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Fifth Money Laundering Directive (5MLD) and Trust Registration Service (TRS)

Technical Consultation

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Executive summary

In this response we set out our main concerns regarding the extensive nature of the proposed trust registration requirements drawing attention particularly to:

- concerns about proportionality due to the asymmetry between the common laws of England and Wales which deploys trusts in so many aspects of private and commercial life, compared to its limited use in EU Member State civil law jurisdictions – for example German law does not permit their creation. The fact that as yet no EU Member State appears fully to have implemented the scheme further reducing the ability to assess proportionality;
- the desirability of matching the registration requirements only to those trusts presenting a real risk of money laundering and terrorist financing so as to avoid undue bureaucracy and cost;
- the potential adverse impact on UK business of the present type B trust proposals and its potential for encouraging forum shopping;
- the potential adverse effect on the choice of English law for use in cross border arrangements given the ubiquitous use of trusts in commercial transactions;
- the extremely burdensome obligations to register third country entities under regulation 45ZA(5) of the proposed legislation;
- examples of where trusts arise in UK commercial life and why the present registration proposals are impractical and disproportionate in this regard;
- concerns about the impracticality of the need to identify trusts created in the past, possibly many decades ago;
- concerns regarding the drafting of the proposed legislation and suggestions for rectifying those concerns; and
- suggestions for providing clarification around concepts such as "express trust" and circumstances when it is sufficient only to refer to a class of beneficiaries and the complexity of the beneficial owner definition.

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General comments

We welcome the opportunity to contribute to HM Revenue & Customs' and HM Treasury's (**HMT**) technical consultation on 5MLD and TRS published on 24 January 2020. We refer you to our response (attached to our cover email) dated 10 June 2019 to HM Treasury's consultation on the transposition of 5MLD into UK law (the **2019 response**).

In the 2019 response, we emphasised the ubiquity of trusts in English law, the resulting onerous nature of the proposed trust registration requirements (**TRS requirements**), the need for proportionality given that many trusts present a low risk of being manipulated for money laundering and terrorist financing purposes (**low AML risk**) and the need for consistency with EU Member States, particularly in view of the rarity of trusts in their jurisdictions.

It is a unique feature of English law that many legal arrangements take the form of trusts. In other jurisdictions, the equivalent legal arrangements would be contractual or achieved by other means (e.g. through insolvency law). In a business context, trusts are omnipresent throughout commercial transactions and the financial markets. Many transaction documents contain trusts which provide for a party to hold on trust any money or assets it receives in a manner not contemplated by the documents. Such 'turnover' trusts may not ever come into existence, and if they do, it would be at a later stage in the life of the transaction. These types of trust 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.

It is therefore fundamental 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 which are low AML risk. Not all trusts are created equally. It is vital to avoid onerous registration requirements where they are unnecessary and increase the administrative burden on people carrying out legitimate 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 corporate and other 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 EU 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.

If the UK fails to do so, the impact on the UK's commercial life will be to remove some of the flexibility and certainty which makes English law so attractive to overseas persons; impose an extraordinary level (and associated cost) of bureaucracy and administration on legitimate business in dealing with far ranging trust registration requirements; and, if the type B trust proposals are implemented as drafted, introduce an incentive to avoid business with UK entities on cross border deals so as to avoid these registration requirements. At a time when the use of English law is under threat as never before with Brexit, we are very concerned to avoid this result.

As we note in our response, the trust structures used in many areas of commercial life are low AML risk. It would be disproportionate to require such trusts to be registered. Many parties in a variety of commercial transactions recognise and use the commercial flexibility of the trust concept and value the certainty of their rights and remedies within a trust arrangement, as underpinned by our extensive case law. Such trusts are used for many incidental purposes in these commercial transactions and it is imperative that the ease in which they can be used should remain to ensure that English law remains flexible and a preferred choice of law globally.

This is even more so the case when (as noted above) considering the need 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 and some of the comments in our response relate to this point. However, it is hard to determine whether the proposed legislation is proportionate when there is limited visibility around how EU Member States are implementing this requirement in 5MLD.

We have undertaken a survey of our other European offices to ascertain the status of their implementation of the trust registration requirements and, where applicable, how they have implemented these requirements. Feedback has shown that some EU Member States have not yet implemented these requirements (the Netherlands, Spain and Czech Republic), Luxembourg has partly implemented these requirements and Germany has implemented these requirements but is awaiting further legislation that will specify which trusts need to be registered. We also note that the European Commission has sent formal letters of notice regarding failure to notify any implementation measures for 5MLD under its infringement procedure to the Netherlands, Spain, Portugal, Cyprus, Hungary, Romania, Slovakia and Slovenia. 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, the UK should not make any decisions regarding the implementation of these requirements until there is visibility on how a reasonable number of the EU Member States have implemented them.

It would also be particularly incongruous, in the light of Brexit, if the UK's transposition of 5MLD is disproportionately onerous in comparison to EU Member States. Transactions could be driven outside the UK with forum shopping for jurisdictions which have implemented the trust registration requirements more leniently. This is a particular concern due to the type B trust definition being linked to trustees entering into a business relationship in the UK with relevant persons which may lead to non-UK trusts refusing to deal with UK service providers or other persons. There is concern about regulation 45ZA(5) of the proposed legislation requiring trustees of in scope trusts to notify HMRC of their "controlling interests in third country entities" that may make it difficult to operate custody arrangements or other trusts in the UK. It is important that there be full examination of the potentially significant unintended consequences of these provisions.

We are grateful to HMT for proposing exemptions from the TRS requirements, particularly in relation to loans and bond transactions which are key areas of the financial markets. As we note in our response to Question 2, while these are helpful in many respects, some of the exemptions could be more comprehensive fully to give effect to the principles underpinning them (for instance, Islamic financing and non-bank entities providing credit facilities would not be covered). There are also other areas in a financial and/or commercial context where we consider additional exemptions would be justified as we explain in our response to Question 1.

We expect that there may be other circumstances where it would be disproportionate to require registration of trusts, even beyond those identified in the additional exemptions that we, and others, will propose. This is due to the wide variety of circumstances in which trusts are used under English law and is an almost inevitable consequence of the proposed drafting approach of applying the TRS requirements broadly to all express trusts unless they fall within a specified exemption. Indeed, this has been our experience in connection with exemptions from authorisation and financial promotions requirements under the Financial Services and Markets Act 2000 (**FSMA**), where additional exemptions have been added as they were identified over time. Therefore, we consider it will be important for there to be flexibility to include additional exemptions as the need for them is identified in future, in order to avoid unintended consequences and potential distortions to the UK financial system and other markets. This is a particular concern because, under the European Union (Withdrawal) Act 2018 (as amended), Ministers will lose the power to amend the MLRs.

We consider that all the exemptions should also apply to type B trusts. This reflects the principles behind the exemptions and avoids illogical results, as well as mitigates against accidental mis-classification. 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.

In the 2019 response, we gave examples of the multifarious trusts used throughout personal and commercial life. Some of these trusts may span generations and be very hard, if not impossible, to diligence. The costs and time involved in attempting to identify historic trusts may be astronomical. In recognition of this and taking into account the need for a proportionate approach, we consider, as we explain in more detail in our response to Question 3, that there should be grandfathering of the TRS requirements.

In our response we refer to the exemption set out in regulation 45ZA(2)(a) of the proposed legislation as exemption 2(a) and so forth for each of the other exemptions set out in regulation 45ZA(2).

Where we refer to the term "relevant person" we mean as defined in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (**MLRs**).

We are conscious of the limited consultation period and the resulting time constraints which have hindered our efforts to comprehensively consider the TRS requirements and their consequences, including their financial costs, both intended and unintended. We would, therefore, welcome the opportunity to meet with you to discuss our response in more detail and are willing to contribute to the process of producing exemptions and guidance should that be appropriate.

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.

In our response to this question, we set out additional examples of express trusts which should be out of scope and the justifications for exempting them. We set out drafting for each of these suggested exemptions in Schedule 3.

We consider that all the exemptions (both the existing ones and the suggested exemptions in Schedule 3) should apply to both type A trusts and type B trusts. This reflects the principles behind the exemptions. There is no rationale for differentiating between them and removing the distinction avoids illogical results (some of which we have highlighted below). 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 for the reasons set out in paragraph 2 of our response to Question 2.

Paragraphs 1 to 2 in our response to this question relate to express trusts that arise in a more general context (i.e. are not specific express trusts). Paragraphs 3 to 14 in our response to this question relate to specific express trusts that we commonly come across in practice.

1. **Trusts arising under transactional arrangements which are incidental to a larger purpose of the transaction**

   A number of express trusts commonly arise in a transactional context which we consider to be incidental to the transaction itself. These incidental trusts arise on a variety of transactions e.g. sales of businesses, sales of assets (including real property), sales of shares, granting of leases, rights issues and IPOs. These trusts not only arise due to market practice, but are also a necessity for such transactions to work effectively in the UK. Specific examples of these trusts are set out in Schedule 1, including information on why they are low AML risk.

   Given the incidental (and often temporary) nature of these express trusts and their wide use on a variety of different transactions, coupled with the fact that they are low AML risk (see details in Schedule 1 for each example), we think there should be an exemption to cover these types of trusts. The TRS requirements will be disproportionate when compared with the risk of these trusts being manipulated for criminal activities – it is very unlikely that someone with criminal intentions would go to the lengths of carrying out an otherwise legitimate high value transaction simply to manipulate for criminal purposes an incidental trust, the assets of which may only represent a fraction of the total value of the transaction. In addition, such trusts are also not "*comparably similar to corporate and other legal entities*" (as referred to in the recitals to 5MLD) because they are simply trust arrangements that are incidental to the transaction itself.

   If such trusts are included, the TRS requirements could make: (i) the UK a less attractive environment in which to do business due to the increased administrative burden on, and cost to, people carrying out legitimate business in the UK; and (ii) English law less attractive, less flexible and less competitive – many overseas persons use English law to carry our transactions that would otherwise have no UK nexus due to its flexibility and certainty. Both of these consequences should be avoided as a general proposition and, in particular, in light of Brexit.

Furthermore, numerous incidental trusts currently exist and will exist, so it is likely that HMRC will be inundated with filings in relation to such trusts, increasing the administrative burden on, and cost to, HMRC, with little benefit to the overall aim of combating criminal activities. Filing such trusts could also significantly reduce the usefulness of the TRS because searching the register will be more difficult. Added to this, there appears to be little benefit versus the cost in parties having to diligence their historic transaction documents to determine whether such incidental trusts exist in order to comply with the TRS requirements.

Drafting for this suggested exemption is in paragraph 1 of Schedule 3.

2. **Temporary trusts**

As drafted, the proposed legislation requires trustees of in scope trusts to provide information on the beneficial owners within 30 days of the trust being set up. Many trusts we come across will be set up and cease to exist within the 30 day registration period. For example, on the extreme end the declaration of trust on a corporate group reorganisation described in paragraph 6 of Schedule 1 may only exist for a matter of minutes and other express trusts set out in Schedule 1 may be temporary in nature. Under the proposed legislation, the trustee of such temporary trusts will be required to register the beneficial owners of the trust with HMRC and then will be required to notify HMRC that the trust no longer exists within a short time period. There is also the non-sensical position that if a trust ceases to exist before the registration is made (e.g. the corporate reorganisation trusts which only last minutes or if the trust ceases before the trustee can collect all the beneficial owner details – currently such details are complex and may take some time to collect in full, see our comments in paragraph 3 of our response to Question 2), then the notification to register the trust will relate to a trust which no longer exists and will be accompanied by a notice that the trust should be removed from the register.

We consider that the administrative burden on trustees in having to comply with the TRS requirements, and on HMRC in having to deal with information being filed, in respect of temporary trusts would appear to be disproportionate when compared to the risk of these trusts being used for criminal activities. Therefore, we suggest that trusts that are set up but cease to exist within the 30 day registration period (whether expressly provided for or by virtue of the relevant arrangements giving rise to such trusts) should be exempt from the TRS requirements.

Drafting for this suggested exemption is in paragraph 2 of Schedule 3.

We have included anti-avoidance wording to prevent people avoiding the TRS requirements by structuring their trusts in order to gain the benefit of the suggested exemption by continually moving the trust property into a new trust arrangement. We suggest that, if assets are held on express trust for more than 30 days in consecutive trusts then the exemption cannot be relied upon.

3. **Agent and trustee arrangements used in contracts to protect third party rights due to the privity of contract doctrine**

Due to the privity of contract doctrine in English law, it is common for contracts governed by English law to use agent and trustee arrangements to protect rights of third parties. This mechanism is used, despite the Contracts (Rights of Third Parties) Act 1999, because generally rights granted under that Act may not be as effective as using agent and trustee arrangements. As it must be established that the parties intended to create a trust (and the English courts are reluctant to imply a trust to avoid the privity of contract doctrine), express trust wording is used so that it is clear that A holds B's promise on trust for the benefit of C (usually as well as for itself).

Examples of the use of agent and trustee arrangements are restrictive covenants or confidentiality undertakings in a share purchase agreement given by a seller of target group companies to a buyer as agent and trustee for the target group companies. This deals with the issue that the loss suffered by the target group companies as a result of a breach of such covenants/undertakings by the seller may be greater than the loss suffered by the buyer alone. In such cases, relying on the agent and trustee wording, the target group companies (as beneficiaries of the trust) may sue to enforce the covenants/undertakings. A further example is in paragraph 4 below.

To ensure that English law remains flexible (in particular compared to civil law legal systems (especially in light of Brexit) where parties to a contract may agree that contractual rights can be transferred to a third party and given that the doctrine of privity of contract is an inflexible doctrine), we think there should be an exemption for these express trusts. Such trusts are low (or even no) AML risk as they are simply used to mitigate the potential severity of the privity of contract doctrine.

Drafting for this suggested exemption is in paragraph 3 of Schedule 3.

4. **Agent and trustee arrangements used in terms of business for the provision of banking and investment services to protect rights of group members due to the privity of contract doctrine**

Terms of business under which banks and investment firms provide banking and investment services to their clients or counterparties often include trust arrangements for similar reasons to those discussed at paragraph 3 above. In this scenario, it is common for one group entity to enter into the contract as agent for other group entities that may provide services to or enter into transactions with the client or counterparty under the terms of business.

In connection with this arrangement, the terms of business will often provide that the group entity that is a party to the terms of business will have the right to enforce the terms of the agreement as agent and trustee for its group members and their respective officers, employees and agents.

Typically, the group member that is the party to the contact will also hold other rights, sums and assets under the contract on trust for other group entities. In particular, terms of business often include a security interest over the client or counterparty's assets, in order to secure obligations that the client or counterparty owes to the bank or investment firm or other member of its group under the terms of business. Therefore, the group member that is a party to the contract will hold the benefit of the security interest on trust for other group members.

As noted above, this agent and trustee mechanism is often used in English law governed contracts due to the privity of contract doctrine in English law. These trusts arising under terms of business are low AML risk as they are simply used to mitigate the potential severity of the privity of contract doctrine and the beneficiaries of these trusts are generally limited to members of the trustee's group (as well as officers, employees and agents of those firms). We therefore think there should be an exemption for these express trusts.

