Communication of the Association of Global Custodians

European Focus Committee

Subject to Supplemental Commentary

21st February 2020

VIA EMAIL: asres.consult@hmrc.gov.uk
Assets & Residence Policy Team
HM Revenue and Customs
Room 3C/03
100 Parliament Street
London
SW1A 2BQ

Re: Fifth Money Laundering Directive and Trust Registration Service, Technical Consultation Document, 24th January 2020 (the "Consultation")

Dear Sir/Madam:

The European Focus Committee of the Association of Global Custodians (the "AGC-EFC") is grateful for the opportunity to submit this contribution to HM Revenue and Customs ("HMRC") in response to the Consultation. Established in 1996, the Association of Global Custodians (the "Association") is a group of 12 global financial institutions[1] that each provides securities custody and asset-servicing functions primarily to institutional cross-border investors worldwide. As a non-partisan advocacy organization, the Association represents members' common interests on regulatory matters and market structure. The member banks are competitors, and the Association does not involve itself in member commercial activities or take positions concerning how members should conduct their securities custody and related businesses.

Introduction

The AGC-EFC provides its views in this communication conscious of submissions from other interested parties on a broad array of relevant issues of concern. We wish to emphasise aspects of the draft legislation presented in the Consultation that are of particular relevance to securities intermediaries, which bear on the interests and focus of AGC member banks and their customers.

Securities custodians play a critical role globally in providing to investors (1) cross-border access to entitlements in intangible assets such as dematerialised securities as well as (2) services necessary to give effect to investors' rights in such securities, including facilitating

[1] The members of the Association of Global Custodians are: BNP Paribas; BNY Mellon; Brown Brothers Harriman & Co; Citibank, N.A.; Deutsche Bank; HSBC Securities Services; JP Morgan; Northern Trust; RBC Investor & Treasury Services; Skandinaviska Enskilda Banken; Standard Chartered Bank; and State Street Bank and Trust Company.

settlement of their sale and purchase and the exercise of voting rights, rights offerings, payment of dividends and income, processing of reclaims for withheld taxes. Customers range from retail and private client investors to large highly regulated investment funds, institutional investors (such as pensions) and supranational entities (such as sovereign funds) throughout the world.

A very large portion of the services that securities custodians typically provide are performed for investors on a cross-border basis, requiring a chain of trusted custodians providing the necessary linkages to enable investors in one jurisdiction to purchase, own and exercise rights with respect to securities in another jurisdiction. The UK especially has benefited from large international interest in UK companies. The Office of National Statistics tracks the value of ordinary shares held in UK incorporated companies listed on the London Stock Exchange by sector of the owner, with a geographical breakdown for shares owned outside the UK: at the end of 2018, shares in quoted UK domiciled companies listed on the London Stock Exchange (LSE) were worth a total of £1.88 trillion; the proportion of UK shares held by the rest of the world was at a record high, at 54.9% of the value of the UK stock market.[2]

The Association has long engaged extensively with governments and regulatory authorities throughout the world to support their work to better understand our industry and ensure the safe and efficient provision of securities custody services for the benefit of investors and the financial system as a whole. The Association continues to support these efforts and stands ready to assist and provide information – within the boundaries of competition and antitrust constraints - as authorities require. The AGC has strongly supported the goals of the EU Money Laundering Directives, most recently in the form of the Fifth Money Laundering Directive ("5MLD", or the "Directive") but, as would be the case in respect of any other legislation, the AGC-EFC is obliged to address developments that might undermine other legitimate priorities and interests of both investors and public authorities.

On a broader level, the AGC-EFC has supported the European Commission's efforts regarding post-trade services pursuant to its Capital Markets Union ("CMU") Action Plan.[3] In addressing post-trade aspects of capital markets, the Commission noted that services that are performed by securities custodians after the execution of a trade are broad and interrelated: therefore, addressing one aspect of these services may affect other aspects, and in this connection we agree with the Commission's overriding goal of achieving efficient and integrated financial markets through "efficient and integrated post-trade markets".[4] The AGC-EFC encourages

[2] Source: https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownershipofukquotedshares/2018. It is worth noting that the ONS report indicates that UK listed shares held through investment trusts fell to their lowest point since 2002, at 1.4%.

