Out in the wash

Nigel Jones talks through the latest anti-money laundering legislation and the responsibilities it places on pension fund trustees

In the fight against organised crime and terrorist financing, money laundering has changed significantly since the Proceeds of Crime Act 2002 came into force as the UK's primary anti-money laundering (AML) legislation. As part of the continuous evolution of AML, new money laundering regulations came into effect last June, which implement the EU's Fourth Money Laundering Directive (4MLD) and replaced the Money Laundering Regulations 2007.

As a result of new duties imposed by these regulations, trustees of occupational pension schemes are required to maintain accurate, up-to-date records in writing of all the 'beneficial owners' of the trust. There are a variety of circumstances where they may have to disclose this information: upon request when entering into a transaction or a business relationship with third parties that are required to perform anti-money laundering checks, or where required by a UK law enforcement authority such as the National Crime Agency or the Serious Fraud Office.

There is a further obligation introduced by the regulations on trustees in relation to pension schemes that are 'taxable relevant trusts'. In general terms, these are schemes that invest directly in real property or in shares and incur liability for various taxes, including income tax, capital gains tax and stamp duty land tax. Affected trusts have to register with HMRC and are required to supply information for inclusion in its new trust register.

How far the duties placed on trustees would extend remained unclear until guidance (in the form of FAQs) was published by HMRC in November 2017. In updating earlier guidance, the FAQs offer some good news in that they appear to confirm that for schemes that have more than 10 beneficiaries (members), trustees are only required to maintain individual records of beneficiaries, and not those of potential beneficiaries such as a member's spouse, until such time as they stand to benefit from the trust. Furthermore, when they provide beneficial ownership information to HMRC (just like the current obligation when transacting with third parties), trustees only have to identify the class of beneficiaries as opposed to providing the details of individual beneficiaries.

In view of the possible penalties that are attached to non-compliance (a hefty fine and potentially up to two years' imprisonment), trustees should make themselves familiar with all aspects of the new record-keeping requirements. In addition, they must ensure that member information is kept up to date and complete in so far as it is possible and practicable to do so. Where necessary, they should approach their investment advisers for guidance in order to identify whether a particular scheme would be treated as a 'taxable relevant trust'. Should this be the case, they will then be subject to registration and reporting requirements imposed by HMRC – either now or at some point in the future.

Although the new requirements appear to be proportionate in response to the legitimate objectives of disrupting money laundering and terrorist financing, trustees are unlikely to have heard the last word on the subject when it comes to new regulations: EU processes for the Fifth Money Laundering Directive (5MLD) are already underway. This seems set to break fresh ground. For the first time in UK law, where a 'legitimate interest' test is met, there will be a requirement on HMRC to release into the public domain the relevant information on the beneficial ownership of trusts. Just how 5MLD will apply to occupational pension schemes remains unknown, but there is presently no exemption for such schemes. Almost certainly, this will be transposed into UK law as part of any forthcoming post-Brexit transitional arrangement.

Written by ARC Pensions Law senior associate Nigel Jones