IFA REPRESENTATION 4/19

HM Treasury: Transposition of the Fifth Money Laundering Directive

The IFA welcomes the opportunity to comment on HM Treasury's consultation on the Transposition of the Fifth money Laundering Directive issued on 15 April 2019.

We would be happy to discuss any aspect of our comments and to take part in all further consultations in this area.

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We are recognised by HM Treasury and the Financial Services Authority in the Isle of Man to regulate our members for the purposes of compliance with the Money Laundering Regulations.

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General comments

1. Our comments in this consultation are restricted to the key areas that affect the accountancy profession and our members. Therefore, we have not provided comments to the specific questions in the consultation on the following areas:
    - Chapter 3 - Electronic money
    - Chapter 9 - Trust registration service
    - Chapter 10 - National register of bank account ownership
    - Chapter 13 - Pooled client accounts

2. For other chapters, we have provided general comments and/or comments to specific questions when those questions are of direct relevance to the accountancy profession and our members.

Scope

3. We support the HM Treasury in extending the scope of the anti-money laundering regime in the UK in line with the terms of 5MLD. The proposed extension relates to tax advisers, letting agents, cryptoassets and art intermediaries.

4. In addition, we support HM Treasury's intention to go beyond the scope of the changes introduced by 5MLD so that new regulations encompass all types of cryptoassets to prevent money laundering and terrorist financing risks. We support HM Treasury broadening the scope of the regulations to include crypto-to-crypto exchange service providers, peer-to-peer exchange service providers, cryptoasset automated teller machines, the issuance of new cryptoassets (e.g., through ICOs), and the publication of open-source software (which includes but is not limited to non-custodian wallet software and other types of cryptoasset-related software). This approach would be more in line with approach advocated by FATF under the amended Recommendation 15.

5. We would also encourage HM Treasury to consider drafting the updated MLR in such a way that it captures new entrants into the cryptoassets market such as Facebook.

Beneficial Ownership and Registers

6. We support increased transparency in relation to beneficial ownership and the requirement to have public registers of companies' and trust. We hope other jurisdictions follow suit.

7. We would support the principle of the obliged entities having access to the trust register in order to meet their obligations under the MLRs, facilitate new business relationships and information sharing for those that have a legitimate interest. .

8. In principle, these registers are vital components in the UK's fight against economic crime. However, it is crucial that information contained in these registers is verified by Companies House (companies) and HMRC (trusts). The consultation on the reform of Companies House is timely in this regard. Companies House must have adequate resources and new powers to verify the information contained in its register.

Effective date and transitional arrangements

9. The government intends the provisions of 5MLD to come into force on 10 January 2020. This is aligned with the deadline for EU member states.

10. We are concerned that, once again, government is not allowing enough time for businesses and supervisory authorities covered by the new regulations to make changes to their policies, procedures, controls and systems. At the time of writing, there is no timetable for issuing draft regulations, final regulations and updates to the Anti-Money Laundering Guidance for the Accountancy Sector which must be approved by HM Treasury (as far as we are aware).

11. Considering the above, the IFA would like to ask for a transition period for businesses and supervisors of at least three months to implement the necessary changes required to be fully compliant with any amendments to the MLRs. It does not seem right that delays by HM Treasury in issuing and finalising the Money Laundering Regulations should have an undue impact on businesses and supervisors. .

Specific questions

Expanding the scope in relation to taxation matters

Question 1: What additional activities should be caught within this amendment?

12. It is our view that these amendments will clarify and bring into scope tax advisers who provide compliance and or tax advice to other tax advisers. There are a variety of tax support organisations in the UK, for example network firms, franchises and tax consultancy services. Our interpretation of 'by way of arrangement' means that these organisations will be brought into scope of the Money Laundering Regulations (MLR). Is this the intention?

13. It is important that the regulations are drafted in such a way that volunteers in not for profit organisations that provide professional support free of charge on tax compliance and tax advice are excluded from this amendment. As drafted in paragraph 2.2 of the consultation, volunteers may be inadvertently included in the expansion of scope since the provision of these voluntary services may be regarded as 'professional activity.'