Drafting for this suggested exemption is in paragraph 4 of Schedule 3, although we note there is overlap between this exemption and the suggested exemption in paragraph 3 of Schedule 3.

5. **Custody of intangible assets**

In the UK, custody of intangible assets (such as dematerialised securities) typically involves the custodian holding the assets on trust for the client; English case law demonstrates that a custodian of dematerialised securities under English law will be regarded as holding such securities on trust. Moreover, in our experience, this is the only practical way in which a custodian can hold intangible assets for a client in a manner which is adequate to safeguard the client's ownership rights in the event of the custodian's own insolvency, as required under the Client Assets Sourcebook of the FCA Handbook (**CASS**).

Both type A and type B trusts may arise in the context of providing custody services. Type A trusts may arise where a UK-incorporated or resident 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 relevant person. We consider these different fact patterns further below.

Absent an exemption, all UK custodians and many non-UK custodians would need to provide details of all their custody clients to HMRC under the TRS requirements. We understand this would be a significant undertaking for custodians, given the scale of the custody industry in the UK and number of client relationships that would therefore need to be registered in a relatively short timescale. Safeguarding and administration of investments (i.e. custody) is a regulated activity under FSMA and so UK custodians will typically be authorised persons under FSMA or nominees acting on the instructions of an authorised custodian. Similarly, non-UK custodians will typically be subject to supervision under local regulatory regimes. Therefore, we consider that the inclusion of trusts arising in connection with the provision of custody services in the TRS would be disproportionate to the risk of them being used for criminal activities.

We have considered whether the proposed exemption for trusts imposed or required by statute in exemption (2)(a) (**statutory trust exemption**) may assist. However, there is no express statutory requirement for custodians to hold client assets on trust, nor is this trust imposed by statute (subject to our comments about the definition of "subordinate legislation" and implications for client money trusts in paragraph 1.1 of our response to Question 2). Therefore, we consider that an additional, express exemption for custody relationships is needed. This is on the basis that requiring custodians to register details of all their custody clients would be disproportionate to the risk of these trusts being used for criminal activities, as well as for the following additional reasons.

Applying the TRS requirements to trusts arising in the context of custody relationships would give rise to level playing field issues and could make the UK a less attractive jurisdiction in which to invest or do business. Non-UK funds and institutional investors investing or trading in the UK market need a local UK custodian to hold their UK assets. The non-UK investor could appoint the UK custodian directly or, commonly, they may appoint a non-UK global custodian that will in turn engage the services of a local UK sub-custodian. In some jurisdictions, the non-UK global custodian may be considered to 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.

For those jurisdictions where the non-UK custodian holds assets on trust for its clients, the draft legislation would prima facie require the non-UK custodian to register these trusts as type B trusts, to the extent that it engages in a business relationship in its capacity as trustee with a UK sub-custodian that is a relevant person. This could cause market disruption or distortion arising from unlevel playing field issues between those jurisdictions that do and do not characterise custody relationships as trust (or trust-like) arrangements within scope of the proposed TRS requirements. For example, we are aware that many EU Member States do not characterise custody arrangements as trusts and so they are unlikely to be subject to the trust registration requirement under the relevant EU Member State's transposition of 5MLD. Therefore, requiring custodians from jurisdictions that do characterise custody as a trust arrangement to register details of all their custody clients would put them at a competitive disadvantage compared with custodians in other jurisdictions. This may act as a disincentive for those custodians to continue to offer access to UK markets and investments for their custody clients.

As noted above, it would be extremely burdensome for non-UK custodians to provide details of all of their custody clients. This may also give rise to client confidentiality concerns or conflicts with banking secrecy-type laws in the third country, which it may not be possible to solve through UK statutory provisions. Moreover, it is ultimately the underlying investor that will decide which markets to invest in, not the investor's custodian. Therefore, applying the trust registration requirements to non-UK custodians in this scenario could have the adverse consequence of disincentivising non-UK institutional investors from investing and doing business in the UK.

Parallels can also be drawn here with the rationale for excluding statutory trusts from the TRS requirements. As noted above, a trust structure is in our experience the only practical way for custodians to hold intangible assets for a client in a manner that complies with UK regulatory requirements to safeguard those assets in the event of the custodian's own insolvency. FCA rules also require UK fund managers to appoint a depositary to hold the fund's financial instruments in custody. Whilst it is possible in theory for investors to hold securities directly, whether in CREST (or other central securities depositories) or otherwise, it is often impractical for them to do so, particularly if their investments are geographically diversified, and so they will typically appoint a global custodian to hold these assets for them. Therefore, even where custody arrangements are not required by law or regulation, they are a practical necessity.

Scope of the suggested exemption

As indicated above, both type A and type B trusts may arise in the context of providing custody services. We have set out in Schedule 2 some simplified examples of custody chains involving UK and non-UK custodians to illustrate where type A trusts and type B trusts may arise in practice and how the proposed exemption should apply.

Taking into account these different fact patterns, we consider that the exemption for trusts arising out of or in connection with custody services should apply where the trustee 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) holding assets in custody for a person referred to in points (i) to (iv).

Drafting for this suggested exemption is in paragraph 5 of Schedule 3. Our reasoning as to why the various limbs of this exemption are needed is set out below.

(a) Our reasoning in relation to limbs (i) to (iii) of the proposed exemption is as follows:

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 trustee (typically holding for the custodian, who holds in turn for the client) but the nominee would typically be able to rely on the exclusion at article 41 RAO, whereby the custodian accepts responsibility towards the client in respect of the custodied assets. Again, these entities should benefit from the exemption on the basis that a "qualifying custodian" has accepted responsibility in respect of the assets. It would also be odd if custodians were exempt from the TRS requirements but their nominees were not.

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 or holds assets of a type outside the scope of the RAO. However, we expect that 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. We consider that 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. Other limbs of the exemption are also relevant particularly to type B trusts as discussed below.

(b) Our reasoning in relation to limb (iv) of the proposed exemption is as follows:

We identified the need for limb (iv) of this exemption in the context of type B trusts, where a non-UK custodian engages a UK sub-custodian, for example to hold UK shares through CREST. This type of structure, where a global custodian engages the services of local sub-custodians to hold local assets, is very common. In this scenario, 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 potential market disruption and 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 have proposed an additional limb to the custody exemption for custodians that are "relevant supervised persons". We have defined this term to capture UK and third country firms on whom relevant persons may rely to conduct customer due diligence under regulation 39 MLRs. We consider 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 anti-money laundering and counter terrorist financing requirements (**AML/CTF requirements**) similar to those set out in the MLRs.

This limb 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 similar to those under the MLRs. Again, we consider this is appropriate and proportionate to the risk of criminal activities that these types of trusts pose, 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 (noting that, for example, trust fund vehicles are commonly used for US pension schemes, endowments and foundations).

(c) Our reasoning in relation to limb (v) of the proposed exemption is as follows:

The final limb of the proposed exemption is intended to address situations where UK custodians are holding assets in jurisdictions where the non-UK sub-custodian is not subject to AML/CTF requirements similar to those set out in the MLRs. In this scenario, the non-UK sub-custodian may hold assets on trust for the UK custodian (depending on how custody arrangements are characterised in the non-UK jurisdiction). 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 in its capacity as trustee. However, in this scenario, the beneficiary of the trust is the UK custodian and so it remains low AML risk.

Again, it would therefore be disproportionate to the low AML 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 certain jurisdictions, which may include various emerging markets where AML/CTF requirements are not yet as well developed as in the UK (i.e. if those third country sub-custodians were unwilling to provide custody services to UK relevant persons to the extent this would trigger the TRS requirements).

Finally, we note that this suggested exemption for trusts arising in the context of providing custody services should have the effect of excluding from the TRS requirements trusts arising in connection with the creation of dematerialised depositary receipts, such as CREST depositary interests ("**CDIs**"). We consider this is appropriate, given the low risk that these trusts pose and the important role that CDIs play in the financial markets by facilitating settlement of non-UK cleared securities through CREST.

6. Shares in UK companies

Shares in UK companies may be held in trust arrangements, including bare trusts. In fact, historically, many UK companies were set up with one member holding legal title to the share(s) as nominee for the other member (the beneficial owner) because of the requirement for all UK companies to have two members under the Companies Act 1985 (which was relaxed for private companies in 1992 and for public companies on implementation of the Companies Act 2006 (**CA 2006**) in 2009). This nominee arrangement is usually a bare trust. Given that the proposed legislation applies retrospectively and many of these arrangements exist, HMRC may be notified of many trusts over shares in UK companies as such arrangements typically occur in group structures.

In addition, UK companies are already subject to transparency obligations under the persons with significant control (**PSC**) regime or DTR5 of the Disclosure Guidance and Transparency Rules in the FCA Handbook (or any equivalent regime of an EEA regulated market or a market that has been deemed equivalent). Information disclosed under the PSC regime is publicly available at Companies House and information disclosed under DTR5 is notified to the public in accordance with DTR5. It is worth noting that the aim of the PSC regime is to increase transparency around who owns and controls UK legal entities with a view to combatting criminal activities. Further, the PSC regime is drafted broadly so that persons cannot hide who has "significant control" (for the purposes of the PSC regime) over a UK company behind a trust arrangement due to the fifth condition in paragraph 6 Schedule 1A CA 2006 and paragraphs 19 and 20 Schedule 1A CA 2006 (shares held by nominees and rights treated as held by person who controls their exercise). Similarly, DTR5 has provisions that look through the person holding the voting rights on behalf of another.

Therefore, we think there should be an exemption for trusts over shares in UK companies. These are low AML risk as there is already information publicly available on the "beneficial owners" of these trusts under the above transparency obligations. The historic bare trust arrangements (where one member of a UK company holds shares as nominee on behalf of the other member) are also low AML risk because the beneficiary of the trust (i.e. the beneficial owner of the shares in the UK company) is also a member recorded in the UK company's register of members; coupled with this UK companies are obliged to file a list of shareholders at Companies House as part of the annual confirmation (unless the shareholder information already held at Companies House equally applies to the relevant confirmation period).

In addition, we do not see the benefit of having an additional filing obligation in respect of UK companies with another government department. We note that the government was considering whether there are other registration services already in existence for particular types of trust to avoid duplicate registration wherever possible. This strikes us as an instance of this.

Without an exemption, the TRS requirements would be an additional administrative burden and cost, which may potentially make UK companies a less attractive vehicle through which to carry out business, without actually furthering the aim of the TRS requirements. An exemption would also relieve the administrative burden and cost of having to diligence, due to the retrospective nature of the proposed legislation, whether any such trusts exist in relation to shares in existing UK companies.

We do note that both the PSC regime and the DTR5 requirements only capture interests over a certain threshold. However, we consider that this should not be an issue because these limits were set based on considerations of the criminal activities risk versus proportionality, and the same considerations should apply when implementing the trust registration requirements in 5MLD.

Drafting for this suggested exemption is in paragraph 6 of Schedule 3. This exemption could be extended to trusts over shares in EEA companies and companies subject to transparency obligations equivalent to DTR5.

7. **Registration gap**

Some assets require specific steps to be taken to enable the transfer of the legal title to pass from one person to another. For example:

(a) **UK land**: Legal title to registered freehold or leasehold properties does not vest in the buyer until the transfer has been registered at the Land Registry due to section 27 of the Land Registration Act 2002; this affects every transfer of registered property both residential and commercial.[1] However, the parties usually agree in the sale documentation that the beneficial title passes at completion of the transfer documentation. The result is that pending such registration the seller holds the legal interest on trust for the buyer, and the buyer gets the benefit of the property from the moment that it pays over the completion monies. It is arguable that this would not fall within the statutory trust exemption as although statute stipulates when the legal title transfers there is nothing stipulating that the beneficial title transfers to the buyer separately in advance of the legal title transferring and it is only the intention of the parties (expressed in the sale documentation) for the beneficial interest to transfer in advance which creates the trust (e.g. when purchasing a house the buyer does not have to wait for the Land Registry to complete the registration before being given the keys and possession of the house, and the seller does not have to wait for completion of registration to be paid the purchase price).

(b) **Certificated shares in a UK company** (Note we are raising this here as well because we do not know your view on the trust exemption suggested in paragraph 6 above): Legal title to certificated shares in a UK company does not transfer to the buyer until its name is entered in the register of members in respect of the transferred shares due to section 112 CA 2006. On completion of a sale of the shares, the buyer will only have a beneficial interest in the shares until the buyer's name is entered in the register of members in respect of the transferred shares. Until the buyer's name is entered in the register of member, the seller holds the transferred shares on bare trust for the buyer under common law. There is usually a gap between completion and updating the register of members because (unless the share transfer is exempt from stamp duty; such circumstances are narrow) the transfer document (usually a stock transfer form) must be stamped by HMRC and the target company cannot update the register of members until it has received the stamped transfer document. In addition, in order to protect the buyer's interests in the registration gap, the seller will often execute an irrevocable power of attorney in favour of the buyer pursuant to which the seller will expressly agree to hold

[1] According to HM Land Registry data for 2019 there were 460,078 applications to register transfers of part, first registrations of unregistered land and grants of new registrable leases. Each of these will result in a registration gap trust. In addition, there were 4,298,488 other applications in relation to registered land (this includes transfers, charges and notices) of which 864,835 were individual house sales.

in trust monies, other benefits or notices/communications in respect of the transferred shares until the register of members is written up to reflect the share transfer.

We think there should be an exemption for these trusts as there is no way to avoid them arising as completion of transfer of legal title to the relevant assets is outside the control of the parties. These trusts are low AML risk as they only last for a limited period of time pending the legal title vesting in the person who is the beneficiary under the trust once a government department completes the necessary steps to enable the transfer to complete. In each case the beneficiary will submit paperwork to a government department (HM Land Registry in the case of registration of the transfer of land and HMRC in the case of stamping of the share transfer document) so there is no element of secrecy involved in the trust as a government department will have sight of the beneficiary of these trusts.

Drafting for this suggested exemption is in paragraph 7 of Schedule 3.

The drafting for the suggested exemption provides that the benefit of this exemption only arises if the transfer document has been submitted to a government department within 30 days of the trust being set up to ensure that this is low AML risk. This will also ensure that the documents disposing of title are submitted to the relevant government department within what would otherwise have been the 'registration window' in the proposed legislation. This also mirrors the fact that share transfer documents are typically submitted to HMRC within 30 days to avoid late stamping interest. However, we note that the 30 day period is shorter than the cut-off date for submissions to the Land Registry and, therefore, will still increase the administrative burden in some property transactions.

8. **Real estate exemptions**

There are numerous examples of trusts used to own property (in this paragraph 8, we use 'property' to mean interests in land and/or buildings situated in England and Wales) in both personal life and business transactions in England and Wales. Certain circumstances in relation to leases of property can also give rise to express trusts. Examples of such trusts include:

(a) rent deposits held on trust for tenants;

(b) service charge payments held on trust for tenants;

(c) friends or family members jointly owning a home together;

(d) trusts arising from the limit of four legal owners of property;[2]

(e) nominees holding property on bare trust (two nominees are often used to allow the beneficial interest to be overreached[3]), often in conjunction with common property owning vehicles such as English limited partners; and

[2] Section 34 Trustee Act 1925.

