

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the "Regulations")

Employee Benefit Trusts and Nominee Arrangements

1. Background

The Regulations came into force on 26 June 2017 and represent the implementation by the UK of the EU's Fourth Anti-Money Laundering Directive 2015/849 (**4MLD**) which was adopted on 26 June 2015. The rules impose new obligations on corporate bodies and trusts in relation to their beneficial ownership information and are part of the drive to detect and prevent money laundering and terrorist financing. Elements of 4MLD are currently being re-negotiated however the government has said that it will consult separately on the amended directive.

The UK has already taken steps to create transparency of beneficial ownership through the introduction of a public register of individuals holding more than 25% of and/or exercising significant influence or control over UK private companies, LLPs and Societates Europaeae (the **PSC register**). Changes have been made to the PSC provisions of the Companies Act 2006 to take account of 4MLD. Notably, the exemption from the requirement to keep a PSC register for companies subject to DTR 5 requirements (which included UK public companies with shares admitted to a prescribed market) has been limited to companies with shares admitted to a regulated market. This now means that UK incorporated AIM and NEX Exchange Growth Market companies have to maintain a PSC register. Practically speaking, the PSC regime has not been relevant to EBTs and nominee arrangements.

2. Summary of requirements

The Regulations impose specific obligations on certain trustees to obtain and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust. This information has to (i) be accessible to certain persons and (ii) be reported on a central register when the trust generates "tax consequences". Both EBTs and nominee arrangements could be within these new provisions.

3. Are EBTs and nominee arrangements "relevant trusts"?

Part 5 of the Regulations applies to "relevant trusts". These are defined (Reg. 42) as:

- A UK trust that is an express trust; and
- A non-UK trust which is an express trust **and** (i) receives income from a source in the UK **or** (ii) has assets in the UK (in both cases) on which it is liable to pay any of UK income tax, CGT, IHT, SDLT, Land and Buildings transaction tax or SDRT

A trust is a **UK trust** if either (i) all the trustees are resident in the UK or (ii) at least one trustee is established in the UK and at the time when the trust was set up or when funds were added to the trust the settlor was resident and domiciled in the UK.

An express trust is not defined but the HMRC consultation states that it should be taken to mean a trust that was deliberately created by a settlor expressly transferring property to a trustee for a valid purpose as opposed to a statutory, constructive or resulting trust.

Is an onshore EBT a "relevant trust"? **Yes** because:

- It is an express trust
- It is a UK trust because trustee is established in the UK

Is an offshore EBT a "relevant trust"? **Possibly** because:

- Is an express trust and
- It receives UK source income or has assets in the UK on which it is liable to pay UK income tax (dividends on shares in UK companies/loan note interest/SDRT on agreements to purchase shares) or
- (less common) It is subject to IHT on assets in the UK

Is a nominee arrangement with an onshore nominee "relevant trust"? **Yes** because:

- It is an express trust (a bare trust arrangement)
- It is a UK trust because trustee is established in UK

Is a nominee arrangement with an offshore trustee a "relevant trust"? **No** because:

- HMRC take the view that in a bare trust arrangement the tax is the liability of the beneficiary

So,

(i) on-shore EBTs (including SIP trusts established in conjunction with a tax-advantaged share incentive plan) (ii) nominee arrangements with on-shore trustees and (iii) off-shore EBTs with UK source income or UK assets

are all "relevant trusts" within this regime. *Note that HMRC indicated in a written response to a practitioner's question that a trustee of a trust that incurs stamp duty in relation to trust assets in a given year would be required to register on TRS because payment of stamp duty cancels the SDRT charge that would otherwise arise. This is the reason, they claim, why the regulations exclude stamp duty from the list of taxes covered by the regulations. Our view is that this is not the correct interpretation of the law because a payment of stamp duty cancels any SDRT charge from the very start. Nevertheless, trustees of offshore EBTs may, given HMRC's view, wish to register these trusts as a precautionary matter.*

4. What are the obligations of trustees of relevant trusts under the Regulations?

The obligations broadly fall into three categories:

- Record keeping** - a requirement to keep records of the "beneficial owners" (defined below and wider than simply beneficiaries) of the trust containing prescribed information
- Disclosure** – a requirement to provide information about beneficial owners to certain persons
- Registering/Reporting** – a requirement for "taxable relevant trusts" (discussed later) to provide information about the trust and beneficial owners under the HMRC Trust Registration Service (TRS) which will be available for inspection by certain persons.