- Paragraph 2.1 of the consultation refers to payroll service providers under the definition of an accountant, provided in HMRC guidance. HMRC guidance refers to 'payroll agents that provide accountancy services and/or tax advice'. The Anti-Money Laundering Guidance for the Accountancy Sector does not refer specifically to payroll agents. While it would be difficult to imagine that there are payroll agents that don't provide accounting and/or tax services to their clients, it would be useful if the MLR and/or guidance clarified that payroll agents are included in the scope.

Question 2: In your view, what will be the impact of expanding the definition of tax advisor? Please justify your answer and specify, where possible, the costs and benefits of this change. .

14. In our view, it would be beneficial to clarify this area of interpretation to avoid misinterpretation.

Customer due diligence

Question 44: Is there a need for additional clarification in the regulations as to what constitutes "secure" electronic identification processes, or can additional details be set out in guidance?

15. In order to avoid misinterpretation, we would support further guidance being included in the MLR on what constitutes 'secure' electronic identification processes. This will provide clarity of understanding to providers of electronic identification processes as well as users of such services.

16. For the same reasons, we would support further guidance being included in the MLR on how to assess whether the electronic verification processes are independent, reliable, comprehensive and accurate to meet the MLR requirements relating to client identification and verification. Some electronic sources can evidence identity from commercial organisations from a range of sources which may not be subject to independent verification and assessment. Having transparent criteria for identity and verification requirements will ensure common standards and consistency in this area.

Question 45: Do you agree that standards on an electronic identification process set out in Treasury-approved guidance would constitute implicit recognition, approval or acceptance by a national competent authority?

17. Yes. It is important to note that the standards on electronic identification processes should be incorporated into sector guidance as well. The guidance issued by the Joint Money Laundering Steering Group is developed for the financial services sector. Any standards that are developed need to be relevant to other sectors within the scope of MLR as well.

Question 46: Is this change likely to encourage firms to make more use of electronic means of identification? If so, is this likely to lead to savings for financial institutions when compared to traditional customer onboarding? Are there any additional measures government could introduce to further encourage the use of electronic means of identification?

18. Many financial services institutions already use electronic means of identification. However, standards and advice on electronic verification by commercial providers is not consistent in this area. Some commercial providers insist that all firms must use electronic identification methods of verification which is clearly not the case in the current MLR.

19. Having clear guidance in the MLRs on when it is appropriate to use electronic identification and the factors that need to be considered to ensure independence, reliability and accuracy of electronic means of identification is likely to increase usage of electronic means of identification for all sectors in the scope of MLRs, not just financial services.

20. Traditional methods of identification verification require the presence of customers and checks of identity documents, which means extensive paperwork and possible errors. By contrast, electronic identity verification can be easier and quicker for both the customer and the service provider. . It is important that commercial providers of electronic verifications have processes in place to ensure that government-issued IDs are authenticated and unaltered in order to ensure that the person associated with the ID exists.

Question 47: To what extend would removing 'reasonable measures' from regulation 28(3) (b) and (4) (c) be a substantial change? If so, would it create any risks or have significant unintended consequences?

21. We do not agree with the removal of 'reasonable measures' from 28(3)(b) and (4)(c) since it is contrary to the risk-based approach advocated by FATF. In addition, there are some practical considerations which need to be considered, particularly for SMEs.

22. Removing 'reasonable measures' from regulation 28(3) (b) and 4(c) would be a substantial change since it obliges relevant persons to verify the information, irrespective of whether independent, reliable and accurate mechanisms exist to facilitate this process. As HM Treasury is aware, identifying and verifying beneficial ownership can be very challenging, given the nature of information available both in the UK and internationally. .

23. Given the importance of registers of beneficial ownership in the debate about transparency of ownership and prevention of economic crime, the IFA would strongly urge the UK government to exercise its influence and take a lead in encouraging and helping to establish public registers for: British Overseas Territories and UK Crown Dependencies (deadline has moved from 2020 to 2023), UK Crown Dependencies (deadline unknown) and register for properties by overseas companies and legal entities (deadline 2021). . This would also help obliged entities to meet their CDD obligations, assuming the registers are public.

