BDB PITMANS

# HM TREASURY AND HMRC CONSULTATION: FIFTH MONEY LAUNDERING DIRECTIVE AND THE TRUST REGISTRATION SERVICE – 24 JANUARY 2020 TO 21 FEBRUARY 2020

## RESPONSE FROM BDB PITMANS LLP

By email to: asres.consult@hmrc.gov.uk

Thank you for the opportunity to respond to the HM Treasury and HMRC consultation on the Fifth Money Laundering Directive (**5MLD**) and the Trust Registration Service (**TRS**). The response from the BDB Pitmans LLP Charities team is set out below. Our response relates mainly to the impact of the proposals on the charity sector.

If you have any queries regarding this response or would like to discuss any points, please contact Nicola Evans (nicolaevans@bdbpitmans.com).

### About BDB Pitmans LLP Charities team

We have a long-established charities practice, advising charities across the spectrum, whether large or small, operating locally, nationally or internationally. We are involved in the establishment of numerous charities each year, as well as on mergers and incorporations of charities, in each case advising on suitable legal forms and structures according to the specific circumstances of the case. We have advised a number of charities on various compliance points arising out of the transposition of previous Money Laundering Directives, including the PSC regime and the TRS, and have responded to previous consultations and discussion papers on the subject, including the 2019 consultation on the transposition of 5MLD (the **2019 Consultation**). A copy of our response to the 2019 Consultation is annexed to this response.

### Responses

### Who is required to register?

1 **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.**

1.1 We agree with the proposal in the consultation that charitable trusts should not be in scope to register. As noted in the consultation document and elsewhere, the risk of such trusts being used for money laundering or terrorist financing activity is low. It is also the case that, as noted in our response to the 2019 Consultation, the current registration requirements for charities in the UK already provide for much of the TRS information to be publicly available (and/or within the possession of HMRC).

1.2 We should like clarity on whether some charity trust situations are considered to fall within the reference to "charitable trusts" and therefore to be out of scope. In particular:

1.2.1 Funds held as sub-funds by a charity but not registered separately as a charity.

(a) As noted in our response to the 2019 Consultation, it is common for charities to hold multiple funds, e.g. scholarship funds or endowment funds to hold specific property, which may be established by different ways (e.g. under a Will, by a specific gift, in response to an appeal or as an endowment on a merger).

(b) Some, but not all, such funds may appear on the charity register as "linked" charities to the "trustee" charity (which may or may not itself be a trust).

(c) Where such funds appear as "linked" charities on the charity register, it would be helpful to have it confirmed that that is sufficient for the linked fund to fall within the description in draft regulation 45ZA(2)(e) as being "registered ,,, *as a charity*" (emphasis added). On a reading of the power to direct linking under s12 Charities Act 2011, our view is that it should be sufficient, but we consider that this should be put beyond doubt.

(d) Where a fund is not shown as a linked charity on the charity register, we consider there is doubt as to whether such fund would be registrable under the TRS or not. As noted in our response to the 2019 Consultation, we consider that such funds should be out of scope. In particular:

(i) In many of these cases, there is likely to be difficulty in identifying which funds are *trusts* as opposed to held on some other basis. Often the original terms of the gift will have been lost. Even if the original document is available, it may well not be drafted clearly, giving rise to different interpretations. The question of how a corporate charity may hold funds, such as prize funds, is an ongoing area of confusion and debate in charity law.

(ii) If charities were required to register each of these separate funds with the TRS, that would be a hugely expensive, and disproportionate, requirement, both for the charities and, we believe, for HMRC. We believe it would also raise resource problems for the Charity Commission, as a requirement to register such funds with the TRS may cause the trustee charity to consider they need to register the fund(s) as separate charities (where the income is £5,000 or more) and/or to apply to link them, and hence bring the funds out of scope.

(iii) The funds will be accounted for by the trustee charity (often consolidated with the accounts for the charity's funds).

(iv) Where the charity trustee takes the form of a company limited by guarantee, it will also be registered at Companies House and subject to the PSC regime. Other legal forms may well be registered in some form elsewhere (e.g. corporations established by Royal Charter, with the Privy Council; community benefit societies, with the Financial Conduct Authority).

(v) We consider that such funds would fall within one or both of the bullet points in paragraph 3.4 of the consultation document, as the (charitable) purpose and structure of such funds will mean that payments to beneficiaries are predetermined (within the purpose and beneficial class of the fund) and highly controlled and they will be subject to overall control of one or more of the charity regulators and, in most cases, registered also with HMRC.

1.2.2 Assets held as nominee or on bare trust for charity.

(a) As noted in our 2019 Consultation response, assets may be held for charity in a number of situations, usually dictated by the legal structure of the charity.

(b) Unincorporated associations.

(i) Many charities with little or no access to advice will establish themselves as unincorporated associations. Such charities are not trusts, but those holding the charity's assets for the charity will be trustees. They hold as bare trustees for the charity, although it may not be the case that they will necessarily always formally declare a trust in those terms.

