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The Trust Registration Service: the next iteration of the regime

The Trust Registration Service (the Trust Register) has been in place since 26 June 2017 following the UK's transposition of the EU Fourth Anti-Money Laundering Directive (4MLD) into national law.¹

The scope of the regime has now been extended by the Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020 (the 2020 Regulations)² as part of the UK's

¹ Council Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L141/73.

² The Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020 (SI 2020/991) (the 2020 Regulations), <https://www.gov.uk/eu-withdrawal-act-2018-statutory-instruments/the-money-laundering-and-terrorist-financing-amendment-eu-exit-regulations-2020> [Accessed 17 May 2021].

implementation of the EU Fifth Anti-Money Laundering Directive (5MLD)³ with effect from 6 October 2020.

Despite Brexit (and unlike much of the short-lived directive on administrative cooperation (DAC6) regime), the new extended Trust Register seems here to stay—indeed the 2020 Regulations expressly provided for changes required with effect from the end of the Brexit transition period (namely in relation to references to the European Economic Area (EEA)).⁴ Although the regime was in part introduced in order to comply with the UK’s obligations under 4MLD, this was not its only purpose: the Trust Register is also intended to digitise tax reporting for trusts with a UK tax liability (including both UK resident and non-UK resident trusts). This dual purpose has coloured much of the regime, including in particular how it applies to non-UK resident trusts.

Despite initial speculation (and although the scope of the regime has unquestionably been significantly widened) the final scope of the regime is, however, much narrower than had initially been anticipated. In particular, the majority of non-UK resident trusts should remain outside the scope of the regime in most instances provided they do not have a relevant UK tax liability: only non-UK resident trusts with at least one UK resident trustee or which acquire UK land directly are likely to be materially affected.

This note will cover the main changes to the Trust Register with effect from 6 October 2020, the new expanded scope of the regime and the main open questions which still remain. As at the date of writing (April 2021), further HMRC guidance is expected imminently.

(1) What are the main changes?

The first iteration of the Trust Register (which one of the writers of this note summarised in a previous note⁵) only required “taxable relevant trusts” (broadly, UK resident express trusts and non-UK resident express trusts with a relevant UK tax liability) to populate the Trust Register. It was also not accessible by third parties—only certain law enforcement and government authorities had access to the Trust Register.

Under the new regime, the main changes are as follows:

- 1) First, a relevant UK tax liability is no longer the only trigger for registration—*all* UK resident express trusts (referred to as a “type A trust”⁶) will now have to register, whether or not they are also taxable relevant trusts because they have a relevant UK tax liability. In addition, non-UK resident express trusts are required to register not only if they are “taxable relevant trusts”, but also if they:
 - (a) enter into a business relationship with a relevant UK service provider (broadly, entities who are required to perform customer due diligence—so-called “obliged entities” within the meaning of 4MLD and

³ Council Directive 2018/843/EU of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L156/43.

⁴ The 2020 Regulations Pt 4.

⁵ I. Morton, “The Trust Register: is there such a thing as too much information?” [2018] B.T.R. 146.

⁶ The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692) (the 2017 Regulations) (as amended by the 2020 Regulations reg.2) regs 45ZA(1) and 45ZA(2)(a).

- 5MLD or “relevant persons” within the meaning of the UK regulations) *and* (crucially) have at least one UK resident trustee (referred to as a “type B trust”⁷); or
- (b) acquire an interest in UK land, even if they have no UK resident trustees (referred to as a “type C trust”⁸).⁹

However, the new regime also includes an expanded list of exemptions from the requirement to register (so-called “excluded trusts”) aimed at capturing situations where there is a low risk of money laundering or terrorist financing or where the information should already be available under another regime.

- 2) Secondly, third parties will now have access to the information on the Trust Register in certain circumstances. In broad terms, third parties may access information on the Trust Register if they have a legitimate interest in doing so—or “on written request” alone if the trustees hold a controlling interest in a non-UK entity established in a territory which does not have an equivalent corporate beneficial ownership register (referred to as a “third country entity”).¹⁰ For example, it is expected that jurisdictions like Guernsey and the Cayman Islands would be considered third countries for these purposes on the basis that the corporate beneficial ownership registers in these jurisdictions are not publicly available as required by 4MLD.

