Think Ahead ACCA

Money Laundering Regulations 2017

A public consultation issued by HM Treasury

Comments from ACCA
April 2017
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ACCA (the Association of Chartered Certified Accountants) is the global body for professional accountants. We aim to offer business-relevant, first-choice qualifications to people of application, ability and ambition around the world who seek a rewarding career in accountancy, finance and management.

Founded in 1904, ACCA has consistently held unique core values: opportunity, diversity, innovation, integrity and accountability. We believe that accountants bring value to economies in all stages of development. We aim to develop capacity in the profession and encourage the adoption of consistent global standards. Our values are aligned to the needs of employers in all sectors and we ensure that, through our qualifications, we prepare accountants for business. We work to open up the profession to people of all backgrounds and remove artificial barriers to entry, ensuring that our qualifications and their delivery meet the diverse needs of trainee professionals and their employers.

We support our 188,000 members and 480,000 students in 178 countries, helping them to develop successful careers in accounting and business, with the skills required by employers. There are approximately 8,300 ACCA accountancy practices in the UK. We work through a network of 100 offices and centres and more than 7,400 Approved Employers worldwide, who provide high standards of employee learning and development. Through our public interest remit, we promote appropriate regulation of accounting, and conduct relevant research to ensure accountancy continues to grow in reputation and influence.

Further information about ACCA's views of the matters discussed here may be requested from Ian Waters, Head of Standards (email: ian.waters@accaglobal.com; telephone: +44 (0) 207 059 5992).

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ACCA welcomes the opportunity to comment on the proposed Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ('the Regulations'), issued by HM Treasury. These are required in order to transpose Directive (EU) 2015/849 of the European Parliament and of the Council ('the Directive') by 26 June 2017. ACCA's Global Forums for Taxation, for Business Law and for Ethics have considered the matters raised, and their views are represented in the following. In addition, the expertise and experience of our members and in-house technical experts allow ACCA to provide informed opinion on a range of areas, including how the current proposals would affect small and medium-sized accountancy practices (SMPs).

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GENERAL COMMENTS

The value that ACCA brings to this transposition process is derived from its experience of regulating accountancy practitioners. (All practising members in the UK are required to hold practising certificates.) As most ACCA practitioners are within SMPs, this provides an almost unique perspective to ACCA. SMPs operate in a particular risk environment – rarely holding clients' assets, and usually having on-going client relationships. In addition, SMPs tend to operate with less flexibility in how their resources are applied, and so the regulatory impact on SMPs may be disproportionately higher than for other entities.

Given the requirement of Article 67 - that Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 26 June 2017 – it is extremely disappointing that the draft Regulations had not been published for comment before mid-March. (The previous consultation closed on 10 November 2016.) This has necessitated not only a brief period of consultation (only four weeks), but also a very brief period in which to consider changes to the Regulations arising from the consultation. Therefore, it is necessary to confine our comments here to those that are most significant, in the expectation that they will be given due consideration by HM Treasury.

The wide and diverse nature of the supervised community means that each obliged entity within each sector will have its own assessment of risk and the appropriate response. Therefore, each obliged entity must operate within a framework that reflects

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that diversity. This is particularly true in respect of the SMP accountancy sector and trust and company service providers (TCSPs). Consistent standards must be applied across the supervisors and the supervised community. However, this should be regarded at a high level, and does not mean that the same processes and procedures are appropriate 'across the board'. For the accountancy sector as a whole, a starting point should be an acknowledgement that the regulated sector (including those regulated by their own professional body) presents a significantly lower risk than the unregulated sector.

The consultation document poses four specific questions. However, those questions do not cover all the areas of concern to the professional bodies; neither do they cover all those areas that should be of interest to HM Treasury. ACCA supervises accountants in practice, and is concerned that the supervisory requirements must be proportionate, fair and focused on the public interest. We shall respond separately to HM Treasury's call for further information on the UK's AML supervisory regime. In that response, we shall set out why we believe that the proposals for oversight of the professional body supervisors are unworkable, and contrary to the public interest.

However, with regard to the implementation of the Directive, we believe that the introduction of an effective oversight body – with the necessary breadth of oversight – would enhance communication and help give proportionate effect to many of the requirements of the Directive. The professional bodies have indicated a willingness to work with a new oversight body, and to seek to inform its executive in the work and risk profiles of the legal and accountancy professions, so that appropriate procedures and communications concerning AML risk may ensue. Therefore, although the provisions of regulation 46, for example, as drafted, are somewhat prescriptive, and appear to go beyond the high level requirements of the Directive, appropriate collaboration with the oversight body would be expected to give rise to appropriate information sharing.

