



Response from ICAS

Fifth Money Laundering Directive and Trust Registration Service

21 February 2020

About ICAS

1. The following submission has been prepared by the ICAS Tax Board. The Board, with its five technical Committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants working across the UK and beyond, and it does this with the active input and support of over 60 committee members. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 22,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.

General comments

2. ICAS welcomes the opportunity to respond to the consultation, Fifth Money Laundering Directive and Trust Registration Service, issued by HMRC and HMT on 24 January 2020. We appreciated the opportunity to discuss the consultation and draft legislation with HMRC at the stakeholder meeting on 7 February and the Charity Tax Forum meeting on 13 February.
3. We welcome the confirmation in the consultation document that joint ownership trusts which exist solely for the purpose of jointly owning a home with a partner, relation or friend will not be within scope. However, there remains a lack of clarity around some other trusts, including bare trusts and Scottish express trusts; this needs to be addressed and we have included some suggestions below.
4. We also welcome the proposal that charitable trusts should not be within scope. We understand that it is the intention that charitable trusts in England and Wales with income below £5,000 (which are not required to register with the Charity Commission for England and Wales) should fall within the exclusion – but this needs to be made clear in the legislation. There is potentially a question about the risk presented by these very small charities and whether they should be required to register with someone – but if so, we believe this should be subject to proper consideration through a separate consultation.
5. It is essential that a fully functioning, user friendly Trust Registration Service (TRS) is available in time for the significant expansion of the registration requirements. We discuss this in more detail in our response to Question 3, but we would like to see a timeline for implementing full functionality in TRS published as soon as possible – followed by communications to agents and trustees so that they can sign up for the new system.
6. There are also issues with trustees authorising agents to act for them because the new system requires the trustee to set up a Government Gateway account to perform a 'digital handshake', which some will be unable or unwilling to do. Many trustees who will have to register a trust because of 5MLD are likely to want to appoint an agent to do it for them; whilst we appreciate that the authorisation process needs to be secure it also needs to meet 'customer' needs and to cater for those who are digitally excluded or digitally 'unwilling'.

Specific questions

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.

Express trusts under Scottish law

7. In our response to the 2019 consultation we commented that trusts which are express trusts under English or Scottish law, but which would not be express trusts elsewhere in the EU should be excluded from the definition: otherwise application of the directive will be more onerous in the UK than in other EU member states. We continue to believe that this should be the UK approach.
8. We also noted that there are arrangements which would be treated as express trusts under Scottish law but not under English law; the government response to the 2019 consultation suggested that there would be proposals to address the potentially greater impact in Scotland. Last year the Law Society of Scotland supplied a list of examples of these Scottish trusts to the consultation team: we understand that they will be supplying an updated version in response to this consultation. Our view is that these trusts should also be excluded from scope.
9. We understand from HMRC comments at the stakeholder meeting that the position of express trusts under Scottish law is still being considered. We believe it is important that the rules should apply

consistently across the whole of the UK and that arrangements in Scotland should not be subject to more onerous requirements solely because of differences between Scottish and English law.

Pension schemes

10. We support the proposal that pension schemes registered with HMRC should not be within scope for registration. The risk of money laundering by a registered scheme should be minimal.

Trusts to hold life insurance policies etc

11. We welcome the exclusion from scope of the trusts described in section 3.15 of the consultation, ie trusts consisting solely of a policy which is a pure protection policy and payment is not made until the death or terminal illness of the insured. It might be sensible to include critical illness policies in this exclusion; it is difficult to see any significant risk arising from these.
12. Could the exemption for life policy trusts be linked to the concept of a 'qualifying policy' to make clearer which policies it applies to? The distinction would be that a policy trust that could result in a chargeable event gain when distributed would have to notify.
13. Regardless of the precise details of the exclusion, a considerable number of trusts will remain within scope – such as discounted gift trusts and similar wealth management products, which allow or include payments unrelated to death or illness (in the case of discounted gift trusts, this is a fundamental feature.)
14. In many cases, taxpayers, and even some advisers, may not understand that a trust is part of the arrangement. The trustees may be unaware that they are in fact trustees. Going forward we assume that life companies will ensure that this information is provided – or it could be made a requirement that they provide the information and inform clients that registration will be required. For trusts already in existence we believe the only practical approach will be to require the life companies to provide the information.

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?

Bare Trusts

15. The current consultation notes that the government continues to consider the position of bare trusts and the money laundering risk associated with them. There are many scenarios involving bare trusts and some of these will not be low risk so should remain in scope. However, there will be significant practical issues. Further consideration of bare trusts for minors and the elderly is vital.
16. We have identified the following scenarios which need to be addressed (either in the legislation or in the guidance).
 - a. Nominee arrangements (including for minors/the vulnerable/elderly);
 - b. The end of an express trust – when assets have not yet been transferred into the names of the beneficiaries – and similar situations arising where an estate is being wound up; and
 - c. Gifts have been made, but legal title has not yet been transferred.