However, both of these routes to accessing the Trust Register are narrower than had initially been expected. In particular, they are only available in relation to certain categories of registered trusts and not for *all* registered trusts. In practice, the result is that information will only generally be accessible in relation to non-UK resident trusts if the trust: (a) has at least one UK resident trustee; *and* (b) has either engaged a UK obliged entity or has acquired UK real estate after 6 October 2020.

- 3) Finally, the deadline for registering on the Trust Register, as well as for updating the information when there is a change, has been materially shortened. Trustees will generally have only 30 days from the event triggering registration or from the date there is a change to the registered information to report the relevant information.

⁷The 2017 Regulations (as amended by the 2020 Regulations) reg.45ZA(1) and 45ZA(2)(b).

⁸The 2017 Regulations (as amended by the 2020 Regulations) reg.45ZA(1) and 45ZA(2)(c).

⁹The amended regime retains the dual set of obligations on trustees introduced in 2017—an internal record-keeping obligation on all “relevant trusts” to maintain records of the trust’s beneficial ownership and, for a sub-group of those “relevant trusts”, a further obligation to register that information on the Trust Register. In keeping with the changes to the categories of trusts which need to register on the Trust Register, the definition of “relevant trust” in 2017 Regulations reg.42, para.(2)(b), has also been expanded to impose an internal record-keeping obligation on the trustees of type B trusts and type C trusts. As previously noted, the trustees of UK resident express trusts (i.e. type A trusts) were already obliged to keep internal records of their beneficial owners.

¹⁰See 2017 Regulations reg.42, para.(6)(b) (as amended by the 2020 Regulations reg.14, Pt 4 para.(2)(b)).

(2) Which trusts fall within the new regime?

(a) *Excluded trusts*

As before, the regime continues to apply only to “express” trusts.¹¹ This term remains undefined, but is understood to mean a trust established intentionally by the settlor. As previously noted, this continues to exclude trusts which come into existence by operation of law—for example trusts arising on intestacy, implied, resulting or constructive trusts and trusts created under a court order such as on divorce.

In addition, certain express trusts are nevertheless excluded from registration under the new regime. The full list of excluded trusts is set out in new Schedule 3A (Excluded Trusts) to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (2017 Regulations) inserted by regulation 11 of the 2020 Regulations and is beyond the scope of this note. However, some notable examples include:

- 1) Trusts relating to joint ownership of property (for example, land or bank accounts)—but only if the legal and beneficial owners are the same. If the legal and beneficial owners are different (either at the outset or due to a subsequent change), then there will be a requirement to register (for example, where parents hold on trust for themselves and their children);
- 2) Charitable trusts (but in broad terms only if they are registered charities or excepted from registering). It is unclear as at the date of writing whether this exemption will also include nominee or bare trust arrangements in respect of assets held for a charity or non-UK charities that are recognised by HMRC as a charity for UK tax purposes;
- 3) Trusts holding assets of a pension scheme (but again, only if it is a registered pension scheme);
- 4) Trusts holding life policies which only pay out on death, terminal or critical illness or permanent disability of the person assured. The trust will, however, have to register when the policy pays out, unless the trust is a will trust wound up within two years of death (see below). It is also still unclear whether trusts holding policies with a surrender value will have to register (including, for example, certain historic life assurance policies);
- 5) Trusts arising on death under a person’s will which hold only property comprised in a person’s estate unless it is in existence for more than two years after the death of the individual. Will trusts would also need to register if further assets are added to the trust which were not part of the person’s estate;
- 6) Pilot trusts which hold no more than £100 and which are in existence before 6 October 2020. It is unclear why this exemption only applies to pilot trusts which predate the new regime. This will clearly impose an additional burden where pilot trusts are commonly used, for example to receive death benefits under a pension

¹¹ See definitions of “taxable relevant trust”, “type A trust”, “type B trust” and “type C trust” referred to above.

- policy or to receive assets under a will. Pilot trusts will also obviously need to be registered if/when the trust assets exceed £100;
- 7) Trusts which are required to meet statutory conditions in order to benefit from some beneficial status (for example, trusts for vulnerable beneficiaries or employee trusts);
 - 8) Trusts imposed by law. For example, this should apply in the context of partnerships where partnership property is deemed to be held (unless there is a contrary intention) by the legal owner (for example, one of the partners or a nominee) on trust for all of the partners pursuant to section 21 of the Partnership Act 1890. If section 21 does not apply (for example, because the partnership did not acquire the asset for consideration), then the arrangement may nevertheless be outside the scope of the regime on the basis that the trust is not an express trust; and
 - 9) Certain commercial trusts (for example, relating to bond issues or syndicated loans).