[3] In early 2016, as part of the Commission's Capital Markets Union Action Plan, the European Commission established in an expert group, the European Post-Trade Forum ("EPTF"), which included representatives of the AGC, to assess the evolution of the EU post-trade landscape and progress in removing barriers.

[4] European Commission, *Consultation Document on post-trade in a Capital Market Union: dismantling barriers and strategy for the future* (August 2017) (the "2017 EC Consultation"), p.3.

the UK to continue to participate in these effort following Brexit, including to the extent they involve implementing legislation giving effect to anti-money laundering measures and similar anti-crime and tax transparency initiatives.

In the AGC-EFC's work to date, we have been mindful of the application and operation of English law – as well as other European national laws – impacting post-trade services. We are therefore mindful of the potential implications of the broad scope of the draft legislation and the onerous and disruptive burden it might impose on securities intermediaries both within the UK and without. We agree with others who express a concern that the draft legislation does not achieve the stated aim of the government or 5MLD of defining the scope of the proposed trust registration requirements in a way that is proportionate to the money laundering and terrorist financing risk. In particular, we believe:

(a) It is disproportionate to impose unnecessary and onerous registration requirements on trusts which present a low risk of being manipulated for money laundering and terrorist financing purposes;

(b) The UK should not implement 5MLD disproportionately to EU Member States in a way which disadvantages the UK and, therefore, it should wait to make any decisions regarding the implementation of the trust registration requirement in 5MLD until EU Member States have implemented it (we are not aware that any have done so to date);

(c) The linking of the type B trust definition to trustees entering into a business relationship in the UK with relevant persons could put UK professional services providers at a competitive disadvantage to other jurisdictions. We consider that the exemptions should apply to both type A trusts and type B trusts to avoid exacerbating this situation and to reflect the principles behind the exemptions;

(d) The flexibility of trust concepts – applied to the securities custody world based on the basis of case law and not through any prescriptive legislation – are intended to give certainty of rights and remedies to end investors as an incidental (and attractive) attribute of common law principles[5]: it would be disproportionate to bring securities custody per se within the scope of the trust registration requirements.

(e) Some of the exemptions provided for in the draft legislation should be expanded to fully cover important principles that we will address below.

General comments

We refer you to the AGC-EFC's response (attached) dated 10th June 2019 to HM Treasury's (HMT) consultation on the transposition of 5MLD into UK law (the "2019 response").

[5] Typically, securities custody agreements do not describe the custodian as a "trustee" – there is no express creation of a "trust". Suggestions of a "trust" relationship (e.g., "bare trusteeship", as referenced in paragraph 3.13 of the Consultation) have been the subject of academic literature and debate.

In the 2019 response, we emphasised the heavy use of trust concepts in relation to highly regulated investment funds throughout the world and the need for proportionality given that such trusts present a very low risk of being manipulated for money laundering and terrorist financing purposes. The vast majority of U.S. retail mutual funds take the form of "business trusts", U.S. institutional investors such as pensions, foundations and endowments invest through unit trusts commonly referred to as "collective" and "common" trust funds, Hong Kong regulated funds historically take the form of unit trusts, and unit trusts are also widely used both in the UCITS and AIFMD contexts in Ireland. These investment funds are subject to extensive regulation around AML, sanctions screening and customer due diligence. We therefore urge HMRC to ensure that such structures are not brought within scope of the draft legislation arising by reason of merely acquiring UK securities, which involve establishing a relationship between the fund trustee or global custodian and a UK sub-custodian (who then provides access to the CREST system, where the UK securities are actually maintained in dematerialised form) and UK tax consequences (e.g., SDRT, withholding tax on income generated from UK securities, etc.).

