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FIFTH MONEY LAUNDERING DIRECTIVE AND TRUST REGISTERATION SERVICE

Response by Association of Taxation Technicians

1 Introduction

1.1 The Association of Taxation Technicians (ATT) is pleased to have the opportunity to respond to the HMRC and HMT consultation, the 'Fifth Money Laundering Directive and Trust Registration Service: Technical consultation document' ('the Consultation'), issued on 24 January 2020[1].

1.2 The primary charitable objective of the ATT is to promote education and the study of tax administration and practice. We place a strong emphasis on the practicalities of the tax system. Our work in this area draws heavily on the experience of our members who assist thousands of businesses and individuals to comply with their taxation obligations. This response is written with that background.

1.3 Our response is set out as follows:

Sections 2 – 7 - Questions 1-6 of the Consultation

Section 8 - Provision of proof of registration to obliged entities

Section 9 – Residency of beneficial owners

Section 10 – Comments on implementation

1.4 We have raised a number of concerns in section 4 on the operation of the various deadlines by which trustees must register or update their registrations on the Trust Register ('the Register'). We found the provisions included in the Consultation difficult to follow and do not think that they always result in the intended outcome.

1.5 In section 4, at paragraphs 4.18-4.27 we have also highlighted how requiring the same information for both taxable relevant trusts and type A/B trusts could help to simplify the implementation of the regulations.

1.6 In section 10, we have briefly reiterated concerns we have raised elsewhere about some of the practical issues for reporting on the Trust Registration Service (TRS), particularly for digitally challenged trustees. Our primary concern is ensuring there is a non-digital route for trustees to appoint their agents to act.

[1] https://www.gov.uk/government/consultations/technical-consultation-fifth-money-laundering-directive-and-trust-registration-service

1.7 We took part in a stakeholder roundtable (by conference call) on 13 February and have had sight of informal notes of a discussion with the Chartered Institute of Taxation (CIOT) on 27 January and have made reference to these meetings/discussions as appropriate. We have previously commented on earlier consultations and a link to our response of 10 June 2019 is provided below[2]. As in our previous response on the Trust Registration Service (TRS), we have focused our comments on the impact for UK trusts.

1.8 We have had sight of the response from the Chartered Institute of Taxation (CIOT) and endorse their submission. In particular, we support their views on whether a trust which enters a business relationship with an obliged entity should be included on the Trust Register.

1.9 We would be pleased to discuss any aspect of this response further. Relevant contact details can be found in section 11.

2 Question 1 – Are there 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

2.1 The Consultation sets out a number of trusts as being out of scope in 3.9-3.18. Our comments are as follows:

2.2 *Statutory Trusts (3.9-3.11)*

Land

The Consultation states that where a joint ownership trust exists solely for the joint ownership of property with partners, relations and friends, registration will not be required (3.11). This is enacted under regulation 45ZA(2)(a), which excludes from registration trusts imposed or required by an Act or subordinate legislation.

We are not legal specialists but understand that, very broadly, land law imposes a trust when joint ownership is involved. On this basis, presumably it is intended that *all* jointly held land, whether the parties are friends, partners, companies, personal representatives etc (i.e. wider than the terms used in the Consultation) are intended to be excluded, rather than the limited circumstances identified in the consultation? Equally, the exclusion will apply for both *joint tenants* and *tenants-in-common*. We support this approach and it would be helpful if guidance could clearly confirm all these aspects.

We are unclear what the position will be for tenants-in-common who change their beneficial ownership *after* the initial purchase by an express declaration. It is quite common for changes to be made in the beneficial ownership split between tenants-in-common. Such planning is currently easy and relatively inexpensive. We cannot see it would be excluded under the existing carve-outs, nor can we see any benefit in registering subsequent changes of beneficial ownership of property on the Register. In any case where income is being generated from the land, the change in beneficial ownership should be reflected in the individual's tax returns. Could HMRC/HMT confirm that such changes will not need to be registered and ensure that this is reflected in the legislation?

Intestacy

The current provisions mean that a trust set up in a Will must register under 45ZA(1)(a), but a trust created through intestacy is excluded under s45ZA(2)(a). There is an argument that this could create perverse

[2] https://www.att.org.uk/technical/submissions/transposition-fifth-money-laundering-directive-att-response

incentives not to create a Will, if the intestacy rules would largely achieve the desired result and would avoid the administration time and costs of registration on the Register.

We have suggested below at 2.4 that Bereaved Minor Trusts and 18-25 trusts should be excluded to help redress the balance.

2.3 *Bare trusts (3.13)*

There are a range of potential bare trusts where we consider that it is impractical and unreasonable to expect individuals to register on the Trust Registration Service (TRS), particularly in family situations such as individuals helping either their own children, or their elderly parents, to manage a bank account. We can see little/no benefit in registering these arrangements, nor it is likely that most people would realise registration would be required.

It does not appear to us that any specific provision has been made to exclude bare trusts in the draft regulation 45ZA(2). We are not legal experts and are not clear if specific exclusions are needed under 5MLD to achieve the same rule. For 4MLD, it was explained that bare trusts did not need to register as the tax liability arose at the level of the beneficiary and not at the level of the trust and therefore no specific exclusions were needed.