However, an excluded trust will still have to register if it has a UK tax liability. As noted above, this is because one of the purposes of the regime is to digitise UK tax reporting and track all taxable trusts.

A conspicuous omission from this list is nominee and bare trust arrangements. Although such arrangements will be excluded in specific situations (for example in certain commercial situations), as a general rule, nominees and bare trustees will be required to register. It is understood that this is an ongoing topic of discussion with HMRC and it is hoped that further guidance will follow. However, in practice (for the reasons set out below), this is likely to be relevant only for UK resident nominees/bare trustees or where a non-UK resident nominee/bare trustee is holding UK real estate which was acquired after 6 October 2020.

(b) UK resident express trusts—“type A trusts” or taxable relevant trusts (depending on whether the trust has a UK tax liability)

All UK resident express trusts will have to register irrespective of whether they have a UK tax liability—unless they fall within one of the exemptions mentioned above and do not have a UK tax liability.

As previously noted, trustees of non-UK resident trusts will need to take even more care to ensure a non-UK trust does not become inadvertently UK resident and therefore automatically registrable on the Trust Register. This is a particularly acute risk for those jurisdictions in which trusts are commonly used as estate planning tools (for example in the US) and it is not unusual for a settlor to establish multiple trusts of which he or she is the sole or co-trustee. If the settlor then becomes resident in the UK in these circumstances without first resigning as a trustee before the start of the relevant UK tax year, the trusts would automatically become registrable under the new regime.

As ever, it will also be critical that there is absolute clarity in relation to who the trustees of the trust are and where they are all resident. For trusts with individual trustees, this could pose difficulties in the current climate where travel restrictions and health concerns may have forced certain individuals to spend significant amounts of time in the UK.

(c) Non-UK resident express trusts

As noted above, non-UK resident express trusts are now required to register:

- 1) not only if they have a relevant UK tax liability (and are therefore taxable relevant trusts); but also if they
- 2) enter into a business relationship with a UK obliged entity and have at least one UK resident trustee (a “type B trust”); or
- 3) acquire an interest in UK land (“type C trust”).

(i) Non-UK resident trusts with a UK tax liability: taxable relevant trusts

This trigger for registration is unchanged. One of the writers of this note has previously explored the circumstances in which this is likely to be relevant and the challenges this poses for non-UK trustees.¹² It continues to be the case that:

- 1) The UK tax liability must fall *on the trustees* directly (and not on a company held by the trustees or on the settlor or a beneficiary). This means the trustees have to actually be liable to pay one of the relevant taxes listed in regulation 45(14) of the 2017 Regulations. For example, it has been expressly confirmed by HMRC that UK assets held through a company owned by non-UK resident trustees would not trigger a registration obligation because the liability would fall on the company rather than the trustees in those circumstances; and
- 2) Due to the way in which “relevant trust” is defined¹³ (which continues to be the “gateway” into the regime), in most instances (with the exception of trustees holding certain look-through entities) the trustees need to hold assets situated in the UK or assets which give rise to UK source income directly. For example, there would be no need to register where non-UK resident trustees are liable to a UK inheritance tax charge on UK residential property held through a non-UK company. This is because, although the tax liability falls on the trustees directly, the charge to tax in these circumstances relates to a non-UK asset (the value of the shares in the non-UK company to the extent this is attributable to the UK residential real estate) and not on a UK asset which is held directly by the trustees.

(ii) Non-UK resident trusts without a UK tax liability which enter into a UK business relationship: “type B trusts”

In the run up to the publication of the final regulations on 15 September 2020, there was speculation that non-UK resident trusts with no UK tax liabilities could be brought within the scope of the expanded regime *solely* by virtue of engaging a UK obliged entity, including, to take an extreme example, simply having a UK custodian or a UK legal adviser.

This was largely driven by the dual purpose of the Trust Register and the fact that the UK had gone beyond what was required by 4MLD when the Trust Register was first introduced. In

¹² Morton, “The Trust Register: is there such a thing as too much information?” [2018] B.T.R. 146.