(ii) Presumably, where no formal trust is declared, the trust is not an "express trust"?

(iii) However, if the charity seeks to formalise the ownership of charity assets, so it is clear that those holding such assets do not do so beneficially, it seems that that would be an express trust? If so, it is not clear that the express trust is out of scope.

(iv) It seems to us inappropriate that a charity which seeks to act properly by formalising and documenting its ownership of assets which, due to the charity not being a legal person, must be held by others thereby triggers an obligation to register under the TRS; we believe that such a result would act as a disincentive for unincorporated charities to formalise ownership of their assets.

(c) Holding trading subsidiary shares/membership

(i) Where an unincorporated charity (which may or may not be a trust) has a wholly owned subsidiary company (alone or with other charities), it is common for one or more people to hold the shares (or membership if the trading company is a company limited by guarantee) of the company on trust for or nominee for the charity (or charities).

(ii) As above, such arrangements would usually (but may not always) be evidenced by a simple declaration of trust. Again, presumably those arrangements would be "express" trusts but are not obviously out of scope under the current draft regulations.

(d) We understand the comments made at paragraph 3.13 of the consultation document regarding bare trusts. We consider that such trusts, where assets are held for charity only, should be out of scope.

1.2.3 Equity-sharing by charities and individuals

(a) Sometimes a charity will hold property jointly with another person, usually an employee, in order to help the employee purchase living accommodation that would otherwise be unaffordable. (See Charity Commission Operational Guidance OG547[1] for further information).

(b) For example, a church may enter into such an arrangement with a pastor to enable the pastor to live at or near the church.

(c) In such cases, the jointly-owned property will be held on trust but the trust will not be exclusively charitable (and so cannot be a "trust for charitable purposes"); instead it will be part charitable and part private, according to the equity-sharing arrangement that is agreed between the charity and the individual.

(d) In entering into such arrangements, the charity trustees of the charity are subject to the usual charity trustee duties and must have an express power to enter into such an arrangement.

(e) It seems to us that such arrangements should be out of scope as falling within the circumstances of:

(i) paragraph 3.11 of the consultation document: in that it is not clear why it should make any difference if one party is a charity rather than an individual (save that it would appear to be lower risk if a regulated entity such as a charity is involved); or

(ii) paragraph 3.12 of the consultation document (although we assume that paragraph is not intended to apply to trusts of real property).

(f) As such, we consider such arrangements should fall within draft regulation 45ZA(2)(a) as a trust imposed or required by an Act or subordinate legislation. It would be helpful if this could be confirmed.

1.2.4 Charities on the "Combined List" in Northern Ireland.

(a) As noted in our 2019 Consultation response, the Charity Commission for Northern Ireland (**CCNI**) is still in the process of registering charities in Northern Ireland, following the charity regime being brought into effect there a few years ago. Those charities not yet registered at CCNI are held on the "Combined List"; our understanding is that such charities are recognised by (and hence registered with) HMRC.

[1] http://ogs.charitycommission.gov.uk/g547a001.aspx

(b) It is not clear that charities on the "Combined List" would fall within draft regulation 45ZA(2)(e) as they are not yet "registered as a charity in ... Northern Ireland".

(c) We assume that it is intended that any such charities which are trusts should be out of scope and it would be helpful if this was confirmed (and the draft regulations amended accordingly).

1.2.5 Non-UK charities which are recognised by HMRC for UK charity tax purposes.

(a) Where a non-UK charity qualifies for recognition by HMRC for UK charity tax purposes (under the test introduced in Finance Act 2010, Schedule 6), where such non-UK charity is a trust (or may hold assets on trust), it seems that it may be liable to registration under the TRS (subject to whether or not it is registered in an EU member state).

(b) For example, if such a body were to inherit UK property under a Will and held that property on trust (perhaps via a nominee on bare trust), it is not clear that such entity would be out of scope under the draft regulations and we wonder if this is intended?

(c) It would be helpful if this was clarified.

1.3 The boundaries of what is and is not out of scope will need to be clear, both so that trustees can understand their obligations, but also so that those who are out of scope are able to explain/demonstrate as such to financial institutions. Otherwise there is a risk of undue administrative expense caused if institutions routinely ask for evidence of TRS registration and do not accept that such registration is not required.

## 2 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?

2.1 We refer to our response to question 1 above regarding some areas where we believe some clarification/confirmation would be helpful.

2.2 Subject to those points, we believe that the proposed drafting of regulation 45ZA(2)(e) appears helpful in that, from the perspective of English law, it includes those trusts which are exempt or excepted from the requirement to register as a charity in England and Wales.

