

Navigating 5MLD: Increasing Transparency of Beneficial Ownership and the Changing Nature of the Business Relationship

Thursday 27 August 2020

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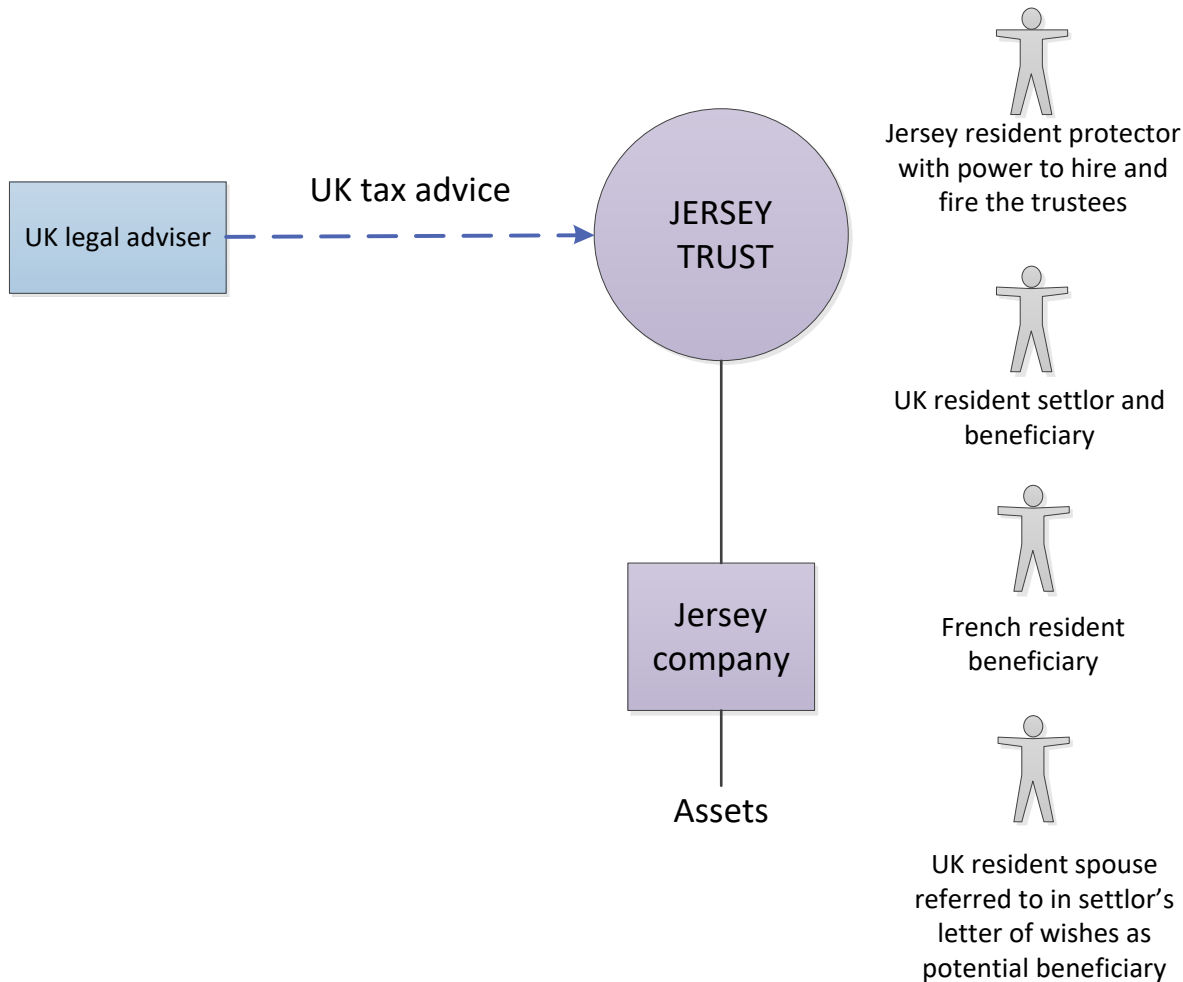
Navigating 5MLD:

Increasing transparency of beneficial ownership and the changing nature of the business relationship