Nominee arrangements within a. which are for minors or the vulnerable or elderly should generally be low risk. Could these be excluded from scope? We support the exclusion of jointly held bank accounts (paragraph 3.12 of the consultation). This will remove many bank accounts where a relative's name is added to the account for practical reasons (e.g. to allow access to/control of the account following death).

17. In the other examples, the bare trusts may be inadvertent (i.e. it has not been considered), or deliberate but short term (where further changes are intended to occur, and it is uneconomic to do the legal paperwork.) For practical reasons registering these short term bare trusts would be difficult. One possibility might be to exclude from scope any short term (less than 1 year) bare trust falling within b. and c. above.
18. Consideration could also be given to excluding short term bare trusts, i.e. those lasting less than one year, in general, so that only longer term nominee arrangements are caught. This would reduce the

administrative burden for HMRC and trustees – effectively trustees would have the choice between changing/completing the change in the legal ownership within a year or registering and reporting the different beneficial ownership.

19. For bare trusts which are within scope it is difficult to see the necessity for requiring the provision of complicated details of settlors, trustees, beneficiaries and trust provisions – it should be sufficient to report that although the legal owner is x, the beneficial owner is y, and to provide the tax details of x and y. The most common situations where bare trusts with more than one trustee arise, would fall into b. above and would pose a minimal risk of money laundering.
20. Another common example would be life policy “trusts”. Many of these are structured as bare (“absolute”) trusts to prevent an immediate IHT charge – i.e. where the initial transfer of value (generally a premium) is greater than the nil rate band.

Charitable trusts

21. We welcome the proposal that charitable trusts should not be within scope. We understand that the exclusion from scope in regulation 45ZA of the draft legislation is intended to cover charitable trusts in England and Wales with income below £5,000 (which are not required to register with the Charity Commission for England and Wales (CCEW) but are subject to its regulation) - as well as other trusts which are exempt or excepted from registering. However, this needs to be made clear in the legislation.
22. There is potentially a risk arising from the fact that these very small charities are not required to register with anyone – either the CCEW or TRS. We understand that HMRC is in discussion with the CCEW so we assume that the risk of abuse will be considered. If it is decided that they should potentially be required to register somewhere we believe that there should be proper consideration of all the issues, through a separate consultation. This could cover whether they should be required to register and if so whether the right approach would be registration on TRS or with CCEW.
23. We understand from discussions at the stakeholder meeting, that where there is a delay in processing the registration of a new charity with the CCEW, the Charity Commission Northern Ireland or the Office of the Scottish Charity Regulator there will not be a requirement for the charity to register on TRS whilst waiting for its registration with the relevant UK charity regulator to be completed. We support this approach and would like to see it explicitly mentioned in the guidance.

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

24. We welcome the proposed approach to penalties for failure to register and failure to update. It is reasonable that in cases where the failure to register is not deliberate there should be no financial penalty. We anticipate that the trustees of many existing trusts which will now be required to register by 5MLD will not be aware of the requirement. Nudge letters will therefore be appropriate.
25. Over time awareness of the need to register may improve for some types of trust; as noted in our response to Question 1 we would expect that life companies will provide information to future clients and explain the need to register new trusts – potentially they should be required to do this. However, in cases where there is a genuine mistake or a lack of awareness there should continue to be no financial penalty.
26. We also support the use of a notification for a first failure to update details within the time limit, rather than an immediate financial penalty. However, we continue to believe that the 30 day time limit for updating details is too short. Whilst this is proposed to be 30 days from the date the trustees become aware of any changes, it does not allow sufficient time for trustees to advise their agents – and for the agents to seek clarification or request further details. We believe that the time limit for updating details should be at least 60 days.
27. As set out in our General Comments, it is essential that a fully functioning, user friendly TRS is available in time for the significant expansion of the registration requirements. We understand that the new system is currently available in a beta version – but this has not been widely publicised. Whilst it currently allows agents and lead trustees to register a trust and to view data, it is still not possible for agents or lead trustees to declare no change, amend or add data or close a trust. We would like to see the publication of a timeline for implementing full functionality in TRS as soon as possible – followed by communications to agents and trustees so that they can sign up for the new system.

28. It is also essential that trustees who do not want to deal with registration (and updating) themselves can easily appoint and authorise an agent to act on their behalf. The new TRS system requires the trustee to set up a Government Gateway account to perform a 'digital handshake', which some trustees will be unable or unwilling to do. Many trustees who will have to register a trust because of 5MLD are likely to want to appoint an agent to do it for them (many will not want to deal with HMRC's systems at all); whilst we appreciate that the authorisation process needs to be secure it also needs to meet 'customer' needs and to cater for those who are digitally excluded or digitally 'unwilling'.
29. The HMRC Charter provides that taxpayers have a right to appoint an agent. We do not believe it is within the spirit of the Charter to fail to provide a workable alternative to the digital handshake. It is also likely to lead to the use of insecure workarounds which will undermine rather than enhance security.

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.

30. We have no comments on this question.

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?

31. We have no comments on this question.

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.

32. We have no comments on this question.