits from a life insurance policy and are wound up within two years of death
- Existing trusts holding assets valued at less than £100, unless or until further assets are added

Many of these exemptions are intuitive and it is pleasing to see that life insurance trusts and pilot trusts set up to receive assets on a future event are confirmed to be exempt.

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

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

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

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

In relation to an individual:

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

In relation to a corporate trustee:

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

## REGISTRATION DEADLINES

The government currently proposes a filing deadline of 10 March 2022 for unregistered trusts without a tax liability which are already in existence. For trusts created within 30 days of or after 10 March 2022, the government proposes that the trust should be registered with HMRC within 30 days of its creation.

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 has 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?**

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

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

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

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

## **CONCLUSIONS**

This technical bulletin is a summary of the most important concepts of 5MLD as it applies to trusts and incorporates various updates from the government and HMRC over the nine six months.

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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