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21 February 2020

Dear Sirs

Fifth Money Laundering Directive and Trust Registration Service
Technical consultation document

We welcome the opportunity to comment on the technical consultation document and to express our concerns below.

The Chartered Governance Institute is the professional body for governance. We have members in all sectors and our Royal Charter purpose is to lead 'effective governance and efficient administration of commerce, industry and public affairs'. With more than 125 years' experience, we work with regulators and policy makers to champion high standards of governance and provide qualifications, training and guidance. The Institute is the professional body that qualifies Chartered Secretaries and Chartered Governance Professionals, which includes company secretaries. Company secretaries have a key role in companies' governance arrangements including, in many cases, their compliance with money laundering regulations.

The Institute is also the parent of ProShare, which has been the voice of employee share ownership since 1992 when it was established by HM Government, a group of FTSE 100 companies and the London Stock Exchange to promote wider share ownership. Today, its focus is solely on helping to promote employee share ownership in the UK and to represent employee share plan practitioners and professionals.

Our members are therefore well placed to understand the issues raised by the directive and its transposition.

We offer below some general comments and then some specific answers to the first two questions raised in the consultation. Given the wide-ranging nature of the consultation, we have focussed the latter on those areas in which our members have particular knowledge and experience.

General comments

In our response dated 10th June 2019 to the original Consultation on the Transposition of 5MLD, we drew the attention of HMRC to the potentially disproportionate impact that transposition would have were Employee Ownership Trusts and Employee Benefit Trusts included within the definition of an 'express trust'.

As we said in that response, "Not only will the inclusion of these vehicles, which we would suggest are particularly low risk, impose significant additional compliance requirements, and associated costs, upon those engaged with the management of such trusts, it is likely that service providers will seek to pass these costs on to the settlor companies, thereby disincentivising them from making shares available to employees, which we believe to be against the Government's UK public policy.

Perhaps more importantly, the number of beneficiaries involved can be significant, with hundreds, thousands or, in the case of the very largest SIPs, hundreds of thousands of beneficiaries. We believe it important to establish a mechanism whereby the personal details of these private individuals are exempt from registration requirements and from capture within the definition of 'legitimate interest' which we believe should be restricted to legitimate law enforcement organisations and activities."

By way of example, we referred to the Disguised Remuneration Regulations. These included sensible, limited carve-outs which maintained employee share plans' effectiveness without any risk to or undermining of the legislation's central purpose.

We were therefore delighted to see, in paragraph 3.14 of the current consultation, that trusts relating to "approved share option and profit-sharing schemes" would not be included in TRS. However, on reviewing the new section 45ZA it was not immediately apparent to us how the statement in paragraph 3.14 had been carried through into the draft legislation. More importantly, in our view the statement in paragraph 3.14 does not go far enough to cover all the forms of trust or nominee arrangements connected with employee share schemes including, potentially, some Employee Ownership Trusts and Employee Benefit Trusts.

In this regard, we have seen the detailed response submitted to you by Nicholas Stretch of Ashurst LLP on behalf of the Share Plan Lawyers group. We agree with their analysis and support their recommendations to you.

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.

Yes, there other express trusts that should be out of scope. As outlined in our general comments above and explained in more detail in the Share Plan Lawyers response, nominee arrangements associated with share schemes and any employee share trust should be exempted from the Reg 45ZA requirements.

In the event that the Government proceeds with the implementation of the EU CSD Regulation into UK law, one of the likely scenarios is that there will be company nominee arrangements established to facilitate the dematerialisation of individual retail shareholdings currently evidenced through paper share certificates without requiring those individuals to use the services of an intermediary. Any such nominee or trust arrangements should also be excluded from TRS for similar reasons.

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?
No, the proposed definitions and descriptions do not give enough clarity. We would welcome more guidance on the treatment of nominee arrangements associated with share schemes and any employee share trust to confirm that they are not within scope of the new regulations.

We hope you find our comments helpful and would be happy to expand on any of these points should you wish to discuss them further.

Yours faithfully

Peter Swabey
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Executive Director, ProShare