In many of these 'bare trust' situations, an asset such as a bank account, will already be subject to anti-money laundering (AML) procedures with the bank required to verify the ID of the customer who manages the account and the underlying beneficial owner. Would one approach to excluding 'bare trusts' from the additional types of trusts required to register, be to amend the legislation to exclude any arrangements where the sole asset in the 'trust' is a financial asset such as a bank account which is managed by a financial institution required to carry out identity checks for AML purposes?

However it is achieved in legislation, we would like to see bare trusts excluded as far as possible from the Register and certainly for the day-to-day family situations described above. We wonder if the Human Rights Act and the right to respect for private and family life would have any bearing on the level of transparency which should be considered reasonable here?

Bare trusts arising on the encashment of insurance policies should also be out of scope. Clear guidance of what is intended to be in and out of scope will be needed.

2.4 *Specific exclusions (3.14)*

The Consultation suggests that the following trusts are intended to be excluded as the limitations placed on them reduce the potential for abuse.

- Maintenance fund trusts for historic buildings
- Approved share option and profit-sharing schemes
- Vulnerable beneficiary trusts
- Personal injury trusts

We agree with this approach, and suggest that this list should be extended to the following categories of trust which also have limiting conditions with which they must comply to maintain beneficial tax treatment:

- Bereaved minor trusts
- Age 18-25 trusts

At present we cannot see where any of these trusts are excluded in draft regulation 45ZA(2). Will additional specific exclusions be added to this section to cater for such circumstances? We would like to see all the exclusions clearly stated in legislation to ensure the position is unambiguous.

2.5 *Life insurance policies*

We are pleased to see that trusts of certain insurance policies are excluded from the scope of registration. There will be vast numbers of such trusts and, until encashment, the surrender value is often not significant. We previously raised concerns that many trustees would not even necessarily appreciate that they were trustees of such policies which can lie dormant for many years.

We are concerned that the exclusions are limited to specific types of policies. This still leaves a huge range of insurance-style policies (e.g. critical illness, policies that can be encashed in life) and we understand that CIOT have suggested excluding policies which have a surrender value below a set limit. We support this approach to widen the range of such trusts which are out of scope.

Alternatively, we wonder if insurance policies provided by regulated investment entities which are required to carry out due diligence and AML checks on their customers could be out of scope on the grounds that existing regulations are in place to ensure checks on beneficial owners? This is similar to our suggestion for bare trusts at 2.3 above.

Finally, what is the intended position for registration when such insurance policies are encashed? We presume that in many cases the trustees will then be holding funds as bare trustees until payment can be made to the beneficiaries so that no registration will be required. However, is it intended that if the funds remain in trust on encashment, the trust will then need to be registered? If so, registration deadlines of 30-days may be challenging. Guidance on this point will be required and potentially clarification in legislation.

2.6 *Charities*

We note that registered charities are excluded under draft regulation 45ZA(e) but, as noted in discussions with the CIOT, registration for Charities can be triggered by payment of SDLT, LBTT/LBT or Stamp Duty Reserve Tax (SDRT) if the charity purchases property or shares. We agree with the CIOT that this is unhelpful and charities should not be forced to register just because they purchase property or shares subject to SDRT.

2.7 *Pilot trusts/Low Value trusts*

Although not mentioned in the Consultation, would there be merit in excluding exceedingly low value trusts from registration on the grounds of proportionality? This might include trusts of investment policies with low surrender values. Again, it would be helpful if any such exclusion could be included in legislation.

2.8 *Trusts with IOUs*

We also suggest excluding trusts which only contain an 'IOU' or charge over another asset in them. These are generally low risk trusts, often with elderly trustees who are unaware of the trust's existence.

A number of these trusts were set up prior to the introduction of the transferable nil rate band when the first of a couple died. The charge or 'IOU' is typically to the value of the nil rate band at the time the trust was formed. Members report that these often lie dormant for many years, only to re-emerge on the death of the survivor very many years later. These trusts will have no funds to pay professional fees and should be low risk for money laundering or terrorist purposes.

2.9 *Immediate post death trusts containing property*

In a similar vein, it is not uncommon for a deceased spouse to leave a life interest in the family home to the surviving spouse – an Immediate Post Death Interest or IPDI trust. No income arises as the survivor will continue to live in the property and often, over time, it is forgotten that a portion of the property is in a trust as it has no impact day to day. Our members support the CIOT's call to exclude from scope interest in possession trusts for the benefit of the survivor where the only property is a dwelling occupied by the survivor.

3 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?

3.1 As previously noted, we are keen to see robust guidance which covers as many situations as possible. A clear list of both what is, *and what is not*, intended to be registered is essential.

3.2 We would also like to see some form of communications campaign from HMRC to highlight these new responsibilities to trustees. The extent of the campaign will depend on what is ultimately decided to be in scope. The challenge is that many trustees will not appreciate that they are actually trustees and may not appreciate that they need to engage with these rules. We therefore appreciate that communicating the changes to those affected will be very difficult and we presume that this is partly why the penalty regime has been structured to include a 'prompt' or 'nudge' letter as a first step in achieving compliance.

3.3 Trustees are not always in the position to afford professional legal advice. Many trusts do not have liquid cash assets or assets that could be easily sold to raise funds, leaving trustees having to self-fund professional advice. In all but the most complex cases (where the guidance could identify the need to seek professional advice), an unrepresented trustee needs to be able to establish their obligations from clearly drafted guidance.