We also urge HMRC to use caution with respect to custody accounts generally – not just those of investment funds – due to the need for consistency with EU Member States, particularly in view of the rarity of trusts in their jurisdictions[6], as well as with jurisdictions outside the EU. Given that custodians may hold securities in omnibus accounts for other intermediaries who themselves may have many thousands or more underlying customers, some of whom may themselves be intermediaries in the chain of custody, and that the identity of customers may be expected to change frequently, it would seem disproportionate to expect custodians to register and constantly update details of these ultimate customers who would be considered "beneficial owners".

It is a unique feature of English law and other common law systems that securities custody agreements may be viewed – based on interpretations of case law – as a form of "bare trusteeship". In other jurisdictions, the equivalent legal arrangements would be contractual. To the extent UK securities custody accounts may be considered as "bare trusts", they are far removed from the traditional form of trust where a settlor places assets into a trust and appoints a trustee to hold and manage these assets for the benefit of a specified person or class of persons.

We urge HMRC to keep in mind the types of trust susceptible to money laundering and terrorist financing (criminal activities) and avoid casting the net too widely to capture trusts that incur low AML risk. It is vital to avoid onerous registration requirements where they are unnecessary and increase the administrative burden on people carrying out legitimate

[6] If trusts arising out of the provision of custody and being expressly documented would be treated as in-scope then UK custodians would be subject to a burden that EU custodians would not. In the custody space, fiducies (e.g., in Luxembourg) and Treuhands (e.g., Germany) are not "true" equivalents to UK trustees as intermediated securities holdings in jurisdictions where those devices exist do consider the providers to "intermediate" in quite the same way as in the UK: they might instead refer to the creation of a sui generis co-ownership right or intermediated property right in favour of account holders.

business, whilst producing little benefit to the overall aim of combatting criminal activities. The recitals of 5MLD state that rules that apply to trusts (and similar legal arrangements) with respect to access to information relating to their beneficial ownership should be comparable to the corresponding rules that apply to legal entities and that the decision on whether or not a trust (or a similar legal arrangement) is comparably similar to corporate and other legal entities should be taken by Member States due to the wide range of types of trusts that exist in the EU. Therefore, the UK has flexibility to determine what "trusts" should or should not be included and should use this flexibility.

HMRC's considered forbearance is ever more important in order to ensure the UK remains an attractive environment in which to do business, especially against the backdrop of Brexit. We note that the recitals to 5MLD state that any measures taken should be proportionate to the risks and that the aim of the national law transposing the trust registration requirements should be to prevent the use of trusts (or similar legal arrangements) for the purposes of criminal activities. As such, it is imperative that the TRS requirements are proportionate. However, we are very concerned about a how a proportionality determination can be made without knowing how other EU Member States are implementing the same requirements of 5MLD, especially in view of the lack of "trust" concepts per se in virtually all of them. Therefore, due to reasons of proportionality and the fact that trusts are used far more commonly and in far many different circumstances in a common law regime when compared to a civil law regime, we do not think that the UK should make any decisions regarding the implementation of this requirement in 5MLD until EU Member States have implemented it.

As we have suggested above, we are concerned about the type B trust definition being linked to trustees entering into a business relationship in the UK with relevant persons. This could have significant unintended consequences, which need to be fully understood. In any case, HMRC's proposed exemptions should also apply to type B trusts. We agree with the sentiment of others that any difference in treatment between type B trusts and equivalent type A trusts may also make non-UK persons disinclined to do business in the UK, including purchasing and holding UK securities.

Finally, taking into account the need for a proportionate approach, as we explain in more detail in our response to Question 3, that there should be grandfathering of the TRS requirements in view of the enormous challenges of bringing existing trusts into alignment with TRS requirements.

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.

We note HMRC's reference to "bare trusts" at 3.13 of the consultation. Custody documentation typically would not expressly invoke trust concepts: any treatment of custody as "bare trusteeship" under English law is therefore a question of interpretation based on common law concepts (case law). Whilst a custodian retains responsibilities to its customers that can be likened to fiduciary duties, the relationship of custodian to account holder is not

established for the purpose of shielding or hiding the identity of owners, but rather as a mechanism for providing access to securities entitlements and rights associated with UK securities.

