What's next for the trust register?

In a two-article series for *Taxation*, Helen Thornley explains why non-taxable trusts will now need to be included in the UK trusts register and what they need to do to comply with the latest regulatory changes.

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After all the work getting details held on the UK's trust register up to date this January, advisers now have a new challenge – adding a much wider range of trusts to the register by autumn 2022.

Under new rules which took effect in October 2020, registration is now no longer limited to trusts with a UK tax liability and instead, in the name of transparency, *all* existing UK trusts (and an increased range of non-UK trusts) must register – unless they are specifically excluded.

In this article I will be looking at a brief history of the regulations before turning to what non-taxable trusts (which have not previously been required to register) will need to do to comply with the changes. In a forthcoming *Taxation* article, I will cover the changes to taxable trusts and what additional information they must supply by autumn 2022. I will also look at who will be able to request access to the trust register from that time.

Although HMRC still has a lot of work to do in the coming months to develop the online services that agents and trustees will need in connection with the new registration obligations, it is worth planning how to tackle the various changes now.

Key points

- Under the Fifth Money Laundering Directive all UK trusts (and some non-UK trusts) will need to be entered in the trusts register.
- These trusts need to be added to the UK trusts register by autumn 2022.
- The information a trust must supply, when and who can access the register vary by the type of trust.
- Identifying new categories of trusts and alerting trustees to their new obligations will be challenging.
- Non-taxable UK trusts only need to supply details of their beneficial owners and controlling interests in other countries.

Background

The obligations for HMRC to maintain a register of trusts (and trustees to provide relevant information to populate it) were first introduced in July 2017, when the *Money-Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (the 2017 regulations) came into force. At the same time, the trust registration service (TRS) – the mechanism by which trustees supply information to the register – came into being (although agents could not access it until later that same year).

The regulations brought the requirements of the Fourth Money Laundering Directive ((EU) 2015/849)) (4MLD) into effect in the UK. Even as we were dealing with that, a further EU Directive was already in train. The Fifth Money Laundering Directive ((EU) 2018/843)) (5MLD) took effect on 9 July 2018 and member states were given until 10 January 2020 to enact it. Since the implementation deadline preceded the UK's exit date from the EU, we have been required to legislate for it in the UK despite Brexit.

The changes required by 5MLD are included in *The Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020* (the 2020 regulations) (tinyurl.com/2020regs) which were introduced in October 2020.

A brief history of 4MLD

Under 4MLD, only *taxable relevant trusts* needed to be on the register. To explain what one of these is requires some unpacking of definitions.

Firstly, a *relevant trust* under 4MLD is either:

- an express UK trust; or
- an express non-UK trust which has income or assets in the UK on which it is liable to pay one of the UK taxes specified below.

An *express trust* is, according to the Financial Action Task Force, one that has been created deliberately by a settlor, usually documented in writing. Trusts created by the operation of law, rather than the settlor's intention, are out of scope — more on that later.

A *UK trust* is one where either all the trustees are UK resident, or at least one of the trustees is UK resident and the settlor was UK resident when the trust was set up or funds were added to it.

A *taxable* relevant trust is a relevant trust which has a liability to one of following UK taxes: income tax; capital gains tax; inheritance tax; stamp duty land tax/land and buildings transaction tax/land transaction tax; or stamp duty reserve tax.

What has changed?

Under 5MLD, it is not only *taxable* relevant trusts that must be included on the register, but *all* relevant trusts – unless they are specifically excluded. This dramatically increases the number of trusts which need to be included on the register, with estimates of the additional registrations ranging into the low millions.

The definition of *relevant trust* under 5MLD is also wider than the 4MLD definition, as it also includes non-UK trusts which are not already registered elsewhere in a country which follows regulations similar to 4MLD (broadly the EEA), which either:

- acquire an interest in UK land; or
- have one or more UK trustees and enter into a business relationship with a UK adviser (including a tax adviser or accountant) who is subject to money laundering regulations.

This was a particular area of contention during consultation, with the CIOT and others highlighting the potentially unintended (and undesirable) consequences of overseas trusts seeking advice outside the UK in less regulated markets to avoid the need to register in the UK. As a result, the requirement that at least one of the trustees is based in the UK was added to try and reduce the potential impact for those who advise offshore trusts.

Who must report under 5MLD?

For reporting purposes, there are now four types of trust which are required to register under 5MLD.

Taxable relevant trusts – which can be UK or non-UK trusts.

And the following three types of non-taxable trusts:

- *Type A* – a UK express trust which is not specifically excluded, nor registered elsewhere in the EEA.
- *Type B* – a non-UK express trust which has at least one UK-resident trustee and which either acquires land or property in the UK, or enters into a business relationship with a relevant person in the UK such as a tax adviser, solicitor etc – provided that it is not excluded nor registered elsewhere in the EEA.
- *Type C*– a non-UK express trust where all trustees are non-UK resident but the trust acquires land in the UK.