3.4 It would also be helpful if the guidance emphasised that there are (currently) no *de minimis* thresholds. That would reinforce the blanket approach of the Fifth Money Laundering Directive ('the Directive' or '5MLD').

3.5 We have identified in the previous section a number of areas where specific guidance will be needed (in addition to the legislation) to confirm if the trust is intended to be in or out of scope. These include:

- Examples of relevant Acts under 45(2)(a) – for example trusts of land with joint ownership and trusts arising under intestacy.
- In respect of land we would like to see detailed, clear guidance, with examples, to clarify what is intended to be in and out of scope.
- Examples of bare trusts, particularly bank accounts managed on behalf of children/family members, joint bank accounts etc.
- All forms of special trusts as set out in 2.4.
- Investment policies – particularly clear guidance will be needed if only a subset of policies will be exempted.

If trusts involving investment policies are to remain in scope in whole or in part, we think that it would be helpful if specific guidance targeted at investment providers and financial advisers was provided.

3.6 Other areas where guidance might be needed include:

- The differences between *taxable relevant trusts* and type A/B trusts.
- Any regional differences due to differences in Scottish/Northern Irish trust law (NB This may also require amendments to legislation).
- How to confirm that extracts from other EEA registers are legitimate.
- If/how the regulations might apply to Community Amateur Sports Clubs (CASCs) who may hold land under trust structures and will not be exempted under the charity provisions.

3.7 As can be seen from our comments in section 4 below on the registration deadlines, guidance on the various deadlines for the registration of taxable relevant trusts and for type A/B trusts would be helpful. Those already registered under 4MLD need to understand the additional information required and when it must be provided, while those not yet registered but who will incur a tax liability before 10 March 2022 need to understand which of three different deadlines will apply to them.

3.8 Ideally, we would like to see HMRC provide additional helpline support to assist trustees in complying with their obligations. However, given the significant number of additional trusts requiring registration and the current pressures on HMRC resources, we assume that HMRC will struggle to provide this. This reinforces the requirement for clear, comprehensive guidance to enable trustees to comply. We would be happy to contribute to the preparation of such guidance.

4 Question 3 – Do the proposed registration deadlines and penalty regime have any unintended consequences that would lead to unfair outcomes for specific groups?

4.1 We have split our response to this question into a number of areas:

- Impact for taxable relevant trusts (4.2)
- Information requirements (4.18)
- Meaning of 'set-up' for registration deadlines (4.31)
- Deadlines in general (4.38)
- Penalties (4.46)

4.2 **Impact for taxable relevant trusts**

4.3 The Consultation sets out at 3.22 the proposed deadlines by which registration must be completed. The proposals appear straightforward at first glance, but we have struggled to reconcile what is in the Consultation to the draft legislation, with a range of different deadlines for different circumstances. We have found it difficult to follow the wording of the legislation in some cases and in others we are not clear if it achieves what is intended.

4.4 We think part of the confusion arises because the proposed legislation introduces a distinction between *taxable relevant trusts* (already subject to registration requirements under 4MLD) and other trusts (type A and type B) now brought into the requirements under 5MLD. These separate categories of trust have different deadlines but it is possible for trusts to move between the categories.

4.5 The deadlines for registering and/or updating the details for taxable relevant trusts are contained in regulation 45 and are linked to tax years in some cases. The new provisions for all other express trusts which must register (type A/B trusts, which excludes taxable relevant trusts) are contained within regulation 45ZA and tax year deadlines do not apply.

4.6 The proposals are that all trusts which incur a tax liability for the first time prior to 10 March 2022 (and which are then taxable relevant trusts) will follow existing 4MLD rules until that point and will be required to provide additional information to bring their registration in line with 5MLD by 10 March 2022.

For all other express trusts within scope, the Consultation proposes at 3.22 that:

- trusts in existence at 10 March 2020 (in line with the Directive) must register by 10 March 2022.
- trusts that are set up after 10 March 2020** must register within 30 days or by 10 March 2022, whichever is the later.
- trusts that are set up on or after 10 March 2022** will have 30 days to register.

*** N.B. The legislation has 9 February 2020 in both cases – presumably to ensure that a trust set up on 8 March 2020 would get the full 30 days to register and not be required to complete registration in 48 hours. This is helpful.*

4.7 For *taxable relevant trusts*, under the proposed amendments to regulation 45(3), the trustees are required to complete registration:

> (a) on or before 31st January after the tax year in which the trustees were first liable to pay any of the taxes referred to in paragraph 14 ("UK taxes"), in the case of a trust **which is set up** before 6th April 2021; [**our emphasis**]
>
> (b) on or before 10th March 2022, in the case of a trust **which is set up** after 5th April 2021 and before 9th February 2022;
>
> (c) within 30 days of the trust **being set up**, in any other case.

4.8 On this basis, a trust which was created on (say) 1 February 2020 which first acquires a tax liability in 2019/20 will need to register by 31 January 2021. This meets the requirement that a trust in existence at 10 March 2020 should be on the register by 10 March 2022. And if the same trust first acquires a tax liability in 2020/21, then it will need to be registered by 31 January 2022 – again meeting the requirements.