2.2.1 We assume that this wording is intended to exempt charitable trusts whose gross income does not exceed £5,000, on the basis that they are "excepted" by s30(2)(d) Charities Act 2011. If so, we agree that that is appropriate – these will be among the smallest "kitchen table" charities for which any obligation to register under the TRS would, we believe, be wholly disproportionate.

2.2.2 However, we consider that it needs to be made explicit in the regulations that such charities are out of scope.

(a) The Charities Act 2011 does not define "excepted" charities. s30 Charities Act 2011 can be read as if "excepted" does not apply to s30(2)(d), a reading apparently supported by the Explanatory Notes to s3A Charities Act 2006 (which amended the previous regime relating to excepted charities in the Charities Act 1993), which seem to go to some lengths not to refer to charities below the registration threshold as "excepted". (Those provisions were consolidated into what is now the Charities Act 2011).

(b) However:

- ss161 and 168 Charities Act 2011 appear to assume s30(2)(d) charities are excepted; and
- s32(2)(b) Charities Act 2011 empowers the Minister to make an order to substitute a different sum "with a view to extending the scope of the exception provided by s30(2)(d)".

(c) Similarly, charities within s30(2)(d) are included within the meaning of "qualifying excepted charity" in commencement provisions for the 2006 Act (see SI 2008/3267), but that is not the same as defining them as "excepted" charities in the Act itself.

(d) The Charity Commission's guidance "Excepted charities"[2] is vague as to whether or not such charities are excepted charities, but its Glossary of terms used in its Operational Guidance[3] defines "excepted charities" as including "any charity whose annual income from all sources does not amount to more than £5000".

2.2.3 We consider that charities with annual income not exceeding £5,000 are excepted charities, but for the reasons noted above the position is open to doubt. If the point is not made clear in the regulations, there is a real risk of confusion as to whether or not such charities, where they may be "express trusts", would be required to register.

2.2.4 We suggest that the point may be addressed by defining "excepted" in the regulation expressly to include charities falling with s30(2)(d) Charities Act 2011.

2.3 As noted in our 2019 Consultation response:

2.3.1 it would be helpful if clear guidance is produced to accompany the regulations, explaining the definitions (including the parameters of regulation 45ZA(2)(e)) so that it is clear which charity-related scenarios are not (or are) in scope.

2.3.2 Similarly, the guidance should also be clear as to how the definitions of the regulations apply to charities. The language of 5MLD does not sit well in a charity context (where, e.g., there tend to be no "beneficial owners" as that expression is understood in charity law) and, at present, this can make it difficult to apply.

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2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/587387/Excepted_charities.pdf

3 http://ogs.charitycommission.gov.uk/glossary.aspx

(a) For example, charities and their advisers can have protracted correspondence with financial institutions to satisfy those institutions as to which people are the "beneficial owners" in respect of the charity for these purposes.

(b) The financial institution's form will, understandably, adopt the 5MLD language, with limited or no clarification or definition. The charity situation tends not to fit easily in to such language. The risk then is that incorrect information is given (because those involved are not clear how to apply the form to the situation) or a long explanation is needed, which requires individual attention at the institution.

(c) If the guidance explained how the 5MLD terms (such as "beneficial owner") translate to the relevant roles within charities, as understood under the charity jurisdictions of the UK (such as "charity trustee"), we believe that it would facilitate better compliance, a supply of more accurate information and a significant saving of cost and administration time.

**Deadlines, data retention and penalties for non-compliance**

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

3.1 As stated in our 2019 Consultation response, to the extent that any charity-related trusts were required to register (please see our response to question 1 above), we believe there would be unintended consequences and/or difficulties arising from the proposed 30 day deadline, which could lead to unfair consequences.

3.1.1 If any underlying funds held by charities on trust were in scope, the 30 day limit would be likely to create logistical problems. As noted above, there can be debate as to whether the funds are held on trust at all and, if they are, it may not always be clear when the trust was created.

3.1.2 For other trust arrangements within charity structures, we believe that a registration requirement would be unnecessary duplication and disproportionate (e.g. in the case of trust arrangements arising due to an unincorporated charity's lack of legal personality). Given the often relatively informal nature of such situations, we consider that a 30 day registration requirement would be unrealistic.

3.1.3 For many charities, especially smaller ones, we expect that a 30 day limit would also be a logistical hurdle. E.g.

(a) if charities on the Combined List in Northern Ireland were in scope, a small charity on that list, if even aware of the obligations, would likely have to try to manage TRS registration (and its application to the circumstances of their trust) without access to assistance.

(b) Similarly, many charities have significant numbers of charity trustees, often spread out geographically (and not all online), making marshalling the details required time-consuming.

(c) It can also be difficult to identify the other individuals whose details would be needed for registration, e.g. the various "settlors" of a charity, and time-consuming to identify who might fall within the definition of those having control (e.g. there are often powers for someone to appoint one or a minority of charity trustees, but this presents limited "control" because charities generally make decisions by majority).

