

The UK Trust Register - January 2018

Briefing Note - Non-UK Trusts

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 were passed on 22 June 2017 and took effect on 26 June. The Regulations require a register of beneficial owners (who are very widely defined) of certain trusts to be created and maintained by HM Revenue and Customs. The information in the Trust Register must be supplied and kept up-to-date by affected trustees.

The registration will take place through an online process run by HMRC that was launched for agents in October 2017. The register will not be in the public domain but will be accessible to certain UK and non-UK agencies.

Both UK and non-UK trustees will be affected and must consider whether they will be caught by the requirements of the Regulations.

What is the Trust Register?

The Trust Register is an online register of trusts held by the UK tax authority, Her Majesty's Revenue and Customs (HMRC).

The register will contain details of certain trusts and their 'beneficial owners', as defined in UK law.

Why has the UK introduced a Trust Register?

The register derives from the EU Fourth Anti-Money Laundering Directive. As an EU member state, the UK was required to implement the Directive in its domestic law. It did so by introducing the Money-Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations. The final version of the Regulations was published on 22 June 2017.

The Regulations introduced a legal requirement for trustees of certain trusts to register information about the trusts and individuals connected with them with HMRC.

The Regulations also set out other obligations, such as the legal requirements to disclose information to third parties where trustees enter into transactions with other regulated people. This note focuses on the trusts register only and does not cover all the other requirements in the Regulations.

In the absence of any other steps by the UK government, following the departure of the UK from the EU, the Regulations will continue to be law.

It is important to note that at present, there is little guidance as to how the Regulations apply in practice and there is uncertainty as to the reporting position in relation to certain structures and individuals connected with them. We hope that HMRC will provide further clarification this year.

Who is responsible for registration?

The trustees.

Deadlines

The Regulations that introduced the Trust Register came into effect on June 2017 (all now extended).

There are various possible deadlines:

- If a trust is already registered with HMRC for self-assessment, then the first deadline for registering the trust with the new service and providing the required details will be 5 March 2018
- If the trust is not registered with HMRC for self-assessment and has to register due to an income tax or capital gains tax liability in 2016/2017, the deadline will be 5 January 2018
- If the trust is not registered with HMRC for self-assessment and has to register due to an inheritance tax, SDLT or stamp duty reserve tax liability in 2016/2017, the deadline will be 5 March 2018.

Which trusts must be registered?

There are two parts to the test for registration.

First, the trust must fall within one or more of the following categories:

1. Trusts whose individual trustees are all UK tax resident;
2. Trusts that have a corporate trustee that is incorporated in the UK;
3. Trusts that have a mixture of UK and non-UK trustees and have been funded by a person who was UK resident or domiciled at the time of the funding;

4. Other trusts (i.e. non-UK trusts) that have assets in the UK; and
5. Other trusts (i.e. non-UK trusts) that have income from a UK source;

Second, the trust must be UK taxable. This means that the trust (or rather its trustees) are liable to pay any of the following UK taxes:

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

The test for tax liability is applied on a yearly basis, so a trust may be UK taxable in one tax year but not in the next.

The Regulations specifically state that the trustees of a trust must be **liable** to pay one of the UK taxes. This means the existence of an actual sum in tax to pay. This means that there is no registration requirement for a non-UK resident trust that does not (except where UK residential property is involved) own UK assets directly but through an underlying company. It appears that there is also no requirement to register where a non-UK trust without a UK-resident beneficiary or potential beneficiary owns only UK shares or cash that generate dividends or interest that are treated as 'disregarded income' for UK income tax purposes and does not purchase more UK shares or share-related interests.

Who are the 'beneficial owners' of a trust?

This class is very widely defined and consists of:

- The settlor of the trust (their details must be reported even if they have died);
- The trustees of the trust;
- The beneficiaries of the trust;
- If the individual beneficiaries of the trust have not been ascertained, the class of people in whose main interest the trust is set up or operates;
- Anybody else who has a power to:
 - > dispose of, advance, lend, invest, pay or apply trust property;
 - > vary or terminate the trust;
 - > add or remove a person as a beneficiary or to or from a class of beneficiaries;
 - > appoint or remove trustees or give another individual control over the trust;
- Anybody else who has a power to direct, withhold consent to or veto the exercise of the four powers mentioned immediately above.

The last two categories will essentially cover protectors, enforcers, guardians and appointers of trusts.

What information must be registered?

The information required covers the trust itself, its beneficial owners and potential beneficiaries and there is a lot of it:

Details of the trust itself:

1. The full name of the trust;
2. The date on which the trust was set up;
3. A statement of accounts for the trust, describing the trust assets and identifying the value of each category of the trust assets at the date on which the information is first provided to HMRC (including the address of any property held by the trust);
4. The country where the trust is considered to be resident for tax purposes;
5. The place where the trust is administered;
6. A contact address for the trustees;
7. "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". This is the wording of the Regulations but HMRC have said that they will only require the details of the agent who is acting on behalf of the trustees' in relation to the trustees tax affairs.

Details of the beneficial owners of the trust and any other individual named as a potential beneficiary in a document from the settlor such as a letter of wishes:

1. The individual's full name;
2. The individual's national insurance number or unique taxpayer reference, if any;
3. If the individual does not have a national insurance number or unique taxpayer reference:
 - a. The individual's usual residential address; but
 - b. If the address provided under point 3 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;
4. The individual's date of birth;
5. The nature of the individual's role in relation to the trust.

Details required where the beneficiaries of the trust 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 under the trust. HMRC guidance states that if members of a class can be identified their details do not need to be disclosed until they have been "determined" - which is now interpreted to mean when a beneficiary is in receipt of a financial or non-financial benefit. This interpretation was changed in late November 2017. For example if the class of beneficiaries is the current or future grandchildren of the settlor, the class must be described (to cover unborn grandchildren) but living grandchildren do not need to be named until they actually benefit.