4.9 If, however, the same trust first acquires a tax liability in 2021/22 then, following 45(3)(a), it will presumably need to register by *31 January 2023* – i.e. after the 10 March 2022 deadline despite the trust being in existence at 10 March 2020.

4.10 We therefore considered if, at 10 March 2022, this trust would be caught by regulation 45ZA instead. However, provided the tax liability is incurred before 10 March 2022, then it is surely a *taxable relevant trust* for 2021/22 and so is not caught by the provisions of regulation 45ZA. This suggests to us that with the current drafting some trusts in existence on 10 March 2020 might not be required to register by 10 March 2022.

4.11 We presume if the first tax liability is deferred further – so the same trust does not acquire a tax liability until 2022/23, then at 10 March 2022, the trust is not a taxable relevant trust*,* but it is a type A trust and it must register the information required under regulation 45ZA by 10 March 2022. This will meet the requirements of the Directive.

4.12 However, when this trust then becomes a taxable relevant trust in 2022/23, it will have to supply additional information to the Register – and as it was created ('set-up') prior to 6 April 2021, presumably not until 31

January 2024. This would be significantly at variance with a trust created in 2022/23 which had a tax liability in that same year, which would under the new rules have only 30 days to supply the same information.

4.13 Having three different potential registration dates, which depend on both the creation date of the trust and its tax liability, is confusing and we wonder if this could be simplified. We appreciate that part of the problem is that the 10 March 2022 deadline does not sit well for a deadline calculated by tax years in the transitional year of 2021/22. Would one approach be to simply require any trust that first acquires a tax liability in the period from 6 April 2020 to 9 February 2022 should register by 10 March 2022, since the difference between the usual registration date for taxable relevant trusts in 2020/21 of 31 January 2022 and 10 March 2022 is negligible? The term 'set-up' could then be removed from draft regulation 45(3)(a) and (b) and the two tests combined.

4.14 Assuming that separate information requirements are maintained for taxable relevant trusts and type A/B trusts (see below for our reasoning why we think this is unhelpful) could the requirement to consider the date that the trust was 'set up' also be removed or amended for draft regulation 45(3)(c)? As in 4.15-4.17, a trust may acquire a tax liability some years after it was created and move from a type A/B trust to a taxable relevant trust and we are not convinced that the legislation as drafted gives a sensible answer in these cases. (We have commented further on the term 'set up' at 4.31 below.)

4.15 *Moving from type A to taxable relevant trust*

We are unclear how updates of the Register are intended to operate when a type A or B trust becomes a taxable relevant trust.

4.16 To illustrate our understanding with an example, consider a type A trust created ('set up') on 1 February 2020, which does not incur any tax liability before 10 March 2022. On this basis, it will first be required to register details of its beneficial owners alone under regulation 45ZA(6)(a) by 10 March 2022.

If the trustees purchase a property (say) on 5 May 2022 and incur an SDLT charge the trust becomes a taxable relevant trust for 2022/23, and additional information is required on the Register under regulation 45. We are taking from the current draft provisions in 45(3)(a) that this information is not required until 31 January 2024 as the trust was set up before 6 April 2021.

If the same trust had been set up on 1 February 2022 and acquires a property on 5 May 2022, then information on beneficial owners would be required under regulation 45ZA(6)(a) by 10 March 2022, and then further information on becoming a relevant taxable trust under regulation 45. Again, looking at the proposed legislation at 45(3)(b), the deadline for a trust set up before 9 February 2022 is 10 March 2022, *before* the trust became a relevant taxable trust.

4.17 One solution might be to change the wording of 45(3)(c) so that a trust is required to provide the additional information required 'within 30 days of the trust becoming a relevant taxable trust' rather than within 30 days of being 'set up'.

4.18 **Information requirements**

4.19 Our second, and preferred, option would **be to collect the same information for both types of trust**. In a previous submission, we advocated that the Trust Register should collect the same data for taxable and non-taxable trusts. Collating different information for taxable and non-taxable trusts is confusing –furthermore

the differences do not appear to be significant – or at least the provision of this extra information should not (with one exception which we address at 4.21) be unduly onerous.

4.20 From 10 March 2022, the additional information demanded of taxable relevant trusts compared to type A/B trusts is:

- The full name of the trust.
- The date on which the trust was set up.
- A statement of assets for the trust at the date on which information was first provided to the Commissioners (this has been interpreted in practice by HMRC[3] as the assets in the trust at commencement – this is helpful as it means that trustees do not need to make annual statements. Again it would be helpful if the legislation could reflect what is actually being provided in practice).
- Country where the trust is considered to be resident for tax purposes.
- The place where the trust is administered.
- A contact address for the trustees.
- The full name of any advisers providing legal, financial or tax advice.
- For any reported individual (settlor, trustee, beneficiary etc.) their *full* date of birth (type A/B trusts only ask for month/year).
- **For any individual beneficial owner, their National Insurance number or Taxpayer reference, or failing that their usual residential address and, if the address is outside the UK, some further identity information such as passport/ID card number and expiry date.**

We strongly suspect that the Trust Register will be drafted to capture most of this information regardless of the type of trust being registered.

4.21 The only substantial difference in terms of the data we can see is the requirement to supply beneficial owners' National Insurance numbers (or the additional information for non-UK individuals) highlighted in bold at 4.20. As we have previously observed, trustees find collection of this information challenging and we consider that HMRC will have access to NI numbers through other channels when a tax liability is at stake (self-assessment, forms R185, IHT reports for example), without need to include this information on the trust register.