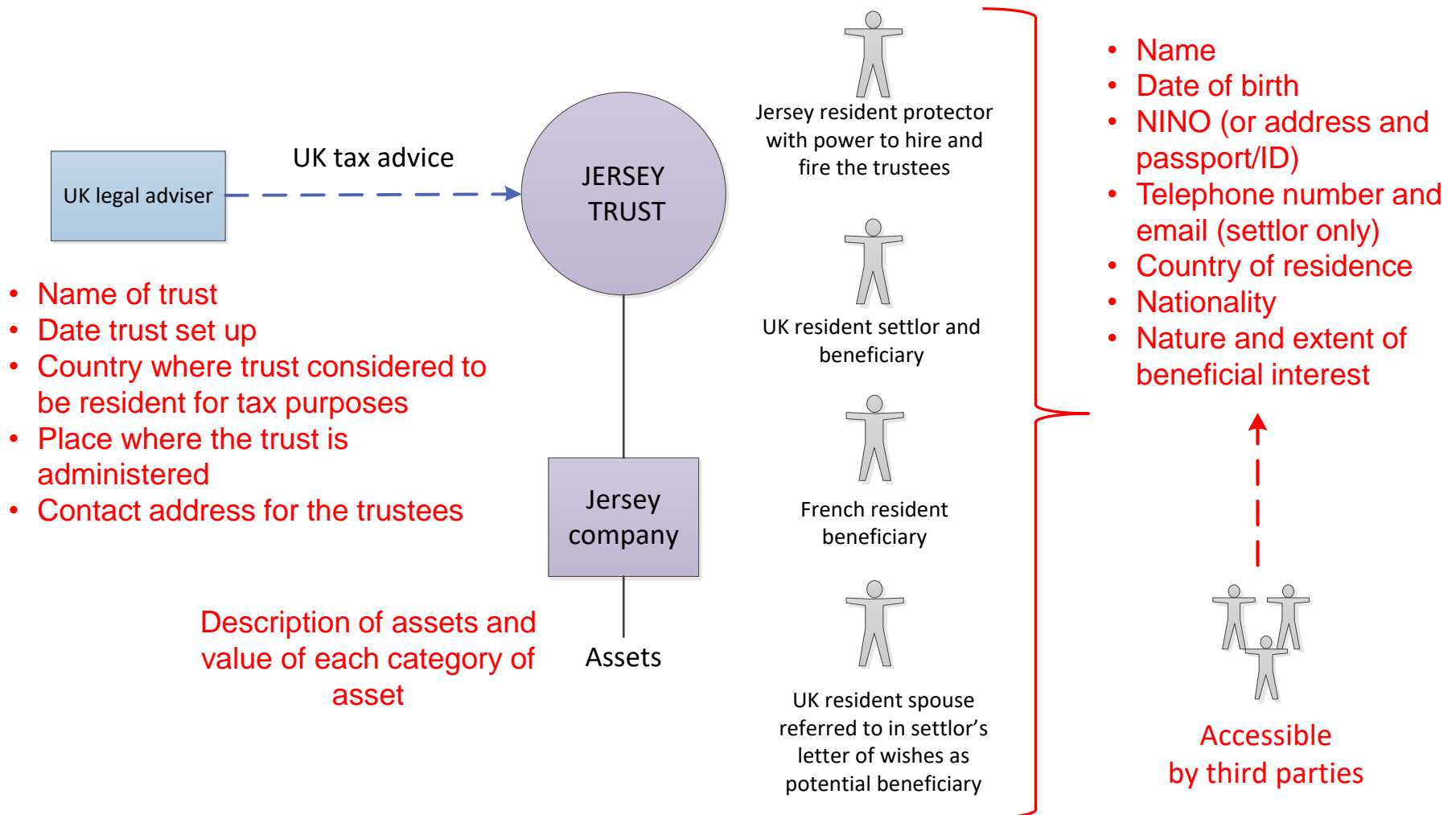
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What information about non-UK trusts is available now?



What information about non-UK trusts may be available after 5MLD?



4MLD

Introduction of trust register

Two separate obligations:

- **Record-keeping:** all “**relevant trusts**” must collect and hold beneficial ownership information
- **(Non-public) central register:** all **taxable** “**relevant trusts**” must register

UK implementation of 4MLD

Introduction of UK Trust Register

Dual purpose:

- Complies with MLD
- Part of ongoing digitisation of tax reporting: replaces previous system for notifying HMRC of a UK tax liability

Implementation of two obligations:

- **Record keeping:** All UK trusts and taxable non-UK trusts must collect beneficial ownership information
- **Registration:** All taxable trusts (UK and non-UK) must register

5MLD – Extension of trust register

Key changes (1)

- **Extends the scope of registrable trusts by removing the tax link:**
 - All UK express trusts
 - Non-UK express trusts:
 - with a UK tax liability;
 - with a UK business relationship and at least one UK resident trustee; or
 - which acquire an interest in UK land.