24. The UK meets the FATF beneficial ownership register requirements for the most part since it has a Register of People of Significant Influence (PSC) in Companies House. . However, the register does not include all types of entities. Furthermore, as was noted by the Treasury Select Committee in its recent report, the absence of due diligence checks by Companies House due to lack of resources and powers means that the PSC register cannot be relied on. . It is crucial that the government consider the outcome of the Companies House consultation when drafting MLR. .

25. Obliging relevant persons to identify and verify beneficial owners when the mechanisms may not be in place nationally and internationally, is risky and could create unintended consequences. . Our expectation is that accountants would be able to verify beneficial ownership in Companies House. However, information on the register and beneficial ownerships disclosures are not rigorously enforced by Companies House. . If an error in beneficial ownership verification has occurred, would Companies House, the relevant person or the directors of the company be responsible?

26. The rationale for removing 'reasonable measures' from regulation 28(3)(b) and 4(c) is unclear since FATF recommendation 10 (b) includes the term reasonable measures as does paragraph 10.10 in the FATF Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT systems.

27. If 'reasonable measures' is removed, HM Treasury may also want to consider removing 'reasonable measures' from 28(3)(b).

Question 48: Do you have any views on extending CDD requirements to verify the identity of senior managing officials when the customer is a body corporate and the beneficial owner cannot be identified? What would be the impact of this additional requirement?

28. The IFA would support the introduction of this requirement for legal entities such as incorporate charities which are run by trustees. Trustees are not beneficial owners of the charity, but they do control the charity.

29. Guidance will be needed in the MLRs to clarify what is meant by senior management official and what circumstances it would be appropriate to identify and verify the senior management official instead of the beneficial owner, especially if the amendments suggested in question 47 are introduced.

Question 49: Do related ML/TF risks justify introducing an explicit CDD requirement for relevant persons to understand the ownership and control structure of customers? To what extent do you already gather this information as part of CDD obligations?

30. The AML Guidance for the Accountancy Sector (AMLGAS) paragraph 5.1.1 already includes a requirement to 'understand a client's identity and business activities so that any MLTF risks can be properly managed' as well as a requirement on 'knowing the identity of the client, including that owns and controls it'. Therefore, the accountancy sector already gathers this information and introducing an explicit requirement would be inconsequential.

Question 50: Do respondents agree we should clarify that the requirements of regulation 31 extend to when the additional CDD measures in regulation 29 and the EDD measures in regulations 33-35 cannot be applied?

31. We would support this clarification in order to avoid possible misinterpretations of the requirements of the MLRs. However, as far as we are aware, this is not an area that has caused misinterpretation in the accountancy sector.

Question 51: How do respondents believe extending regulation 31 to include when EDD measures cannot be applied could be reflected in the regulations?

32. We would suggest that regulation 31 be extended to cross-refer to relevant regulations, perhaps something along the following lines 'Where, in relation to any customer, a relevant person is unable to apply customer due diligence measures as required by regulations 28, 29, 33-35 that person—'

Question 52: Do respondents agree the requirements of regulation 31 should not be extended to the EDD measures which already have their own 'in-built' follow up actions?

33. Yes. However, to ensure consistency in interpretation, sectoral guidance should include advice on what is meant by 'in-built' follow up actions and reasonable timeframes associated with in-built follow up actions.

Obliged entities: beneficial ownership requirements

Question 53: Do respondents agree with the envisaged approach for obliged entities checking registers, as set out in this chapter (for companies) and chapter 9 (for trusts)?

34. 5MLD also requires that whenever an obliged entity enters into a new business relationship with a company or trust that it is subject to beneficial ownership registration requirements, it must collect either (a) proof of registration on that register; or (b) an excerpt of the register. 4MLD currently requires obliged entities to verify the identity of the customer with whom they enter into a relationship, but they would now be required to collect proof. .

35. The IFA would encourage HM Treasury to make both registers publicly available. Our proposal is that the trust register should look more like the Companies House Register, with changes in trustee information being updated as they happen. This data would help obliged entities meet their CDD obligations in an efficient and effective manner without devoting resources to chase for proof from the trust. . Furthermore, this data could also be used by HMRC to support trustees in meeting their tax obligations.