(f) property holding vehicles which are structured as trusts or which do not have separate legal personality so that the property is held on trust for the investors in such vehicle.

Whilst transactions involving property are perceived to be a target for unscrupulous individuals and organisations intent on criminal activities they are also an asset class that affects the everyday life of many individuals and underpin many legitimate business dealings. To give an indication of the importance of real estate to the UK economy, the total market value of UK real estate is £1,662bn, representing 21% of total net wealth. The UK commercial real estate industry directly employs more than one million people and supports an additional one million jobs in the UK, while contributing over £101 billion to the UK's economy each year (about 7% of UK GVA) and generating £3.8bn of taxes for UK economy (including transaction taxes but excluding PAYE, NI and business rates).[4] Investment in UK commercial real estate during 2019 was £48.4bn, a fall of 23% on 2018 principally thought to be down to political uncertainty. Overseas investors are an important source of this investment making up 49% of the market.[5]

Many of the trusts encountered in a real estate context arise as a result of the mechanics of dealing with real estate and unlike some real estate holding structures which use trusts, these are not "*comparably similar to corporate and other legal entities*" (as referred to in the recitals to 5MLD) and present a low AML risk. The proposed legislation also produces illogical results. We set out low AML risk areas which could benefit from exemptions and the illogical results that we have identified below. We also identify situations where, if there is no exemption, grandfathering rights would be essential to avoid imposing disproportionately onerous diligence obligations on trustees of existing trusts.

8.1 Rent deposits

Rent deposits where, as security for performance of the tenant covenants under a lease, the tenant pays a sum of money to the landlord are commonly encountered in both residential and commercial occupational leases.

Whilst deposits paid under assured shorthold tenancies are required to be protected under either a custodial or insurance scheme[6] and so are not usually held by the landlord on trust, this statutory requirement does not apply to commercial leases or to residential leases and occupational arrangements which do not qualify as assured shorthold tenancies (e.g. licences to occupy for lodgers, low or high value tenancies, lettings to students by certain educational institutions, lettings by certain public bodies including certain housing associations).

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3 Sections 2 and 27 Law of Property Act 1925.

4 Statistics from the "UK Commercial Real Estate, Economic Footprint" published in 2019 by the British Property Federation.

5 Statistics from "Market in Minutes: UK Commercial" published 21 January 2020 by Savills plc.

6 Section 213(1) Housing Act 2004.

One of the most common rent deposit structures is for the money to be held by the landlord in a bank account in its own name on trust for the tenant. This ensures that the landlord can access the funds if the tenant is in breach of the lease whilst safeguarding the tenant's money in the event of the landlord's insolvency. This is an express trust created in the rent deposit deed. However, requiring these to be registered is disproportionate for the following reasons:

(a) Rent deposits are very common for commercial leases and can be entered into by the original tenant under a lease or subsequently by an incoming tenant taking an assignment of an existing lease. An additional registration requirement on every new rent deposit deed structured as a trust would be an additional unnecessary administrative burden, the cost of which would likely be passed onto the tenants.

(b) Any additional costs associated with a rent deposit would disproportionately affect many of the occupiers of small commercial premises. Many large corporate occupiers may be able to avoid these costs by using alternative forms of security (e.g. guarantee from the shareholder of the company or a bank guarantee). However, bank guarantees incur a fee which can be prohibitively expensive especially for SMEs and rent deposits are often used to avoid the need for an individual shareholder to give a personal guarantee of the lease covenants.

(c) Persons occupying residential premises under leases which are not assured shorthold tenancies would be disadvantaged compared to tenants under assured shorthold tenancies as their details would need to be held on a register which does not seem proportionate to the need to take into account an individual's right to the protection of their personal data.

(d) To identify existing trust arrangements, landlords will need to review the terms on which any rent deposits are held to identify whether they are trusts or not. Rent deposits can be in place for many years without needing to be called upon, and the distinction between trust-based rent deposit and other rent deposits has not been required previously so landlords are unlikely to have information readily available thereby imposing a significant administrative and cost burden on landlords. This will affect all landlords not just institutional ones and is an example of why a cut-off date for historic trusts requiring registration under the TRS requirements is required if rent deposit trusts are not covered by an exemption. (Please refer to our response to Question 3 for our comments on such grandfathering.)

(e) Rent deposit sums held under a trust arrangement are paid out only to satisfy amounts due to a landlord following breach of the lease covenants by the tenants. Therefore, the risk of tenants (as the beneficial owners of the trust) being able to manipulate the trust assets for criminal activities is very low.

(f) There is also already a legislative precedent for reducing the administrative and cost burden of registration in relation to rent deposits as charges over rent deposits are not required to be registered at Companies House.[7]

To give an indication of the number of rent deposits trusts, according to HM Land Registry data for 2019 there were 168,708 new registrable leases granted out of a registered title. Taking a conservative estimate that one third of these had a rent deposit deed, this equates to approximately 56,000 new rent deposit deeds per year. If half of these adopted trust structures that would be 28,000 new registrable rent deposit trusts per year without including rent deposits given on lease assignment or on leases for terms of less than seven years.[8] We therefore think there should be an exemption for these rent deposit trusts.

Drafting for this suggested exemption is in paragraph 8 of Schedule 3.

We have provided two alternative exemptions, the first is limited to rent deposits and the second covers other types of deposits, retentions and security payments in relation to non-lease related contractual obligations in addition to lease rent deposits. The wider exemption would mean that other commonly occurring trusts which are low AML risk could be excluded. For example retentions are common in the construction sector, where the employer under a building contract may withhold a pre-agreed percentage of progress payments as security for the contractor's performance. While such arrangements may not always be expressed to be by way of trust, it is notable that the JCT standard form construction contracts (an industry standard suite of documents) expressly describe a trustee position and employers must put retained monies into a separate account at the contractor's request. In practice, such provisions are often amended, but will not be in all circumstances.

8.2 Service charges

Service charges exist in all multi-occupancy buildings or where buildings share services or facilities whether such buildings are residential, commercial or mixed use (e.g. business and retail parks, office buildings, rows of shops, town centres and high streets owned by local authorities, residential buildings, mixed-use buildings) to enable the proper repair, maintenance and management of the common parts of that building or estate for the benefit of all occupiers. As an indication of the number of possible service charge trusts created, assuming that 85% of new registrable leases had a service charge, this equates to approximately 140,000 new leases of more than seven years creating a service charge trust per year.[9]

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7 Section 859A(6)(a) Companies Act 2006.

8 Leases for less than seven years are not registrable at HM Land Registry so the number of new leases which could have rent deposits is actually much higher than 169,000 and in practice rent deposits tend to be more common for shorter leases.

9 This is based on HM Land Registry data for new registrable leases granted out of a registered title during 2019. Leases for less than seven years are not registrable at HM Land Registry so the number of new leases which could have service charge arrangements is actually much higher than the 169,000 leases submitted to HM Land Registry for registration.

These service charges are paid in advance in respect of anticipated expenditure with a reconciliation once the actual expenditure for the year is known. The landlord or managing agent who receives such payments holds them on trust for the contributing tenants. The service charge funds can only be used to pay for repair, maintenance and management costs in accordance with the lease terms. The trust arrangement is especially important in relation to contributions to long term reserve funds and sinking funds in relation to future large items of irregular expenditure as these sums tend to be held for a number of years before being used.

The purpose of the trust arrangement is to protect tenants' money from being misappropriated by the landlord and to ring fence it in the event of insolvency of the landlord. For this reason residential service charges are required to be held on trust for the tenants and the terms of that trust are prescribed by statute, which terms prevail over the terms of any express or implied trust created by a lease so far as inconsistent (other than an express trust created prior to the statutory provision taking effect).[10] There is no equivalent statutory protection for commercial service charges and certain residential landlords (e.g. local authorities, registered housing associations, charitable housing trusts and various other public bodies) are exempt from the trust requirement which applies to residential service charges.[11]

These service charge trusts are a low AML risk given the controls in the lease around how such sums can be used and excluding them will not affect the effectiveness of the UK's anti-money laundering regime. The consultation recognises that service charge protection trusts should not be caught by the TRS requirements,[12] but based on the current exemptions, this intention is only achieved for residential service charges paid to non-exempt landlords which can rely on the statutory trust exemption. This means a number of discrepancies arise:

(a) The terms of a residential lease with a non-exempt landlord may create an express trust (which is compatible with the statutory trust terms and therefore not overridden by the statutory trust) and it is unclear whether such a trust would be able to rely on the statutory trust exemption.

(b) Exempt landlords will likely hold service charge payments on trust notwithstanding that they are exempt from the statutory requirement to do so especially in a building which has a range of different type of tenancies. It would not be proportionate for such landlords to have the burden of the TRS requirements when commercial landlords benefit from the statutory trust exemption. It also does not seem equitable, given the acknowledged need to take into account an individual's right to the protection of their personal data, for the residential tenants of public bodies and housing associations to have their details held on a register but the residential tenants of commercial landlords not to be subjected to such requirement. This is exacerbated by the different TRS requirements applying to individuals arising not due to their own status or actions but due to the nature of their landlord.

[10] Section 42 Landlord and Tenant Act 1987.

[11] The exempt landlords are defined in section 58(1) Landlord and Tenant Act 1987.

[12] Paragraph 3.10 of the technical consultation.

(c) Commercial service charge trust arrangements are the same nature and purpose as residential service charges but do not fall within the statutory requirement and therefore do not benefit from the statutory trust exemption (or any other exemption). There is no reason why these service charge arrangements should be treated differently to residential service charge trust arrangements as they are the same nature and risk profile.

There is no cost-effective, viable alternative to service charge monies being held in trust structures which offer the same level of protection to tenants. If the funds are held by the landlords for themselves the protection for the tenants is lost, if the funds are held by a third party it would likely involve additional costs which would ultimately have to be borne by the tenant. We therefore think that there should be an exemption for all service charge trusts.

Drafting for this suggested exemption is in paragraph 9 of Schedule 3.

8.3 **Friends or family members jointly owning a home together**

The consultation identifies (and we agree) that joint ownership of a home by friends or family members is a trust which trustees should not be required to register.[13] However, there is no specific exemption in the proposed legislation for this type of trust. It is possible that it could fall within the statutory trust exemption, however, we think that there is a significant element of doubt as to whether this exemption could be relied upon and believe that the situation should be put beyond doubt, particularly given the potentially criminal consequences of a failure to comply.

The doubt arises because, although the legal estate in a property must be held by co-owners as joint tenants and cannot be split,[14] statute does not impose requirements on how the beneficial interest is held, allowing it to be held as joint tenants or as tenants in common. There is a rebuttable presumption of a joint tenancy, but this can be severed. Therefore, it is usual on the purchase of a property for the beneficiaries to make a statement (often but not always in a declaration of trust) as to how the legal owners are holding the property for the beneficial owners (and indeed it is a requirement of HM Land Registry forms of transfers and leases to include such a statement where there is more than one legal owner). These statements could be considered to be express trusts indicating a clear intention of the settlors in writing to create a trust.

Further, how the beneficial interest is held can be subsequently changed from a joint tenancy to a tenancy in common and vice versa. These changes are commonly achieved by the execution of a new express declaration of trust. As express trust is not defined in the proposed legislation and the commentary in the consultation provides little additional assistance, there are reasonable arguments that these joint home ownership trusts could be express trusts which are not imposed or required by a statute (as for instance, there is no statutory requirement to sever a joint tenancy into a tenancy in common) and therefore registrable under the TRS requirements. Even if

13 Paragraph 3.11 of the technical consultation.

14 Section 36(2) Law of Property Act 1925.

the initial holding benefits from the statutory trust exemption due to the operation of section 36(2) of the Law of Property Act 1925, they would become registrable following a subsequent declaration of trust changing how the beneficial interest is held.

To ensure that the intention expressed in the consultation not to capture these joint home ownership trusts is fulfilled, we think that there should be an exemption for trusts where the legal and beneficial owners are the same and their interests are concurrent.

Drafting for this suggested exemption is in paragraph 10 of Schedule 3.

We also note that, this arrangement would be a type B trust if the trustees are not UK residents and in this case no exemptions can apply. This produces illogical results where the same trust arrangement can flip between being registrable or not registrable but the legal and beneficial owners and therefore the risk associated with the trust are unchanged. For example, if two people own a home together (potentially an exempt type A trust) but one or both subsequently move abroad for a period for work so that they are no longer UK resident the same trust becomes a type B trust which does not have any exemptions and so becomes registrable. However, when the individual(s) return(s) home to the UK the TRS requirements cease as it becomes a type A trust and can benefit from an exemption again. The same applies if two or more individuals whilst working abroad purchase a home together in the UK for them to live in when they return to the UK. Therefore, as suggested in the introduction to our response to this question, the exemptions should apply to type B trusts as well as type A trusts to avoid such illogical results.

In the absence of such an express exemption, detailed guidance should be provided to clarify how the legislation reflects the stated intention not to bring these trusts within scope of registration. This should provide that joint ownership trusts for jointly owning a home are considered to be outside the TRS requirements regardless of whether they are joint tenancies or tenancies in common and remain outside the TRS requirements even if an express declaration of trust is made in writing and notwithstanding subsequent switches between tenancy type, or residency of the legal owners. We suggest that the legislation provides for guidance to be issued so that any such guidance has the status of statutory guidance which can be relied upon by individuals purchasing their homes.

The exemption we propose would also clear up the following inconsistencies arising from the proposed legislation as drafted:

(a) The consultation[15] expresses an intention that trusts will not be required to register where two or more people co-own an asset legally and beneficially for themselves with concurrent and not successive interests as these arrangements do not meet the intention of 5MLD. However, there is currently no exemption for express trusts of this nature in the proposed legislation.

[15] Paragraph 3.13 of the technical consultation.

(b) There can be no more than four legal owners of land.[16] A trust which arises because more than four persons wish to purchase a property would likely fall within the statutory trust exemption, (though we question whether, on a strict interpretation, this could be relied upon if an express trust was also declared). However, if exactly four individuals purchase a property together (for example, as business partners) then their trust arguably would require registration under the TRS requirements (for the same reasons referred to above that friends or family members purchasing a home together arguably cannot rely upon the statutory trust exemption). It is an odd result that five co-owners would not be required to register their trust but four co-owners would as there is no material difference in the AML risk profile.

8.4 **Maximum of four legal owners**

As mentioned above, if there are more than four legal owners of land a trust must be created as there can be no more than four legal owners of land.[17] If the trustees are UK resident then this is a type A trust and within the statutory trust exemption. However, the same structure would be a type B trust if any of the trustees are non-UK resident. Similarly, a trust may change from being exempt to being registrable if a trustee is replaced with a non-UK resident trustee or a trustee changes its residency. The nature of the trust and therefore the risk of it being manipulated for criminal activities is unchanged in these circumstances and, therefore, we think (as suggested in the introduction to our response to this question) the exemptions should apply to type B trusts as well as type A trusts to avoid such illogical results.