Custody or custody type arrangements should therefore not be scope for the TRS given that they are not "express trusts" of the sort giving rise to FATF concerns and because securities custodians will be subject to extensive regulation in this area in any case. We therefore seek clarification that the proposed legislation will not apply to securities custody arrangements not created under trust instruments in order to fall into line with jurisdictions where a custody relationship would not be considered as a trust arrangement, anyway. We recognise that the legislation looks to consider comparable trust structures, however, as indicated above, we still do not know what EU jurisdictions will do in this regard and, in any case, we believe the same proportionality concerns apply to all securities custody accounts, regardless of legal structure local legal concepts applying to them.

Absent an exemption, UK custodians would need to provide details of all their custody clients to HMRC under the proposed legislation. In particular, draft regulation 45ZA(4) specifies that the information for inclusion on the register would relate to beneficial owners: "beneficial owners" may – but often are not – a securities custodian's direct (proximate) clients. This is a core feature of the indirect holding system for securities custody: "chains" of custody can be attenuated as a function of necessity so that investors anywhere in the world may access UK capital markets. In the main, securities custodians in a chain rely on each other to preform necessary functions through the chain, including compliance with all relevant AML, sanctions and customer due diligence requirements.[7]

The industry has undertaken extensive work in this regard to provide a framework through the establishment of "Principles"[8] that have been designed to become the securities-custody equivalent of the Wolfsberg Correspondent Banking Principles.[9] These Principles cover conduct risks, including measures to counter money laundering, terrorist financing, market abuse, corruption, fraud and the evasion of sanctions, and provide market participants with practical guidance on the question of transparency of ownership and control in intermediated securities custody arrangements. The principles are meant to apply globally to all financial institutions who are active in the cross-border intermediation of securities - addressing the question of transparency of ownership interests (since this is what distinguishes securities from other branches of financial services). Crucially, the Principles do not question or influence the validity or fitness for purpose of the different legal frameworks for vesting

[7] For example, UK custodians are required to comply with the relevant Money Laundering Regulations, including with respect to undertaking due diligence on beneficial owners – see Art 28(4).

[8] See, e.g., *Financial Crime Compliance Principles for Securities Custody and Settlement*, International Securities Services Association (Second Revision, May 2019), found at: https://www.issanet.org/e/pdf/2019-05-21_ISSA_FCC%20Principles_second_revision.pdf

[9] The Principles build on the *IOSCO Principles on Client Identification and Beneficial Ownership for the Securities Industry* of 2004, which provide that correspondent banks may undertake enhanced due diligence on their equivalently regulated financial institution customers in order to rely on the customers' programs to identify Clients and Ultimate Assets Beneficial Owners.

ownership interests. Instead, the aim in effect has been to future-proof current legal structures – addressing the world as it is.

The Principles are premised on the following allocation of responsibilities:

- It is the responsibility of a Custodian to communicate its KYC standards and other requirements to its Account Holders.
- It is the responsibility of the Custodian's Account Holder to comply with those requirements.
- Where the Account Holder has clients who themselves accept deposits of third-party client securities, the Account Holder should notify those clients that by holding securities cross-border they will be subject to the requirements of the jurisdictions in which the securities entitlements are held, including the standards of the relevant Custodian(s).
- It is the responsibility of the Account Holder to sub-deposit securities with the Custodian only when the Assets of Beneficial Owners have been subjected to satisfactory due diligence. On a risk-led basis, the Custodian should be entitled to verify that its due diligence requirements have been met.

Scope of the suggested exemption

As suggested above, both Type A and Type B trusts may conceivably arise in the context of providing custody services. Type A trusts may arise where a UK-incorporated custodian is providing custody services in the UK. Type B Trusts may arise where the custodian is a UK branch of a third country firm, or where a non-UK firm providing custody services outside the UK enters into a business relationship with a UK relevant person (e.g., an overseas global custodian who, on behalf of its client(s), appoint a UK sub-custodian in order to provide access to UK securities held in CREST, in which the UK sub-custodian will participate).

