

From the President

113 Chancery Lane
London WC2A 1PL
Dx 56 Lon/Chancery Ln
Tel 020 7242 1222
Fax 020 7831 0344
www.lawsociety.org.uk

Ed Balls MP
Economic Secretary
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ



The Law Society

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Dear Ed

Thank you for your letter of 4 June 2007 and for the opportunity to meet with you and your officials to discuss the definition of beneficial ownership in the draft Money Laundering Regulations 2007.

The Law Society has reviewed the proposed new definition in consultation with our members, STEP and Counsel. We are pleased to see that the definition has achieved clarity for trust law and that steps have been taken to make the obligations more proportionate to the very minimal money laundering risk which applies to all trusts (including discretionary trusts, which we do not consider to be high risk, as suggested in your letter).

The Law Society welcomes the retention of the ability to identify a class of beneficiaries by description as set out in paragraph 9 of the preamble to the directive, as opposed to identifying the individuals within that class, and the more precise definition of a specified interest. The deeming of the personal representative to be the beneficial owner of an estate in the course of administration resolves many of the concerns which had previously been expressed regarding this type of trust situation.

Whilst we also welcome the further clarity with regard to the definition of "beneficial owner" in the case of a body corporate, we consider that it remains insufficiently certain. As currently drafted, the definition could include actual voting rights as well as contingent and/or limited rights which may become vested or unlimited in certain circumstances, for example, non voting preference share rights which become voting if the company fails to pay the preference dividend. To remedy this uncertainty, we suggest the following wording:

(2)(a) as respects any body other than a company listed on a regulated market, ultimately owns or controls (whether through direct or indirect ownership or control, including through bearer share holdings) more than 25% of the issued equity share capital or voting rights attributable to the issued equity share capital as currently exercisable in the body;

We also recognise the balance which has been struck in adopting a wider definition of control. However there is one aspect of that definition which causes us significant concern. The proposed definition applies where persons collectively exercise powers with other persons under law or the trust instrument. We are concerned that this will apply very widely and will include situations where beneficiaries have rights to act collectively with respect to the disposal or investment of trust property, meaning that every beneficiary would have to be individually identified. We do not believe that this would be proportionate or is what is intended.

Examples of where this would occur are:

- As a result of the case of *Saunders v Vautier* (1841) 4 Beav 115) where all beneficiaries are of age and absolutely entitled to property (of any percentage) then they may seek to terminate the trust and either dispose of trust property among themselves or have new trustees appointed. This is a rarely exercised power and would require regulated persons continually monitoring the trust to make sure that:
 - the last beneficiary has reached 18 or
 - where there is a class which can be added to by birth, the last female within the class has passed child bearing age.Once that point is reached every single beneficiary will need to be identified individually, irrespective of their level of interest.
- Section 19 of TLATA 1996 allows the beneficiaries under a trust to collectively give a direction requiring a trustee to retire.
- In some pension funds individual beneficiaries are able to direct what type of investment their funds will be used for. As such, collectively, all the beneficiaries have control over the whole of the trust property. The number of beneficiaries in such a fund is significant and it is hard to see how even a majority of them could be convinced to direct their investments in such a way as to facilitate money laundering. It is clearly the intention of the directive that such trusts should generally have their beneficiaries identified by way of class.

Accordingly, the Law Society and STEP recommend that the following addition should be made to the definition of control in sub paragraph 4:

For the purposes of this definition any powers exercisable by the beneficiaries collectively, whether under statute or common law, shall not constitute control.

Again, I thank you for working collaboratively with us to achieve a clear and workable definition of beneficial ownership for the regulations. Aside from the outstanding issues set out above, we are now well positioned to provide assistance to our members on the practical implications of this definition.

Yours sincerely



Fiona Woolf CBE
President