¹³ The 2017 Regulations (as amended by the 2020 Regulations) reg.42(2)(b).

particular, the beneficial ownership register envisaged by 4MLD only applies to trusts with a defined connection to the Member State (this was initially the governing law of the trust but then became the trust's place of administration/residence under 5MLD). However, the UK's transposition of 4MLD had gone beyond this threshold requirement in its attempts to capture all trusts with a UK tax liability, including non-UK resident trusts which might otherwise have only a tenuous connection to the UK. It was previously uncertain whether the UK would adopt the same wide approach in expanding the regime in line with 5MLD.

However, following consultation with industry bodies, the final regulations adopted a "measured approach"¹⁴ in relation to the implementation of 5MLD. In particular, a non-UK resident trust with no relevant UK tax liabilities is only required to register on the Trust Register by virtue of entering into a business relationship with a UK obliged entity *if the trust has at least one UK resident trustee*. In practice, this is of course unlikely to be the case without the trust itself becoming UK resident, (although in certain circumstances it would be possible for a trust with both UK resident and non-UK resident trustees to still be non-UK resident if the settlor was not UK resident and domiciled when the trust was set up and/or when funds were added to the trust).¹⁵

In addition:

- 1) Only *new* business relationships entered into after 6 October 2020 trigger registration. Engagements which predate the new regime will not require registration; and
- 2) As with taxable relevant trusts, a UK business relationship will also only trigger registration if it is directly with the trustees. In other words, where the settlor or a company held by the trustees enters into a UK business relationship, this should not trigger registration (unless there is some other reason for registration (such as a relevant UK tax liability)).

The definition of "business relationship" requires some "element of duration".¹⁶ HMRC's stated view is that this would normally involve an ongoing relationship which at the outset is expected to last for more than 12 months.¹⁷ However, it is possible that this will be interpreted differently by the UK courts and in future HMRC guidance. At this stage we can only speculate when, for example:

- 1) multiple short-term projects will amount to an ongoing business relationship; or
- 2) a pre-existing business relationship will be treated as a new business relationship.

¹⁴HMRC and HM Treasury, *Fifth Money Laundering Directive and Trust Registration Service: Summary of Responses* (15 July 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901008/Technical_consultation_Fifth_Money_Laundering_Directive_and_Trust_Registration_Service_-_Summary_of_Responses.pdf [Accessed 17 May 2021], para.2.15.

¹⁵Although a detailed discussion is outside the scope of this note, it is interesting to note that the residence test for trusts in 2017 Regulations reg.42(2)(c) and (d) is slightly different from the normal residence test for UK income and capital gains tax purposes. This may lead to unexpected results in certain situations.

¹⁶The 2017 Regulations reg.4(1)(b).

¹⁷HMRC and HM Treasury, *Fifth Money Laundering Directive and Trust Registration Service: Summary of Responses* (15 July 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901008/Technical_consultation_Fifth_Money_Laundering_Directive_and_Trust_Registration_Service_-_Summary_of_Responses.pdf [Accessed 17 May 2021], para.2.14.

However, this is obviously something non-UK resident trusts with at least one UK resident trustee will need to bear in mind if and when they enter into new business relationships, including for example where they decide to change their existing UK advisers and/or accountants.

In keeping with the spirit of the new regime, the writers expect that the situations in which there is an engagement with a relevant UK service provider but which does not amount to a “business relationship” are likely to be limited in practice.

(iii) Non-UK resident trusts with no UK tax liabilities which acquire UK real estate: “type C trusts”

Non-UK resident trusts with no UK tax liabilities also need to register if they acquire UK real estate directly. This registration trigger applies irrespective of whether the trust has at least one UK resident trustee. It is understood that a wider approach was considered to be reasonable in this context given that:

- 1) It will generally only apply if there is an obvious and tangible link to the UK, that is, to the UK real estate. In particular, there will only be a requirement to register if the trustees acquire an interest in UK land directly after 6 October 2020 (such that the trustees are registered as the legal owners at HM Land Registry). There should be no need to register if, for example, UK land is acquired by a company owned by the trustees or by a nominee on behalf of the trustees (albeit, of course, the nominee may need to register);
- 2) The trust may in any event be registrable as a taxable relevant trust (although it is worth noting that why the trust is registrable will impact upon what information needs to be disclosed and in what circumstances third parties may have access to the information). Even if this is not the case, corporate trustees will soon need to register under the planned Registration of Overseas Entities Bill Register (the OEBO Register) which the government intends to become operational in 2021 for non-UK entities which acquire UK real estate. It is worth noting, however, that the information to be registered may differ—the OEBO Register will require information about the beneficial ownership of the corporate trustee rather than focusing on the beneficial ownership of the trust (although if the OEBO Register follows the structure of the corporate beneficial ownership register, this may require disclosure of certain other controlling parties); and
- 3) By way of concession, the information on the Trust Register about trusts required to register under this limb will not be available to third parties unless there is at least one UK resident trustee (see further below).