Ongoing duties

Trustees must maintain accurate and up-to-date written records of the beneficial owners of the trust and of its potential beneficiaries.

Trustees of registered trusts must notify HMRC if details they have supplied (apart from asset values) change. However, this obligation only applies in a year when the trust is taxable. Therefore, there may not be a duty to keep the register updated in a year where the trust does not have a UK tax liability.

What about foundations?

The Regulations refer to registration of trusts and their beneficial owners and do not appear to include entities such as foundations that may share some characteristics with trusts. Again, we await confirmation that this is the approach that HMRC will take (or not). However, if a foundation is subject to tax in the UK, on the basis that it falls within the UK tax regime as it applies to trusts, registration may be sensible.

Who will have access to the Trust Register?

The register will not be accessible to the public. It can however be accessed by:

1. Any UK law enforcement authority; and
2. Through a request to the UK National Crime Agency, by any EEA financial intelligence unit and by any other agency responsible for enforcing the 4th Anti-Money Laundering Directive in an EEA state that is looking into the affairs of a beneficial owner or potential beneficiary.

How to register

Registration is made online by the trustees or (from October 2017) by their agents using the UK 'Government Gateway' facility. The trustees must set up a Government Gateway account online.

What about data protection and confidentiality laws?

In respect of trustees governed by UK law, complying with the requirements relating to the Trust Register should not conflict with data protection duties.

In respect of trustees who are subject to non-UK law that may prohibit the gathering, storage, processing and/or disclosure of information that the Trust Register requires, the position is not yet clear. Illegality under non-UK law appears to be no defence to a failure to comply with the Regulations, although enforceability of the Regulations in these circumstances may be a different matter.

Planning

For costs and other reasons, trustees and settlors may prefer not to have to register and/or provide the level of detailed information above about individuals. This may legitimately occur where, for example, the connection of a non-UK trust with the UK is genuinely tenuous and/or not fundamental to the purpose and running of the trust or where a person will be linked to a trust from which they have very little, if any, chance of benefiting.

In those circumstances, the trustees and connected people may be able to take steps to sever a link with the UK or a person that would otherwise cause the trust to be registered or require significant information gathering and disclosure exercises. For example:

1. Non-UK trustees may wish to dispose of UK assets if ownership would bring them within the requirement for registration;
2. Non-UK trusts may consider owning UK assets through non-UK companies rather than directly (the company itself may still have a duty to register and pay UK tax);
3. Protectors may wish to step down if they do not wish to be identified as the beneficial owners of assets from which they can never benefit; and
4. Settlor may review letters of wishes and amend them to remove references to individuals who are not current beneficiaries unless absolutely necessary and/or describe such individuals by class as opposed to by individual name.

Some common situations

I am the UK-resident sole trustee of a trust that holds a share portfolio.

You must register details of the trust and its beneficial owners as the trust is a UK trust and is liable to tax in the UK.

We are a non-UK resident corporate trustee of a trust that owns and rents out UK real property directly. None of the beneficiaries is UK tax-resident.

You must register details of the trust and its beneficial owners as the trust has UK assets and is liable to tax in the UK.

I set up a trust that has trustees in the Cayman Islands. It holds non-UK shares and cash outside the UK. I cannot benefit from the trust but my grandchildren, who are UK resident, can. The settlor of the trust was non-UK domiciled.

As the trust is not liable to tax in the UK, there is no requirement to register.

We are the non-UK resident corporate trustee of a trust that holds cash in a Swiss bank account and all the shares in a BVI company. The BVI company owns a portfolio that includes shares in UK companies that pay dividends. The settlor of the trust was non-UK domiciled.

As the trust is not liable to tax in the UK, there is no requirement to register.

We are the non-UK resident corporate trustee of a trust that holds cash in Switzerland and all the shares in a BVI company. The BVI company owns UK residential property. The property is not rented.

The trust will be liable to UK inheritance tax if the underlying company continues to hold the property at a 10 year anniversary or the company shares are appointed out while the company owns the property. However, the trust will still not own the UK property itself. This means that that trust should not need to register. HMRC's guidance says that if there is a "look through" for tax purposes, so that the trustees have a UK tax liability, there will be a need to register. It is unclear exactly what is meant by "look through" but in our opinion, non-UK trusts should not have to register due a to an inheritance tax charge triggered by company-owned UK residential property as no look-through is involved – the trust is being taxed on the company shares, not the property. However, this will need to be kept under review as further guidance emerges.

And some slightly absurd ones

An old family friend of mine, Mrs Z, died a year ago, leaving three small children. Under her will, her estate was left on trust for her children until they are 21 years old. The two trustees live in the UK. As a protection, if the trustees want to add a new beneficiary of the trust they have to have my consent. Neither I nor my family can ever benefit from the trust.

Congratulations. According to the Regulations, you are a beneficial owner of the trust. Your details must appear on the register of trusts.

I have always lived in Guernsey. 20 years ago, I set up a trust for my nephews and nieces and their children. There are currently 10 of them and they all live outside the UK. I have written a letter of wishes that says that if they all die before the trust ends, I would like my (named) surviving godchildren to be added as beneficiaries and to receive the trust fund. All my godchildren live outside the UK. I have not told my godchildren about this. The trust currently owns an investment property in the UK.

Your godchildren do not need to be registered as individual beneficial owners - the trustees may list them as a class of beneficiary in the trust register. However, if any of your godchildren receives a benefit from the trust in future, his/her full details will need to be added to the register.

This note is an overview and does not constitute legal advice. If you would like further advice as to the impact of the new register on you or your clients, please contact us.

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