The UK register of beneficial ownership of trusts

August 2017

Introduction

This new piece of UK legislation will affect a broad range of trustees, those responsible for foundations and fund administrators in the offshore jurisdictions and will add to the ever increasing administrative burden of the professional trust company and corporate service provider.

On 26 June 2017 the transposition of the EU Fourth Money Laundering Directive (4MLD) into UK law continued, as the new Money Laundering Regulations took effect. This heralds the creation of a new trusts registration system in the UK.

Trustees of UK resident trusts, and of non-UK trusts with UK tax liabilities, are now required to maintain up to date and accurate records of their beneficial owners, and to report this information annually to HMRC who will maintain an electronic register of all trusts with UK tax filing obligations. Broadly, a trust is in scope if the trustees are UK resident or, despite being non-UK resident, are or become liable to pay any UK tax in any particular year. It is therefore an annual obligation and ‘tax’ for this purpose includes income tax, capital gains tax, inheritance tax, land and buildings transaction tax, stamp duty land tax and stamp duty reserve tax. By implication, therefore, non-UK resident trustees who have no such UK tax liability will be outside these registration and reporting requirements, as will trustees who own UK assets through an underlying company, as any UK tax liability then falls on the company and not the trustee.

Background

This is not a new requirement so far as concerns trustees of many trusts with a UK tax exposure. Before the introduction of online filing, there was a requirement, dating back many years, to file a paper form (41G) notifying HMRC of the creation of a trust. The form was withdrawn in April 2017. The online system now requires more information about the trust and its beneficiaries than before. The current proposals envisage access only to ‘competent authorities’ but the route to public access is open via a proposed amendment to the 4MLD which provides for access to ‘persons and organisations that can demonstrate a legitimate interest’. A member state may decide to modify this where such access would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation. Whether the UK introduces this access requirement depends in part upon the progress of Brexit.

Who is in scope?

The register applies to all express trusts which includes collective investment schemes such as unit trusts. It also applies to foundations and to testamentary trusts. There is no de minimis exception, so these rules will be of wide application.

The register

The deadline for providing information is 31 January 2018 or 31 January after the UK tax year in which the trustees first come within scope. The information to be supplied is:

- the full name of the trust and date when established
- the address of the trustees and place of administration and tax residence of the trust
- a set of accounts for the trust describing assets and their values including the address of any property held by the trust
- the full name of any advisors who are being paid to provide legal, financial or tax advice to the trustees.

The trustees must also identify for HMRC the beneficial owners of the trust, supplying their name and UK tax reference or National Insurance number or, if none, their residential address, unless this is outside the UK, in which their passport or ID card number will be reported.

If beneficiaries are defined by reference to a class, it is only necessary to report a description of that class.

What is a beneficial owner?

The term ‘beneficial owner’ is an artificial concept. It effectively links back to the description adopted by the Financial Action Task Force and is concerned with ‘control’. It includes the settlor, the trustees and any individual who is regarded as having control over the trust. In this context ‘control’ means power to deal with trust assets, to vary or terminate the trust, to add or remove a beneficiary, to appoint or remove trustees and to exercise consent or veto powers in relation to any of the above. On that basis a protector or enforcer is likely to be someone who exercises control.

In addition to these ‘beneficial owners’, the trustees also have to identify any other individual referred to as a potential beneficiary, such as in a letter of wishes from the settlor. This might lead living settlors to consider reviewing what is contained in existing letters of wish.

The classification of trusts as either UK resident or non-resident mirrors that of the UK income and capital gains tax rules, so that if all trustees are UK resident or at least one trustee is UK resident and the settlor was resident and domiciled when the trust was set up or when funds were added, then it will be treated as a UK trust. Otherwise it will be a non-UK trust.

Other obligations

The Regulations go further. Trustees of a trust which is within scope, as well as maintaining accurate written records of all beneficial owners of the trust, must share such information, on request, with other bodies that have client due diligence obligations. If the trustees enter into a transaction which involves the provision of such information (effectively any business dealing, such as the purchase or sale of trust property) they are obliged to reveal that they are acting as such and, on request, to provide information identifying all the beneficial owners of the trust.

Where a trust is wound up, and trustees who are being paid have been acting, they are obliged to retain their (written) trust records for a period of five years from the final distribution and to make arrangements for those records to be deleted at the end of those five years unless they are needed in the context of legal proceedings or consents are obtained from anyone to whom the recorded information relates.

This is the other side of the information ‘coin’, intended to ensure that confidential information is not stored for ever and a day.