HMRC have published guidance on the operation of the new regulations. HMRC take the view that **offshore-EBTs holding UK assets or with UK source income will only need to comply with the record keeping/disclosure/registration and reporting requirements if they actually incur a liability to pay such tax in a tax year.** The guidance also states that **if tax relief is claimed which results in no liability to pay any of the relevant UK taxes, the trustees are not obliged to register or update their details on the trust register.**

4.1 Record keeping obligations (Reg. 44(1))

According to Regulation 44(1), the **trustee** of a relevant trust must maintain **accurate** and **up-to-date** records **in writing** of all the "beneficial owners" of the trust and any potential beneficiary (e.g. those referred to in a letter of wishes). The record can be in electronic form as long as it can be read.

For this purpose, beneficial owners are

- (i) the settlor;
- (ii) the trustees;
- (iii) the beneficiaries or where the relevant individuals have not been determined, the class of persons in whose main interest the trust is set up or operates; and
- (iv) any individual who has control over the trust.

4.2 Disclosure requirements (Reg.44(2)-(5))

There are two disclosure obligations on the trustee of a relevant trust under Reg. 44:

Disclosure to law enforcement authorities

The trustee of a relevant trust must, on request, provide information "about" the beneficial owners of the trust or any potential beneficiary (such as under a letter of wishes) to any law enforcement authority (broadly HMRC, the FCA, the UK police, the SFO and the NCA). The information has to be provided before the end of such reasonable period as may be specified by the law enforcement authority.

Disclosure on dealing with "relevant persons"

When entering into a "relevant transaction" (defined in Reg. 44(4) as one in relation to which the relevant person is required to apply customer due diligence measures under Reg. 27) with a "relevant person" or forming a business relationship with a "relevant person" (defined in Reg. 8 as certain persons (including credit and financial institutions, accountants and tax advisers, legal professionals, trust of company service providers and high value dealers) acting in the course of a business carried on by them in the UK) the trustee of a relevant trust must:

- (i) inform the relevant person that it is acting as trustee; and
- (ii) on request provide that person with information identifying all the beneficial owners of the trust (i.e. beneficiaries, settlor, trustee) and any other individual referred to in any document such as a letter of wishes relating to the trust.

While the business relationship continues, the trustees must also notify the relevant person of any change to the information in (ii) above within 14 days of becoming aware of the change.

Data Protection Issues

Reg. 44(7) provides that the provision of information in accordance with Reg. 44 is not to be taken to breach any restriction, however imposed, on the disclosure of information. Reg. 44(6) states that where a disclosure is made in good faith in accordance with Reg. 44 no civil liability arises in respect of the disclosure on the part of the trustee of a relevant trust.

Reg. 41 states that personal data obtained by relevant persons for the purposes of the Regulations may only be processed for the purposes of preventing money laundering and terrorist financing. No other use may be made of such personal data unless it is permitted under an enactment other than the Regulations or the consent of the data subject has been obtained.

Relevant persons (which includes professional trustees) must provide new customers with certain information before establishing a business relationship with them which includes (i) the information specified in paragraph 2(3) in Part 2 of Schedule 1 to the Data Protection Act 1998 (interpretation of the data protection principles) and (ii) a statement that any personal data received from a

customer will be processed only for the purposes of preventing money laundering and terrorist financing or as permitted under other enactments or if the relevant person has given their consent to the proposed use of the data.