3.1.4 As also noted in our 2019 Consultation response, there is also the risk of the unintended consequence of deterring people from taking on charity trusteeship, if individual volunteers are required to hand over their data (often very sensitive data) again and again, leading to a build-up of data across an increasing number of institutions and a growing sense of unease over the security of that data.

3.1.5 Any addition to the administrative burdens of running a charity should be justified clearly, setting out the basis on which it is necessary, fair and proportionate.

3.2 We support the proposals not to impose a penalty for the first accidental omission to register or update, but instead to use that as an opportunity to make the trustee(s) aware of their obligations.

3.3 We have some concerns over other aspects of the proposed penalty regime.

3.3.1 Where a trustee has received the "nudge" letter but then has difficulties registering or updating within the 30 day period, e.g. because they have difficulties obtaining the right information, or where they challenge that they are in scope, it is not clear what happens under the proposals.

(a) Is it proposed that HMRC have discretion where a trustee is willing but unable to provide the full information? If so, how is it proposed the discretion would be applied?

(b) What is the proposed process if a trustee disputes their trust is in scope (and/or that it is not an express trust)?

3.3.2 In respect of the proposals for "deliberate" failure:

(a) it is not clear what evidence would be required to establish that non-compliance was "deliberate";

(b) on the face of it, it appears that HMRC may proceed direct to a penalty for deliberate non-compliance with no "nudge" letter – in what circumstances might this happen?

(c) we are not sure that "reasonable excuse" is the right defence to a charge of "deliberate" non-compliance (e.g. is it a "reasonable excuse" to say that the action/omission was accidental not deliberate?).

3.3.3 It would be helpful to see the proposed draft regulations to see how it is proposed that the penalty regime would work in practice.

**Legitimate interest & third country entity requests**

**4 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.**

4.1 We think the proposals assist in providing some more defined framework for such requests; we think that some further tightening up/clarification would be helpful.

4.2 It is not clear how an "investigation" would be defined. Is this wider than a criminal investigation? Does it include:

4.2.1 an investigation by an investigative reporter?

4.2.2 any journalistic investigation?

4.2.3 a request from a private investigator?

4.2.4 a request by lawyers (e.g. for a divorcing spouse, or potential litigant)?

4.2.5 academic research?

4.3 It is also not clear how rigorous the requirement would be to show that access would "further work" to counter money laundering or terrorist financing.

4.4 In draft regulation 45ZB(1), we suggest that "… person who can demonstrate …" should be "… person who demonstrates …".

**Exemptions to providing beneficial ownership information**

**5 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?**

5.1 We wonder whether the parameters of draft regulation 45ZB(6)(a) are sufficiently clear – should one or more of those terms be defined? E.g. It is not immediately clear how widely (or narrowly) "harassment" or "intimidation" might be interpreted.

5.2 We suggest that a further criterion to consider would be where access would expose the beneficial owner to action contrary to the Human Rights Act and/or UN Universal Declaration of Human Rights (or equivalent as applicable in UK law).

5.3 We suggest that thought might also be given to the situation where access might not expose the beneficial owner in the request to detriment or harm but may expose another beneficial owner or members of the beneficial owner's family to potential harm.

5.3.1 E.g. suppose a third party state sought details of a beneficial owner as part of an exercise to track down a relative believed to be living with them? Or where a private investigator makes an enquiry about their client's spouse (the beneficial owner) with the motive of kidnapping their children to remove them from the jurisdiction?

5.3.2 It may be that the information which may be provided in response to a request may be thought not to assist such enquiries, but it may also be that it would provide an important part of a wider information-gathering exercise.

**Process, reviews and appeals**

**6 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.**

6.1 It is difficult to answer without full details of the proposed process and appeals.

We hope you have found this response helpful. We should be happy to engage further if requested.

**BDB Pitmans LLP**

**20 February 2020**

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# HM TREASURY CONSULTATION: TRANSPOSITION OF THE FIFTH MONEY LAUNDERING DIRECTIVE – APRIL 2019 TO 10 JUNE 2019

## RESPONSE FROM BDB PITMANS LLP

By email to: Anti-MoneyLaunderingBranch@hmtreasury.gov.uk

Thank you for the opportunity to respond to the HM Treasury consultation on the transposition of the Fifth Money Laundering Directive (**5MLD**). The response from the BDB Pitmans LLP Charities team is set out below. Our response relates only to chapter 9 of the consultation in relation to the impact on the charity sector of the extension of the Trust Registration Service (**TRS**).

If you have any queries regarding this response or would like to discuss any points, please contact Nicola Evans (nicolaevans@bdbpitmans.com).

### About BDB Pitmans LLP Charities team

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### Responses

### Chapter 9 – Trust registration service

### Definition of express trust

1 **Question 64: Do respondents have views on the UK's proposed approach to the definition of express trusts? If so, please explain your view, with reference to specific trust type. Please illustrate your answer with evidence, named examples and propose your preferred alternative approach if relevant.**

1.1 We welcome the statement at paragraph 9.15 of the consultation document that the Government is considering whether there are other registration services already in existence for particular trust types that could fulfil the 5MLD registration requirement.