(iv) European Economic Area (EEA) registered trusts

There is a limited exception under the new regime for “EEA registered trusts”¹⁸—these trusts do not have to register in the UK if the trustees can provide proof that they have registered elsewhere

¹⁸ The 2017 Regulations (as amended by the 2020 Regulations Pt 4 reg.14(1) and (2)).

(and provided the trust is not required to register for another reason).¹⁹ Post-Brexit this term includes any trust established in a country or territory outside the UK with a regime which has broadly equivalent effect to the UK Trust Register. As international pressure mounts, this may in due course also cover non-EEA jurisdictions.

However, this dual register exception is not available for taxable relevant trusts²⁰ or non-UK resident trusts which acquire UK real estate (that is, type C trusts).²¹

It is also unclear at this stage how this exception will operate in practice. For example, if a trust is registrable in the UK and in another EEA jurisdiction, but the trustees have not yet been able to register in that EEA jurisdiction because the registration portal is not yet available, it is unclear whether the trust will have an obligation to register in the UK.

As different EEA jurisdictions implement their trust registers in slightly different ways, it is also possible that there will be an element of “jurisdiction-shopping”, especially if, for example, (unlike the UK) other jurisdictions:

- 1) do not require a threshold connection to that jurisdiction (such as, for example, at least one resident trustee); or
- 2) do not exclude from registration pre-existing business relationships and holdings in land which predate the introduction of the 5MLD regime.

It is also likely that the bar for third-party access to information on the trust register will differ from jurisdiction to jurisdiction.

(3) What information must go on the register?

This now differs depending on why the trust is required to register. In broad terms, trusts with no UK tax liabilities which are required to register under one of the new limbs need to disclose less information than taxable relevant trusts. In particular, registrable trusts with no UK tax liabilities only need to provide information in relation to their beneficial owners (and not information on the trust assets).²² One of the writers of this note has explored in depth in a previous note the definition of “beneficial owners” for these purposes and the issues this definition gives rise to in practice (including, in particular, the fact that information also needs to be disclosed in relation to any potential beneficiaries).²³

The main change in this context is that all registered trusts must now also disclose the residence and nationality of beneficial owners (and potential beneficiaries), as well as the nature and extent of the individual’s beneficial interest.²⁴

Certain trusts (namely UK trusts and non-UK trusts with at least one UK trustee and either a UK business relationship or which acquire UK land—irrespective of whether they have a UK

¹⁹ See definition of type A trust and type B trust, 2017 Regulations (as amended by the 2020 Regulations reg.2) regs 45ZA(1), 45ZA(2)(a) and 45ZA(2)(b).

²⁰ See definition of “taxable relevant trust”, 2017 Regulations reg.45(14).

²¹ See definition of “type C trust”, 2017 Regulations (as amended by the 2020 Regulations reg.2) regs 45ZA(1) and 45ZA(2)(c).

²² The 2017 Regulations (as amended by the 2020 Regulations reg.2) reg.45ZA(3) and (4).

²³ Morton, “The Trust Register: is there such a thing as too much information?” [2018] B.T.R. 146.

²⁴ For taxable relevant trusts, see 2017 Regulations reg.45(10E). For type A, type B and type C trusts see 2017 Regulations (as amended by the 2020 Regulations reg.2) reg.45ZA(3).

tax liability) must now also disclose information in relation to any third country entity where the trustees hold a controlling interest (broadly, where the trustees hold more than 50 per cent of the shares or voting rights in the entity or exercise significant influence or control over the entity).²⁵ Post-Brexit, a third country entity is any non-UK entity established in a jurisdiction which does not have an equivalent corporate beneficial ownership register.