4.22 Trustees, settlors and beneficiaries are unclear why their personal information is required when the trust is tax compliant and there are no personal tax consequences for them, and potential beneficiaries are of course not always aware of their beneficiary status. There are also cases where the NI number is not available - for example children under 16 who have not yet been issued with their NI number, and deceased individuals. In the early stages of the TRS, it was necessary to provide a workaround for deceased individuals. Furthermore, not everyone has a passport.

4.23 The requirement to provide NI or passport numbers on the trust register is also not consistent with the information which a director or shareholder must supply to Companies House and therefore seems unduly burdensome in the trust context, where the risk of money-laundering has been assessed as low.

4.24 As further support for our position, regulation 34 of the Directive states that information made accessible to the public should not significantly differ from the data currently collected. Any additional information

[3] See section I page 22 https://www.att.org.uk/sites/default/files/171122%20-%20TRS%20Guidance%20FAQ%20-%2022%20November%202017.pdf

that HMRC requires for the purposes of tax collection should not be collected as part of the Trust Register but should continue to be collected via HMRC's existing processes for tax.

4.25 We suggest that the requirement to supply National Insurance numbers is dropped. It is obviously not considered crucial to the prevention of money laundering/terrorist finance, or it would have been required for type A/B trusts to start with.

4.26 We think it would be more helpful for identification purposes to supply *full* dates of birth for both taxable relevant trusts and type A/B trusts to the Register which is then available in full to law enforcement agents (while retaining the provisions that only month and year details are disclosed in response to legitimate interest requests). It is highly likely that trustees will collect full dates of birth anyway. This additional requirement could help to justify removal of the obligation to supply NI numbers for taxable relevant trusts.

4.27 Making the data collected the same for all trusts would also remove need for the provisions at 45(9) for updating the data held for taxable relevant trusts by the 31 January following the tax year in which a tax liability was incurred. It makes little sense for trustees to have obligations to update the data in respect of beneficiaries within 10A-10C within 30 days, but only keep the rest of the information supplied up to date in a year in which a tax liability arises. For practical purposes, much of the data in 4.20 will not be changing regularly.

4.28 The only potential justification we can see for keeping requirements for an annual review of the data held for taxable relevant trusts (and these trusts only, since an annual review would be a substantial burden for type A/B trusts) in addition to the 30-day updating requirements, would be that is analogous to the position for companies. Companies are required to provide Companies House with updates of changes to directors (for example) during the year with a confirmation statement filed annually to confirm all the details held.

4.29 However, the position for trustees is not straight forward compared to companies. A company is required to file a confirmation statement to confirm details *at a specific point in time* and within a 14-day period. The date of the confirmation statement is tied to the formation date of the company. In contrast, trustees of taxable relevant trusts are asked either to make a confirmation that there were no changes *during a tax year* by the 31 January following the tax year of the change, or notify of any changes made during that tax year by the same date. Unlike a company making a confirmation statement, by the time the trustee comes to make either a notification or a confirmation some months after the end of the tax year, the position could have changed again. Guidance was supplied at the time[4] on how trustees should deal with this, but this regulation has not been implemented as the TRS cannot yet be updated and so these inconsistencies have not been brought to light.

4.30 It would be helpful if while changes are made to the regulations, 45(9) could be redrafted to address whether HMRC wants retrospective confirmation of what happened in a tax year for taxable relevant trusts, or a confirmation of the details at a given point in time on an annual basis – or if such provisions are even required now trustees have in-year update obligations.

[4] See page 25 https://www.att.org.uk/sites/default/files/171122%20-%20TRS%20Guidance%20FAQ%20-%2022%20November%202017.pdf

4.31 **Meaning of 'set-up' for registration deadlines**

4.32 Another aspect of the legislation we find to be unclear in regulations 45(3) and 45ZA(6) is what 'set up' is intended to mean in this context. Is it intended to mean the point at which the trust is fully *constituted* – i.e. that assets are transferred to/vested in the names of the trustees?

4.33 We have previously expressed concerns that the requirement to register a new trust within 30 days of creation will not be workable in all cases and that additional time will be needed in specific circumstances. We understand from our discussions at the HMRC roundtable on 13 February that HMRC is aware of these concerns in respect of Will Trusts in particular but that it has not been decided how 'set up' is to be interpreted. (We have commented further on the 30-day period separately below.)

4.34 We think that 'set up' should be taken to mean the point at which the trust is fully *constituted*. This would be particularly helpful in the context of Will Trusts as the assets will be held by personal representatives until such point as the assets are assented to the trustees of the ongoing trust (who may or may not be the same people) or the administration is otherwise completed. This would allow a suitable period of time to deal with immediate post-death concerns (funeral arrangements etc.) and estate administration.

4.35 If 'set up' is not removed from the legislation as suggested at 4.14, then we think another term should be used to make the intention of the legislation clear.

4.36 Our only concern about tying registration to vesting of assets is that we are aware in some circumstances it can take a long time for assets to be vested in the hands of the trustees.

4.37 At the roundtable on 13 February, it was suggested that 'set-up' could be linked to the date of grant of probate. We consider this to be unhelpful. The grant of probate is not otherwise relevant in the creation of a will trust and this unrelated date will introduce confusion. Advisers should be able to identify when a will trust has been constituted and trustees should be able to understand when assets have been transferred to them.