Given the requirement to maintain records ‘in writing’, it is not entirely clear how these are to be ‘deleted’. Perhaps more seriously, the requirements, and the penalties for failure to comply must bring into question just how these rules are to be enforced in practice, particularly in the case of non-UK resident trustees who are not within the jurisdiction of HMRC or the UK courts. There is also the question of limitation. A trustee

1 Beneficial owner refers to the natural person(s) who ultimately owns or controls a customer. It also includes those persons who exercise ultimate effective control over a legal person or arrangement: The FATF Recommendations General Glossary 2016.
making a final distribution may be well advised to keep trust records for longer than five years so wholesale
file destruction may not be the answer.

What about confidentiality?

Trustees have a common law duty to keep the affairs of the trust confidential, and this extends to personal
information relating to the beneficiaries. Clearly this is subject to compliance with obligations of disclosure
imposed by law (and to the terms of the trust instrument), but this begs the question as to whether trustees
of one jurisdiction are obliged to comply with the obligations of another.

The Regulations which impose these obligations expressly state that provision of information as required
‘is not to be taken to breach any restriction, however imposed, on the disclosure of information’. 4
Furthermore, where a disclosure is made in good faith in accordance with the Regulations, no civil liabilities
are to be imposed on the trustee who makes the disclosure. 5

Trustees’ duties of confidentiality are generally considered in the context of enquiries from beneficiaries
interested in the reasons for particular trustee decisions. Jersey law 6 legislates expressly on the question
of a trustee’s obligation to disclose or not to disclose trust information, and this enables the court to order
disclosure to any person, not simply to a beneficiary. 7

The position may be further complicated by the potential application of data protection law. The recent
case of Dawson-Damer v Taylor Wessing LLP 8 decided that, under English law, a beneficiary may use the
subject access request procedure to circumvent the principle that trustees should not be obliged to reveal
details of confidential decision making. This applies to UK based solicitors advising non-resident trustees.
When considering their responsibilities, trustees should bear in mind the data protection law in the
jurisdiction in which they are based.

Action now

• Review existing trusts and foundations to decide which are in scope. Remember that where assets
  are held in an investment vehicle under the trust, the trust itself may have no UK tax exposure.
• Do you have an up to date set of trust accounts? If not, quite aside from these rules, that will be a
  concern.
• Decide who are the beneficial owners in each case and review the information held on them.
  Remember that this can include a protector whose involvement may be marginal, perhaps simply
  holding the power to change trustees, and also potential beneficiaries identified in a letter of wishes.
  It is unlikely that personal details such as national insurance number or taxpayer reference will already
  be on file so those will have to be obtained. In the common case of a non-UK resident protector, his or
  her passport details will be needed, but may already have been obtained under existing KYC rules.
• Communication is going to be important. The protector may have been happy to provide confidential
  information to the trustee, but could be surprised to learn that this information is going on to a register
  maintained by the UK revenue authorities and might be exposed to public access in due course.
• Establish a separate written record of the information about the beneficial owners. Do not simply rely
  upon existing information in a file. This may satisfy the regulations but may be a costly exercise to
  replicate when it comes to the obligation to delete if there is a need to keep trust records for a longer
  period.
• Ensure that systems and training are in place.

Then, if that were not sufficient, trustees of non-UK resident trusts and offshore corporate service providers
have another new register to look forward to.

4 Regulation 44(7).
5 Regulation 44(8).
6 Article 29 Trusts (Jersey) Law, 1984.
7 In the matter of the CA Settlement [2002] JLR 312.
8 [2017] EWCA Civ 74.
Proposed new UK register of beneficial owners of overseas entities with UK real estate

The UK government has committed to a proposed new register of offshore companies that own or want to buy property in the UK, or wish to participate in UK government procurement.

The intention is that an overseas entity will not be able to buy, sell, charge or grant a long lease over UK real estate unless their details are on the new register which will be kept by Companies House in the UK. In this context, 'long lease' means a lease of over 21 years. The process will involve the registration of required information at Companies House in advance of any transaction. A successful application will be allocated a registration number which must be provided when coming to register title at HM Land Registry.

It is registration that confers legal title in the UK, so without a valid registration number, legal title is not acquired.

Where UK real estate is already owned offshore, the entity will have a year to register the required information or to sell the property if they wish to avoid disclosure. If these requirements have not been dealt with at the end of the transitional year, then a sale, charge or lease of the property will not be possible until they are.

Clearly if there is no plan to deal with the property, then there is no incentive to register. This may be dealt with by the creation of a criminal offence for failing to register. However, it may be thought that the inability to deal with the property should be sufficient incentive without the need to criminalise failure to comply.

The information required will be familiar to those who have studied the Register of People with Significant Control. This brings us back to the concept of the 'beneficial owner', the definition of which is based upon that used for the purposes of the PSC Register.

These proposals were the subject of a ‘call for evidence’ issued by the UK government on 5 April 2017 with a deadline of 15 May 2017. There was clearly some concern as to the possible impact on inward investment to the UK, but it is doubtful whether that concern will do anything other than assist in shaping some of the features of the new register.

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