

## Trustees' Obligations under the EU 4th Anti-Money Laundering Directive

### Background

The EU 4th anti-money laundering directive (4AMLD) was implemented on 26 June 2017. HMRC introduced the new Trust Registration Service (TRS) in order for the UK Government to meet its obligations under the directive.

### Trust registration service

The TRS allows trustees and personal representatives to register their trusts and complex estates online. The TRS gives HMRC and other law enforcement agencies access to trust data so they can draw links between all parties related to assets held in a trust. This is intended to help prevent the use of trusts for money laundering and terrorist financing.

Appendix 1 sets out who needs to register under the TRS.

### Trustees' further obligations

The trustees' obligations under the 4AMLD go far wider than the TRS. The trustees of a relevant trust must maintain accurate and up to date records in writing. A relevant trust includes all UK trusts and non-UK trusts which receive UK-sourced income or have UK assets.

Appendix 2 sets out the records that need to be maintained.

The trustees of a relevant trust must - on request - provide any of this information to any law enforcement authority.

### General data protection regulation

Trustees should be mindful of the General Data Protection Regulation (GDPR) which came into effect on 25 May 2018. GDPR is about making sure personal information is accurate and kept safe, both online and offline. As a minimum, trustees collating data on beneficiaries and settlors will need to let those individuals have:

- Confirmation that their personal data is being processed, the reasons why, and what it is being used for (i.e. for the trustees to meet their obligations under 4AMLD including the TRS, where appropriate)
- The purposes of the processing and the categories of data being processed
- Who their data might be shared with
- How long their data will be stored
- The source of their data and a copy of it
- Details of their rights (to erasure and rectification of errors).

The common law rules relating to the disclosure of trust information to beneficiaries have been settled for some time. Beneficiaries can usually expect to receive disclosure of trust accounts and copies of trust instruments. Trustees would not usually disclose letters of wishes, documents evidencing their deliberations or material on which deliberations have been based, or correspondence with third parties (such as other beneficiaries). However, data protection legislation starts from the premise that personal data must be processed fairly, and the rights of data subjects must be promoted.

In the context of subject access requests, however, a recent Court of Appeal judgement concluded that the advisers in that case had to comply with the beneficiaries' subject access request notwithstanding that:

- (a) Complying with the request would be expensive and time-consuming
- (b) There appeared to be a 'collateral purpose' of obtaining documents for litigation, and
- (c) The information was not disclosable as a matter of Bahamian trust law.

There has been concern that this potentially allows beneficiaries to obtain copies of documents evidencing the exercise of discretions, and even letters of wishes and/or confidential correspondence with third parties (such as other beneficiaries), overturning established principles which allow for the proper administration of trusts.

However, a data controller is only obliged to provide a data subject with their own personal data; there is no obligation to provide a copy of the document within which that data appears. The obligation could therefore be discharged by providing a schedule setting out the relevant data contained in each document. A beneficiary may be entitled to see the sentences which relate specifically to him or her in minutes regarding the exercise of the trustees' powers, he or she would not be entitled to see copies of the minutes themselves. If a beneficiary's data is 'mixed' with data relating to other individuals, then appropriate redactions can also be made.

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## What does this mean in practice?

Data protection rights should be borne in mind in the day-to-day administration of trusts. Trustees will wish to continue to keep comprehensive records, especially given the scrutiny which may be applied to their decisions. However, formal documentation and correspondence should be prepared on the basis that beneficiaries can potentially obtain references to them in any documentation held within paper or electronic filing systems.

- Where a trustee or their advisers have received a subject access request it is vital to act quickly. There is a relatively short deadline, and the penalties for missing the deadline have increased.
- Trustees' fiduciary obligations and duties of confidence must be taken into account when conducting any review and disclosing information. A trustee will not wish to risk breaching these duties in complying with a subject access request.
- The concerns which trustees will inevitably have about the confidentiality of the settlor's communications and third parties' privacy rights may well provide a legitimate basis for refusing the full disclosure of information.

## Appendix 1

### Who needs to register for the TRS?

Trusts or complex estates which need to register self-assessment (SA) for the first time must now use the TRS. The trust should be registered by 5 October after the end of the first tax year for which the trust had a liability to pay UK tax.

For relevant trusts or complex estates already in SA (or if they don't need to register for SA), they have to register or update the TRS in subsequent years, by 31 January after the end of the tax year in which the trust had a liability to pay one of the relevant taxes. The exception is trusts and complex estates wound up by the end of the tax year.

### A relevant trust is defined as:

- A UK express trust (express meaning deliberately created by a settlor); or
- A non-UK express trust which receives UK source income or has UK assets on which it is liable to UK taxes

### The relevant taxes include:

- Income tax
- Capital gains tax
- Inheritance tax
- Stamp duty land tax (or land and buildings transaction tax in Scotland), and
- Stamp duty reserve tax.

## Appendix 2

### Records required for the TRS?

Below is a summary of the information required by trusts for the TRS (requirements for complex estates are far less onerous):

- Information about the trust provisions
- Details about each trustee, settlor, beneficiary and protector
- Details about any person with significant control over the trust
- Details of assets placed in the trust by the settlor when the settlement was first created.

## Penalties for non-compliance

The lead trustees may have to pay a penalty if they do not register the trust before the registration deadline. If they do not register or update the information and cannot show HMRC that they took reasonable steps to do, the penalties are:

- £100 for registering up to three months after the deadline
- £200 for registering between three to six months after the deadline
- £300 or 5% of the tax liability in the relevant year (whichever is higher) for registering more than six months after the deadline

## Trustee obligations under 4AMLD

The trustees of a relevant trust must maintain accurate and up-to-date records in writing of all the beneficial owners of the trust and of any potential beneficiaries. Beneficial owner is a legal term used to describe situations where specific property rights in equity belong to a person even though legal ownership of the property belongs to another person. In trust situations, the trustees are the legal owner of the trust property, and the beneficiaries are the beneficial owners.

A potential beneficiary includes individuals referred to as a potential beneficiary in a document from the settlor relating to the trust such as a letter of wishes.

Records to be maintained by the trustees should include:

### For each beneficial owner and potential beneficiary

#### For individuals:

- The individual's full name
- The individual's national insurance number or unique taxpayer reference, if any
- If the individual does not have a national insurance number or a unique taxpayer reference, the individual's usual residential address
- If the address provided is not in the

UK: the individual's passport number or identification card number, with the country of issue and the expiry date of the passport or identification card; or if the individual does not have a passport or identification card, the number, country of issue and expiry date of any equivalent form of identification

- The individual's date of birth, and
- The nature of the individual's role in relation to the trust.

#### For legal entities:

- The legal entity's corporate or firm name
- The legal entity's unique taxpayer reference, if any
- The registered or principal office of the legal entity
- The legal form of the legal entity and the law by which it is governed
- If applicable, the name of the register

of companies in which the legal entity is entered (including details of the EEA state or third country in which it is registered), and its registration number in that register, and

- The nature of the entity's role in relation to the trust.

Where the beneficial owners include a class of beneficiaries, not all of whom have been determined:

- A description of the class of persons who are beneficiaries or potential beneficiaries
- A contact address for the trustees
- The full name of any advisers who are being paid to provide legal, financial or tax advice to the trustees in relation to the trust.

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