4.38 **Deadlines in general**

4.39 We called in our previous submission for more time than the originally proposed date of 31 March 2021 and are pleased that the requirement for all trusts to register on the TRS has been pushed back to 10 March 2022. (It is also helpful that the deadline does not coincide with the 31 January self-assessment deadline.)

4.40 However, we do note that the new register will not be available for registration until 2021 (3.22). Depending on when in 2021, this could give practitioners up to 14 months or only 2 months and 10 days to comply. We are obviously concerned that practitioners have sufficient time to get to grips with the new rules and the exclusions, and register all their trusts, on top of existing work. We consider that if the register goes live any later than March 2021, an extension to the 10 March 2022 deadline will be needed.

4.41 Even with a clearer picture of the exclusions, it is not known how many trusts there are to register and determining if 10 March 2022 provides sufficient time to comply is therefore challenging.

4.42 In the meantime, we look forward to the opening up of the new micro-service (currently in private beta testing) so that trustees and agents can start to update the Register for changes which have occurred since first registration. Currently, only very limited updates to the lead trustee can be made. It would be very helpful if the new micro-service could be made available to agents and trustees as soon as possible, so that

they can start to bring existing registrations up to date before tackling the larger numbers of registrations required by 5MLD.

4.43 Members have also asked if it would be possible to register trusts without a tax liability on the existing register now – even though they appreciate additional information will be required next year on nationality and residency in line with 5MLD – just so they can start the process of tackling registrations to spread the workload over a longer period.

4.44 Members have raised concerns that 30-days is too short a period both for initial registration and to make updates to the Register for changes subsequent to initial registration, particularly during busy self-assessment periods. When a Will trust commences, it can take a significant period of time to identify beneficiaries – one member recently reported a case where it took over a year to trace a beneficiary who had moved overseas. We suggest that as a minimum, 90 days or three calendar months would be a more manageable period of time for both initial registration and updates, with potentially a longer period for the initial registration. We see CIOT have called for a period of six months. As noted above, we consider the initial registration period should run from the date that assets are transferred to the trustees.

4.45 As a further observation – under regulation 44(3), trustees are required to inform the 'relevant person' if during the course of a business relationship, there is a change in the information provided about beneficiaries under 44(2)(b) within 14 days. We think it would be helpful if the dates for informing the TRS of changes and of informing relevant business relationships could be aligned at 30 days (or the longer period suggested above). It would be helpful if the TRS provided a prompt to remind trustees to inform their advisers of any changes at the same time.

4.46 **Penalties**

4.47 In our previous submission, we sought assurance that penalties would be proportionate where it is clear that there has been no deliberate failure to register, particularly where trustees had not appointed professional advisers and/or were not aware of their obligations. We are pleased to see that this has been recognised in the Consultation and that the Government recognises the need for a proportionate approach (3.26). We consider the proposed approach is reasonable and, having called for a *period of grace* in which trustees could be made aware of their obligations without penalty, we very much welcome the proposal to issue nudge letters as set out at 3.28.

5 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 would consider this not to be the case.

5.1 Following our previous submission which highlighted concern about ensuring that legitimate interest was well-defined, we have repeated some suggestions below.

5.2 We are pleased to see that access will be restricted to situations where the person requesting data is making it in the context of a specified instance of suspected money laundering and that potential beneficiaries will not generally be able to carry out a 'fishing' exercise for information - unless the trust has a controlling holding in a third-party company in which case there are no such protections. The use of trusts is frequently driven by personal and private relationships and trustees should be protected from speculative and inappropriate requests. It might be helpful to provide in guidance an example of what an eligible request could look like.

5.3 We have some hesitation over the practicalities for trustees of monitoring controlling holdings in non-EEA countries (which must be reported to the Register and updated within 30-days), but have no specific feedback from our members on whether this will prove difficult for trustees to comply with. We welcome the move from a 25% interest test to a 50% interest test.

5.4 As part of evidencing legitimate interest, we consider that persons seeking information should be asked to disclose if they have any family connections to the trust as part of the application process.

5.5 When information is disclosed to someone with a legitimate interest, it may be that information is being shared with someone who is potentially unfamiliar with how trusts are structured and operate. In order that the information supplied is not misleading, it may be helpful to include some general information or guidance about what the nature and extent of a beneficial interest might mean in practice, or suggest that professional advice is sought.

5.6 We have previously suggested that either an independent arbiter should be part of the process or there should be some transparency with trustees being informed of requests made. We are also aware that HMRC has to balance transparency with trustees with concerns about 'tipping off' those suspected of money laundering. We see that a review process is proposed but it does not involve the trustees and only concerns the point where HMRC decide an exemption under 45ZB(6) applies.

5.7 In respect of the review process provided, who will conduct the review and will HMRC have sufficient resources to carry out these independent reviews?

5.8 Where a person makes a number of similar requests – perhaps after a first application is refused – then could this effectively be viewed as asking for a review of HMRC's first decision? We consider that the review process should be expanded to treat repeat requests as effectively a review request and that the trustee should be involved and allowed to make representations as to why disclosure should not be permitted at that point. There should be a limited risk of tipping off in those circumstances if HMRC has already considered that the request is not in connection with a specific instance of suspected money laundering or terrorist activity on the first application.