8.5 **Nominees holding title on bare trust for a third party and overseas joint ventures structured as trusts**

Two nominees holding legal title to properties on bare trust for another is a structure which is commonly seen in commercial property transactions for legitimate reasons. For example general partners of limited partnerships will often appoint two nominees to hold legal title to the property on trust for the partnership so that the partnership interests can be overreached.[18] This structure is also used to protect the privacy of individuals, which may be required for very legitimate reasons, particularly with residential property and high profile individuals. However, we acknowledge that such structures pose a higher risk of manipulation for criminal activities.

Similarly, there are various non-EEA overseas vehicles commonly used for legitimate commercial reasons to purchase UK property investments which are either structured as trusts or which do not have separate personality (and therefore cannot hold land in their own right) so create trusts when purchasing interests in UK land (e.g. JPUTs, GPUTs, Jersey Limited Partnerships). The trustees of these trusts are typically overseas entities and so these would likely constitute type B trusts under the TRS requirements.

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16 Section 34 Trustee Act 1925.

17 Section 34 Trustee Act 1925.

18 Sections 2 and 27 Law of Property Act 1925.

We note that JPUTs and GPUTs are generally tax transparent with the tax liability of the trust sitting with the unitholders. However, the trustees are liable to pay any SDLT/LTT arising on the acquisition of property by the unit trust. This arguably makes them 'relevant taxable trusts' under the existing regulations which seems an odd result given that the trustees have no ongoing tax liability following acquisition of the property unless further properties are acquired. The SDLT/LTT return must be filed to enable the trustees of the unit trust to be registered as the legal owner of the property so the requirement to register with TRS does not appear to add a great deal from an AML perspective. The consequence though is that these unit trusts face different trust registration requirements to, for example, Jersey Limited Partnerships although the AML risk associated with them are not markedly different. We consider that both should be treated as type B trusts.

Acknowledging that structures of this nature are likely to be registrable under the TRS requirements, it is imperative that access to the register is suitably controlled to protect the legitimate privacy concerns of individuals (especially in relation to residential property and high profile individuals) so that such individuals are not put off the UK property market due to lack of privacy. It should also be taken into consideration that imposing this requirement could make property investments in the UK less attractive than opportunities elsewhere which have lower administrative burdens and greater protection of the privacy of individuals' residences.

Furthermore, the imposition of the TRS requirements on all existing trusts of this nature regardless of when they were created is, in our view, not proportionate to the risk of them being used for criminal activities and is potentially incompatible with principles of the rule of law. Individuals and entities will have chosen to structure their ownership in compliance with the laws applicable at the time of implementing the structure and property is frequently held as a long term asset (often held for decades) so, the exercise of checking historic records to identify all such trusts would be very time consuming and costly from an administrative perspective as it could require records dating back decades to be checked or require negotiation to obtain information to be provided in situations where the trustees have no contractual right to obtain it. Further, some arrangements may pre-date compulsory registration of land and if the ownership has not changed since, these trusts over unregistered land will be very difficult to identify. Therefore, we consider that the burden imposed would be only be proportionate to the risk if the TRS requirements only apply to recently created trusts of this nature. Please refer to our response to Question 3 for our comments on such grandfathering.

9. Intellectual property and intangibles

In the UK, ownership interests in intellectual property (**IP**) rights will often automatically become the subject of a trust. English case law has often construed the existence of a trust arrangement in connection with the ownership interests of IP rights, particularly in scenarios where imperfection of title is an issue or to give business efficacy to contractual relationships that may otherwise be deficient, technically or otherwise.

By way of example, legal title in most IP rights can only be assigned by way of a written instrument signed by the assignor. Where contracting parties have agreed that one party should own IP rights that may have been created by the other party, that agreement may be defective in assigning legal title, either due to lack of formality or because it is not always[19] possible to assign legal title of future IP rights. In those circumstances, a trust is likely to arise once a future IP right is generated with the creating party holding legal title on trust for the beneficiary until such time as legal title is conveyed by a written instrument. Such trusts are either automatic in nature or are expressly specified as a holding mechanism pending the subsequent execution of a written document to transfer the relevant IP right.

Similarly, trusts have been construed by the courts to give business efficacy to contracting party arrangements, where those written arrangements are deficient in giving a party access to use the IP right. For example, several well documented cases have found implied assignment obligations in contracts where an author or artist is commissioned to generate an artistic work. Again, absence an express written agreement, the ownership arrangements fall back to a trust being established to ensure the beneficiary has an interest in the work they commissioned.

As mentioned above, express trusts in relation to IP will often arise as language will be added to contracts to that effect so that the position is clear to the parties (and so that they do not have to rely on the courts implying trusts in the circumstances stated above). This language is often seen through research and development agreements, University research and funding agreements, collaboration agreements and many other contractual relationships where IP is likely to be an important asset class that is developed or arises from the contractual relationship.

Such trusts are low AML risk and are often forgotten about or overlooked due to the administrative burden of having to follow up by executing further agreements to secure a separate written assignment of legal title in the applicable IP right. If it were necessary to report each of these trusts, the volume would be excessive and burdensome. Therefore, we think that there should be an exemption for these express trusts.

Drafting for this suggested exemption is in paragraph 11 of Schedule 3.

In relation to registered IP rights that may be the subject of such a trust, the detection of a trust could be identified or reported when the proprietorship record is subsequently updated to record the new proprietor. Since it is registered IP rights (e.g. trade marks, patents etc.) that often drive monetisation activities through royalties, detection of inappropriate behaviours could be monitored at a registry level when proprietorship records are updated.

Finally, IP rights are capable of being held jointly, either in equal shares or unequal shares. Accordingly, a trust arrangement is likely to arise in those situations of joint ownership and similar issues raised above regarding joint ownership of real property apply. The drafting for the suggested exemption in paragraph 10 of Schedule 3 is broad enough to capture these trusts as well.

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[19] An exception to this is copyright, where title to future copyrights can be assigned by way of a historical agreement. But such arrangements do not apply to patent rights.

10. **Oil and gas**

Trust arrangements are used in the upstream oil and gas sector where interests in oil and gas fields are typically held jointly by a number of participants. Standard industry Joint Operating Agreements include express trust arrangements that may be used for holding and transferring participants' interests in the relevant licensed area. Trust arrangements are also used to hold decommissioning funds. These activities are all regulated, currently by the Oil and Gas Authority (**OGA**). The OGA is the licensing authority for licences issued under the Petroleum Act 1998 and all changes in ownership of interests in a licensed area are subject to approval by the OGA. All decommissioning arrangements are approved by the Secretary of State. Therefore, we think that there should be an exemption for these trusts as they are low AML risk and ownership information is already recorded elsewhere.

Drafting for this suggested exemption is in paragraph 12 of Schedule 3.

11. **Lease financing of aircraft and other transportation assets**

Financiers and owners of aircraft and other big-ticket transportation assets (primarily rail rolling stock and ships) and associated equipment commonly utilise the lease as a secured financing device as it allows ownership of the aircraft or other asset to be held by an acceptable entity, often a bankruptcy-remote vehicle, and use and possession of the asset to be enjoyed by the airline or other operator. The rentals paid by the operator are applied in repayment of the funding for the purchase or other acquisition of the asset. In some cases, the commercial arrangements will provide for the operator to acquire title to the asset at the end of the lease term (for example, under a hire-purchase or conditional sale agreement or pursuant to a purchase option under the lease). Civil aircraft engaged in international air navigation and commercial passenger services and ships (other than small vessels) will typically be registered on specific asset registers, such as the UK Civil Aviation Authority Aircraft Register and the UK Ship Register, respectively, and therefore, these leasing arrangements would appear to be low AML risk.

While exemptions 2(f) and 2(g) may encompass certain of these lease financing transactions (where there is a related facility or credit agreement or a securities instrument), the wording does not easily extend to standalone leasing or similar arrangements. We therefore think that there should be an exemption for lease financing of aircraft and other big-ticket transportation assets and associated equipment.

Further, in the commercial passenger aircraft sector, in order to facilitate trading of the asset, aircraft leasing companies are increasingly using "aircraft owner trusts" whereby the legal ownership of the aircraft is held by a professional trustee in favour of the leasing company or its subsidiary, as beneficiary. This "owner trust" structure enables the beneficial interest in the trust estate (that is, the aircraft) to be transferred by the original lessor to another leasing company or affiliate, while preserving the underlying lease with the airline or other operator, instead of a sale of the aircraft itself (a "metal transfer"); this transfer mechanic seeks to reduce operational and documentary disruption for the airline. The aircraft will still be registered on a nationality register; in addition, the Federal Aviation Administration (**FAA**) Aircraft Registry of the United States, which specifically allows for registration of such aircraft where the trustee qualifies as a US citizen, has clear, detailed requirements for and a well-understood review process of the underlying trust arrangements for valid registration of the aircraft. In recognition of the increasing number of commercial aircraft held in aircraft owner trusts, as the international aviation leasing and financing sector develops, a leading industry association, the Aviation Working Group, has launched a voluntary "Global Aircraft Trading System" (**GATS**) involving these structures. GATS provides for the establishment and registration of such owner trusts and introduces an electronic platform, supported by standard form documentation, for effecting beneficial interest transfers and security interests in respect of those owner trusts. GATS seeks to increase the transparency of aircraft ownership and trading and therefore, beneficial interest transfers will be recorded on an "e-ledger" which will be searchable by all industry participants (further information is available at http://www.awg.aero/project/gats/).

We suggest that aircraft owner trusts which are already recorded on the FAA Aircraft Registry and other similar nationality registers or on a public registry such as the GATS platform should be exempted from the TRS requirements.

Drafting for these suggested exemptions are in paragraph 13 of Schedule 3.

12. Escrow accounts

Escrow arrangements are often encountered in commercial transactions. They typically involve either sums of money or documents being deposited with independent third party professionals to be held in escrow pending the outcome of certain conditions. The escrow agents are usually financial institutions, firms of solicitors or specialist escrow providers (e.g. Law Debenture). The escrow agents either act as stakeholders or trustees depending on the terms of the escrow agreement and if it is the latter this will be an express trust created by the escrow agreement. These trusts not only arise due to market practice, but are also a necessity for such transactions to work effectively in the UK. For example:

(a) In connection with the sale of an asset or a company, the buyer may place any deposit payable on signing in escrow to be released on closing of the transaction as an alternative to depositing it with the seller's solicitors as stakeholder. Deferred consideration is similarly sometimes placed into escrow until it becomes due. In addition, completion monies may be placed into escrow to cover any successful claims (e.g. warranty and/or indemnity claims) made by the buyer for breach of the sale and purchase agreement by the seller.

(b) In some situations documents will be conditionally delivered into escrow to be released when the escrow conditions are satisfied. This is used when the parties require that the deed or contract cannot be withdrawn or recalled once executed but conditions need to be satisfied prior to it becoming effective.

(c) On public takeovers, the target may put money into escrow to be released to the bidder (or vice versa) in the event that a break fee is payable.

(d) In relation to English limited partnerships used as funds or joint venture vehicles, the general partner may deposit monies held on account for the purchaser of a defaulting limited partner's interest, or an outgoing limited partner may deposit monies held on account for a substitute limited partner in relation to transfers of interests.

(e) Escrow arrangements may be put in place in fund structures for carry purposes.

(f) Escrow arrangements are often used to hold intellectual property rights on behalf of various beneficiaries, as a safeguard against manufacturer insolvency (e.g. in the rail industry for rolling stock manufacturers).

Whether an escrow arrangement will be an express trust will depend on the terms of the individual escrow arrangement. Therefore, it will be an enormous exercise for escrow agents to diligence all existing escrow arrangements to verify their status which would be very time consuming and costly from an administrative perspective. We anticipate that if escrow arrangements using a trust structure become registrable then market practice will change to favour the non-trust structure. However, without a cut-off date for historic trusts requiring registration under the TRS requirements, the administrative burden for historic arrangements will remain problematic. We think, therefore, that the burden imposed would only be proportionate to the risk if the TRS requirements only apply to recently created trusts of this nature. (Please refer to our response to Question 3 for our comments on such grandfathering.)

Furthermore, where the escrow agent is itself already subject to the MLRs, these trusts present a low AML risk as the escrow agents will already be required to carry out 'know-your-customer' checks on the beneficiaries and report suspicious activities, and the release of assets from the escrow arrangement is tightly controlled by the terms of the escrow agreement. Given these existing protections, requiring all trusts created by escrow arrangements to be registered would be disproportionate and impose a heavy administrative burden and cost on persons wanting to put anything into an escrow arrangement. We therefore think that there should be an exemption for escrow arrangements that constitute trusts where the trustee is a "relevant supervised person". (Please refer to paragraph 5(b) of our response to this question for our comments on the meaning of "relevant supervised person".)

Drafting for this suggested exemption is in paragraph 14 of Schedule 3.

13. **Guarantees**

Guarantees given in transaction documents, whereby the guarantor guarantees the performance by another entity of its contractual obligations, will frequently include a covenant that the guarantor will hold for the benefit of the party receiving the guarantee any security and rights which the guarantor has over any assets of the entity whose performance is being guaranteed whilst any liabilities of such guaranteed entity and/or the guarantor remain outstanding.

These trusts are low AML risk as they are difficult to manipulate for criminal activities. The trust lasts whilst the guaranteed entity has outstanding liabilities and in practice is only called upon in an insolvency situation where the guaranteed entity cannot meet its obligations and the entity with the guarantee wishes to benefit from any security which the guarantor may have over the insolvent entity.

They would also give rise to a very onerous historic trust due diligence exercise, as they can only be discovered by reviewing the terms of the transaction documents (not all guarantees create such a trust). Also, guarantees are common in leases which can have terms lasting for decades and so without a cut-off for historic trusts requiring registration under the TRS requirements, the administrative burden of reviewing all historic leases containing guarantees would be problematically burdensome. (Please refer to our response to Question 3 for our comments on such grandfathering.)

We therefore think that there should be an exemption for these guarantor trusts.

Drafting for this suggested exemption is in paragraph 15 of Schedule 3.

14. **Client account**

There are innumerable circumstances in which solicitors will receive or deal with money belonging to their clients or third parties in connection with their delivery of legal services. Solicitors are required to use a dedicated client account to do so, which must be operated in accordance with strict rules prescribed by the Solicitors Regulation Authority. There is judicial authority confirming that money in a solicitor's client account is held on trust.

By way of illustration, on every property purchase (whether commercial or residential), the completion monies are transferred via solicitors' client accounts. This is often the solicitors' client's money, but can also be third party money if completion funds are sent by other parties in advance of completion. This money is held on trust for the person who paid it into the client account. Although there is not always an express written trust, the solicitors' terms of engagement set out the basis on which client money will be held, and this will often be confirmed through correspondence to clarify that the money is being held on behalf of the client.

The receipt by solicitors of funds into their client account is very common: by way of example, our London office would expect to receive such payments many hundreds of times in the course of an average year. For the sake of clarity for practitioners, we think that there should be an exemption making clear that trusts arising where funds are paid into a client account are not required to be registered. Solicitors are regulated by the Solicitors Regulation Authority and are relevant persons when participating in certain financial or real property transactions. This already requires solicitors to carry out 'know-your-customer' checks on clients and to report suspicious activities. Given these existing protections, and in light of the frequency with which funds are received into client accounts, requiring all trusts created by holding client monies to be registered would be disproportionate and impose a heavy administrative burden and cost on solicitors.