According to its guidance HMRC expects all trustees of relevant trusts to maintain the following records

The following information about the **EBT**

- Full name of the trust
- Date on which the trust was created
- Country in where the trust is considered to be resident for tax purposes
- The place where the trust is administered
- Contact address for the trustee

The following information about the **settlor** (not defined but presumably the company establishing the trust and any group company funding the trust):

- Name
- UTR (if any)
- registered address or principal office (if no UTR)

Full name of the **advisers** who are being paid to provide legal, financial or tax advice to the trustees in relation to the trust

Details of the **beneficiaries** (where individual beneficiaries can be identified otherwise a description of the class of beneficiaries):

- Full name
- Date of birth
- NI number (NINO) or UTR if any
- Usual residential address
- If the address is not in the UK, their passport number or ID card number with the country of issue and expiry date of the passport or ID card or if they don't have either of these the number, country of issue and expiry date of any equivalent form of ID

HMRC have confirmed that provided the information is in writing, the format is a matter for the trustee.

Professional trustees have to keep the records for a period of 5 years after the date on which the final distribution is made under the trust at the end of which they should delete them (unless needed for other legal purposes/the subject consents to it)

4.3 Reporting requirements (Reg. 45)

If a relevant trust is a "taxable" relevant trust, the trustees must provide HMRC with prescribed information about the trust using the Trust Registration Service. The information that needs to be provided is:

- all the information it holds in respect of beneficial owners
- the full name of trust
- the date the trust was set up

- A statement of accounts for the trust describing the trust assets and identifying the market value of each category of the trust assets at the time when they were settled (HMRC have said that they do not expect a formal valuation and a good estimate is sufficient. There is guidance on what to do if the trust was set up a long time ago and the value of assets when the trust was set up is not known. HMRC guidance states that the details of trust assets are only provided once at the first point of registration and if this changes over time you do not need to update information about the trust assets on TRS)
- The country where the trust is considered to be resident for tax purposes
- The place where the trust is administered
- The contact address for the trustees
- The name of any advisers who are being paid to provide legal, financial, tax or other advice to the trustees in relation to the trust (HMRC have confirmed that for the purposes of the register, this is simply the details of any agent acting on behalf of the trustee in relation to its registration affairs. The information required is only that needed to contact an agent if there are technical issues with the submission of their registration i.e. agency name, address, telephone number and customer reference).

HMRC have created an online portal to collect this information which can be accessed through GOV.UK. To access the service the trustee must have a Government Gateway ID. There are separate registration pages for new and existing trusts (for existing trusts the trustee must provide its self-assessment unique taxpayer reference number). If an EBT has previously been registered using a form 41G it must nevertheless register again using the TRS. This is because the old form does not contain all the information required by the new Regulations.

As part of the process the trustee has to specify what kind of trust is being registered. An EBT is likely to fall within the category of an "employment-related trust".

When notifying the number of beneficiaries, HMRC guidance provides that EBT trustees can use the trusts with more than 10 beneficiaries field (and simply describe the class of beneficiaries) provided it:

- Lists individual directors and key employees (i.e. staff responsible for the operational running of the business at the top of the organisational chain by making key decisions or those that have a financial ownership or stake in the organisation, also those members of staff whose skills and expertise are critical to the business for which they enjoy a high level of remuneration). These should be current directors and key employees;
- Declares the number of beneficiaries which best covers the class above; and
- Lists known beneficiaries (e.g. those individuals who have received a distribution).

The deadline for submitting information depends on whether or not the trust is already registered for self-assessment (i.e. already completes SA900 tax returns):

Tax year in which liability incurred	SA registered?	Registration deadline
2016/17	Not previously registered	<p>5 October 2017 (if incurred IT or CGT) but HMRC have said no penalties if registered by <u>5 January 2018</u></p> <p>31 January 2018 (if does not need to register for SA and has incurred IHT, SDRT) but HMRC have said no penalties if registered by <u>5 March 2018</u></p>

2016/17	Already registered	31 January 2018 but HMRC have said no penalties if registered by <u>5 March 2018</u>
2017/18 onwards	Not previously registered	5 October following end of tax year (if incurred IT or CGT) 31 January following end of tax year (if does not need to register for SA and has incurred IHT, SDRT)
2017/18 onwards	Already registered	31 January following end of tax year

Trustees are only obliged to update the register in tax years in which they are liable to pay any UK taxes. They can choose to update the register at other times if they want to however.