1.2 With regard to charitable trusts in the UK, we would suggest that the registration processes in place for charities with the charity regulators in England and Wales, Scotland and Northern

Ireland, combined with the recognition of charities process at HMRC, should be sufficient (perhaps with a few tweaks) to save undue duplication of registration.

1.3 We expect that such an approach should be sufficient in Scotland and Northern Ireland, where their charity regulation regimes provide no exception/exemption from registration. In Northern Ireland, the Charity Commission for Northern Ireland (**CCNI**) is still in the process of registering charities since the charity regime was brought into effect there a few years ago. Those charities not yet registered at CCNI are held on the "Combined List", but our understanding is that such charities are recognised by (and hence registered with) HMRC.

1.4 The area where we believe there may be a gap in the current registration regime in this respect is for some charities in England and Wales. Our charity regulation regime provides that not all charities are required, or permitted, to register with the Charity Commission – such charities are excepted or exempt charities.

1.5 Exempt charities

1.5.1 For those charities which are exempt from registration with the Charity Commission, many, but not all, will have a principal regulator (under the Charities Act 2011) which will have some form of "registration" process which may suit (or be adapted to suit) the purposes of 5MLD. We would also expect exempt charities to be recognised by HMRC, so that HMRC will hold relevant details for such charities.

1.5.2 What may be more difficult is those charities which are exempt as being connected institutions under paragraph 28 of Schedule 3 to the Charities Act 2011. Such institutions (which may include charitable trusts) are generally smaller charities, such as small societies associated with certain exempt educational charities. The relevant exempt charity should have details of these charities and their trustees, but it is not clear where else they may be registered. By their nature, such charities will usually be small and it may be difficult to make their trustees aware of any obligation to register on the TRS. We suspect that any obligation to do so is likely to be disproportionate to any risk.

1.6 Excepted charities

1.6.1 Charities may be excepted from registration with the Charity Commission by order or regulation (subject to their income not exceeding £100,000) or where the charity's gross income does not exceed £5,000.

1.6.2 Charities established in England and Wales with an income below £5,000 per year can, in theory, apply to register with the Charity Commission, but the Charity Commission states it will only consider such applications in "exceptional" circumstances. (The provision of the Charities Act 2011 which would enable voluntary registration on request has never been brought into force). Such charities may be registered with HMRC, and will want to do so in order to be able to claim tax relief (e.g. on donations). Where such charities are established as trusts, therefore, we believe that the extent to which they will already be registered will be unclear.

1.6.3 We believe that imposing on such charities a requirement to register with the TRS will be very difficult. By their nature, it will be the tiniest charities being run by

volunteers from the kitchen table which are least likely to be registered already with the charity regulator/HMRC.

1.7 Special trusts and other funds held on trust

1.7.1 Another area of concern is that there will be many cases where charities may not themselves be formed as trusts but become trustees of charity funds, e.g. where funds are given (often by Will) on a restricted basis (for a prize fund, say).

1.7.2 Many charities end up with hundreds of such funds, created over decades or centuries, which, technically, will often each be a separate charity trust (although, just to add to the confusion, not all will be trusts – e.g. some may be scheme charities, established or regulated by Charity Commission scheme).

(a) In some cases, these will be appear as linked funds on the trustee charity's Charity Commission register entry; but in other cases they may not be registered at all (often because the sums are so small).

(b) In either case, the funds will be accounted for by the trustee charity (often consolidated with the accounts for the charity's funds).

(c) Where the charity takes the form of a company limited by guarantee, it will also be registered at Companies House and subject to the PSC regime. Other legal forms may well be registered in some form elsewhere (e.g. corporations established by Royal Charter, with the Privy Council; community benefit societies, with the Financial Conduct Authority).

1.7.3 In many of these cases, there is likely to be difficulty in identifying which funds are *trusts* as opposed to held on some other basis. Often the original terms of the gift will have been lost. Even if the original document is available, it may well not be drafted clearly, giving rise to different interpretations. The question of how a corporate charity may hold funds, such as prize funds, is an ongoing area of confusion and debate in charity law.

1.7.4 If charities were required to register each of these separate funds with the TRS, that would be a hugely expensive, and disproportionate, requirement, both for the charities and, we believe, for HMRC. We believe it would also raise resource problems for the Charity Commission, as registration with the TRS may also cause the trustee charity to consider they need to register the fund(s) as separate charities (where the income is £5,000 or more).

1.8 Other trusts associated with charities

1.8.1 There are other situations which can give rise to a trust within a charity structure, even where the charity itself is not a trust.

