

GOVERNMENT RESPONSE TO CONSULTATION

EU 5th Money Laundering Directive and Trust Registration Service

The UK Government has now published its response to the technical consultation on the implementation of the Fifth Money Laundering Directive (5MLD) and the Trust Registration Service (TRS). The TRS consultation ran from 24 January until 21 February 2020 and responses were received from a range of stakeholders including Forsters LLP.

As a reminder, the TRS rules have required trustees to collect, maintain and file details about affected trusts (essentially, express trusts that are taxable in the UK) from 2018 onwards. **5MLD significantly broadens the scope of the TRS, potentially including all express trusts with a connection to the UK.** It also provides for enhanced access to the register, opening it up to anyone with a “legitimate interest” in the “beneficial ownership” of the trust, or in certain cases, to anyone who writes to HMRC to request information with a justifiable reason.

The UK Government appreciated that the broad scope of the changes to the TRS proposed in 5MLD raised concerns in the UK and this understanding was reflected in its technical consultation. The response now published indicates that the Government took into account the legitimate concerns of stakeholders who responded to the consultation, and the amendments it has made to its original proposals are welcome.



UK BUSINESS RELATIONSHIPS

A particular concern had been the proposed requirement to register a trust where there is a “business relationship” with a UK-based adviser by anyone in the world, even in the absence of any other UK connection. A “business relationship” in this context is defined as a business, professional or commercial relationship that arises out of the professional activities of the “obliged entity” (e.g. a lawyer or accountant) and that is expected, at the time the relationship is established, to endure for a period of time – at least 12 months.

Given that UK-based advisers are subject to very stringent regulatory requirements and are well-versed in assisting clients with complex trust, tax and compliance-related queries, the potential scope of this requirement seemed particularly counterproductive. UK tax legislation is constantly evolving and the Government should be encouraging those that may be affected to take appropriate advice so as to properly meet their obligations.

In response to concerns raised on this issue, the Government has now confirmed that non-UK trusts will only be required to register on entering into a UK business relationship if the trust has one or more UK resident trustees.

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A non-UK settlor or trustee merely appointing a UK-based adviser to act will not prompt registration. This is a sensible and welcome change, which allows UK based advisers to advise on overseas trusts without restriction.

ACCESS

A further concern was the proposal to grant increased access to information on the TRS, including to those with a “legitimate interest” in the “beneficial ownership” of a trust or to anyone who writes to HMRC with a justifiable request to such access in circumstances where a trust holds a controlling interest in a non-EU entity.

A further welcome concession by the Government is their confirmation that, while non-UK

“FORSTERS HAS EMERGED AS ONE OF THE BRIGHTEST STARS IN THE PRIVATE CLIENT FIRMAMENT”

Legal 500, 2020

trusts that acquire an interest in UK land will be required to register whether or not they have a UK-resident trustee, they **will not be subject to the third-party data sharing provisions if they do not have such a trustee.**

With regard to information to be provided by trustees with a **controlling interest in a non-EEA entity**, the provisions granting access remain unchanged from the original proposals, except that they will now also **only apply to trusts that have a UK resident trustee.**

These measures are significant as it should be rare (and avoidable) for a non-UK trust to have a UK resident trustee.

Where the data sharing provisions do apply, the response states that each request under the “legitimate interest” process will be reviewed on its own merits and access will only be provided where there is evidence that this will help counter money laundering or terrorist financing activity.

It will remain to be seen how this operates in practice. The response notes that representations were received from those who felt greater access should be given, as well as those who felt that the proposals unduly threatened privacy.

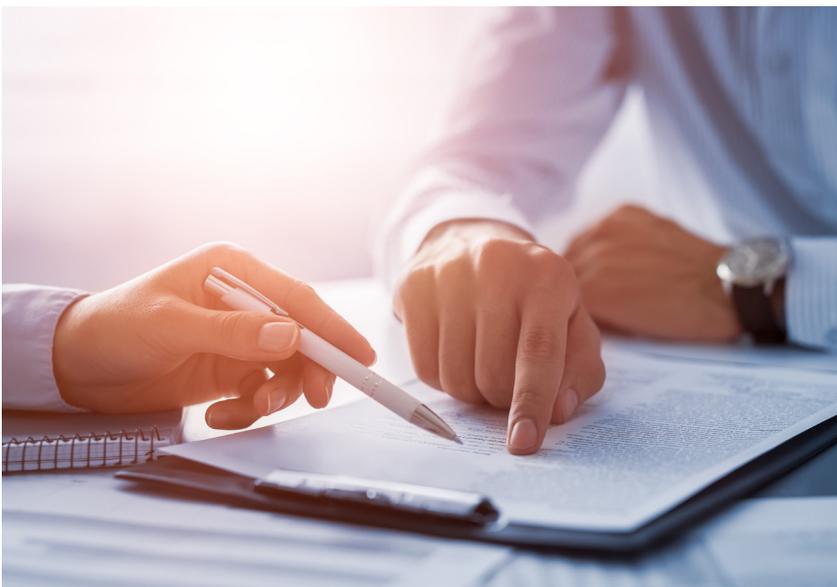
This remains an area of concern where it applies, and it is to be hoped that this will be handled carefully so that legitimate privacy concerns are addressed.

