New hurdles

Employment Tax | Professional standards



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David Pett takes a look at the new Money Laundering Regulations, and the 'Trust Registration Service' they have spawned

Key Points

What is the issue?

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 implement the 4th European Money Laundering Directive

and are effective from 26 June 2017. They replace the Money Laundering Regulations 2007.

What does it mean to me?

The Regs codify the obligations on relevant parties relating to risk assessment, customer due diligence and record-keeping and impose obligations, on ‘trust or company service providers’ acting in the course of business carried on by them in the UK.

What can I take away?

Advisers need to ensure that if their clients meet certain criteria they are fulfilling their obligations under the new Regulations.

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (‘the Regs’) implement the 4th European Money Laundering Directive. Effective from 26 June 2017, they codify the obligations on (among others) financial institutions, lawyers, accountants, tax advisers, their respective professional bodies, the FCA and HMRC relating to risk assessment, customer due diligence and record-keeping. They also impose obligations, on ‘trust or company service providers’ acting in the course of business carried on by them in the UK, to undertake client due diligence and, if the trust concerned is a ‘relevant trust’, to maintain records of, and prescribed information about, ‘beneficial owners’ (which has an extended meaning) and any potential beneficiaries.

A trust is a ‘relevant trust’ if it is either (a) a UK express trust (i.e. as distinct from a statutory, resulting or constructive trust – per HMT’s response to its consultation on implementation of the Directive); or (b) a non-UK express trust with UK source income, or UK assets, on which it is liable to pay a ‘relevant UK tax’. This is defined as income tax, CGT, inheritance tax, SDLT, Scottish land and building tax, or SDRT (but not stamp duty).

A trust is a ‘UK trust’ if either all the trustees are UK resident or at least one is UK resident and the settlor was domiciled and resident in the UK when either the trust was established or the settlor added funds to it. A trustee or settlor is UK resident if it is a UK body corporate or an individual who is resident here for the purposes of any relevant UK tax.

Trustee obligations

Under Part 5 of the Regs, the trustees of a relevant trust must maintain accurate and up-to-date records in writing of all beneficial owners of the trust and of any other individual referred to as a potential beneficiary in a document from the settlor relating to the trust, such as a letter of wishes (Reg 44(1)).

If a trustee enters into a transaction with a ‘relevant person’ (which includes a financial institution, legal professional, estate agent, trust or company service provider) in relation to which that person has obligations of due diligence, or a trustee of a relevant trust enters into a business relationship with a trust service provider, the trustee must provide prescribed information and details of any subsequent changes to it. The trustees of a relevant trust must also, upon request, provide to a law enforcement authority (including HMRC) information about the ‘beneficial owners’ of the trust and about any other individual referred to as a potential beneficiary in a document from the settlor relating to the trust, such as a letter of wishes. Trustees who are paid to act as such must retain the information for five years after the final distribution is made, and then, unless they are required to retain the information for other purposes (or the person concerned consents to it being retained), delete the records.

For these purposes, ‘beneficial owner’ in relation to a trust means each of (i) the settlor, (ii) the trustees; (iii) the beneficiaries or, if the individuals benefitting 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 (Reg 6(1)). ‘Control’ means, inter alia, having the power (alone, jointly or subject to the consent of another) to vary or terminate the trust; vary or restrict the class of beneficiaries; appoint or remove a trustee; or give or withhold consent to any such exercise of a power (Reg 6(2)). It would therefore include a ‘protector’ of the trust. If an individual is the beneficial owner of a body corporate which has such control over the trust, the individual is to be regarded as having control over the trust. An individual is the ‘beneficial owner’ in relation to a body corporate if he exercises ultimate control over the management of the body corporate; he owns or controls more than 25% of the shares or voting rights, or he is a ‘person with significant control’ over the company (per Part 1, Schedule 1A CA 2006) (Reg 5).

It follows that, in the case of a UK company which, for example, has established an employees' trust, the trustees are obliged to obtain and, if the trustees have a liability to a relevant UK tax, provide to HMRC upon request, information about the settlor company; the trustees; the beneficiaries; or, if no benefit has yet been appointed in favour of any named individual, the class of beneficiaries; and any individual having such control over the trust.