36. Obliged entities have a legitimate interest in obtaining this relevant information and the easiest way of doing so is to make the register publicly available. It is also important for the UK government to be seen to be leading the way in transparency, although we do recognise that widening transparency of trusts may pose interesting challenges.

37. If the trust register is not publicly available, the IFA would be left with no choice but to support the proposal that the trust provide proof of registration to an obliged entity. There would be no other mechanism for obtaining the required proof by the obliged entity. .

38. We don't understand the rationale for changing the status quo for companies. As stated in the consultation, Companies House register is public, so why would the company be required to provide proof of registration to the obliged entity if this information is publicly available to the obliged entity? The IFA does not see any benefits of a change in approach for companies.

39. We support HM Treasury's proposal that obliged entities will not have to apply this requirement retrospectively. This requirement will only apply to new business relationships.

Question 54: Do you have any views on the government's interpretation of the scope of 'legal duty'?

40. The IFA would support the government's interpretation of legal duty in relation to the requirement for ongoing CDD where there is a duty to review beneficial ownership information.

Question 55: Do you have any comments regarding the envisaged approach on requiring ongoing CDD?

41. No.

Enhanced due diligence

Question 56: Are there any key issues that the government should consider when defining what constitutes a business relationship or transaction involving a high-risk third country?

42. The IFA supports the government's approach of narrowing the definition of 'involving' in order to exclude UK citizens who are also nationals of countries identified as high-risk countries from enhanced due diligence due to a mere connection with a high-risk country e.g., place of birth.

43. To avoid misinterpretation the MLRs should include a definition of involving which could be narrowed to doing business in a high-risk third country. This would exclude transactions involving a high-risk third country which are not for a business activity. .

Question 57: Are there any other views that the government should consider when transposing these Enhanced Due Diligence measures to ensure that they are proportionate and effective in combatting money laundering and terrorist financing?

44. The prescription of enhanced due diligence measures is contrary to the risk-based approach promoted by FATF. . In 4MLD, enhanced due diligence measures were not prescribed yet these measures were deemed to be proportionate and effective at combatting money laundering and terrorist financing.

Question 58: Do related ML/TF risks justify introducing 'beneficiary of a life insurance policy' as a relevant risk factor in regulation 33(6)? To what extent is greater clarity on relevant risk factors for applying EDD beneficial?

45. While this amendment in MLR relates to financial services, the IFA is of the view that there is little evidence of actual money laundering cases related to life insurance policies compared to the actual size of the life insurance market and the number of SARs submitted.

Politically exposed persons: prominent public functions

Question 59: Do you agree that the UK functions identified in the FCA's existing guidance on PEPs, and restated above, are the UK functions that should be treated as prominent public functions?

Yes, we would support this approach. However, it would be helpful if FCA's guidance could be reviewed to clarify the practical considerations relating to appropriate risk-based enhanced due diligence measures arising having different risk indicators for PEPs. FCA guidance is very generic in this area and does not provide clarity for obliged entities. For example, how can enhanced due diligence measures be taken when the FCA guidance for lower risk PEPs states *"Take less intrusive and less exhaustive steps to establish the source of wealth and source of funds of PEPs, family members or known close associates of a PEP."* This does seem counter-intuitive to the meaning of enhanced due diligence for PEPs.

Question 60: Do you agree with the government's envisaged approach to requesting UK headquartered intergovernmental organisations to issue and keep up to date a list of prominent public functions within their organisation?

46. Yes, we agree with this approach. We would welcome this list being publicly available to facilitate due diligence, particularly for SMEs. The consultation document appears to be silent on whether the government envisages this list to be publicly available. .

Mechanisms to report discrepancies in beneficial ownership information

Question 61: Do you have any views on the proposal to require obliged entities to directly inform Companies House of any discrepancies between the beneficial ownership information they hold, and information held on the public register at Companies House?

47. As noted above, the UK regime meets some but not of all the requirements of Article 40 of the 4 AMLD. Not all legal entities are registered in the Companies House register. A company registration number only applies to businesses incorporated or registered at Companies House, primarily limited companies and limited liability partnership. Other legal entities which are not registered at Companies House are co-operative societies, community benefit society and financial mutual which are registered with the FCA and sometimes the Charity Commission (if not an exempt charity).