A similar situation arises where estate agents or property managers collect rent on behalf of landlords and hold it in client accounts prior to release to the landlord/its lender.

We therefore think that there should be an exemption for the client account trusts of relevant persons.

Drafting for this suggested exemption is in paragraph 16 of Schedule 3.

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?

Paragraph 1 in our response to this question sets out our comments on some of the draft exemptions in the proposed legislation. More specifically:

(a) We suggest that "subordinate legislation" in the statutory trust exemption should be defined.

(b) We suggest widening the scope of exemption 2(b) to capture other examples of trusts arising where an English court will be involved given these are low AML risk.

(c) We consider exemptions 2(f) and 2(g) and outline where they may be deficient and not fully express the principles behind them. We then suggest how they could be redrafted to be more comprehensive, while remaining faithful to the criminal activities concerns behind the MLRs. These exemptions should also be user-friendly so a trustee can readily ascertain whether the relevant trust is subject to an exemption.

Once again, it is important that these exemptions (amended as suggested) should apply to both type A trusts and type B trusts as there is no basis for differentiating between them.

Paragraph 2 in our response to this question sets out some concerns in relation to the definition of type B trust. We consider that 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. We also consider that linking the definition to business relationships in the UK with relevant persons will put UK AML regulated service providers at a competitive disadvantage to other jurisdictions. We also have concerns about the unintended consequences of regulation 45ZA(5) of the proposed legislation.

Paragraph 3 in our response to this question sets out our concerns about the complexity of the definition of "beneficial owners", details of which will need to be notified to HMRC.

Paragraph 4 in our response to this question sets out our comments on guidance we would expect to see to accompany the legislation. We consider that guidance from HMRC on the exemptions would be welcomed to clarify their scope and provide some colour on the principles informing them. We also think there would be great benefit in the guidance from HMRC setting out what is meant by "express trust" given that this term is not defined in the proposed legislation and most lay persons will not understand what is meant by express trust. We also would like the guidance to cover general and limited partnerships as set out below.

1. **Comments on the exemptions**

1.1 **Exemption 2(a)**

The term "subordinate legislation" used in the statutory trust exemption is not defined in the MLRs[20] and so it is not clear whether or not it would capture trusts arising

[20] We note that the MLRs are made under the European Communities Act 1972 (**ECA**) and FSMA. Whilst both the ECA and FSMA define "subordinate legislation" for particular purposes, neither Act includes a

under regulatory rules, such as statutory client money trusts arising under CASS 5.3.2R and CASS 7.17.2R of the Client Assets Sourcebook of the FCA Handbook.

Generally, the scope of the statutory trust exemption would be clearer if "subordinate legislation" was defined. We therefore request that this point of uncertainty is clarified by including an express definition of "subordinate legislation" in the proposed legislation to have the meaning given to this term in the Interpretation Act 1978, i.e. "*Orders in Council, orders, rules, regulations, schemes, warrants, byelaws and other instruments made or to be made under any Act*".

In the context of client money, defining "subordinate legislation" in this way would help clarify that the statutory trust exemption does apply to statutory client money trusts arising under CASS 5.3.2R and CASS 7.17.2R. Nevertheless, we note that a separate exemption for trusts arising in the context of custody arrangements as discussed in paragraph 5 in our response to Question 1 would still be needed in relation to (and therefore should include reference to) cash, in particular where a custodian holds cash on trust for a client outside the scope of the statutory client money trust. This could arise where the custodian elects to hold cash subject to a non-statutory trust under CASS 5.4 or where a fund depositary holds cash on trust for clients outside the scope of the client money rules.

1.2 **Exemption 2(b)**

We are grateful to HMT for providing an exemption for trusts created by or in order to satisfy the terms of an order of a court or tribunal, however, this exemption should be extended to include trusts created to satisfy undertakings given to the court. For example:

(a) On a share capital reduction confirmed by the court under the CA 2006, it is becoming more common for the company to give an undertaking to the court that it will set aside a cash sum in a blocked bank account for the benefit of the company's creditors for creditor protection purposes.

(b) On a takeover by way of scheme of arrangement, the bidder may give an undertaking to the court that it will set aside consideration payable to untraceable or missing shareholders.

In both these cases, the money is held on trust. These trusts are low AML risk as they are unlikely to be manipulated for criminal activities given the involvement of the courts.

Our suggested amendments to this exemption are in paragraph 1 of Schedule 4.

1.3 **Exemption 2(f)**

We are grateful to HMT for providing an exemption for trusts arising in relation to facilities agreements. In the 2019 response, we identified the trust devices frequently

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general definition of "subordinate legislation". Similarly, the definition of "subordinate legislation" in the Interpretation Act 1978 only applies for the purposes of that Act.

employed in loan transactions (e.g. the security trust and the turnover trust) and their low AML risk. In view of this low AML risk, we also made the point that the increased costs to borrowers and the onerous and largely unworkable requirement to register all lenders benefitting from a security trust would be disproportionate and would not be matched by any AML benefits.

Our principal concern with exemption 2(f) is that it applies to credit facilities made available by an authorised person. In our view, this is unnecessarily narrow and drives an arbitrary wedge between credit facilities made available by UK banks which would fall within the exemption and credit facilities made available by non-authorised persons (e.g. funds) which would not fall within the exemption as currently drafted. While a great many credit facilities are made available by authorised persons, this does not represent the totality of the community of lenders in the wholesale financial markets. Credit facilities across many product areas are regularly made available by non-bank entities. A common example is funds e.g. funds in infrastructure transactions, emerging markets transactions and leveraged transactions. Further, the definition of authorised person refers to persons authorised for the purposes of FSMA. At the end of the implementation period, this risks becoming unduly narrow if it only captures UK persons and not EEA persons. The exemption in its current form would also discriminate against providers of credit facilities who are authorised and subject to supervision by a supervisory authority outside of the EEA.

As observed in Sector 17 of the Joint Money Laundering Steering Group guidance which relates specifically to syndicated lending,[21] loans are low AML risk. In recognition of this, we think that the exemption should be more encompassing to reflect the wholesale financial markets.

We set out our suggested amendments to this exemption in paragraph 2 of Schedule 4.

In expanding the category of persons covered by this exemption beyond authorised persons, we have sought to achieve conceptual alignment with the MLRs by requiring the lender, arranger or trustee to be subject to AML supervision under the MLRs or otherwise be subject to and supervised for compliance with customer due diligence and record keeping requirements as set out in regulation 39(3)(b) and (c). Accordingly, UK lenders and trustees would be financial institutions or trust service providers registered with the FCA or HMRC and would already be subject to the AML requirements of the MLRs and overseas lenders and trustees would be subject to equivalent AML requirements in their jurisdictions. We consider that this exemption strikes the right balance between providing a practical exemption for trusts associated with credit facility documentation whilst ensuring that the exemption is not available to trustees and lenders from high risk jurisdictions or those that are not themselves subject to and supervised for compliance with equivalent AML customer due diligence and record keeping requirements. We have also expanded this exemption to include trusts arising in respect of credit facilities made available to securitisation companies (as defined in the Taxation of Securitisation Companies Regulations 2006 (as amended)). This ensures that trusts arising out of these arrangements (e.g. warehousing structures) also benefit from the exemption.

21 https://jmlsg.org.uk/wp-content/uploads/2020/01/Sector_17_Syndicated_Lending_Final_Board_approved_Sept_2019_HMT_approved.pdf

The expanded exemption would also ensure that turnover trusts arising in respect of facilities agreements are not subject to the registration requirements. It is common in loan financing transactions for there to be multiple layers of debt – for example senior and junior lenders and hedge counterparties. Often the rights to repayment and recovery of each lender are regulated by an intercreditor agreement which will contain a turnover (or subordination) trust in which, for example, the junior lenders declare a trust in favour of the senior lenders over amounts they recover from the borrower which were not permitted to be paid to them under the terms of the intercreditor agreement. These trusts are incidental to the financing transaction and will only arise in specified circumstances. They are low AML risk as they are simply a means to ensure that monies incorrectly paid to one party are held on trust for another party until paid to that other party. Turnover trusts are also found in guarantees involving multiple guarantors. These trusts ensure that a guarantor holds money it receives in relation to any guarantee payment made by it until the lenders have been paid in full. The guarantor holds such monies on trust for the lenders. The recrafted exemption would avoid such incidental trusts being inadvertently caught by the registration requirement. However, if this exemption is not redrafted as suggested, a specific exemption for turnover trusts of this nature would be required on the basis that these trusts are benign for money laundering purposes and registration of them would therefore be unnecessary and likely to be disproportionate given that in most other jurisdictions the same results would be achieved through contractual undertakings.

The redrafted exemption applies to both type A trusts and type B trusts to avoid illogical and arbitrary results. For example, under the current drafting, in relation to a security trust under a facilities agreement, if the security trustee is a UK authorised person, the trust would not be a type A trust and would not need to be registered. Whereas if the security trustee is a non-UK person (which enters into a business relationship in the UK), the trust would be a type B trust and registrable under the TRS requirements.

From a comparative law perspective, it is also imperative to avoid any divergent treatment between type A trusts and type B trusts which cannot be justified, as is the case in the example above. Such an approach risks jeopardising the UK's status as a key financial centre and driving business to other jurisdictions. If the UK implements 5MLD disproportionately to EU Member States, this intensifies the risk of forum shopping elsewhere. The exemption we have proposed applies equally to both type A and type B trusts.

As referred to earlier, security trust arrangements established for the purposes of holding security for a group of lenders under a syndicated credit agreement are currently subject to the requirement to register. In our 2019 response we made the point that given the low AML risk of loans and of the security trust arrangements associated with them, there would be no AML benefits of requiring security trustees to register the details of all of the lenders in their capacity as beneficiaries of the security. It would also be extremely burdensome and impractical for security trustees to have to effect these registrations in this context. The number of lenders benefitting from the security at any point in time could be significant and will be constantly changing as lenders sell their participations to new lenders in the secondary loan market. If nevertheless the requirement to register in these circumstances is retained in its current form, we would suggest that such registration should be limited to a description of the class of beneficiaries as opposed to each individual lender institution. In this regard, we would like to point out an inconsistency in the MLRs and the proposed amendments. Both regulation 45(2)(b) and proposed regulation 45ZA(4)(a) provide that the information on individual beneficiaries is not required if the beneficial owners include a class of beneficiaries not all of whom have been determined. However, regulation 45(2)(c) and proposed regulation 45ZA(4)(c) do not contain similar wording where the beneficiary is a legal entity. (This issue does not arise in relation to proposed regulation 45(10)(A) and (B) because there is no similar requirement in relation to beneficiaries that are legal entities). We seek to address this inconsistency in our suggested amendments to regulation 45 and proposed regulation 45ZA set out in Schedule 5. We have also suggested a consequential amendment to regulation 44(1) to ensure consistency between the record keeping requirements and the requirement to register with HMRC. It would also be helpful for clarification in the legislation or in guidance on what is meant by the words "*not all of whom have been determined*" in the context of the registration of a class of beneficiaries under proposed regulation 45ZA(b). For example, would it include where the class of beneficiaries changes or may change from time to time as is the case under a security trust arrangement connected with a facilities agreement? In the case of a security trust, it would be considerably less onerous and more proportionate given their low AML risk, and so helpful to preserving the UK's role in these commercial markets, for the beneficiaries to be registered as a class.

In view of the fact that all the above points are equally valid in relation to trust arrangements arising in respect of other similar financing arrangements (such as, letters of credit, performance bonds, advance payment bonds, guarantee facilities and derivative transactions) we have also expanded this exemption to cover such financing arrangements provided that they constitute an activity listed in points 2, 3, 6 or 7 of Annex 1 to the capital requirements directive (i.e. lending, financial leasing, guarantees and commitments and trading in certain specified financial instruments) or trading in commodities or in MiFID instruments (as not all MiFID instruments are specified in point 7 of Annex 1 to the capital requirements directive). This ensures consistency of approach across these legitimate financial products all of which represent a low AML risk.

In addition, we consider that the TRS requirements could significantly impact Islamic financings. The UK has become, and strives to remain, a leading centre for Islamic finance, with English law being widely selected as the governing law in Islamic finance transactions in the wholesale financial markets. Several other jurisdictions, such as Ireland, Luxembourg, Hong Kong and Malaysia, compete with the UK for a leading position in Islamic finance outside the Gulf region. The UK's position anchors the ability of many UK based service providers, such as banks, insurance firms, the London Stock Exchange, lawyers, accountants and commodities houses, to maintain strong market shares in relation to Islamic finance in their respective sectors. Over recent years, tax and regulatory changes have been enacted in the UK to facilitate Islamic finance transactions in the UK or using English law or utilising one of the UK based service providers. The UK government has itself issued a benchmark issue of *sukuk* (Islamic bonds). The UK's leading position has been secured notwithstanding that the overwhelming majority of issuers or borrowers are outside the UK, many being in the Middle East, but issuers in developing markets such as African countries with significant Muslim populations are increasingly utilising the Islamic finance market.

In order to comply with *shari'a* requirements, Islamic finance transactions are frequently structured involving the transfer of commodities or other assets, and, particularly where more than one bank or investor is providing the finance, it is common to see trusts or similar arrangements, for example for the purpose of holding security. The current exemptions will not cover the trust arrangements utilised in these markets. In order to enable the UK to maintain its position, and to enable English service providers and English law to remain competitive, we suggest that the exemptions be extended to cover these transactions, at least in the wholesale financial markets, which, in the same way as with conventional wholesale financial market transactions, can be seen as low AML risk. We suggest that the exemptions be extended at least to cover transactions of a type covered by any one of article 77A RAO or sections 71 or 73 of the Finance Act 2003.

1.4 **Exemption 2(g)**

We are grateful to HMT for providing an exemption for trusts arising in relation to bond issuances, however, we note that some trusts may unintentionally fall outside the drafting of the exemption. Various types of trust may arise in relation to a capital markets transaction. For example, in relation to a securitisation transaction, there may be a bond trust, a security trust, a share trust, a collection account trust and turnover trusts. While these trusts share the common features of being bare trusts and driven by structuring considerations, they do not all strictly arise in relation to the subscription agreement despite being in the spirit of the exemption.

We therefore seek to address this in our suggested amendments to this exemption in paragraph 3 of Schedule 4.

Our suggested amendments also capture some capital market transactions which, while in the spirit of the exemption, may fall outside the drafting of the exemption. For example, where a securitisation originator trust is used to move assets into a securitisation because there are obstacles to selling assets in the traditional way (e.g. there is a prohibition on sale/assignment of the loan agreement), it should be clear that such arrangements are captured in the exemption. They are a structuring device used to facilitate the transaction where a true sale is not possible.

The same applies to mortgage/receivables master trusts which are used to hold the assets in a master trust securitisation, most commonly residential mortgages or credit card receivables. Again, they are common structuring device used as part of a securitisation transaction and should be included in the exemption.

To reflect the spectrum of capital markets transactions, we would suggest referencing regulation 32(2) MLRs in the exemption which references the instruments which fall within article 77 or 77A RAO and the securities which fall within article 78 RAO.