5.9 As set out in our previous submission, we think it would be helpful for HMRC to publish annually the number of legitimate interest requests received and how many of those HMRC accepted or rejected. This would enable trustees and their advisers to understand the scale of legitimate interest requests.

5.10 *Comments in respect of legislation*

5.11 At 45ZB(4) a *controlling interest* in a third country entity is defined by asking the trustee to consult Companies Act legislation for *significant interest*, and substitute the 25% test there with a 50% test. This is quite confusing to follow and it would be easier if the regulations contained the necessary test for controlling interest without reference to other legislation that does not, in itself, provide the precise definition required.

5.12 Also at 45ZB(4)(b) a 'third country entity' is defined as an entity outside the EEA. For the avoidance of doubt, should this also say 'outside the EEA and the UK'.

5.13 Regulation 45Z might be easier to read as a whole if paragraph 2 was moved up to be the opening paragraph, so that the two paragraphs (1) and (3) dealing with information requests by third parties sat together. (Paragraph 6 would then need amending to be consistent with the new order.)

5.14 There is no commencement date provided for regulation 45ZB. Given that the register is not likely to be up to date until 10 March 2022 (see 4.38), we consider that this regulation should not take effect until 11 March 2022.

6 Question 5 - Does the proposed handling of exemptions for legitimate interest and third country entity requests provide the right access to the beneficial ownership data whilst protecting beneficial owners from potential risk of harm?

6.1 We are pleased to see protections for minor or vulnerable beneficiaries and for those at risk of kidnapping, fraud or extortion. However, we would like to see further details of how this is intended to work in practice. Will there be a clear mechanism for trustees to highlight the existence of vulnerable or 'at risk' beneficiaries? We think that this should form part of the TRS process - with trustees having the opportunity to flag up beneficial owners (including themselves) who might be at risk under any of these categories. Provision could be made for trustees to explain why they consider the exclusions applied.

6.2 When a review is requested as to whether or not an exemption applies, this could be an opportunity to allow the trustees to become involved and be informed that a request has been made. At this point, the trustees could make representations to support their view that they or other connected parties may be at risk and that disclosure is not appropriate.

6.3 Any guidance should clearly highlight to trustees the existence of the new legitimate interest request rights and their ability to highlight any 'at risk' beneficial owners.

6.4 *Comments in respect of legislation*

6.5 In regulation 45ZB(7), when it says that the Commissioners will inform the person making the request about their decision to withhold information on some/all the beneficial owners, how explicit an explanation is it intended the Commissioners will supply? We can see that in order to seek a review the individual requesting data might wish to know if beneficiaries are at risk of fraud, violence or are under 18 or vulnerable. However, providing reasons in that level of detail – particularly when the beneficiary might be at risk of kidnapping - imposes its own risks. We consider it very important that only a 'high level' declaration that an exclusion applies should be made, without reference to the precise nature of the exclusion.

6.6 Regulation 45ZB(8) says that the Commissioners are, on review, permitted to 'alter the scope of the exemption'. We are unclear what this is intended to mean. We accept that a review might conclude that a beneficial owner is not at risk of fraud, kidnapping etc., and that an exclusion might not apply, but that is not the same as 'altering the scope' of an exemption. Perhaps this wording needs rephrasing?

6.7 We are uncomfortable with the idea that HMRC could 'alter the scope' of an exemption without the trustee having had the opportunity to make representations. HMRC should be restricted to considering if it is reasonable to accept that one of the exclusions applies.

7 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.

7.1 We have not responded to this question.

8 Provision of proof of registration to obliged entities

8.1 While there are no specific questions in respect of them in the Consultation, we would like to comment on the proposals in paragraphs 4.28-4.32 in respect of trustees' obligations to provide evidence of their registration.

8.2 We are pleased to see that the Government are adopting the approach of putting trustees in control of obtaining the necessary information from the TRS (4.29).

8.3 In addition to being able to download a digitally signed PDF, we have previously suggested that a trustee should be able to log into the TRS and request that confirmation of registration is sent *direct* to the obliged entity via email. In that way, the obliged entity (or anyone else that the trustee wishes to supply information to) can receive the information direct from the Trust Register which would add further confidence that the registration was genuine.

8.4 We note that at 4.32 the Consultation states that 'there will be help for customers who are unable to use digital services'. We have made further comments below about our concerns for digitally incapable trustees but, in terms of this specific requirement, we consider that any agent who has assisted in registering the trust should also be able to download/email the confirmation of registration to assist the trustees in complying with their obligations.

8.5 For the unrepresented trustee who has perhaps been helped to register on paper, we consider that they should be able to phone HMRC to request a printed version of the necessary information by post.

9 Residency of beneficial owners

9.1 Under the regulations, from 10 March 2022 all registerable trusts will be required to disclose both the nationality and residency of beneficial owners.

9.2 While an individual's nationality will rarely change, their country of residence could change frequently. Keeping track of highly mobile beneficiaries can be hard and may, where the individual is not receiving anything from the trust, not be relevant information for the trustees. Residency information will, in some cases, be onerous for trustees to provide. However, we appreciate this information is required by the Directive, so it is necessary to find a pragmatic solution to this requirement.