Taking into account the various scenarios that could arise, we believe that the exemption for trusts arising out of or in connection with custody services should apply where the trustee/intermediary is:

i. an authorised person under FSMA;
ii. an exempt person under FSMA;
iii. a person who by virtue of article 41 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO") does not require authorisation under FSMA,
iv. a person on whom relevant persons may rely to conduct customer due diligence under regulation 39 MLRs, or
v. where the trustee is holding assets in custody for a person referred to in points (i) to (iv).

(a) Regarding (i) to (iii) above:

As noted above, safeguarding and administration of investments (i.e. custody) is a regulated activity under FSMA and so custodians will typically be authorised persons under FSMA and

subject to regulation by the FCA and/or the PRA. It is also common for custodians to register assets in the name of a nominee company (e.g. in accordance with CASS 6.2.3 R). In this case, the nominee company would be a bare trustee (typically holding for the custodian, who holds in turn for the client) but the nominee would typically rely on the exclusion at article 41 RAO, pursuant to which the custodian accepts responsibility towards the client in respect of the custodied assets. Nominees should benefit from the exemption on the assumption that a "qualifying custodian" has accepted responsibility in respect of the assets.

Some entities in the custody chain may include exempt persons under FSMA, such as appointed representatives in respect of regulated activities for which the principal has accepted responsibility, as well as entities subject to different regulatory regimes, such as CCPs and CSDs. Again, exempt entities should benefit from the exemption on the basis that including these trusts in the TRS would be disproportionate to the risk of them being used for criminal activities. This would also be consistent with the definition of a "qualifying custodian" in article 41 RAO, which includes both authorised and exempt entities.

We also propose that the exemption should apply whenever an entity identified above holds assets on trust for a client. Whilst in most cases we expect that the trustee will be carrying on the specified activity of "safeguarding and administration" under article 40 RAO, it is possible that in some cases, a custodian may hold assets on trust for a client in circumstances falling outside the scope of article 40 RAO, for example if it safeguards assets without also administering them. However, it would be very burdensome for a custodian to assess each of its business lines (and possibly individual client relationships) to identify instances where it may be safeguarding assets in circumstances that fall outside the scope of article 40 RAO, and in practice we would expect that a high standard of care would also apply to the safeguarding of such assets. Requiring custodians to carry out such a granular assessment of their activities would be disproportionate to the risk of these trusts being used for criminal activities.

As noted above, we propose that the exemption should apply in respect of both type A trusts and type B trusts. This is because both UK-incorporated entities and UK branches of non-UK entities may provide custody services and hold assets for clients in the UK. Therefore, if this exemption extended to only type A trusts (or only type B trusts) it would create an unlevel playing field as between UK-incorporated custodians and non-UK custodians acting through their UK branches.

(b) Regarding item (iv) above:

Item (iv) relates to B trusts, in which a non-UK custodian engages a UK sub-custodian, for example to hold UK shares in CREST. This type of structure, where a global custodian engages the services of local sub-custodians to hold local assets, is very common, and in fact accounts for the enormous overseas holdings of UK securities referenced above. In this case, the non-UK custodian holds assets (or interests in assets) for its underlying clients. As noted above, in some jurisdictions, the non-UK custodian may hold these assets on trust for the underlying clients, whereas in others, this may be characterised as a (non-trust) contractual

arrangement. This will depend on the way in which custody arrangements are characterised under local law in the non-UK custodian's jurisdiction.