- **Additional information to be provided re beneficial owners and individuals referred to as potential beneficiaries in a document from the settlor in relation to the trust (e.g. letter of wishes):**
 - Country of residence
 - Nationality
 - Nature and extent of beneficial interest

5MLD – Extension of trust register

Key changes (2)

- **Information on the register can be accessed by third parties**
 - With a “legitimate interest”
 - On “written request” in relation to:
 - UK trusts; and
 - non-UK trusts with UK land and at least one UK resident trustee, or
 - non-UK trusts with a UK business relationship and at least one UK resident trustee, where the trustees have a controlling stake in a non-EEA entity
- Service providers must check KYC information against the register and report any discrepancies
- **Shorter deadlines:** Registration must normally be within 30 days of the creation of the trust or any change to the registered information

“Express” trusts

- FATF: A trust “clearly created” by a settlor

- So does **not** include:
 - Statutory trusts – e.g. arising on intestacy
 - Implied, resulting or constructive trusts
 - Joint ownership of land – even if specific declaration of ownership shares
 - Trusts created in accordance with a court order – e.g. divorce / provision for children

BUT will still need to register if liable to UK tax

Low risk trusts

- **Joint ownership** of land and other assets (e.g. bank accounts) – where legal and beneficial owners the same
- **Pension** scheme trusts
- Trusts which must **meet statutory requirements for beneficial status** e.g. trusts for vulnerable beneficiaries or employee trusts
- **Charitable trusts**
- **Life policy trusts** which only pay out on death, illness or disability
 - Term policy vs surrender value?
 - What about when the policy pays out?
- **Will trusts** if wound up within 2 years of death
- **Pilot trusts/ De minimus exception**
 - Trusts holding up to £100 and which are **in existence** when the new rules come into force

BUT will still need to register if liable to UK tax

Nominees/ bare trusts

- Established intentionally
- May not be low risk
- Is a nominee arrangement a trust or agency?
- Is there any material difference between a nominee arrangement and a bare trust?

- Had been hoped that nominee/bare trust situations would be exempted but **no general exemption**
- Only certain specific categories are exempt – e.g. custody arrangements
- But generally only applies if the nominee/bare trustee is UK resident or the asset is UK real estate

Non-UK express trusts with a UK “business relationship”

- Competing interpretations of the directive:
 - All non-UK trusts to register if enter into a business relationship in the UK
 - Only non-UK trusts which are administered in the UK

- HMRC has confirmed they will take a **measured approach**
 - **Only if at least one UK resident trustee**

- AND:
 - Only **new** business relationships will trigger registration
 - Only triggers registration where the **relationship** is **directly with the trustees** (i.e. not settlor / beneficiaries / underlying trust companies)
 - Requires expectation of an **element of duration** at time established = >12 months

Non-UK trusts which acquire interest in UK land

- Wider approach – **no requirement** for at least one UK resident trustee
- **BUT**
 - Where there is no UK trustee, the information on the register will **not** be publicly available
 - Only **new** holdings
 - May already be registered if UK tax liability
- Only applies where one of the trustees is on the (publicly accessible) UK land registers as the legal owner
 - Legal vs beneficial ownership – use of nominee?

Availability of information to third parties (1)

- **General rule: Legitimate interest**
 - No definition in 5MLD
 - UK interpretation: **high hurdle**
 - Must identify specific trust
 - Must identify specific instance of suspected money laundering/terrorist financing

- **Exception: On “written request”** only re:
 - **UK trusts; and**
 - **non-UK trusts** with UK land/UK business relationships ***and at least one UK resident trustee,***
where the trustees hold a **controlling interest in a non-EEA entity (>50%)**.

- Does **not** apply if non-UK trust and only trigger for registration is:
 - tax liability; or
 - holding in UK real estate if the trust has no UK resident trustees.