48. It would be helpful if the MLR made reference to other sources of publicly available information for other types of legal entities to facilitate CDD, especially for SMEs.

49. In principle, we would support mechanisms for obliged entities to report discrepancies to Companies House in order to have adequate, accurate and current information on the company beneficial ownership register. However, beneficial ownership information also relates to other types of legal entities as discussed in paragraph 46above. Therefore, we would recommend that a similar mechanism be created for reporting discrepancies in beneficial ownership information for other regulators such as the FCA.

50. The role of supervisory bodies in investigating and reporting discrepancies in beneficial ownership information needs to be clarified. . In the draft consultation it is unclear to the IFA as to whether supervisory bodies are deemed to be an obliged entity or a competent authority or neither.

51. As a supervisory body, we already check the accuracy of beneficial information for our supervised population against publicly available information. If there are any discrepancies, we approach our key contact in our supervised firm to ask for clarification between the beneficial ownership information we hold and the information held in Companies House public register and other sources. If the discrepancy is due to incorrect information being held in Companies House, we require our supervised firm to update this information and we check that it has been done.

52. Given the above, consideration needs to be given about the role of supervisors in investigating discrepancies in beneficial ownership and whether the reporting mechanisms for supervisors should differ from other obliged entities.

53. Regarding other obliged entities (our supervised population), we would support a mechanism for reporting discrepancies on beneficial ownership to Companies House. . The reporting mechanism would have to be effective, efficient, confidential, secure and provide confirmation to the obliged entity that the matter was being dealt with by Companies House.

54. Furthermore, the obligation to report discrepancies between information available on registers and information available through CDD could cause practical challenges in relation to the Persons of Significant Control (PSCs) register.

55. Beneficial ownership information is not always the same as information on PSCs which relates to significant control. The PSC regime seeks to establish ownership, but only in the context of that ownership leading to control of the relevant entity; i.e., to establish who the 'people with significant control' are over that entity. The concept of a 'beneficial owner' under 4MLD includes people who control the relevant person on whose behalf the transaction is being conducted and, in the case of customers which are corporate entities, it uses broadly the same tests for control adopted under the PSC regime; so that a 'PSC' is similar to a person who is a 'beneficial owner' under 4MLD because he or she controls a customer that is a corporate entity.

56. Other practical considerations for obliged entities relate to CDD. Government must clarify at what point obliged entities have fulfilled their CDD duties if there are discrepancies in beneficial ownership information which have been reported to Companies House. . For example, will the obliged entities CDD obligations only be fulfilled when Companies House confirm to the obliged entity that the discrepancies have been resolved?

Question 62: Do you have any views on the proposal to require competent authorities to directly inform Companies House of any discrepancies between the beneficial ownership information they hold, and information held on the public register at Companies House?

57. In principle, we would support the proposal to require competent authorities to directly inform Companies House of any discrepancies between the beneficial ownership information they hold, and information held on the public register at Companies House. However, there are some practical considerations that need to be resolved regarding the role of supervisory bodies and implications for CDD for obliged entities. .

58. It would be helpful to clarify what is meant by competent authority within the context of this consultation. As drafted, the only competent authority mentioned in the consultation is law enforcement.

59. The role and responsibilities of supervisory bodies in reporting discrepancies to Companies House and other regulators which hold publicly available beneficial ownership information should be clarified as should the reporting mechanisms (see paragraphs 52 and 56).

Question 63: How should discrepancies in beneficial ownership information be handled and resolved, and would a public warning on the register be appropriate? Could this create tipping off issues?

60. Discrepancies in beneficial ownership information should be handled confidentially and securely to avoid tipping off and investigated and resolved promptly by Companies House.

61. HM Treasury should clarify what the position of an obliged entity is if it unwittingly becomes involved in money laundering and or terrorist finance as a result of incorrect information being held in Companies House and discrepancies in this information being reported to Companies House, but no action taken.

Requirement to publish an annual report

Question 88: Do you think it would still be useful for the Treasury to continue to publish its annual overarching report of the supervisory regime as required by regulation 51 (3)?

62. The IFA supports HM Treasury continuing to issue an annual overarching report of the supervisory regime. However, for the supervisory report to be relevant it must be issued in a timely manner and there must be transparency regarding the process and timetable associated with the publication of this report.