Setting aside the non-UK trusts and focusing just on UK trusts, an UK express trust will be a *taxable relevant trust* if it has a UK tax liability. If it does not have a tax liability it might be lucky and be included on the list of excluded trusts. If not, it will have to register as a *type A* trust.

During its lifetime, a UK trust might move between the taxable, non-taxable (type A) and excluded categories. To add to the confusion, the category of taxable relevant trust trumps the excluded list – so a trust which is excluded will still need to register if it acquires a UK tax liability.

Does it matter which category the trust falls into as long as it is on the register? Yes, because the information a trust must supply, when it must update it, and the rights of third parties to see what's on the register, vary depending on the type of trust.

Is it really this complex?

Take for example, a bereaved minor's trust (BMT) with UK trustees. BMTs can arise through the operation of the will of the parent or under intestacy. For income tax purposes, prior to the beneficiary turning 18, the trustees can accumulate income and a BMT could therefore have a UK income tax liability – or the trustees might perhaps buy a property and incur SDLT.

When arising from a parent's will, a BMT for TRS purposes is an *express trust* and meets the definition of a *relevant trust*. If it incurs a UK tax liability it will fall into the definition of *taxable relevant trust*. Although BMTs are on the excluded list, the trust's tax liability trumps this and it would need to be formally registered on the TRS. This is relatively straightforward.

On the other hand, a BMT which arises via intestacy is not an express trust – it has arisen under statute. As it is not an express trust, it is excluded from the requirement to register on the TRS regardless of its tax status.

However, it could have an income tax liability that it needs to report each year via self assessment. Practically therefore it needs a UTR – and the only way to get one would be to use the TRS. Once registered though, it is not subject to any other TRS obligations because it is not an express trust to which the rules apply.

In practice, this means therefore that both BMTs will have to register via the TRS, but the requirements to update data or use the TRS to report the closure of the trust will not apply to the BMT created under intestacy.

Treating two otherwise similar trusts differently can easily create inconsistencies and confusion. Of course such difference in treatment will only be possible in practice if the system developed to accommodate 5MLD is sufficiently sophisticated to deal with such different scenarios.

In practice, I suspect some of the nuance in the regulations above will be lost – either because the TRS as developed will not incorporate all of the corners in the rules, or because trustees and their agents opt to keep information up to date to the best of their ability regardless – assuming the shortest deadlines apply rather than trying to establish if more time is available in certain circumstances.

Registering non-taxable trusts

There are three types of non-taxable trust which now need to be registered via the TRS – types A, B and C. In this article I will be focusing on UK 'type A' trusts.

Given the nature of English law, which seems to find a way to insert a trust into all sorts of commercial and private relationships, the extension of the trust register to potentially large numbers of non-taxable trusts is very much the scary bit of the 5MLD changes.

Type of trust excluded	Comments
Legislative trusts imposed by statute	This is a useful exemption as it includes: ● trusts arising on intestacy; and ● trusts of land that are considered to arise automatically when a home is jointly held, for example by spouses, civil partners, unmarried couples or friends.
Trusts imposed by the order of a court or tribunal	This is quite a wide ranging exclusion as it might include trusts arising from orders of the family court on divorce or claims under IPFDA 1975 or for compensation.
Pension scheme trusts	This only applies to schemes registered under FA 2004, Pt 4.
Trusts of life insurance policies which pay out on death, terminal illness or permanent disablement or to meet healthcare costs for the assured individual	To be excluded, the policy must not have a surrender value. A further exclusion for trusts arising on death means these trusts can continue to be excluded even when the policy pays out. However, this remains a very limited exclusion and many insurance policies written in trust will still be in scope of the new regulations.
Charitable trusts registered in England and Wales, Scotland or Northern Ireland.	Also excluded are charities which are not required to be registered in England and Wales, including charities with small incomes, schools, museums, galleries and churches. However, a charitable trust which incurs a tax liability by acquiring property or shares could find itself required to register as a taxable relevant trust instead.
Pilot trusts created before 6 October 2020 with assets of less than £100	While the exclusion for existing pilot trusts is welcome, any pilot trusts set up from 6 October 2020 must be registered as there is no *de minimis* threshold to the regulations. Once assets are added to an excluded pilot trust so that it exceeds the £100 limit it will be required to register.
Trusts arising on death by will, until two years from death have elapsed	There is effectively a period of grace after the date of death before trusts to which property of the estate is transferred need to be registered. This is helpful as the provisions of a will may be varied in this period. It would also be impractical for executors to register any trust arising on death within 30 days of death. The same period of grace also applies to trusts which only hold benefits from a life assurance policy on death which means trustees of an excluded life policy will not need to register when the individual dies, provided they pay out the benefits within two years. (Trusts arising by intestacy are – as already noted – excluded separately.)
Co-ownership trusts – trusts of jointly held property where the trustees and beneficiaries are the same persons	This is intended to include jointly held assets as held as ‘tenants in common’ such as land and property or joint bank accounts.
Trusts which meet certain legislative requirements	This section includes BMTs and 18-25 trusts set up by a will (those arising under intestacy are already excluded as arising by statute). It also includes trusts for the maintenance of historic buildings and personal injury trusts.