HMRC's obligations

Reg 45 obliges HMRC to maintain a register of beneficial owners and potential beneficiaries of a relevant trust in any year (presumably intended to mean a tax year) in which its trustees are liable to pay any relevant UK tax in relation to the income or assets of the trust (a 'taxable relevant trust').

The information required to be provided to HMRC is:

- in relation to the trust: the full name of the trust; the date it was established; a 'statement of accounts' describing the trust assets and identifying the value of each category at the date on which the information is first provided to HMRC; the country in which it is resident; the place in which it is administered; a contact address for the trustees; and the full name of any advisers being paid to provide legal, financial or tax advice to the trustees in relation to the trust;
- in relation to the beneficial owners and any potential beneficiary: the individual's full name; NI no. or unique taxpayer reference (UTR) (or if the individual does not have one, their normal residential address and, if that is outside the UK passport or ID information); date of birth; the nature of their role in relation to the trust;
- in relation to the settlor company or any corporate beneficiary, its name; UTR; registered or principal office; legal form and governing law; the country and registration details; and the nature of its role in relation to the trust;
- if the beneficial owners include a class of beneficiaries not all of whom have been determined, a description of the class of beneficiaries or potential beneficiaries under the trust.

The information, and any changes to the information given, must be provided on or before 31 January 2018 or 31 January after the tax year in which the trustees first become liable to any of the relevant UK taxes. If the trustees are not aware of any

changes they must confirm that fact to HMRC on or before 31 January after the tax year in which the trustees are liable to pay UK taxes.

HMRC’s Trust Registration Service

To give effect to its obligations under the Regs, HMRC has established the online Trust Registration Service (‘TRS’) and withdrawn the old HMRC Form 41G, which provided only limited information. Existing trusts which have submitted a Form 41G must register under the new online service. The scope of the TRS extends beyond that of HMRC’s own obligations under Reg 45 of the Regs in that the TRS applies to anyone acting as a trustee of an express trust which incurs a liability to a relevant UK tax, and not merely a trust or company service provider acting in the course of a business in the UK.

The TRS may be accessed on GOV.UK.

Trusts not already registered with HMRC for self-assessment and which have incurred a liability to UK income tax or CGT in a tax year must register by 5 October after that tax year or, if they were first liable for another relevant UK tax in a tax year, 31 January after the end of that tax year. (No penalty is imposed if, in relation to the tax year 2016/17, the registration of a trust not already registered for self-assessment and which has incurred a liability to income tax or CGT for the first time, is completed before 5 January 2018.)

HMRC published detailed guidance on the new TRS on 9 October 2017.

Registration is not required in a given tax year if:

- the trustees do not need to file a tax return and have not incurred a liability to a relevant UK tax;
- the trust is a non-UK express trust and has no UK source income or UK based assets but for some other reason has incurred a liability to pay any of the relevant UK taxes; or
- the settlor or a beneficiary has incurred a liability to pay a relevant UK tax, but the trustees are not so liable; or
- the trustees are holding the trust property as bare trustees (as any liability to a relevant UK tax is that of the beneficiary).

Changes to the information registered may be notified at any time and, if the trustees incur a liability to a relevant UK tax in any tax year, must be so notified by 31 January next following. If they are not so liable, the obligation to update is deferred until 31 January after the next tax year in which they are so liable, although trustees may, and in practice are expected to, update on a voluntary basis even if not so liable. Curiously, details of the trust assets (and a good estimate of their market values) need only be provided once at the point of first registration and are not required by HMRC to be updated. Information on assets later added or held is to be provided in the annual trust tax return (SA900). In the case of multiple trustees, a lead trustee may be nominated to be responsible for the administrative duties in relation to the tax affairs of the trust and will be the main point of contact for HMRC. Trustees may appoint an agent to register on their behalf, but the legal responsibility remains that of the trustees.

Information which, because of shortcomings in the software, cannot be notified (such as, for example, details of more than one corporate trustee) may be provided in writing to: Trusts, HMRC, BX9 1EL.

Details of any agent acting on behalf of the trustees in relation to their registration are required to be given, but not those of other advisers. The information about an agent is their name, address, telephone number and customer/agent reference. The trustees, if acting in the course of business carried on by them in the UK, do however have an obligation under the Regs to keep written records of the full name and address of any paid advisers providing legal, financial or tax advice in relation to the trust.

The information given to HMRC is not on the public record and, if requested, can only be shared by HMRC with other law enforcement agencies in the UK or an EEA member state.