Availability of information to third parties (2)

- Exemption if:
 - Disproportionate risk of harm
 - Beneficial owner is legally incapable (including a minor)
- No notification for trustees/beneficial owners and no right of appeal
- Trustee must give extract from register to any person with which it enters into a business relationship

Timing

Commencement/deadlines (1)

5 October / 31 January after end of tax year in which tax liability arises	Deadline for registration of trusts with a UK tax liability set up before 6 April 2021
10 March 2022	Trusts with a UK tax liability set up after 5 April 2021 where tax liability incurred before 9 February 2022 Trusts with no UK tax liability which fall within regime before 9 February 2022 Existing registered trusts must register additional information re beneficial owners and potential beneficiaries
Within 30 days	In any other case - 30 days to register Once registered, must notify any changes within 30 days

Timing

Commencement/deadlines (2)

- What if trust is terminated before 10 March 2022?
- Information will remain on the register for 5-10 years
- Will not be able to register until 2021

Penalties

Failure to register / update details within the time limit - first offence / inadvertent failure

- No financial penalty
- Notification letter sent to trustees

Failure to update details within the time limit - second and subsequent offences

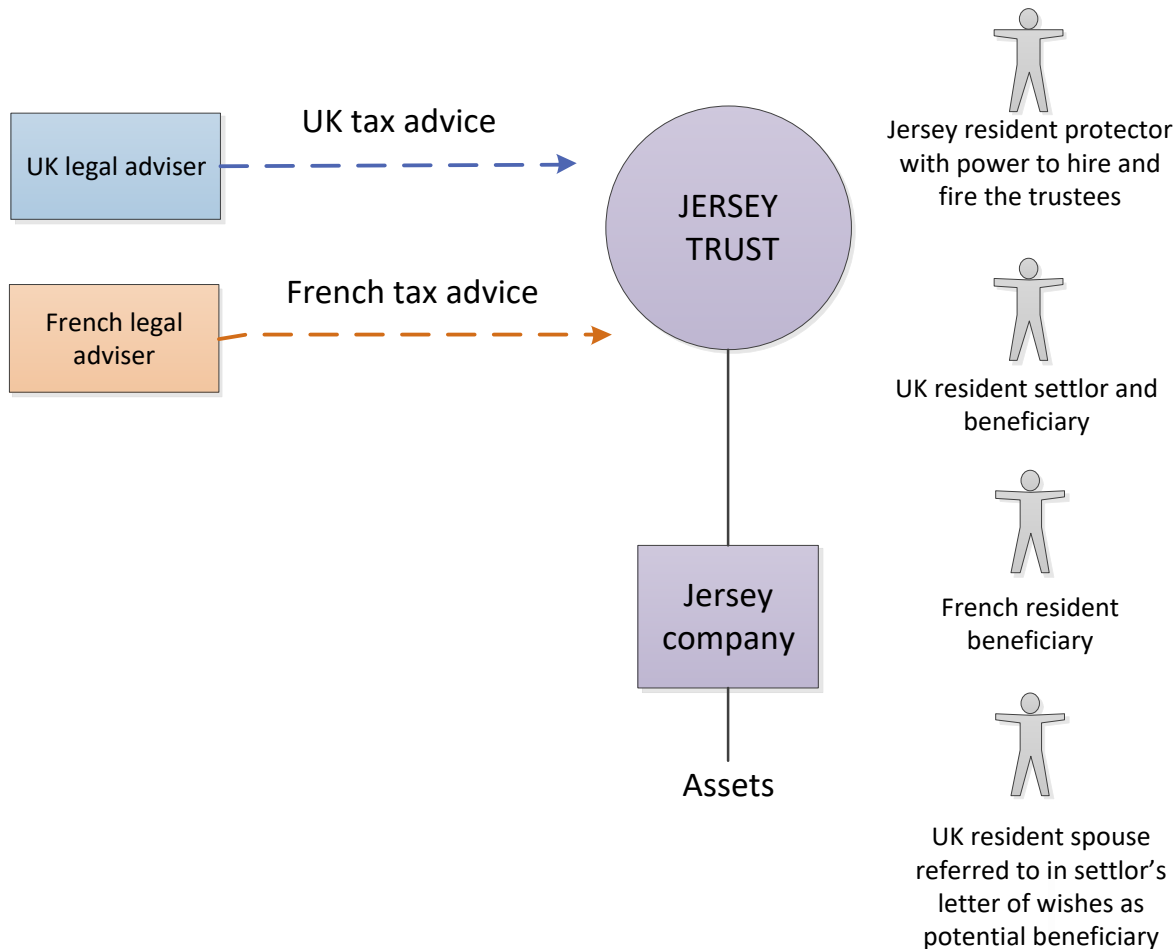
- Set penalty of £100 per offence

Deliberate failure to register or update details within the time limit

- May result in a “financial” penalty – further guidance from HMRC is pending

Looking forward

Implementation in other jurisdictions and next steps



- Implementation in other jurisdictions
 - EU
 - Discrepancies between jurisdictions / level playing field
 - Outside EU?
- Impact on client relationships – **good news**
- Interaction with other transparency initiatives
- What should trustees be doing now?

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