Disclosure of such information is required because (as explained in section (4) below) this dictates when third parties can access the information on the Trust Register. For example, a Jersey resident trust with at least one UK resident trustee which is registrable by virtue of the trustees directly acquiring UK land or entering into a new business relationship after 6 October 2020 will have to disclose information in relation to a wholly owned Guernsey company (even if the holding in the Guernsey company is unconnected with the reason the trust is registrable). This is because the information on the Trust Register in relation to this trust may be accessible to third parties under the route described in section (4)(b) below because of the trustees' stake in the Guernsey company.

(4) Who can access the information on the Trust Register?

The new regime allows third parties to access the information on the Trust Register in two situations. However, in both cases, only information in relation to certain registered trusts is accessible that is, neither of the routes to access the Trust Register set out below applies across the board to all registered trusts.

(a) Legitimate interest

The starting point under the new regime is that third parties can access information in relation to certain registered trusts where they have a “legitimate interest” in doing so.²⁶ However, this does not apply if the only reason a non-UK resident trust is registered is because:

- 1) it is a taxable relevant trust; or
- 2) it has acquired UK real estate and the trust has no UK resident trustees (a type C trust).²⁷

In addition, HMRC have confirmed that “legitimate interest” will be construed narrowly and “access given only where there is evidence that it furthers work to counter money laundering or terrorist financing activity”.²⁸ In particular, third parties will need to be able to both: 1) identify the specific trust and provide detailed information as to why they suspect it is being used for

²⁵ For taxable relevant trusts, see 2017 Regulations reg.45(10G). For type A, type B and type C trusts see 2017 Regulations (as amended by the 2020 Regulations reg.2) reg.45ZA(4).

²⁶ The 2017 Regulations (as amended by the 2020 Regulations reg.2) reg.45ZB(1).

²⁷ The 2017 Regulations (as amended by the 2020 Regulations reg.2) reg.45ZB(8) (see the definition of “accessible information” which refers only to type A and type B trusts).

²⁸ HMRC and HM Treasury, *Fifth Money Laundering Directive and Trust Registration Service: Summary of Responses* (15 July 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901008/Technical_consultation_Fifth_Money_Laundering_Directive_and_Trust_Registration_Service_-_Summary_of_Responses.pdf [Accessed 17 May 2021], para.2.46.

money laundering or terrorist financing; and 2) show that access to the information on the Trust Register would assist in countering money laundering or terrorist financing.

(b) Trusts with controlling interests in third country entities

There is a lower bar for access to information in certain circumstances. In particular, information is in principle available on “written request”²⁹ alone in relation to certain registered trusts if the trustees hold a controlling stake in a third country entity (irrespective of whether the controlling stake is connected with the reason why the trust is registrable). This applies to trusts which are registrable by virtue of being:

- 1) UK resident trusts (type A trusts);
- 2) Non-UK trusts with at least one UK resident trustee and either a UK business relationship or UK land (both referred to as type B trusts for these purposes). A non-UK resident trust which acquires an interest in UK land with at least one UK resident trustee is included in the definition of type B trusts for these purposes. A non-UK resident trust which acquires an interest in UK land with no UK resident trustees remains a type C trust in this section of the 2017 Regulations (as amended by the 2020 Regulations). This discrepancy in the terminology used in the 2017 Regulations (as amended by the 2020 Regulations) is due to the fact that—although non-UK resident trusts which acquire UK land directly are registrable irrespective of whether they have any UK resident trustees—information about these trusts is only accessible by third parties if they have at least one UK resident trustee.

However, HMRC’s consultation materials suggest that this test will be applied in a similar fashion to the legitimate interest test.³⁰ In other words, third parties will still need to be able to show a genuine connection between the request for information and the detection or prevention of money laundering or terrorist financing. They will also need to be able to identify the relevant third country entity and its relationship with the trust which holds the controlling interest.

As with the legitimate interest test above, this route will not be available (even if the trustees hold a controlling stake in a third country entity) if the only reason the trust is registered is because:

- 1) it is a taxable relevant trust (for example, a Jersey resident trust which is registrable only because the trustees are subject to income tax on UK source income); or
- 2) it has acquired UK real estate and the trust has no UK resident trustees (a type C trust)³¹ (for example, a Jersey resident trust with no UK resident trustees, which holds UK land directly and holds other assets through a Jersey holding company).

²⁹The 2017 Regulations (as amended by the 2020 Regulations reg.2) reg.45ZB(3).