We understand that the oversight body (whatever final form it might take) will be established by secondary legislation. Without that legislation (which we assume is already in draft), these proposed Regulations are insufficient to explain the relationship between HM Treasury and any oversight body for the accountancy and legal sectors. Secondary legislation should not be rushed, but should make clear whether the provision of information to an oversight body, for example, would satisfy the requirements in the Regulations to share information with HM Treasury.

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It is important to highlight some areas in which the Regulations go beyond the requirements of the Directive. It is not in the UK's interests to increase the burden on supervisors, the supervised population and consumers and, therefore, we would ask HM Treasury to review the provisions in respect of:

- criminality testing – in respect of the accountancy sector, the Directive simply states that 'member states shall ensure that competent authorities take the ***necessary measures*** to prevent criminals convicted in relevant areas or their associates from holding a management function in or being the beneficial owners of those obliged entities' (emphasis added). The costs of performing criminality checks are likely to outweigh the benefits

- the trusts register – the detail required under proposed regulations 44(4) and 44(6), appear to be unnecessarily burdensome

- the TCSP register – the proposed Regulations would require a TCSP to register with HM Revenue and Customs (HMRC) even though the relevant person may already be supervised (perhaps as a provider of accountancy services).

AREAS FOR SPECIFIC COMMENT

Question 1: The government is interested in views on its approach to one-off company formation, including under which circumstances it might be appropriate, as part of the risk-based approach, for a trust or company service provider to apply simplified due diligence where it concerns the formation of a single company.

We agree with the view expressed in the consultation document that the point at which a TCSP (which might be a firm of accountants) is instructed to form a corporate vehicle is the point at which suspicion might arise, and at which due diligence is most relevant. In the accountancy sector, the risk assessment of the professional body supervisors (which will differ from that of HM Revenue and Customs and between professional bodies) will determine those company formations that may be subject to simplified due diligence (SDD). In most cases involving SMPs, the firm will have been involved in the

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decision to form the corporate vehicle, and the instructions received from the client will neither be suspicious nor unexpected. Conversely, where a client who has been known to the firm for some time requests the formation of a corporate vehicle without first discussing the reasons for it, this might be cause for suspicion.

Regulation 53(2) states 'The Commissioners must maintain a register of those relevant persons who are not included in the register maintained by the FCA under paragraph (1) and are … trust or company service providers…'. Many relevant persons supervised by professional bodies will be TCSPs. If HMRC expands its register to include TCSPs who are supervised by professional bodies, this will be seen as duplication, and an unnecessary burden on relevant persons – especially SMPs. It may also cause confusion, especially when a relevant person ceases (or is deemed to cease) to act as a TCSP. The definition of a TCSP in regulation 12(2) would imply that the vast majority of accountancy and legal practices could be deemed to be TCSPs at certain points in time.

Presumably, a TCSP must be registered in order to practise, whereas our understanding is that an accountant who does not meet the fit and proper requirement to be authorised to practise by his or her professional body will be able to continue practising under the supervision of HMRC. In the interests of transparency and consistency, all practising accountants and TCSPs must be subject to the same requirements in respect of fitness and propriety. A separate concern is that all supervisors must have the same ability to *assess* the fitness and propriety of their supervised populations.

Article 47 states that 'competent authorities [must] take the necessary measures to prevent criminals convicted in relevant areas or their associates from holding a management function in or being the beneficial owners of those obliged entities'. It is not clear that regulation 26 meets the requirement of the Directive. ACCA has concerns that a relevant person refused a practising certificate by his or her professional body will nevertheless be able to practise unregulated, but subject to supervision by HMRC as the default regulator. We do not believe that HMRC has the resources to supervise its expanding AML population.

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Question 2: The government welcomes views on its approach to allow SDD only when firms providing pooled client accounts are low risk.

Generally, we support the proposal to express the circumstances under which SDD is appropriate in terms of the non-exhaustive list of factors in Annex II of the Directive. However, the limited applicability of these factors illustrates the diversity of the supervised firms, and how few of these factors would be relevant to SMPs in the accountancy sector. This list of factors is only relevant when supported by guidance concerning the supervisory authorities' risk assessments.