The register may be inspected by any law enforcement authority. Note that the amendments proposed by the EC Commission to 4MLD would broaden the scope of those with access to the register (potentially it seems to anyone who can demonstrate a legitimate interest in which case the information provided would be limited to the name, month and year of birth, nationality and country of residence of the beneficial owner.)

4.4 Penalties for breach

Trustees who fail to comply with the obligations under the Regulations may be liable for civil sanctions (including penalties and statements of censure). Such sanctions may also extend to the officers of the trustee. On 5 March 2018, HMRC announced that it will not automatically charge penalties for late TRS returns. Instead, they will take a pragmatic and risk-based approach to charging penalties particularly where it is clear that trustees or their agents have made every reasonable effort to meet their obligations under the regulations (particularly in the first year).

If an administrative offence occurs (i.e. a failure to register/notify changes by 31/1 of the tax year following that in which the trustee pays tax on trust assets or income) fixed penalties will be charged by reference to the length of the delay (£100 if three months late, £200 if three to six months late and if more than six months late, 5% of the tax liability or a £300 penalty (whichever is greater).

Criminal sanctions (including up to 2 years imprisonment, a fine or both) also exist for penalties such as contravening one of the requirements of the regulations, prejudicing investigations, providing false or misleading information and disclosing information. Again these sanctions can extend to officers of a body corporate with management functions. On 5 March 2018, HMRC announced that it had the power to apply a penalty for such offences and will consult on the structure of these

Summary of obligations under the Regulations

Type of trust	Record Keeping	Disclosure	Registration/reporting under TRS
UK EBT/SIP trust/Employee Ownership Trust	Yes	Yes	Yes if has UK tax liability
UK Nominee	Yes	Yes	No
Offshore EBT	Yes if has UK tax liability	Yes if has UK tax liability	Yes if has UK tax liability
Offshore Nominee	No	No	No

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Schedule 1

TRUSTS WITHIN TRS

Information for the purposes of The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the "Regulations")

THE TRUST	
Name	
Date Created	
Country of tax residence	
Place where administered	
Contact number and address for trustee	
THE SETTLOR	
Company name	
Company UTR (if relevant)	
Registered address (if no UTR)	
THE TRUSTEE	
Company name	
Company email	
Company UTR (if relevant)	
Registered address (if no UTR)	
AGENT (if any) ACTING ON BEHALF OF TRUSTEE IN RELATION TO TRS REGISTRATION (full name, address, telephone number, customer reference)	
ADVISERS PAID TO PROVIDE LEGAL, FINANCIAL OR TAX ADVICE TO THE TRUST (full name and address)	
TRUST ASSETS (AND MV WHEN SETTLED)(only on first registration)	

BENEFICIARIES			
Description of class of beneficiaries			
Name of key employee/director	Date of Birth (if not known enter 01/01/1900)	NINO/UTR	(if no NINO/UTR) address and (if address is outside UK) passport or ID card number. If number is not known, provide other details (country of issue or expiry date)
Name of beneficiary in receipt of trust assets (post 26 June 2017)	Date of Birth (if not known enter 01/01/1900)	NINO/UTR	(if no NINO/UTR) address and (if address is outside UK) passport or ID card number. If number is not known provide other details (country of issue or expiry date)

Schedule 2

TRUSTS WITH RECORD KEEPING OBLIGATIONS BUT NOT WITHIN TRS

Information for the purposes of The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the "Regulations")

THE TRUST			
Name			
Date Created			
Country of tax residence			
Place where administered			
Contact number and address for trustee			
THE SETTLOR			
Company name			
Company UTR (if relevant)			
Registered address (if no UTR)			
THE TRUSTEE			
Company name			
Company email			
Company UTR (if relevant)			
Registered address (if no UTR)			
ADVISERS PAID TO PROVIDE LEGAL, FINANCIAL OR TAX ADVICE TO THE TRUST (full name and address)			
BENEFICIARIES			
Description of class of beneficiaries			
Name of beneficiary in receipt of trust assets (post 26 June 2017)	Date of Birth (if not known enter 01/01/1900)	NINO/UTR	(if no NINO/UTR) address and (if address is outside UK) passport or ID card number. If number is not known provide other details (country of issue or expiry date)