1.8.2 For example:

(a) Many charities with little or no access to advice will establish themselves as unincorporated associations. Such charities are not trusts, but those holding the charity's assets for the charity will be trustees. They hold as bare

trustees for the charity, although it may not be the case that they will necessarily always formally declare a trust in those terms. Presumably some of these arrangements may be "express" trusts and some not?

(b) Where an unincorporated charity (which may or may not be a trust) has a wholly owned subsidiary company, it is common for one or more people to hold the shares of the company on trust for the charity. Such an arrangement would usually (but may not always) be evidenced by a simple declaration of trust. Again, presumably those arrangements would be "express" trusts.

1.8.3 We do not know how many such trust arrangements exist – or whether there is any way of knowing in practice. We believe that it would be a significant challenge to require such arrangements to be registered on the TRS. In these cases, the trust arrangement exists only because the unincorporated charity is not a legal person and so cannot hold property directly, but the property still belongs to the charity and is accounted for in the charity's accounts. We believe that a pragmatic approach should be taken in these cases, relying upon the charity's ownership of and accounting for the property and the existing registration requirements. (This may be a case where the point made at paragraph 9.14 of the consultation document, regarding a consistent application of 5MLD, is relevant).

1.9 Guidance

1.9.1 The charity sector is complex and covers a huge range of organisations, from the largest household names to the tiniest "kitchen table" charities. They also cover a range of legal forms but, as noted above, the extension in 5MLD does not necessarily affect only those charities established as charitable trusts – charities of all forms can be acting as trustee of various funds and unincorporated charities often require trust arrangements due to their lack of legal personality.

1.9.2 We consider it essential, therefore, that clear guidance *is* produced which will enable charity trustees to identify if they have obligations under 5MLD and, if so, what those obligations are. Such guidance would have to be publicised in the widest possible way for the charity trustees of the smallest charities (probably the most likely to be caught by a registration requirement and yet the least likely to be aware) to be made aware of how it would affect them.

1.9.3 The guidance should also be clear as to the information that would be required in respect of charitable trusts and trusts associated with charities. The language of 5MLD does not sit well in a charity context (where, e.g., there tend to be no "beneficial owners" as that expression is understood in charity law).

1.9.4 The difficulty of applying the language of 5MLD in a UK charity context is an issue not only for charities but for others who need to apply 5MLD.

(a) For example, charities and their advisers can have protracted correspondence with financial institutions to satisfy those institutions as to which people are the "beneficial owners" in respect of the charity for these purposes.

(b) It is often the case that the financial institution's form will use the 5MLD language with limited or no clarification or definition. The charity situation tends not to fit easily in to such language. The risk then is that incorrect information is given (because those involved are not clear how to apply the form to the situation) or a long explanation is needed, which requires individual attention at the institution.

1.9.5 For these reasons, the guidance needs to be clear about what is required from charities, including the information which financial institutions should seek. Such information should explain how the 5MLD terms (such as "beneficial owner") translate to the relevant roles within charities, as understood under the charity jurisdictions of the UK (such as "charity trustee"). We believe that providing guidance in this way would facilitate better compliance, a supply of more accurate information and a significant saving of cost and administration time.

1.10 We appreciate that 5MLD provides for no de minimis exception, but we consider that, against the registration and regulatory background of the charity sector in the UK, combined with the recognition that it is "low risk", there must be a practical solution which will not cause duplication of registration and an undue resource drain both for the charities concerned and for HMRC.

1.11 We would suggest that registration with the relevant charity regulator and/or HMRC should be sufficient. This would mean that any charity which cannot register with the charity regulator would, if it has not already done so, be prompted to register directly with HMRC (rather than on the TRS) to comply, thereby bringing them into the tax regulatory regime (if they were not already).

## 2 Question 65: Is the UK's proposed approach proportionate across the constituent parts of the UK? If not, please explain your view, with reference to specific trust types and their function in particular countries.

2.1 No. As noted above, the charity regulation regimes are different in each of England and Wales, Scotland and Northern Ireland.

2.2 If our suggestion of reliance on the existing registration regimes were accepted, there is still a risk of a disproportionate impact on the very smallest charities in England and Wales, as they would be at most risk of not being registered, not being aware of the regime and having no access to advice or assistance to handle the administration of compliance.

2.3 If additional registration with the TRS was required, we would expect it to have a disproportionate effect across all 3 jurisdictions:

2.3.1 Generally, it is thought that there is a higher number, by proportion, of smaller local charities in Scotland and Northern Ireland; although we expect there will be a greater number of such charities in England and Wales.

2.3.2 Charities established as trusts (rather than having a corporate form) will be more likely to be those with little or no access to legal advice or administrative support (it being easier generally to administer a trust).

2.3.3 There is also a risk of confusion among smaller charities as to whether or not they are within the regime. E.g. as noted above, many charities with little or no access to advice will establish themselves as unincorporated associations and those holding such charity's assets for the charity will be trustees. We think it likely that charity trustees of such charities may be confused (if they are aware at all) as to whether or not they should register.