In order to avoid an unlevel playing field between custodians in jurisdictions that characterise custody relationships as trusts on the one hand and custodians in other jurisdictions on the other, we propose that the custody exemption extend to non-UK custodians that are subject to and supervised for compliance with customer due diligence and record keeping requirements of a FATF member jurisdiction or regional organisation. We believe that this strikes the right balance between providing a workable exemption for custodians in most financial centres, whilst ensuring that the exemption is not so broad that it would provide a loophole for custodians from high-risk jurisdictions or those that are not themselves subject to AML/CTF requirements similar to those set out in the MLR. We consider that referring to FATF members in this proposed exemption is helpful in providing certainty to non-UK custodians as to whether or not they qualify for the exemption by reference to the list of FATF members. It also avoids the need to refer to the EU legislation, which may no longer be desirable given that the UK has left the EU.

Crucially, this aspect of the exemption would also apply to trustees of **unit trusts** (and other fund structures taking the form of a trust) that are responsible for custody of the fund's assets, provided that the trustee is subject to and supervised for compliance with customer due diligence and record keeping requirements of a FATF member. This is appropriate and proportionate to the money laundering or terrorist financing risks that these types of trusts generally do not pose, as highly regulated funds typically providing pooled or commingled investment[10], whilst mitigating the risk that applying the TRS requirements to them could act as a disincentive to those funds investing and doing business in the UK.

An added dimension should be mentioned in relation to unit trusts: typically, investors as "beneficial owners" invest subscription proceeds through distribution channels that are created ultimately by the promoters or sponsors of an investment fund – usually an institutional investment management firm who themselves will be highly regulated. Administrators of these funds typically are appointed by the investment manager, with "transfer agency" being one of the activities carried out on the manager's behalf. Generally speaking, it will be the transfer agent who will conduct necessary AML, CDD and other checks on investors on behalf of the manager/promoter. Trustees of unit trusts generally have not undertaken this responsibility directly themselves, so it is important that this be recognised as an organisational feature of the investment funds landscape.

(c) Regarding item (v) above:

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[10] Unit trust structures are commonly employed as highly regulated investment fund structures for retail and institutional investors who themselves will be subject to local AML and CDD requirements. Examples include Irish unit trusts under the UCITS and AIFM Directives, U.S. "unregistered" "common" and "collective" trust funds, established for the U.S. foundation, endowment and pension plan markets, and Hong Kong unit trusts, which are the regulated vehicles of choice in Hong Kong.

Finally, we believe the exemption should extend to situations in which UK custodians hold assets in non-FATF jurisdictions. In this case, a non-UK sub-custodian may hold assets on trust for the UK custodian. Again, the non-UK sub-custodian is prima facie subject to the TRS requirements for Type B trusts, as it is entering into a business relationship with a UK relevant person potentially in its capacity as trustee or in a similar capacity. However, in this scenario, the "beneficiary" of the trust is the UK custodian. Again, it would therefore be disproportionate to the AML/CTF risk to require the third country sub-custodian to register details of the trust and could otherwise act as a barrier to UK investors being able to invest in assets in non-FATF jurisdictions (i.e. if those third country sub-custodians are unwilling to provide custody services to UK relevant persons to the extent this would trigger the TRS requirements).

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?

First, as suggested above, we are particularly concerned about the definition of type B trusts. Second, on timing, to avoid chaotic implementation, the TRS requirements should only apply to non-UK express trusts entering into new business relationships or acquiring land after the TRS requirements come into force. Third, linking the definition to business relationships in the UK with relevant persons will put UK sub-custodians potentially at a competitive disadvantage compared to those in other jurisdictions. We also agree with others that it is necessary to better define what is meant by "express trust" in view of the fact the term remains undefined in the proposed legislation.

Definition of type B trust

Non-UK trusts which are considered "express trusts" will be captured as type B trusts if they either enter into a business relationship in the UK with a relevant person or acquire an interest in land in the UK. HMT's 2019 consultation on the transposition of 5MLD into UK law stated[11] that the TRS requirements would only apply where such business relationship was entered into or land was acquired on or after 10 March 2020. However, the proposed legislation does not reflect this aspect of the timing: we recommend that the legislation is amended to reflect the intention stated in the 2019 consultation.