Even before we get to carrying out the actual registration, it will be a challenge to identify these trusts and alert their unwitting trustees to their new obligations. This has been vexing both HMRC and professional bodies alike. In many cases, individuals will not know that they are a trustee of some dusty old investment product or long forgotten will trust.

Exclusions

Fortunately, there are a number of exclusions, but they are not as broad as the ATT and others had asked for and some fairly common situations we had hoped might be excluded will still be in scope.

The rationale for excluding some trusts is either that they are considered low risk for money laundering purposes or because information about them is held elsewhere. The list of trusts excluded from the new requirements is set out in Schedule 3A to the 2020 regulations.

There are also exceptions for trusts which arise in commercial transactions, financial markets and for client monies.

One obvious omission from the list above is a bare trust. These will remain in scope unless they fit into one of the exclusions above.

Pending further guidance from the Revenue, a common case that does not fit the exclusion criteria is where a carer or family member is named on the bank account of a vulnerable person for day to day management purposes, but where the assets and income remain 100% the property of the vulnerable person.

The exclusion for trusts of joint property only applies where the trustees and beneficiaries are the same people. While this should cover situations such as a joint bank account – even if the account is owned in a ratio other than 50/50 – it does not appear to cover situations where the bare trustee does not have any interest in the assets.

Registration of this sort of arrangement is both onerous and highly likely to be overlooked.

What information is required?

Non-taxable trusts do not need to supply as much information as taxable trusts. The trustees of a type A, non-taxable UK trust only needs to supply details of their *beneficial owners* and *controlling interests* in entities in third party countries.

A trust's *beneficial owners* are broadly its settlor(s), trustees and beneficiaries. (I'll come back to controlling interests in detail in my second article.)

For individual beneficiaries, the trustees must supply their:

- name;
- month and year of birth;
- country of residence;
- nationality; and
- nature and extent of beneficial interest.

This information is slightly different to taxable trusts which must supply full dates of birth and NI number for their beneficial owners. (In my second article I will cover how taxable trusts must also now supply nationality and residency information.)

For any beneficial owners which are corporate entities, the trustees must supply the company name, registered office and nature of the company's role in the trust.

Unlike for taxable trusts, there is no specific requirement for any 'standing data' about the trust such as its full name, tax residency, advisers or assets. In fact, I cannot see that the regulations even require a type A trust to provide its name.

In practice, HMRC are likely to ask for basic information like the trust name and contact details for the lead trustee over and above the beneficial ownership data set out in the regulations because otherwise registrations would be unmanageable.

Deadlines

According to the regulations, non-taxable trusts which are set up prior to 9 February 2022 are required to register by 10 March 2022. However, HMRC confirmed to the professional bodies in a meeting on 11 March 2021 that, as the TRS is not yet ready for trustees to use, the March deadline (and possibly the related February date) will be pushed back to autumn 2022 to allow trustees around 12 months following the system upgrade to comply. In an Agent Update issued on 14 April 2021 HMRC extended the deadline further: '[for non-taxpaying trusts] we're now able to provide more detail on the timescales and registration deadlines. We:

- expect the TRS service to be open for non-taxpaying trust registrations by autumn 2021, rather than spring 2021 ...
- will be extending the deadline, to provide trustees and agents approximately 12 months in which to register, from the date that the service is available.'

Further updates and clarification on the final deadline will be confirmed in due course.'

Thereafter, such trusts should be registered within 30 days of being set up. Once on the register, trustees should update the data held within 30 days of becoming aware of any changes. The new 30-day deadline is likely to be challenging, but HMRC rejected representations from the ATT and others that trustees and their agents would need more time.

Planning point

The TRS has not yet been upgraded for the new regulations, so non-taxable trusts cannot be registered yet. What agents can do is start the process of identifying trusts which might need to be added and ask their trustees to start to gather the necessary information.

Conclusion

The new regulations are complex and many unsuspecting trustees will find themselves unawares of their duty to register long forgotten trusts. However, there is still time until HMRC updates the TRS to allow registration of these trusts.

In my second article I will look at what trustees of taxable trusts need to do by autumn 2022, and who will have access to the register from that point.

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