2.3.4 There is also a risk of a disproportionate impact in England and Wales due to the excepted/exempt charities regime and due to the problems of underlying funds held as trusts and the existence of other trust arrangements that can exist around charities (which we suspect would be a greater problem in England and Wales due to the greater numbers of charities).

**Data collection**

3 **Question 69: Is there any other information that you consider the government should collect above the minimum required by 5MLD? If so, please detail that information and give your rationale.**

3.1 In respect of charities/charitable trusts, no.

4 **Question 70: What is the impact of this requirement for trusts newly required to register? Will there be additional costs, for example paying agents to assist in the registration process, or will trustees experience other types of burdens? If so, please describe what these are and how the burden might affect you.**

4.1 It depends what registration requirements are imposed on charities/charitable trusts. If existing requirements are relied upon, we would not expect any significant impact.

4.2 If, however, separate registration is imposed, we would expect that to have a significant cost in advice and administration time. As noted above, there will be difficulties in many cases in identifying whether or not the regime applies to the charity, and if so how, before one even gets into the administrative steps of registration.

4.3 We often assist clients with registration with the Charity Commission and with HMRC. We expect that, if separate registration under the TRS was imposed, we would assist with that too, with a consequent increase in cost to our clients.

4.4 We would be concerned about how those charities which lack funds to pay for advice and/or administrative assistance would (i) be aware of a need to comply and (ii) be able to cope with compliance.

## 5 Question 71: What are the implications of requiring registration of additional information to confirm the legal identity of individuals, such as National Insurance or passport numbers?

5.1 There are significant logistical and time hurdles to such an approach. Already, under the current regime, it is not uncommon for financial institutions to require such details of all the charity trustees, whatever legal form the charity takes (i.e. for corporate charities too).

5.1.1 Some charities have 20 or more charity trustees, often spread out geographically (and with their own day jobs and commitments); having to collate/update such information for everyone can be a significant challenge.

5.1.2 In addition, the approach, requiring individual volunteers to hand over their data again and again, leads to a build-up of data (often very sensitive data) across an increasing number of institutions; with that, there can be a growing sense of unease over the security of that data.

5.2 We believe there is a risk of unintended consequences here. It should be borne in mind that in the charity sector charity trustees are predominantly volunteers. They carry a heavy responsibility which they have to fit around the day job and their family and other responsibilities. And yet, increasingly, they face public criticism and worse. There is growing disquiet in the sector that it is becoming harder to recruit skilled people to take on charity trusteeship.

5.3 There is already a significant administrative burden involved in running a charity – which is necessary to ensure that the charity accounts publicly and keeps its regulators properly updated. Anything which is added to that might be the tipping point which makes a talented, but busy, trustee think it is not worth the bother and stress.

5.4 Hence, we would suggest that anything which may act as a deterrent to charity trusteeship (even though not intended) should give pause for thought. That is not to say that the requirement should not necessarily be imposed, but rather that, if it was, it should be explained clearly why it is necessary and what its implications are (i.e. why it is worth it). We also believe that more thought needs to be given to protecting the security of the data.

5.5 That leads to a further point. Charity causes can often be sensitive in nature, which can cause charity trustees to be especially sensitive about handing over certain personal data. For example:

5.5.1 the charity (and its founders and trustees) may be targets for hate crimes or co-ordinated campaigns of harassment;

5.5.2 the charity may relate to gay rights and those involved in running it may be targets for regimes where homosexuality is illegal and which may be criticised by that or other gay rights charities;

5.5.3 charity trustees/settlors who have undergone a change of name (e.g. in domestic abuse cases) and/or gender may be reluctant to hand over data which may disclose their former details.

Such sensitivities would need to be managed.

**Registration deadlines**

**6 Question 72: Does the proposed deadline for existing unregistered trusts of 31 March 2021 cause any unintended consequences for trustees or their agents? If so, please describe these, and suggest an alternative approach and reasons for it.**

6.1 It depends upon what registration requirements are imposed and what guidance is made available in advance. Depending upon what is imposed, there could be significant work involved in identifying what trusts may be subject to registration and what details need to be registered.

6.2 Many (but not all) charities will have a 31 March deadline for submitting their annual returns to the Charity Commission. To the extent there is any cross-over in the information to be submitted, the coincidence of deadline could be helpful; otherwise, the additional administrative burden at that time could put stress on some charities' ability to meet their annual return deadline.

**7 Question 73: Does the proposed 30 day deadline for trusts created on or after 1 April 2020 cause any unintended consequences for trustees or their agents? If so, please describe these, and suggest an alternative approach and reasons for it.**

7.1 Yes.

7.1.1 Where the trust is a charitable trust, the trustees would be required to apply to the Charity Commission (or equivalent in Scotland or Northern Ireland) to register (unless excepted in England and Wales, e.g. because of being below the £5,000 income threshold), which they must do before they can apply to register with HMRC to be recognised as a charity.