In relation to limb (iii) of the exemption as currently drafted, at the end of the implementation period, by virtue of Schedule 8 of the European Union (Withdrawal) Act 2018, only a UK central securities depository (**CSD**) would be authorised under the CSDR (i.e. CREST). This does not reflect the reality of bond issuances, many of which are settled in Euroclear, Clearsteam and The Depository Trust Company. To limit the exemption to CREST, risks driving transactions offshore without any rationale. To ensure the relevant CSDs are captured, we have proposed referring to CSDs which are recognised by central banks and monetary authorities who are members of the Bank for International Settlements (**BIS**). We believe that if a BIS member is comfortable that the settlement system meets the requirements of BIS and, as a result, is recognised by them, this ought to address any concerns of criminal activities in relation to the relevant system.

Our other suggested amendments broaden the list of entities to whom the securities or instruments are issued or will be issued. For example, in some capital markets transactions, the managers may not be authorised persons (e.g. if they are non-UK persons) and not all underwriters may be authorised persons (e.g. they may be exempt). This is also relevant in the context of Brexit where European entities currently authorised may cease to be. In each case, our amendments draw on terminology and principles consonant with the MLRs.

We also consider that, as set out in the introduction to our response to this question, the exemption should apply to both type A trusts and type B trusts to avoid illogical and arbitrary results. For example, in a bond issuance, if the bond trustee is a UK entity, the bond trust would be subject to exemption 2(g). However, if the bond trustee is a non-UK entity (which enters into a business relationship in the UK with a relevant person), it would be a type B trust. This example demonstrates the different results which can be reached in respect of the same trust with the same beneficiaries depending on whether the trustee is a UK or non-UK entity. There are no grounds for such a distinction.

2. **Definition of type B trust**

For non-UK trusts which are express trusts to be type B trusts they either need to 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 very clearly[22] 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 these intended timings and would apply to trusts which entered into business relationships or acquired land interests historically even if such relationships have subsequently ceased or such land interests have been disposed of. Therefore, we suggest that the legislation is amended to reflect the intention stated in the 2019 consultation that the TRS requirements only apply where business relationships are entered into or land is acquired on or after 10 March 2020 (or if later, the date the TRS requirements come into force).

We also consider that linking the definition of type B trusts to business relationships in the UK with relevant persons could put UK AML regulated service providers, such as law firms, accountants and banks (i.e. relevant persons), at a competitive disadvantage to other jurisdictions which have not yet implemented the trust registration requirement in 5MLD or have implemented it more leniently. If the

[22] Paragraph 9.7 of 2019 consultation.

action of appointing UK relevant persons to provide AML regulated services triggers a registration requirement under the TRS requirements for non-UK trusts, this may discourage trustees of non-UK trusts from using such providers in favour of jurisdictions where the registration requirements are more lenient or do not exist. This would not only harm UK businesses but could result in a higher AML risk as these entities will no longer come within the UK's AML regime. HMT's 2019 consultation expressed an intention to only bring non-UK express trusts that are deemed to be administered in the UK by virtue of having one UK trustee (even if there is a non-UK settlor and there is no other connection with the UK) within the scope of the TRS requirements via the entering into a business relationship criteria.[23] We consider that this is a more proportionate approach which should be reflected in the legislation.

In addition, as mentioned in our responses to Question 1 and Question 2, we consider that all the exemptions to type A trusts should apply to type B trusts and we have highlighted specific reasons in those responses. Any difference in treatment between type B trusts and equivalent type A trusts may make non-UK persons disinclined to do business in the UK.

Further, we note the additional requirement in regulation 45ZA(5) of the proposed legislation on trustees of type A and type B trusts who, in their capacity as such, "*have a controlling interest in a third country entity*" to provide HMRC with information on the third country entity. We understand that this requirement would be implementing paragraph 4(d) of Article 31 5MLD. However, we have grave concerns about the unintended consequences of this requirement, which have been hard to assess given the short timeframe in which to respond to this consultation. Before this provision comes into force, we think the impact on UK businesses needs to be fully considered and understood, and the proportionality of this requirement needs to be assessed in light of the fact that the EU Member States have not yet implemented 5MLD (as referred to in our general comments) and in light of Brexit.

We do see some merit in type A trusts being required to notify HMRC of their controlling interests in third country entities, even though this may represent a significant burden for trustees for reasons set out below. However, we consider that the requirement may be a disproportionately heavy burden for trustees of non-UK express trusts simply because they have entered into a business relationship in the UK with a relevant person or acquired an interest in land in the UK. For example, if a Jersey trustee (in its capacity as trustee) enters into a client relationship with a UK law firm, it will be required to notify HMRC of any controlling interests in third country entities that it holds on trust even if such client relationship does not relate to any of those third country entities. Another example is, if a non-UK security trustee on a financing on which a UK law firm is acting has to take legal title to shares in a third country entity when taking security, it will be required to notify HMRC of the details of the third country entity. Once again, this could make UK AML regulated service providers far less attractive causing significant unintended consequences to UK businesses. This would not be a good place for the UK to be in post-Brexit given that

23 Paragraph 9.19 of 2019 consultation

the UK economic output relies heavily on its service industry and UK citizens rely heavily on the service industry for jobs.

We have reservations about this requirement in its entirety, however, if HMRC feels compelled to bring in this proposed legislation we think it would help if the extent of the scope of type B trusts could be narrowed by making the type B trusts subject to the same exemptions as type A trusts. Without (at the very least) extending the exemptions to apply to type B trusts, this requirement could raise real issues for UK businesses when non-UK trustees that have controlling interests in third country entities (in their capacity as such) are considering doing business in the UK with relevant persons. As said, in the time allowed it has been hard to assess the impact of this. Perhaps the proportionate approach is for regulation 45ZA(5) not to apply to type B trusts.

In addition, the scope of regulation 45ZA(5) is particularly burdensome as it requires the trustee to register all third country entities in a corporate chain i.e. below the top third country entity that is the subject of the trust. This is because the definition of controlling interest in regulation 45ZB(4) of the proposed legislation refers to the specified conditions in Part 1 Schedule 1A CA 2006 (i.e. the conditions for the PSC regime) and the first, second and third of these conditions apply directly and indirectly – the indirect test being a majority stake test under paragraph 18 Schedule 1A CA 2006. This means that the trustee would need to register third country entities that sit below the third country entity that is the subject of the trust and, unlike the PSC regime, there is no cut-off when looking through corporate chains.[24] Given the size of corporate structures, this could lead to the trustee having to register a large number of third country entities. We understand that this requirement in 5MLD is to increase the transparency around non-EEA legal entities that are owned and controlled by trusts, however, we think that the sheer magnitude of this disclosure requirement is a further reason to not only narrow the scope of type B trusts, but more fully understand the impact of regulation 45ZA(5).

Furthermore, we have some drafting points on regulation 45ZB(4)(a) (there may be others):

(a) We think it should also modify paragraph 1 Schedule 1A CA 2006 as the references to "company" and "person with "significant control" over the company" in paragraph 1 do not quite work. For instance: "This Part of this Schedule specifies the conditions at least one of which must be met by an individual ("X") in relation to a third country entity ("company Y") in order for the individual to be trustees that have a controlling interest in a third country entity (in their capacity as such).".

(b) Should the fifth condition in paragraph 6 Schedule 1A CA 2006 apply as the proposed legislation is trying to determine whether a trustee has a controlling interest in a third country entity? Is it right to then consider who has the right

[24] The PSC regime requires only registrable PSCs and registrable relevant legal entities to be recorded on PSC registers to avoid duplication of information on PSC registers in corporate chains (see sections 790C(4), 790C(8) and 790M CA 2006).

to exercise, or actually exercises, significant influence or control over the activities of the trust?

(c) Part 2 Schedule 1A CA 2006 is not relevant as these provisions are required for the interpretation of the non-duplication provisions in sections 790C(4) and (8) CA 2006, although query whether any non-duplication provisions should apply.

(d) Paragraph 24 Schedule 1A CA 2006 has been omitted. How should "significant influence or control" be interpreted in the fourth and fifth conditions in paragraphs 5 and 6 Schedule 1A CA 2006 respectively without statutory guidance?

3. **Information required to be registered – complexity of the "beneficial owner" definition**

Regulation 45ZA(4) of the proposed legislation would require trustees to notify HMRC of certain information in relation to the "beneficial owners" of the trust. Regulation 6 MLRs sets out who the beneficial owners of trusts are for the purposes of the MLRs and the TRS requirements would, therefore, require the registration of information on each of the persons listed in regulation 6(1). This means in addition to the settlor, trustees, beneficiaries and class of beneficiaries for whom the trust is set up, "*any individual who has control over the trust*" (see regulation 6(1)(e)) would also have to be identified and registered. Regulation 6(4)(a) then provides that "*where an individual is the beneficial owner of a body corporate which [...] has control over the trust, the individual is to be regarded as [...] having control over the trust*".

You then need to look to regulation 5 MLRs to determine whether an individual is the beneficial owner of a body corporate. This leads to having to carry out an analysis under the PSC regime under Schedule 1A CA 2006 and under the subsidiary undertaking test in section 1162 and Schedule 7 CA 2006. The PSC and subsidiary undertaking analysis can be very complex and we consider that it will be impossible for a lay person to understand these provisions without legal advice from a lawyer that understands these CA 2006 provisions. This will have a significant impact on trustees in terms of cost and timing when complying with the TRS requirements, in particular on non-professional trustees, and may mean that many trustees will inadvertently breach this proposed legislation due to not realising the full extent of what is required to be registered.

The extent of the analysis to identify the beneficial owners also directly impacts the amount of due diligence required in relation to historic trusts and risks making it an impossible task. From our discussions with you, we understand that the registration requirement is intended to be proportionate and not lead to extensive due diligence exercises (and we note that this is partially reflected in the details required to be registered under MLD5 being less extensive than those required for relevant taxable trusts). We consider that the TRS requirements should be limited to only registering the details of the settlor, trustees, beneficiaries and class of beneficiaries in relation to the trust and not include individuals who have control over the trust. This appears to be the most proportionate approach.

If HMRC feels compelled to include persons who control the trust as beneficial owners (in addition to the settlor, trustees, beneficiaries and class of beneficiaries) then we suggest that the requirement is to identify any firm or individual who controls the trust. This would mean that, in the same way as for the settlor, trustees and beneficiaries, a body corporate could be named as the person with control over the trust. This would remove the disproportionate need for a complicated PSC and subsidiary undertaking analysis to be carried out and make the TRS requirements easier to comply with.

4. Areas that should be covered by the guidance

4.1 "Express trust"

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, we think that the guidance should set out what is meant by express trust. Trusts are not easily understood by lay persons and even some non-trust lawyers would need to research what is meant by express trust in order to understand which trusts are in scope. Accordingly, we think it is imperative that any guidance published by HMRC should set out a clear definition of what is meant by express trust. On a fundamental level, people need to understand whether or not their trust is an express trust in order to determine whether it needs to be registered.

This point is emphasised in a foreign law context when trying to determine whether a type A or type B trust exists, which involves ascertaining whether a trust is an express trust. To undertake this analysis in respect of legal arrangements which may not have the nomenclature "trust", it is essential to have a clear definition of express trust to apply to a particular arrangement.

The technical consultation contemplates guidance but does not state whether the guidance will be statutory or non-statutory, although the assumption is that it will be non-statutory guidance as the proposed legislation does not provide for guidance to be issued. You may want to consider whether the definition of express trust should be set out in statutory guidance. For an example, please see BEIS' statutory guidance on the meaning of "significant influence or control" over companies in the context of the register of people with significant control which was issued pursuant to paragraph 24 Schedule 1A CA 2006. BEIS also issued non-statutory guidance to assist people that set up, own and run UK legal entities in understanding their statutory obligations under the PSC regime - it explains the law and is intended to help people comply with the PSC regime. Having non-statutory guidance would be preferable to having no guidance at all.

4.2 Guidance on the exemptions

We consider that it is imperative that the exemptions are set out in the legislation to give certainty to trustees. However, we think that it would be helpful if the guidance contained further information on the exemptions set out in the legislation and the principles behind them. The guidance could explain what the exemptions are intended to cover and give specific examples. This will assist people carrying out legitimate business in determining whether their trust is in scope or not, and give them some comfort when making the decision. The guidance could also give commentary around why the exemption has been included so that people understand the background to the exemption being included to assist with the interpretation of the exemptions. We would expect this to be non-statutory guidance.

4.3 **General and limited partnerships**

Neither general partnerships established under the Partnership Act 1890 (**1890 Act**) nor limited partnerships registered in accordance with the Limited Partnerships Act 1907 (**1907 Act**) have separate legal personality (save for Scottish partnerships established under these Acts), which means that they are unable to hold assets in their own name.

For both types of vehicle, sections 20 and 21 of the 1890 Act apply concerning partnership property, which state that all property either originally brought into the partnership stock or acquired on account of the firm in the course of partnership business must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement and that, unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm. In the case of limited partnerships, the limited partnership agreement usually provides that the general partner, which is responsible for the management of the limited partnership, will hold partnership assets on behalf of the limited partnership.

Leading practitioner texts and case law are contradictory as to the nature of the arrangement whereby assets of these partnerships are actually held.

It is our view that, except in circumstances where both English general partnerships and limited partnerships hold real property directly, the method by which such partnerships hold assets should not constitute 'express trusts' requiring registration under the TRS requirements. In view of the fact that this is an extremely complex area of law on which there is no consensus view, we suggest that guidance should be put in place to add certainty for practitioners and the general public alike that, unless the partnership is holding real property directly, these partnership arrangements whereby one or more partners hold partnership assets for the partnership will not fall within the definition of an 'express trust' and will not require registration.

We consider that the nature in which general partnerships are commonly used by the general public (for example, as family-run businesses) presents a low AML risk, and that requiring such individuals to conduct a complicated legal analysis to assess whether the nature of their partnership constitutes an express trust would be overly burdensome and not proportionate to the risk posed.

English limited partnerships registered in accordance with the 1907 Act are commonly used as fund and joint venture vehicles in the private equity, private debt, infrastructure and real estate context. It is our view that these vehicles are a low AML risk. Firstly, limited partnerships must be registered with Companies House, and details to be provided on registration include the name of each general partner and limited partner. Additionally, Companies House must be notified on the occurrence of any change to the partners (including changes brought about by transfers of interests). Secondly, in the UK, a limited partnership used in a funds context will typically constitute an alternative investment fund, the management of which is a regulated activity. This means that the manager of the fund (either the general partner or a separate manager entity to whom the general partner has delegated management) will need to be authorised by the FCA (assuming management activity takes place in the UK). Before admitting investors into the fund as limited partners, the general partner/fund manager must carry out 'know-your-customer' and AML checks to assess the risks of criminal activities.

It is our view that requiring partnerships (particularly English limited partnerships) to register with the TRS will make the UK significantly less competitive when compared to other markets, and discourage both fund managers and investors from doing business in the UK due to the additional costs and administrative burden that registration would entail. The UK private equity industry is already experiencing a significant decrease in the use of English limited partnership structures as fund vehicles because so many UK-headquartered private equity houses have opted, and are continuing to opt, to use Luxembourg and Ireland-based structures in order to take advantage of the passporting rules under the Alternative Investment Fund Managers Directive post-Brexit. According to the British Private Equity and Venture Capital Association (**BVCA**), the industry body for private equity and venture capital in the UK, during 2014-2018 BVCA members invested over £38 billion into nearly 2,800 companies based in the UK, and employ around 843,000 people on a full-time equivalent basis in the UK.[25] In view of the obvious importance of the private equity and venture capital industry to the UK economy, in our view, it is essential that UK fund vehicles remain as attractive as possible to fund managers and investors, particularly in light of the on-going uncertainty surrounding Brexit.