9.3 Our concern is over *how* residency is intended to be interpreted in this context. Is it intended for beneficial owners to disclose their *tax* residency, or their current country of residence? Tax residency can be difficult to establish, depending on day counts, statutory tests and potentially double tax treaties. Tax residency is also generally determined for tax years in the UK and may not be finally established until after the tax year has ended. If a trustee is making a report on 5 May 2022, say, should they be reporting the tax residency for the tax year just gone, or the tax year just started?

9.4 We consider that guidance is needed to confirm what is required. We suggest that taking the country where the beneficial owner receives their correspondence at the *date of the report* is the simplest approach. On this simple basis, any declaration of residency for TRS purposes should not be considered relevant to tax residency

as it has not been determined in a formal manner by reference to day counting, statutory tests and double tax treaties.

9.5 Regulation 45(10)(E) requires trustees to update the Register 'if the trustee *becomes aware* that any of the information …has changed' [*our emphasis*]. We presume that 'becomes aware' can be interpreted as passive receipt of information and that trustees will not be required to actively pursue beneficiaries who are not in receipt of benefits from the trust for regular updates on their residency. (Where beneficiaries are in receipt of benefits, for tax purposes a prudent trustee should take an active interest in their movements to avoid issues with other tax jurisdictions.) Guidance is needed to confirm HMRC's expectations of trustees' obligations on keeping track of residency for the trust's beneficial owners.

9.6 Guidance should also cover the position where one trustee becomes aware of a change in residence of a beneficiary, but forgets to inform the other trustees so that the Register is not immediately updated. Would it be intended to penalise in this instance, or will a 'nudge' letter be considered reasonable in these circumstances too, provided that the (in)action was not deliberate.

10 Comments on implementation

10.1 At the Agents Digital Design Advisory Group (ADDAG) meeting on 29 January we were asked to include any comments on concerns about the implementation of the TRS in this response. Since much of this has already been raised in meetings, we are only outlining our concerns here.

10.2 The major issue for implementation is the approach for dealing with trustees who do not have the digital capability to either handle the registration themselves online or appoint an agent. With more trusts being brought into scope, the number of trustees who lack the IT skills to handle registration will increase.

10.3 From the perspective of agents, the new process proposed for trustees to authorise them to act as set out in August 2019's *Trusts and Estates* newsletter[5] is unhelpful as it assumes that all trustees will be capable of creating a set of Government Gateway credentials and appointing an agent digitally. (It is also confusingly a slightly different series of steps to the route developed to appoint an agent to handle the new 30-day CGT reporting.) Our members have expressed concerns that not all trusts will have a trustee capable of doing this. **We are keen to see a non-digital route for trustees who are digitally challenged to appoint an agent to act**.

10.4 We would like to see a paper reporting route for non-represented trustees who are not digitally capable. We understand from the meeting on the 29 January that both of these options are being discussed within HMRC and we would be happy to provide any further evidence/suggestions required.

10.5 We think it would be helpful to understand what the experience of unrepresented trustees dealing with the TRS to date has been – although we wonder if for the digitally challenged it has been the case that they have simply failed to comply?

10.6 We understand that private beta testing is ongoing of a new micro-service which will have improved functionality over the existing iForm and we welcome this. Our members would be keen to be involved in further testing as 5MLD requirements are implemented and we look forward to the opportunity to pilot the newly developed TRS.

[5] https://www.gov.uk/government/publications/hm-revenue-and-customs-trusts-and-estates-newsletters/hmrc-trusts-and-estates-newsletter-august-2019#trust-registration-service

10.7 As noted in paragraph 8.4 of this response, we would also like to see agents have the power to access and provide to the trustees the confirmation that the trust is on the register.

10.8 Our members would appreciate it if links to the TRS and Estates Registration Service could be accessed from within the Agent Services Account. Currently, both services can only be accessed by visiting different (but visually identical) pages on GOV.UK and members regularly report frustrations about this non-intuitive approach.

10.9 Finally, as the number of trusts on the Register is due to substantially increase, and since there is no requirement for a trust to have a unique name (unlike the position for companies), we consider it would be helpful if all trusts on the register were allocated a unique registration number. We can see a number of benefits to this, not least for trustees/agents of similarly named trusts (an unfortunate occupational hazard) to ensure that amendments are made to the correct record.

11 Contact details

11.1 We would be pleased to join in any discussion relating to this Consultation. Should you wish to discuss any aspect of this response, please contact our relevant Technical Officer, Helen Thornley on 07773 087125 or hthornley@att.org.uk.

The Association of Taxation Technicians

12 Note

12.1 The Association is a charity and the leading professional body for those providing UK tax compliance services. Our primary charitable objective is to promote education and the study of tax administration and practice. One of our key aims is to provide an appropriate qualification for individuals who undertake tax compliance work. Drawing on our members' practical experience and knowledge, we contribute to consultations on the development of the UK tax system and seek to ensure that, for the general public, it is workable and as fair as possible.

Our members are qualified by examination and practical experience. They commit to the highest standards of professional conduct and ensure that their tax knowledge is constantly kept up to date. Members may be found in private practice, commerce and industry, government and academia.

The Association has more than 9,000 members and Fellows together with over 5,000 students. Members and Fellows use the practising title of 'Taxation Technician' or ‘Taxation Technician (Fellow)’ and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.