7.1.2 If the charitable trust is not registrable (in England and Wales), the trustees would be likely to seek to register with HMRC.

7.1.3 In either case, our experience is that the process (at least in England and Wales) typically takes significantly longer than 30 days.

7.2 It seems odd, to us that registration with the TRS (if required) would need to happen before the registration process has run its course with the Charity Commission (or equivalent) and/or HMRC. In particular, if the Charity Commission refused registration (or, if not registrable with the Charity Commission, HMRC refused to recognise the trust as a charity), the registration may be inaccurate or redundant.

7.3 In respect of the point noted above regarding underlying funds held by charities on trust, the 30 day limit would be likely to create logistical problems. As noted above, there can be debate as to whether the funds are held on trust at all and, if they are, it may not always be clear when the trust was created.

7.4 For other trust arrangements within charity structures, we believe that a registration requirement would be unnecessary duplication and disproportionate (e.g. in the case of trust arrangements due to an unincorporated charity's lack of legal personality). Given the often relatively informal

nature of such situations, we consider that a 30 day registration requirement would be unrealistic.

7.5 For many charities, especially smaller ones, we expect that a 30 day limit would also be a logistical hurdle. There is a lot to deal with in the early days of establishing a charity – including registration with the charity regulator/HMRC as noted above, setting up a bank account (which can be a long and time-consuming process), adopting suitable policies and practices etc, all of which can span over a few months, depending upon the resources (including time available) of the charity.

7.6 If our suggested approach of relying upon existing registration regimes (with the UK charity regulators and HMRC) were adopted, we believe that these concerns would fall away.

**8 Question 74: Given the link with tax-based penalties is broken, do you agree a bespoke penalty regime is more appropriate? Do you have views on what a replacement penalty regime should look like?**

8.1 Yes.

8.2 In particular, we consider that imposing a penalty on charity trustees would in most cases be disproportionate.

8.2.1 It is likely to be the trustees of smaller charities who would be caught out.

8.2.2 It would be likely to be a breach by accidental omission (due to lack of awareness of any obligation).

8.2.3 The charity trustees would in most cases be volunteers and would have to pay any penalty out of their own funds, when they were trying to act out of positive motives.

8.3 We believe that a penalty should only be imposed on charity trustees in respect of the regime where there is clear evidence of deliberate non-compliance.

8.4 Again, if our proposal that reliance is placed on existing registration regimes was accepted, we believe there would be no need for a separate penalty regime for charities/charitable trusts.

**Data sharing with obliged entities**

**9 Question 75: Do you have any views on the best way for trustees to share the information with obliged entities? If you consider there are alternative options, please state what these are and the reasoning behind it.**

9.1 As elsewhere, it depends upon what requirement is placed on charities/charitable trusts. E.g., if our proposal to rely upon existing registration processes were accepted, in most cases it would be easily verifiable by reference to the public charities register. For those charities not on the register, confirmation from HMRC that they recognise the charity as such should be sufficient.

9.2 Depending upon the information that would need to be verified, such information may also already be available on the public charities register.

9.2.1 E.g. in England and Wales and in Northern Ireland, the charity's register entry shows its charity trustees (among other details), save where the Charity Commission or CCNI has given dispensation for the name not to be displayed (e.g. due to the risk of personal danger if the name is displayed).

9.2.2 The Scottish charity register does not contain the same details, e.g. it does not show the charity trustees. However, the Scottish Government has consulted recently on proposals to extend the charity register entries in this way (among other things).

**Data sharing for legitimate interest requests**

**10 Question 76: Do you have any comments on the proposed definition of legitimate interest? Are there any further tests that should be applied to determine whether information can be shared?**

10.1 We are not sure if what is in the consultation document quite amounts to a definition, but we support (with some caveats) the general approach, in essence that to have a legitimate interest in this context someone would need to be involved in investigating anti-money laundering or terrorist financing and have evidence to support their request.

10.2 It is not clear from the consultation document what is meant by having "active involvement" in anti-money laundering or counter-terrorist financing activity. We assume this means involvement in an "official" capacity. However, we consider that in some cases some caution/additional safeguards may be needed.

10.2.1 E.g. there may be human rights concerns if a request is made by an investigating authority of another state for details of charity trustees of a human rights organisation (or similar) where, say, those trustees could face unlawful retribution from that state if identified.

10.2.2 Similarly, it is not clear what level of "evidence" would be deemed sufficient to accede to a request.

10.3 As indicated above, there are cases where charity trustees' names are not displayed publicly because of the risk of personal danger to them. Similar rules apply for display of details at Companies House. We would expect similar safeguards to be built in to the legitimate interest process to protect individuals from harm or harassment.

We hope you have found this response helpful. We should be happy to engage further if requested.

**BDB Pitmans LLP**

**10 June 2019**