³⁰HMRC and HM Treasury, *Fifth Money Laundering Directive and Trust Registration Service Summary of Responses* (15 July 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901008/Technical_consultation_Fifth_Money_Laundering_Directive_and_Trust_Registration_Service_-_Summary_of_Responses.pdf [Accessed 17 May 2021], para.4.15.

³¹See 2017 Regulations (as amended by the 2020 Regulations reg.2) reg.45ZB(3).

(c) Exceptions for minors and vulnerable individuals

Third parties will not be able to access information in relation to any individual who:

- 1) would be exposed to a disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation; or
- 2) is under the age of 18 or is incapacitated.³² Trustees can notify HMRC at the point of registration/when they update the information if an individual in relation to which information has been provided lacks mental capacity.

It is understood that where information is not disclosed, the person who requested the information will have the opportunity to appeal HMRC's decision. As at the date of writing, it is unclear how this appeal procedure might work. Unfortunately, it is understood that trustees and affected beneficiaries are unlikely to have the right to appeal a decision by HMRC to disclose information.

(d) Access to information on the Trust Register in the context of client due diligence

It is also worth noting in this context that, from 10 March 2022, trustees of registrable trusts who enter into a business relationship with a relevant UK obliged entity will also need to provide to that service provider proof of the trust's registration on the Trust Register. For example, a registrable trust which enters into a new business relationship with a UK adviser will have to provide that adviser with an excerpt from the Trust Register showing the trust's registration. The service provider will then be obliged to compare the information on the Trust Register against the information gathered as part of its normal client due diligence procedures. Any material discrepancies will need to be reported to HMRC as soon as reasonably practicable after discovery. As at the date of writing, the writers' understanding is that this should relate only to new clients at the time of on-boarding (and not, for example, when existing due diligence is periodically renewed).

(5) When does the information need to be provided?

For taxable relevant trusts set up on or before 5 April 2021, the timing for registration remains unchanged, that is, by 31 January after the tax year in which the trustees were first liable to pay one of the relevant UK taxes.

For 1) taxable relevant trusts set up on or after 6 April 2021 where the tax liability was incurred before 9 February 2022; and 2) type A, type B and type C trusts which fall within the new regime before 9 February 2022, the relevant deadline is now 10 March 2022 (albeit HMRC recently announced their intention to extend this deadline until summer 2022). Although in principle the information to be registered must be current and up-to-date as at registration, it is still unclear whether a trust which falls within the regime before 9 February 2022 but which is terminated before 10 March 2022 will still need to register.

³² The 2017 Regulations (as amended by the 2020 Regulations reg.2) reg.45ZB(5).

Trusts which were already registered before 6 October 2020 must also register the additional information, referred to in section (3) above in relation to their beneficial owners and third country entities, by this date.

Post-10 March 2022, trustees will generally have 30 days from the event triggering registration to register (for example, when the trust is set up, when a relevant UK tax liability arises, when the trustees enter into a new business relationship or when UK real estate is acquired) and/or when there is a change which requires the register to be updated.

Once information is on the register, the information will remain on the Trust Register for at least five years or at most 10 years after the trust is terminated or the information becomes obsolete (for example, where the trustees change or a beneficiary is excluded).

(6) Penalties

HMRC have confirmed that the new regime will include penalties for non-compliance, but as at the date of writing these have not yet been introduced.

HMRC's stated intention³³ is that a first offence/inadvertent failure will not carry a financial penalty—at this stage, trustees will only receive a notification letter.

However, deliberate failures to register or update the details on the register within the time limit will result in a “financial” penalty. As at the date of writing, further details from HMRC as to the likely level of the penalty are still awaited.

Where the trustees have a reasonable excuse for their failure to comply, it is also intended that they will have an opportunity to appeal the penalty.

Isobel Morton* and Iskra Doukova**

³³ HMRC and HM Treasury, *Fifth Money Laundering Directive and Trust Registration Service: Technical consultation document* (24 January 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/860269/Technical_consultation_document_Fifth_Money_Laundering_Directive_and_Trust_Registration_Service.pdf [Accessed 17 May 2021], paras 3.25–3.30 and HMRC and HM Treasury, *Fifth Money Laundering Directive and Trust Registration Service Summary of Responses* (15 July 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901008/Technical_consultation_Fifth_Money_Laundering_Directive_and_Trust_Registration_Service_-_Summary_of_Responses.pdf [Accessed 17 May 2021], para.2.34.

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