TYPES OF TRUSTS TO BE REGISTERED

The Government response notes concerns raised about the broad range of trusts that were initially proposed to be registered, especially where these presented very low risks of being involved in money laundering or terrorist financing.

The response sets out a **list of trusts that should generally be exempt from registration.** Among others, the list includes the following:

- UK registered pension trusts.
- UK regulated charitable trusts.
- Pure protection life insurance policies and those that pay out on critical illness or disablement.
- Certain will trusts that are wound up within two years of death.
- Pilot (or standby) trusts (or other trusts holding assets worth less than £100).
- Trusts for vulnerable beneficiaries, including those created on the death of a parent for young people between the ages of 18 and 25, or bereaved minors.



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This should reduce the compliance burden on numerous low value family trust arrangements, where the compliance costs would have been disproportionate. Unfortunately, the list does not mention bare trusts for minors, even though we are told that these received more objections than other types of trust that have been exempted.

Bare trusts are a commonly used method of holding assets for children or disabled persons and it is hard to see how they are a target of 5MLD.

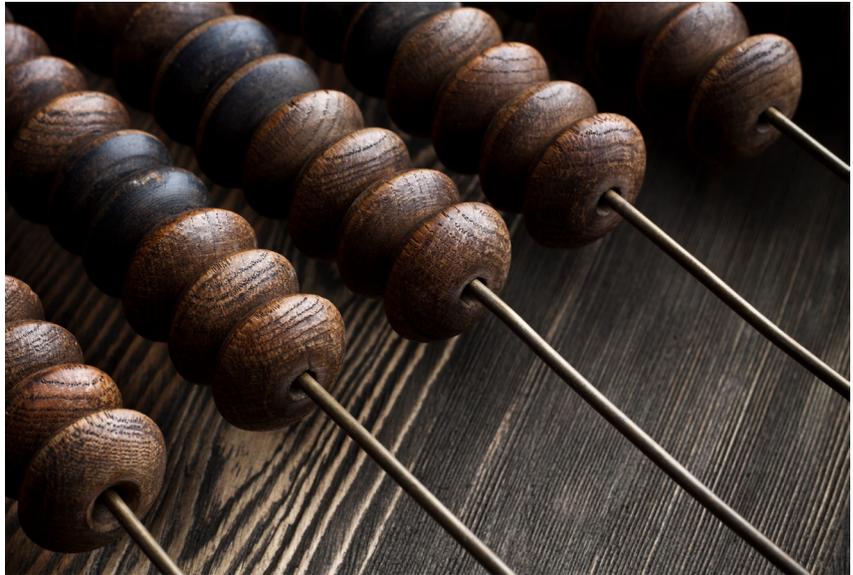
DEADLINE

The response states that a registration deadline of 10 March 2022 should provide sufficient time for trusts to register, or to update their details if they are already registered. A deadline of 30 days for new trusts set up on or after 10 March 2022 is also considered to be sufficient, although the Government considers that this should not apply to will trusts, which should not require registration at all if they only receive assets from the deceased's estate and are wound up within two years of death.

These provisions should give trustees adequate time to register where required before March 2022. Registering new affected trusts within 30 days of establishment should become part of trustees' new trust checklists.

PENALTIES

The response states the intention to proceed with the previously proposed penalty regime, where there is a failure to register on time or a failure to keep up-to-date and correct records. The proposals include the typical use of nudge letters for first failures to comply,



in the absence of deliberate behaviour, and fines of £100 for second and third instances of a failure to update. This is unlikely to be an area of significant concern, although trustees should be concerned about possible penalties and reputational risks around non-compliance.

NEXT STEPS

Proposed legislation has been prepared and we are told that it is being considered by committees in the House of Commons and the House of Lords. The response states that there are some remaining policy issues that the Government will continue to explore and that further input may be sought from the respondents to the consultation regarding guidance on the new rules.

The UK, along with a number of EU countries, has been served with an enforcement notice by the EU for failure to implement these rules by 10 January 2020. The UK was asked to provide a satisfactory response by mid-September and this indicates that they should be in a position to do so.

Forsters' Regulatory Approach

The Regulatory team advises trustees, other fiduciary service providers, companies and individuals about their obligations under the UK's ever increasing regulatory framework and the global reporting issues that they need to consider.

If you have any questions prompted by this note, please do get in touch with the authors or your usual Forsters contact.

"THEY HAVE CONTINUALLY SATISFIED EXPECTATIONS FOR RELIABILITY AND EFFICIENCY AND ARE ALWAYS DEDICATED TO DELIVERING A QUALITY SERVICE."

Chambers HNW, 2019

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