Employees’ trusts

If an employees’ trust makes share awards to employees in a year in which the trustees are not themselves liable for any relevant UK tax, there is no obligation to notify a change of beneficial ownership, although the trustees have a duty to maintain a written record of the awards. If a beneficial interest in shares is sold by trustees, triggering a liability to SDRT, this will normally be a liability of the transferee, not of the trustees. To avoid liabilities under the ‘disguised

remuneration' rules, it is common practice for trustees of an employees' trust to agree to satisfy an employer's awards or option exercises without having the names of the employees disclosed to the trustees. In such a case, it is difficult to see how the trustees can provide information on the employees or ex-employees concerned until they have been given the names, typically when the awards become vested or the options are exercised. That is clearly the occasion of a change in the information provided, but an obligation to notify HMRC of the change will not immediately arise if the trustees are not in that tax year liable to a relevant UK tax. That said, it is likely to be easier in practice for the trustees to update the information on a voluntary basis regardless of whether such a liability has arisen. If, thereafter, the trustees hold the bare legal title to the shares on behalf of the employee or ex-employee, it would seem that no further obligation to notify any change in the information provided to HMRC would arise by reason only of the beneficial owner deciding (for example) to sell the shares. This is because a liability to a relevant UK tax would not then arise at the trust level.

HMRC guidance refers to 'employee ownership trusts', but this is understood to be intended to refer to all forms of employee's trusts and not merely those which rank as 'employee-ownership trusts' per TCGA 1992 s 236H. The guidance provides that 'to help keep administrative burdens to a minimum for business type trusts with large numbers of beneficiaries…the trustees will only be asked to identify the class of beneficiary if the number of named beneficiaries exceeds 10'. It appears to follow that, if in the case of a typical 's 86-type' employees' trust, there are fewer than 10 employees, or there are named beneficiaries but fewer than 10 of them, details of those beneficiaries must be given. Likewise, details must be given of any beneficiaries who are in receipt of benefit and can be named, regardless of how many there are of such actual beneficiaries. The guidance goes on to provide that, in any event, the identity must be provided of current 'key employees and Directors'. Key employees are defined in the HMRC guidance as 'staff who are responsible for the operational running of the business at the top of the organisational chain by making key decisions or that have a financial ownership or stake in the organisation. We [HMRC] would also define this as key members of staff whose skill and expertise are critical to the business for which they enjoy a high level of remuneration….'. In practice, independent trustees may not have access to the information to enable a judgement to be made as to who is such a key employee. Engagement terms may need to be amended to enable the trustee to shift responsibility for such identification to the company, although the obligation to inform HMRC remains that

of the trustee.

Share Incentive Plan trusts are express UK trusts, so the trustees, if acting in the course of business, are obliged by Reg 44(1) to maintain written records of the beneficial owners (as defined) and potential beneficiaries. The obligation to register the trust with HMRC, and notify the appropriate information and any changes to it, arises only if and when the SIP trustees have a liability to a relevant UK tax in a tax year. It should be noted that dividends on unawarded shares are now charged to income tax on the trustees at the dividend ordinary rate (the exemption for dividends on such shares in the 'applicable period' now extending only to tax at the higher dividend trust rate). If the shares are purchased in a transaction attracting a charge to SDRT or if unawarded shares are sold outside of the 'relevant period' so as to attract a CGT charge, an obligation to register will arise. In practice, therefore, SIP trustees are likely to want to register voluntarily so as to avoid inadvertent failure to register when obligated to do so.

It is not uncommon for a private company to establish a wholly-owned subsidiary to act as sole corporate trustee of its employees' trust and/or its qualifying SIP. Such a trustee company would be acting in the course of business even if it receives no consideration for acting as trustee and will be obliged both to maintain written records in accordance with the Regs and register the trust with HMRC pursuant to the TRS.

Professional Standards Guidance

Agents acting on behalf of trusts often have a number of questions relating to client due diligence and risk reviews. Anti-Money Laundering Guidance for the Accountancy Sector (CCAB guidance) has been updated following the introduction of the Money Laundering Regulations 2017 and the Professional Standards Team have also developed some FAQs (including one relating to trusts) based on current understanding of how the regulations operate. For the latest guidance please refer to the CIOT and ATT websites. Members with any queries should email standards@tax.org.uk.