It is proposed that pooled client accounts should not be automatically eligible for SDD and, therefore, regulation 36(4) includes two conditions ((a) and (b)) that must be satisfied in relation to financial institutions providing pooled accounts. We believe this is the wrong approach, as well as being impractical. The first condition is that (a) 'the business relationship with the holder of the pooled account presents a low degree of risk of money laundering or terrorist financing'. It is difficult to imagine how that relationship might be different to most other relationships between a large financial institution and a legal firm (except in the case of very few large legal practices).

In the case of large legal practices, condition (b) might be difficult to comply with, especially within two working days, and bearing in mind factors such as data security concerns and technical capability. We also believe that this condition is very prescriptive. Given the proposed introduction of an oversight body for the supervisors in the legal and accountancy sectors, we believe it is appropriate to rely on a consistent standard of supervision in future, and that the concerns of some respondents to the initial consultation should now be seen as outweighed by due regard for proportionality. Therefore, conditions (a) and (b) should be removed.

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Question 3: The government would welcome views on whether the reference to "at the latest within two working days" should be included and if not, how long third parties should be given to provide this information.

Reliance upon the due diligence of others – even other obliged entities – is problematic. Although we would welcome the ability of firms to take advantage of such provisions, in practice sharing the results of one's due diligence measures is perceived (rightly or wrongly) as presenting unacceptable commercial risk.

A further concern is the limitation in article 25 of the Directive (reflected in regulation 38(1)), which states:

'Member States may permit obliged entities to rely on third parties to meet the customer due diligence requirements …. However, the ultimate responsibility for meeting those requirements shall remain with the obliged entity which relies on the third party.'

Therefore, given the requirement to obtain and retain any information supplied by the third party anyway, and to achieve a written agreement between them, we would not expect many relevant persons to see a significant benefit from relying on third party customer due diligence (CDD). Nevertheless, should two parties enter into such an agreement, the requirement to supply copies of documents within two working days appears very prescriptive and unnecessary. Having performed the CDD and shared the results, it should be possible for a supervisor or law enforcement agency to obtain the necessary documentation directly from the third party that has performed the CDD.

Question 4: The government would welcome views from the sector on the requirement for the policies, controls and procedures to be documented.

The purpose of a risk-based approach to regulation is not only to reduce the regulatory burden on regulated entities, and the resultant cost to consumers, but also to ensure that the effort and resources of regulators are targeted to those areas that need it most, and are therefore used most effectively. It is a process that develops over time, and in response to changing risk environments, and so any risk-based approach must incorporate the flexibility required for it to be as effective as possible.

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Appropriate documentation of policies, controls and procedures will allow a supervisor to assess the adequacy of a relevant person's risk framework for the purpose of that risk framework being able to evolve and the benefits of innovation being shared across the sector.

Article 8 requires obliged entities to assess risk, and to document those assessments. Although the risks inherent in the SMP accountancy sector are few, we do not believe that they are well understood by HM Treasury (and the recent National Risk Assessment has not succeeded in identifying those risks clearly). Therefore, it is important that each different sector has the freedom to establish the approach to risk assessment and documentation that is appropriate to that sector and proportionate.

The policies, controls and procedures of obliged entities must be proportionate to their nature and size, and developed in the specific areas set out in article 8.4. The requirements of article 8 are incorporated into regulations 18 and 19. As drafted, regulation 18(4) would require ACCA to determine which relevant persons among its supervised firms would be exempt from the requirement to document 'all steps it has taken' in considering the factors in regulation 18(3) (and to notify them that they are exempt). This would be an unreasonable burden on all the professional bodies, as a result of 'gold-plating' the Directive by being too prescriptive. An additional burden (and an ambiguity) is within proposed regulation 18(5), which suggests that none of ACCA's supervised firms would be eligible for reduced record-keeping requirements in any event.

The requirements of regulation 19, in respect of the recording of a relevant person's policies, controls and procedures, appear more proportionate. However, they are somewhat prescriptive, and some measures would be inappropriate for many relevant persons. Perhaps it should be made clear that regulation 19(4) does not undermine the requirement of regulation 19(3) – that the policies, controls and procedures adopted by a relevant person must be 'proportionate with regard to the size and nature of the relevant person's business'.

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