63. The last HM Treasury Anti-Money Laundering and Counter-Terrorist Financing: Supervision Report 2015-17 was issued in March 2018 and relates to supervisory activities for the IFA for the period ending 31 March 2017. The IFA submitted its report to HM Treasury for the next iteration by 31 October 2018 for the period ending 31 October 2018. Yet, as at the time of writing, HM Treasury has not issued its supervisory report due to other priorities.

64. In addition, HM Treasury should consider how the publication of its report might be co-ordinated with the publication of OPBAS' themes from its anti-money laundering supervisory assessments for the accountancy and legal sectors which was issued in March 2019. In order to ensure consistency of messaging regarding the AML/CTF supervisory regime, the timing of issuing both reports and the time period that is included in both reports must be aligned to be comparable.

65. Regarding the content of the self-regulatory reports, the IFA is assuming that no additional information will be requested by HM Treasury for the next iteration of the annual supervisory report which is due to HM Treasury by October 2019. As stated in this consultation in paragraph 11.1 the information provided to HM Treasury by supervisors meets the 5MLD requirements of self-regulatory bodies publishing an annual report. Therefore, the IFA is not expecting any further changes in data collection and returns as a result of the transposition of 5MLD. In other words, the data requirements for HM Treasury and the self-regulatory report will be as detailed in MLR 2017 schedule 4.

Other changes required by 5 MLD

Question 90: Are you content that the government's existing approach to protecting whistle-blowers satisfies the requirements in Article 38 of 4MLD as amended?

66. No. The UK's approach to whistleblowing is partial in that it only protects workers in the public, private and voluntary sectors. As drafted, the Public Interest Disclosure Act only protects employees and does not protect owners, directors, and partners of organisations, self-employed individuals, voluntary workers (including charity trustees and charity volunteers) or the intelligence services from retaliation.

67. Given the importance of this area for UK's economic crime plan, we would urge the HM Treasury to consider the EU developments regarding whistleblowing as part of the 5MLD consultation.

Additional technical amendments to MLRs

Question 96: Do you agree with our proposed changes to information-sharing powers of regulations 51, 52?

68. Yes, we would support amending the legislation to make HM Treasury and OPBAS' powers on information sharing more explicit.

Question 97: Do you have any views on this proposed new requirement to cooperate?

69. We don't see the need to include a requirement to co-operate with OPBAS in the regulations for the following reasons. First, FCA's requirement to co-operate Business Principle 11 Relations with Regulators is included in the FCA Handbook not the Money Laundering Regulations 2017. Second, the IFA and other professional bodies have co-operated with OPBAS in an open way. This has been acknowledged by OPBAS several times. Therefore, we don't believe there is a need to include this requirement in the regulations.

70. If HM Treasury and OPBAS were minded to include a requirement to co-operate, the best place for this with would be the OPBAS Source book. Guidance would need to be provided regarding what was meant by 'reasonably expect notice' and the mechanism and timeliness of making such disclosures.

71. The requirement to co-operate should apply to all AML supervisors, statutory and private.

Question 98: Do you agree with our proposed changes to regulations 56?

72. Yes, we would support making this amendment on the grounds of consistency across the regulated sectors.

Question 99: Does your sector have networks of principals, agents and sub-agents?

73. The accountancy sector does have networks of principals, agents and sub-agents as detailed in the Accountancy Age network survey 2018.

Question 100: Do complex network structures result in those who deliver the business to customers not being subject to the training requirements under the MLRs?

74. The MLR17 training requirement applies to relevant employees only. Given this definition, it is possible that self-employed individuals working with an organisation involved in a network may not receive the appropriate training.

Question 101: Do complex network structures result in the principal only satisfying himself or herself about the fitness and propriety of the owners, officers and managers of his or her directly contracted agents, and not extending this to sub-agents delivering the business?

75. Our supervised firms are not involved in complex network structures. Therefore, we are not able to comment on this and subsequent questions in relation to complex networks.

Contact details

Should you wish to discuss our responses further, please contact Anne Davis, Head of Professional Standards by email at anned@ifa.org.uk