Linking the definition of type B trusts to business relationships in the UK with relevant persons could put UK AML regulated sub-custodians at a competitive disadvantage compared to other jurisdictions that have not yet implemented the trust registration requirement in 5MLD or that have implemented it more leniently. The latter seems likely in view of the lack of definition of "express trusts" and the fact that the vast majority of EU jurisdictions lack trust concepts.

We fear this direction of travel could harm the UK as a destination of capital investment. In relation to "business relationships" with UK relevant persons, HMT's

11 Paragraph 9.7 of 2019 consultation.

2019 consultation on the transposition of 5MLD into UK law expressed an intention only bring within scope of the TRS requirements non-UK express trusts that are deemed to be "administered" in the UK by virtue of having a UK trustee, even if there is a non-UK settlor and there are no other connections with the UK.[12] We agree that this is a more proportionate approach which should be reflected in the legislation, however, we caution that it is also important in the context of securities held in custody through UK sub-custodians that exemptions for securities custody – as such – should apply equally to type A trusts and type B trusts.

"Express trust"

As noted above, the term "express trust" is not defined in the proposed legislation. In order for it to be clear what trusts are in scope for the purposes of the TRS requirements, the guidance should set out what is meant by express trust. This is particularly important in the foreign law context, where trust concepts may differ significantly from those of the UK's.

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

Our concerns about the proposed deadlines and penalty regime imposed by the TRS requirements focus on the relate to the need to (1) provide for grandfathering rights for existing trusts and (2) provide for longer registration periods for existing trusts to allow for diligence.

Grandfathering

As mentioned in our general comments, we consider that there should be grandfathering of the TRS requirements for existing trusts which do not benefit from an exemption. A cut-off is necessary to avoid excessive, costly, unmanageable and in some cases impossible diligence exercises spanning decades. In many cases the documentation creating the trust will not contractually oblige the beneficial owners of the trust to provide the information required to comply with the TRS requirements and so may lead to costly and time consuming negotiation to obtain the required information. Grandfathering is especially important where there is a low AML risk and there, therefore, would be no real benefit to such diligence exercises.

We suggest, therefore, that a cut-off date is introduced for historic trusts such that the TRS requirements should only apply to trusts created within 5 years before the registration date (i.e. trusts created on or after 10 March 2017) and continuing to exist at the registration date.

Timing for registration of historic trusts

As noted in the grandfathering section above, the records checking exercise imposed on trustees of existing trusts cannot be overestimated and will remain significant even

12 Paragraph 9.19 of 2019 consultation

if grandfathering rights are granted. We therefore consider that there needs to be adequate time for individuals and investors to: (i) become aware of the TRS requirements; (ii) check their records to identify trusts requiring registration; and (iii) collate the details required for the register (such details will not always be simple and legal advice may be required).

Awareness of the TRS requirements is undoubtably currently quite low (especially amongst non-professional trustees) and we consider that even with significant input into raising awareness it is unlikely that the TRS requirements will reach the mainstream consciousness until registrations can actually commence in 2021. Diligence exercises can also not commence in earnest until the legislation is settled and the extent of the trusts within the scope of the TRS requirements is known.

It is therefore unlikely that the majority of trustees will commence their diligence exercises immediately and many, through lack of awareness, may not commence their diligence exercise of existing trusts until much closer to March 2022. The period between the scope of the TRS requirements being settled and 10 March 2022 is not long enough for trustees to take all the steps listed above to enable them to be in a position to comply with the TRS requirements.

Therefore, we suggest that the time period for registering trusts in existence at 10 March 2020 is extended to 10 March 2024.

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.

[We have no comments on this question.]

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?

[We have no comments on this question.]

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.

[We have no comments on this question.]

In view of the limited Consultation period and the importance of the proposed legislation and its impacts, we would welcome the opportunity to meet with you to discuss our response in more detail and contribute to the development of any exemptions and guidance as HMRC deems helpful.

Sincerely,

John Siena

Chair, European Focus Committee

Association of Global Custodians