[25] Statistics from the BVCA response to HMRC's consultation on international Tax Enforcement: disclosable arrangements, 11 October 2019.

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

In our response to this question, we cover the below matters relevant to the registration deadlines and penalty regime imposed by the TRS requirements:

(a) grandfathering rights for existing trusts;

(b) longer registration periods for existing trusts to allow for diligence, and inconsistencies in the timing for registration between the technical consultation and the proposed legislation;

(c) confirmation that the sanctions for breach of the TRS requirements are civil penalties; and

(d) the interaction of regulation 45ZA of the proposed legislation with regulation 44 MLRs (obligation on trustees to maintain written records).

1. **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.

There are numerous examples where the diligence required would be unmanageable and disproportionate to any AML risk. We have highlighted some of these already in our response to Question 1. A further example is in a structured debt context where some notes may be very long dated (it is not uncommon for some secured corporate deals to have maturities of 40 years or more). All outstanding notes spanning such periods would have to be audited to see if they fell within exemption 2(g).

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 five years before the registration date (i.e. trusts created on or after 10 March 2017) and continuing to exist at the registration date.

2. **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 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 — please see our comments in paragraph 3 of our response to Question 2 for more details).

Awareness of the TRS requirements is undoubtably currently quite low (especially amongst non-professional trustees) and we consider that even with significant awareness raising programmes 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. Therefore, we consider that 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.

We also note that there is currently inconsistency in the descriptions of the timing for registration of trusts set out in the technical consultation[26] and regulation 45ZA(6) of the proposed legislation. We query why this is the case. In addition, regulation 45ZA(6) refers to whether trusts have been set up at specified dates whereas the consultation refers to trusts in existence at the relevant dates. We consider that it is correct to refer to trusts in existence, otherwise regulation 45ZA(6)(a) has the non-sensical result of requiring every historic trust set up before 9 February 2022 (i.e. since time immemorial) to register notwithstanding that the majority will have ceased to exist for a number of years. We consider that this regulation should refer to trusts in existence at the relevant cut-off dates (taking into account our comments about extending the relevant timings for historic trusts).

3. **Penalties for breach of TRS requirements**

We welcome the approach taken to the proposed penalty regime for breach of the TRS requirements which we believe in general strikes an appropriate balance taking into account that many non-professional trustees may not be aware of their obligations under the TRS requirements notwithstanding any awareness raising programmes which are instigated and that trustees (especially in relation to existing trusts) will be reliant upon others to obtain the information required to comply with their obligations.

However, we consider that the offences of failure to register on time and failure to keep the record up-to-date, which are administrative offences, should not result in criminal offences which we consider to be disproportionately harsh. Taking into account the broad scope and historic nature of trusts to which the TRS requirements could apply, the complexity of the TRS requirements and the non-professional nature of many trustees likely to be affected, we consider that the 'nudge letter' and penalties should be civil in nature. A civil only regime goes a long way to addressing the concerns of trustees unknowingly committing criminal offences (e.g. cross defaults under joint venture or finance agreements triggered because of a criminal offence

[26] Paragraph 3.22 of the technical consultation.

having been committed). A criminal offence may still be appropriate for deliberate and persistent breaches of the TRS requirements and trustees found to be involved with criminal activities could already also be subject to separate penalties under the MLRs and Proceeds of Crime Act 2002 which ensures that the sanctions can escalate if needed.

Currently, the enforcement provisions for the MLRs are set out in Chapter 9 of the MLRs by reference to the "relevant requirements" set out in Schedule 6 to the MLRs. The existing obligations to register and keep up to date the beneficial ownership of relevant taxable trusts under regulations 45(2) and 45(9) are "relevant requirements" which can lead to criminal sanctions under regulation 86. If the new obligations under regulation 45ZA are to have a different, civil penalty regime only (which we consider that they should), then the legislation should make this clear.

4. **Regulation 44**

We would also like to draw your attention to the obligation on trustees of "relevant trusts"[27] under regulation 44 MLRs to maintain written records of the beneficial owners of the trust. We are concerned about how this obligation fits with regulation 45ZA of the proposed legislation.

Where a type A trust or a type B trust is required to be registered under regulation 45ZA, the information which would be required to be recorded in respect of such trust is less extensive than the information which is required under regulation 44. We cannot reconcile this difference.

Further, we also find it incongruous that, where a trust is exempt from registration as a type A trust or a type B trust, regulation 44 would nevertheless apply and require written records to be kept about that trust. The trust is exempt from registration because it poses a low AML risk. It is therefore difficult to see the written records having any value.

Accordingly, for consistency and to promote a principled approach to the MLRs, we suggest that exempt trusts are carved out of the regulation 44 requirement and the information requirements in regulation 44 are aligned with regulation 45ZA for type A trusts and type B trusts.

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?

[27] As defined in regulation 42(2)(b) MLRs.

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.

SCHEDULE 1
EXAMPLES OF INCIDENTAL TRUSTS

1. On an asset sale, to the extent any monies, assets, intangible property, benefit of any contract etc. (**assets**) in relation to the business sold are received or held by the seller after completion but should be the buyer's (or vice versa), the asset purchase agreement will often provide that such assets are held on trust for the relevant party until transferred to such party. Such situations can arise because, for example, on complex asset sales it may not always be possible to identify accurately all the assets that should have been transferred with the business and so assets may be in the wrong hands post-completion or assets held by the seller may require third party consent to transfer to the buyer and such consents aren't received until after completion (e.g. rent deposits held by the seller of real property which require the tenant's consent to be transferred). These trusts are low AML risk as they simply arise to ensure that assets held by a party/in a party's name on or after completion of an asset sale that should be held by the other party/in the other party's name are held on trust for the other party until transferred to the other party. They are temporary in nature pending transfer to the person who is beneficially and contractually entitled to the assets. In some instances, they only arise due to circumstances outside the seller's and buyer's control e.g. when waiting for third party consents.

2. If a party receives any monies which it is contractually obliged to hand over to the other party (e.g. the seller of a property which is subject to occupational leases may receive rental payments from tenants after completion which are properly due to the buyer as the new landlord or money received from trade debtors by a seller following a sale of a business that should have been paid to the buyer of the business (see also incidental trusts on asset sales in paragraph 1 above)), it holds these monies on trust pending the payment of them to the other party. This trust is frequently created expressly in the sale agreement. It is low AML risk as it is temporary in nature pending monies being transferred to the person who is beneficially and contractually entitled to them.

3. Under the sale agreement for a property which is subject to occupational leases the seller will usually terminate the property insurance policy at completion and the buyer puts in place its own insurance policy. Typically for a tenanted building, the property insurance is placed by the landlord who recharges the insurance premiums to the tenants under the terms of their leases. On terminating the insurance policy at completion of the transfer of the property, the seller usually receives a refund of the insurance premium paid from the insurer and is contractually obliged to pay this to the buyer to hold on trust for the tenants in proportion to their contribution to the insurance premium. This ensures that the tenants receive the benefit of the refunded premiums to which they contributed. This trust is created expressly in the sale agreement. Furthermore, in this case, the tenants, as beneficiaries of the trust, have no control over the creation of the trust – it is created as a result of the dealings of the buyer and seller and therefore it presents a very low risk of being manipulated by the beneficiary for money laundering purposes.

4. With leasehold property certain trusts can arise over the insurance proceeds received by the party insuring, for example: (i) under a 'hell or high water' lease where the tenant is required to insure the property, any insurance proceeds received by the tenant are held on trust for the landlord; and (ii) under long (capital value) leases

(e.g. residential leases), where reinstatement is frustrated insurance proceeds are divided between the parties with an interest in the property based on the nature of their respective interests and held on trust by insured party prior to being distributed. These trusts are frequently created expressly in leases. They are low AML risk because they only arise in specific circumstances outside the control of the parties (i.e. damage to the property by an insured risk, leading to an insurance pay-out) and are temporary in nature pending the funds being distributed to the parties in their contractually agreed share.

5. Similar arrangements as described in paragraphs 1 to 4 above (for asset sales and real property) exist when moveable, income-generating assets are sold or otherwise transferred. For example, an aircraft leased and operated by an airline may be sold by the owner subject to the ongoing lease. Title transfer and payment of the purchase price will be subject to calculation of rental payments and other amounts related to the ongoing maintenance and usage of the aircraft, which, due to a mismatch in timing between the sale closing and receipts of such payments, may involve the seller and buyer including provisions in the sale agreement requiring a party to hold on trust any payments it is not contractually entitled to pending the payment of them to the other party. These are low AML risk for the reasons stated above.

6. On a corporate group reorganisation, a declaration of trust is commonly used to transfer shares in a UK company when legal title needs to transfer to the buyer immediately e.g. because successive transfers of the same shares need to happen in quick succession. This is a work around to deal with the registration gap issue that arises when a stock transfer form is used to transfer shares for value as such document needs to be stamped by HMRC before the register of members can be written up to reflect the transfer (see paragraph 7(b) in our response to Question 1 for further information). In such cases, the declaration of trust is the stampable document. The seller transfers bare legal title to the shares to the buyer using a "nil" consideration stock transfer form. As the buyer can certify the back of the stock transfer form as not being chargeable with stamp duty because the consideration is under £1,000, the company can update the register of members immediately to reflect the transfer. This is low AML risk given that the trust exists for only a short period of time and also information on the shareholders and PSCs over UK companies can already be found at Companies House.

7. On a rights issue or open offer, if shares are allotted to a shareholder and payment for such shares is not received or is treated as invalid, then the company may make arrangements to sell the shares and hold the proceeds of sale on behalf of the relevant shareholder. We consider this to be low AML risk because this trust arrangement exists purely where the acceptor of the shares has failed to make payment for them and enables the company to make arrangements to sell the shares as part of the rights issue/open offer.

8. On a rights issue, the terms and conditions of the offer require the receiving agent to verify the identification of the person lodging the provisional allotment letter for the purposes of the MLRs that are currently in force. Where the acceptance is not valid, the company can make arrangements to sell the ordinary shares as part of the rights issue (acting as agent for acceptor) and holds the proceeds of sale on trust for the acceptor, subject to the MLRs. This is low AML risk as the proceeds can only be released subject to the MLRs.

9. On a rights issue, where the underwriter places any non-accepted rights shares (known as the "rump shares") in the market for a price in excess of the rights issue subscription price, then the company receives any premium over the rights issue share subscription price on trust for non-accepting shareholders (known as "lazy shareholders") or excluded shareholders (broadly, overseas shareholders who are unable to participate directly in the offer due to securities laws issues) and is required to account to these shareholders for such monies. This is low AML risk as the monies are paid to existing shareholders and the ability to realise any premium for the shareholders is entirely dependent on the market price for the shares at the time at which they are placed in the market.

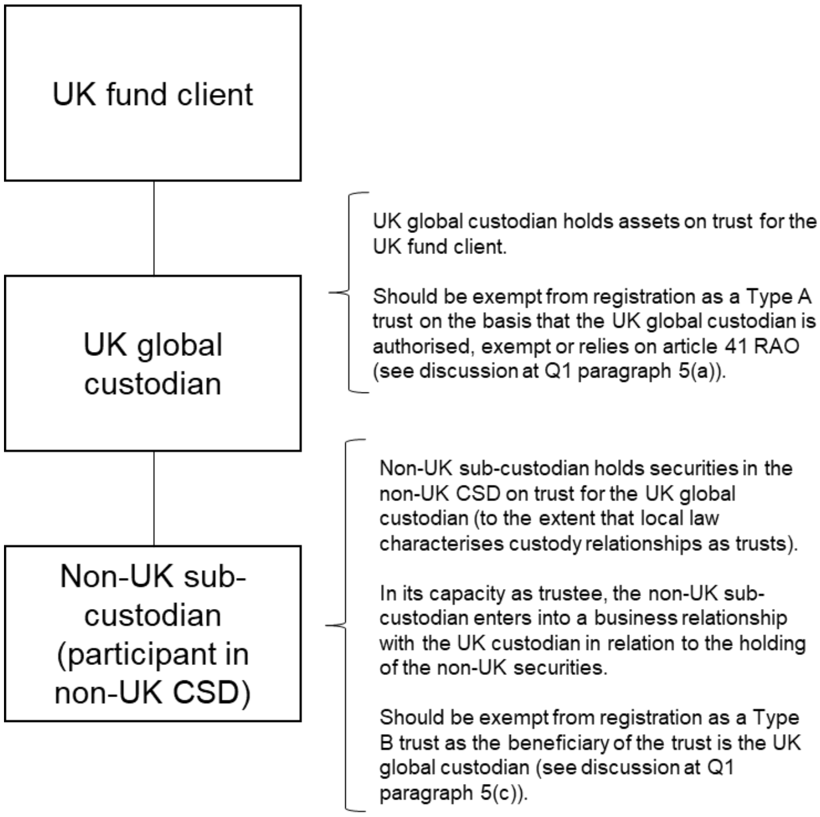
10. On an IPO, where institutional shareholders are selling down their shares as part of the IPO they are required to execute CREST stock transfer forms in favour of a Crest nominee. The Crest nominee is registered as the holder of the shares but holds the shares as nominee for the selling shareholders for the purposes of effecting settlement of the sale and purchase of such shares. On closing, the Crest nominee will hold the sale shares as nominee for the purchasers of the shares. Similar arrangements apply where there are individual selling shareholders and where there is a shareholder who is delivering over-allotment shares. These trust arrangements exist in order for the shares to be dematerialised and as such we consider them to be low AML risk.

11. In connection with any IPO stock loan arrangements, the lender of the shares may transfer the shares to the borrower (usually an investment bank) prior to admission. The borrower will hold those shares as bare trustee for the lender pending admission, at which point the borrower will apply those shares to give effect to the loan and the bare trust will terminate. Alternatively, if admission does not occur by a specified date, the borrower will transfer the shares back to the lender and the bare trust will terminate. These trust arrangements are created purely for administrative convenience and as such we consider them to be low AML risk.

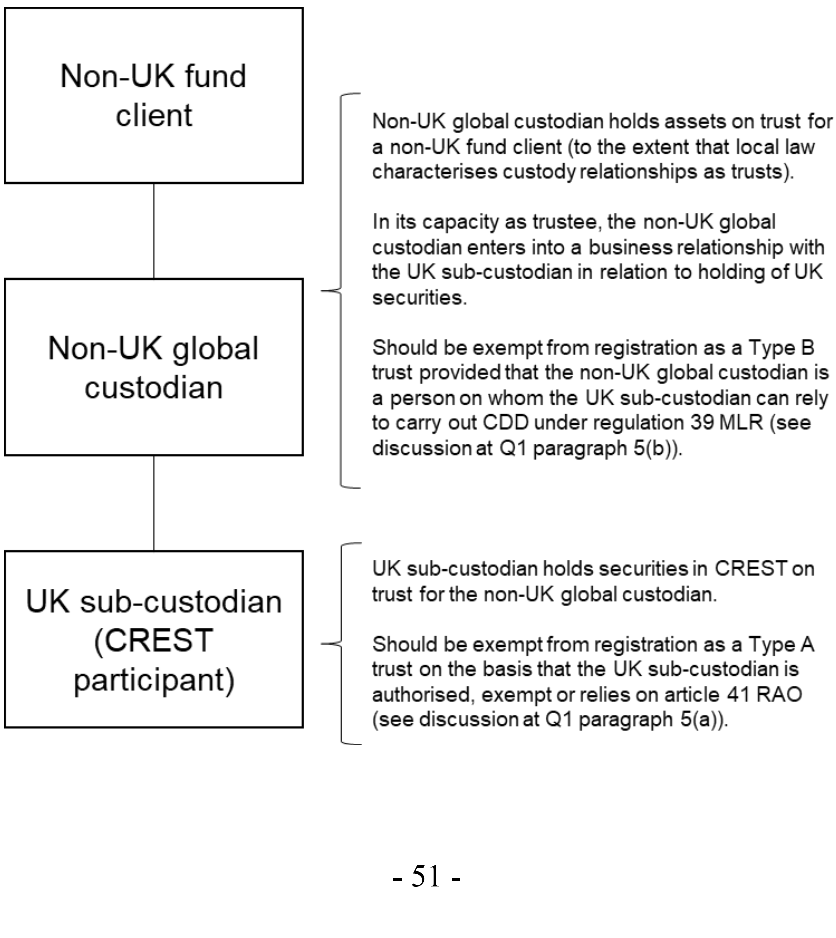
12. On a transfer of an interest in a limited partnership or other joint venture vehicle, to the extent that the outgoing limited partner receives any monies in relation to the interest being transferred after the 'effective date' of the transfer, the transfer agreement usually provides that such outgoing limited partner receives such monies as trustee for the benefit of the incoming limited partner, until transferred to that party. These trusts are low AML risk because they are temporary in nature and only arise to the extent that the outgoing investor receives distributions from the limited partnership pending the incoming investor being registered as the new owner of the interest, and such monies being transferred to the incoming investor who is beneficially and contractually entitled to them.

SCHEDULE 2
EXAMPLE CUSTODY CHAINS

Example 1 – UK fund investing in non-UK assets



Example 2 – Non-UK fund investing in UK assets



SCHEDULE 3
QUESTION 1 – DRAFTING FOR SUGGESTED EXEMPTIONS

1. **Trusts arising under transactional arrangements which are incidental to a larger purpose of the transaction**

A trust arising out of, in connection with, or for the purpose of facilitating, a transfer of:

(i) an ownership interest in a firm, wherever it is incorporated or established;

(ii) a business or undertaking or part of a business or undertaking; or

(iii) an asset or property (whether real, personal or intangible),

(the **transaction**) where the holding of any sums, assets, property or the benefit of any contract on trust is an incidental part of the larger purpose of the transaction.[28]

2. **Temporary trusts**

Trusts which cease to exist within 30 days of the trust being set up, other than where any part of the subject of the trust becomes the whole or any part of the subject of another trust within 30 days of the first trust ceasing to exist.

3. **Agent and trustee arrangements used in contracts to protect third party rights due to the privity of contract doctrine**

A trust arising where a party to a contract expressly receives the benefit of any provision in the contract as trustee for a third party or third parties in order to confer the benefit of that provision, including the right to enforce that provision directly, on the third party (whether or not in addition to the contracting party itself).

4. **Agent and trustee arrangements used in terms of business for the provision of banking and investment services to protect rights of group members due to the privity of contract doctrine**

A trust where:

(i) the trustee is a relevant supervised person; and

(ii) the trustee holds any sums, rights or other assets as security:

(A) for any obligation arising out of or in connection with the performance of any listed activity or any investment services and activities by the trustee or any member of its group; and

(B) for the benefit of the trustee, any member of its group or any officer, employee or contractor of the trustee or any member of its group.

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[28] Parts of this wording are taken from regulation 4(i) The Business Contract Terms (Assignment of Receivables) Regulations 2018 and section 678(2)(b) Companies Act 2006.

"investment services and activities" means any of the services and activities listed in Section A of Annex I of MiFID relating to any of the instruments listed in Section C of that Annex;

"MiFID" means Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments;

"relevant supervised person" means a supervised person other than a third party to whom regulation 39(4) applies;

"supervised person" means a relevant person who is subject to these Regulations under regulation 8 or a person referred to in regulation 39(3)(b) or (c);

5. **Custody**

A trust arising out of or in connection with the holding of assets (including cash) belonging to another where the trustee is:

(i) an authorised person;

(ii) an exempt person;

(iii) a person that, by virtue of article 41 RAO, does not require authorisation under FSMA;

(iv) a relevant supervised person; or

(v) holding the assets for a person referred to in paragraphs (i) to (iv).

"exempt person" means a person who is exempt for the purposes of FSMA;

"RAO" means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001;

"relevant supervised person" means a supervised person other than a third party to whom regulation 39(4) applies;

"supervised person" means a relevant person who is subject to these Regulations under regulation 8 or a person referred to in regulation 39(3)(b) or (c);

6. **Shares in UK companies**

A trust holding only shares in a company.

"company" has the same meaning as in the Companies Act 2006;[29]

[29] 2006 c. 46. See section 1.

7. **Registration gap**

A trust created by a disponor of assets for the benefit of a disponee of the assets arising on completion of the disposition of the beneficial interest of the assets that only exists until legal title to the assets has vested in the disponee, as long as the relevant documents disposing of title to the assets have been submitted to a government department [or its successors][30] within [30 days] of the trust being set up.

8. **Rent deposits**

(a) Option 1 – Rent deposits only exemption

A trust set up for the purposes of holding a cash deposit given as a security in connection with a leasehold interest in land in the United Kingdom.

(b) Option 2 – Wider deposit/retentions/security payments exemption

A trust set up for the purposes of holding sums or assets given as a security, retention, deposit or other credit support in connection with the performance of contractual obligations [in the United Kingdom] and the holding of sums or assets on trust is an incidental part of the larger purpose of the contract giving rise to such contractual obligations.

9. **Service charges**

A trust set up for the purposes of holding or managing service charge payments or operating the service charge arrangements made under a lease of an interest in land.

"Service charge" has the same meaning as in section 18(1) of the Landlord and Tenant Act 1985.

10. **Legal and beneficial owners of the property (tangible and intangible) are the same**

A trust where the trustees and beneficiaries are identical and the beneficiaries have concurrent and not successive interests. / A trust where the trustees hold the asset for themselves entirely as the sole beneficiaries with concurrent and not successive interests.

11. **Intellectual property and intangibles**

A trust arising out of, in connection with, or for the purpose of facilitating, a transfer of:

(i) an ownership interest in an intellectual property right wherever it exists; or

[30] Legislation will need to address possible HM Land Registry privatisation which would mean that HM Land Registry ceased to be a government department.

(ii) an interest in an intellectual property right generated pursuant to the commissioning of a work, or performance of a service or activity by a person for or on behalf of, or in collaboration with, another,

where documentation does not exist, or is insufficient or defective in complying with the formality requirements to convey legal title to such intellectual property right.

12. **Oil and gas**

A trust created by a holder of a licence under the Petroleum Act 1998 in relation to its interest in any licensed area, including any trust created by or on behalf of a site operator (within the meaning of the Energy Act 2008(c)) to hold and accumulate assets under the terms of a funding arrangements plan that is part of a funded decommissioning programme submitted to the Secretary of State for approval under section 45 of that Act.

13. **Lease financing of aircraft and other transportation assets**

(a) A trust arising out of, or in connection with or which otherwise relates to, an agreement (or a document ancillary to or made in connection with such agreement) entered into wholly or mainly for the purpose of granting by one person of a right to possession or control of a qualifying transportation asset to another person for a term in return for a rental or other payment, where the trustee is one or more relevant supervised persons.

"relevant supervised person" means a supervised person other than a third party to whom regulation 39(4) applies;

"supervised person" means a relevant person who is subject to these Regulations under regulation 8 or a person referred to in regulation 39(3)(b) or (c);

"qualifying transportation asset" means any asset (or item of equipment associated with or ancillary to such asset) which is:

(i) an aircraft object as defined in Regulation 5 of The International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015;

(ii) railway rolling stock, which means any vehicle moveable on a fixed railway track or directly on, above or below, a guideway, together with traction systems, engines, brakes, axles, bogies, pantographs, accessories and other components, equipment and parts, in each case installed on or incorporated in the vehicles, and together with all data, manuals and records relating thereto; or

(iii) a United Kingdom ship as defined by section 313(1) of the Merchant Shipping Act 1995;

(b) A trust arising out of, or in connection with or which otherwise relates to, the ownership of an aircraft object (or item of equipment associated with or ancillary to such object) where such trust is, or is to be, registered or otherwise recorded in a public registry.

"aircraft object" means aircraft object as defined in Regulation 5 of The International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015;

14. **Escrow accounts**

A trust holding sums, assets (whether tangible or intangible) or contractual documents in escrow where the trustee(s) is a relevant supervised person.

"relevant supervised person" means a supervised person other than a third party to whom regulation 39(4) applies;

"supervised person" means a relevant person who is subject to these Regulations under regulation 8 or a person referred to in regulation 39(3)(b) or (c);

15. **Guarantee**

A trust set up by an entity which is providing a guarantee of the performance of another entity's contractual obligations to the entity which is receiving the benefit of the guarantee for the purposes of holding any security and rights which the entity which is providing a guarantee has over any assets of the entity whose performance is being guaranteed whilst any liabilities of such guaranteed entity and/or the entity providing the guarantee to the entity receiving the guarantee remain outstanding.

16. **Client account**

A trust holding sums or assets in a client account where the trustee(s) is a relevant person. / A trust holding sums or assets in the client account of a relevant person.

SCHEDULE 4
QUESTION 2 – REVISED VERSIONS OF CERTAIN OF THE EXEMPTIONS SET OUT IN THE PROPOSED LEGISLATION

1. **Revised exemption 2(b) – additional wording in bold/italics**

A trust created by or in order to satisfy the terms of an order of***, or an undertaking given to,*** a court or tribunal.

2. **Revised exemption 2(f)**

(f) a trust arising out of, or in connection with or which otherwise relates to, an agreement (or a document ancillary to or made in connection with such agreement) under which:

(i) a credit or other facility is, or is to be made available to a company which is taxed pursuant to the Taxation of Securitisation Companies Regulations 2006 (as amended); or

(ii) a credit or other facility is, or is to be, made available by or is arranged by, or where the trustee is one or more relevant supervised persons.

"credit or other facility" means an arrangement under which one or more of the parties performs any of the activities listed in points 2, 3, 6 or 7 of Annex 1 to the capital requirements directive or trades in any financial instrument or commodity;

"commodity" has the meaning given by Article 2(6) of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive;

"financial instrument" means any of the instruments listed in Section C of Annex I of MiFID;

"MiFID" means Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments;

"relevant supervised person" means a supervised person other than a third party to whom regulation 39(4) applies;

"supervised person" means a relevant person who is subject to these Regulations under regulation 8 or a person referred to in regulation 39(3)(b) or (c);

3. **Revised exemption 2(g)**

(g) a trust arising out of or in connection with, or ancillary to, instruments or securities of the type specified in regulation 32(2) ("specified instruments") issued or to be issued under an arrangement:

(i) that is, or is to be, listed and/or admitted to trading on a "regulated market" as defined in regulation 3; or

(ii) where the specified instruments are, or are to be, issued to or subscribers for the specified instruments are procured by an "authorised person" as defined in regulation 3;

(iii) where the specified instruments are, or are to be, issued to a "credit institution" or a "financial institution" as defined in regulation 10; or

(iv) to which the capital market exception under section 72B of the Insolvency Act 1986 (as amended) applies; or

(v) where the trustee is a relevant supervised person or an authorised person; or

(vi) where the specified instruments are, or are to be, issued to or subscribers through a central securities depository or clearing and settlement system recognised by any Bank of International Settlements central bank or monetary authority member; or

(vii) where the specified instruments are to be issued by or borrowed by a company which is taxed pursuant to the Taxation of Securitisation Companies Regulations 2006 (as amended).

"relevant supervised person" means a supervised person other than a third party to whom regulation 39(4) applies;

"supervised person" means a relevant person who is subject to these Regulations under regulation 8 or a person referred to in regulation 39(3)(b) or (c);

SCHEDULE 5
REGISTER OF BENEFICIAL OWNERSHIP – SUGGESTED REVISIONS REGARDING REGISTRATION

1. **Regulation 45**

(2) The trustees of a taxable relevant trust must within the time specified in paragraph (3) provide the Commissioners with—

(a) the information specified in paragraph (5) in relation to the trust;

(b) the information specified in paragraph (6) in relation to each of the individuals referred to in regulation 44(2)(b) and (5)(b) ~~(but if sub-paragraph (d) applies, this information does not need to be provided in relation to the beneficiaries of the trust)~~;

(c) the information specified in paragraph (7) in relation to each of the legal entities referred to in regulation 44(2)(b);

(d) the information specified in paragraph (8), where the beneficial owners include a class of beneficiaries, not all of whom have been determined,

but if sub-paragraph (d) applies, the information specified in sub-paragraphs (b) and (c) does not need to be provided in relation to any of the beneficiaries or potential beneficiaries of the trust that form part of the class referred to in that sub-paragraph.

2. **Proposed regulation 45ZA**

(4) The trustees of a type A trust or a type B trust must, within the time specified in paragraph (6), provide the Commissioners with—

(a) the information specified in paragraphs (i) to (v) in relation to each of the beneficial owners of the trust who is an individual, and in relation to any other individual referred to as a potential beneficiary in a document from the settlor relating to the trust such as a letter of wishes—

(i) the individual's full name;

(ii) the individual's month and year of birth;

(iii) the individual's country of residence;

(iv) the individual's nationality;

(v) the nature and extent of the individual's beneficial interest~~,~~;

~~but if sub-paragraph (b) applies, this information does not need to be provided in relation to the beneficiaries of the trust;~~

(b) where the beneficial owners include a class of beneficiaries, not all of whom have been determined, a description of the class of persons who are beneficiaries or potential beneficiaries under the trust;

(c) the information specified in paragraphs (i) to (iii) in relation to each of the beneficial owners of the trust who is a legal entity—

(i) the legal entity's corporate or firm name;

(ii) the registered or principal office of the legal entity;

(iii) the nature of the entity's role in relation to the trust,

but if sub-paragraph (b) applies, the information specified in sub-paragraphs (a) and (c) does not need to be provided in relation to any of the beneficiaries or potential beneficiaries of the trust that form part of the class referred to in that sub-paragraph.

3. **Regulation 44**

(1) The trustees of a relevant trust must maintain accurate and up-to-date records in writing of all the beneficial owners of the trust, and of any potential beneficiaries referred to in paragraph (5)(b), containing the information required to be provided to the Commissioners by regulation 45(2)(b) to (d) and (5)(f) and (g).