

FCA Quarterly Consultation No 28 (CP20/7)

A consultation issued by the Financial Conduct Authority (FCA)

Comments from ACCA
31 July 2020
Ref: TECH-CDR-1917

ACCA is the Association of Chartered Certified Accountants. We're a thriving global community of **227,000** members and **544,000** and future members based in **176** countries that upholds the highest professional and ethical values.

We believe that accountancy is a cornerstone profession of society that supports both public and private sectors. That's why we're committed to the development of a strong global accountancy profession and the many benefits that this brings to society and individuals.

Since 1904 being a force for public good has been embedded in our purpose. And because we're a not-for-profit organisation, we build a sustainable global profession by re-investing our surplus to deliver member value and develop the profession for the next generation.

Through our world leading ACCA Qualification, we offer everyone everywhere the opportunity to experience a rewarding career in accountancy, finance and management. And using our respected research, we lead the profession by answering today's questions and preparing us for tomorrow.

Find out more about us at www.accaglobal.com

Further information about ACCA's comments on the matters discussed here can be requested from:

Sundeep Takwani
Director – Regulatory Relations
sundeep.takwani@accaglobal.com

Wesley Walsh
Supervision Manager
wesley.walsh@accaglobal.com



GENERAL COMMENTS

ACCA is a Professional Body Supervisor (**PBS**) for anti-money laundering (**AML**) in the UK. We welcome the opportunity to provide feedback on the proposed changes to the Sourcebook of the Office for Professional Body Anti-Money Laundering Supervision (**OPBAS**) in respect of the requirement for criminality checks under Regulation 26 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (**the 'MLRs'**), as amended by the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 on 10 January 2020.

ACCA engaged with the development of the OPBAS Sourcebook in 2017¹, advocating a principles-based and proportionate approach to setting expectations for compliance with the MLRs and the AML supervision of members of PBSs. We therefore welcome the review and update of guidance within the Sourcebook to reflect the recent amendments to Regulations 26 and 46 of the MLRs.

ACCA recognises there is a risk of an approved person being convicted of a relevant offence and the perception that this will increase the risk that the individual will therefore be more susceptible to involvement in money laundering. However, we believe that the expectations for compliance with the requirements of Regulation 26 should be proportionate and risk-based. Therefore, we have some detailed concerns with the proposed changes to the Sourcebook, and these are highlighted in our response where appropriate.

In particular, we consider that OPBAS' expectations of the term 'sufficient information' contained in Regulation 26(7)(b)(i) run contrary to the concept, enshrined in Regulations 46(1) and 17, that the PBS must adopt a risk-based approach according to the risk assessment carried out by the PBS. The proposals seek to override and undermine that concept, with OPBAS in effect undertaking the risk assessment for the PBS and dictating its response to the assessed risk. Given the significant additional burden on the PBSs and the supervised population, OPBAS has provided no evidence on the numbers of approved persons who have an undisclosed relevant conviction and the existence of any links to them being engaged in money laundering, and it is therefore unclear what benefits the proposals will generate. The proposals will only, to an extent, mitigate the perceived risk rather than eliminate it, and they appear to determine and impose a certain level of risk acceptance without the consultation providing an evidence base.

ACCA has previously raised concerns with HM Treasury (**HMT**) that Regulation 26 did not provide a **definitive requirement** for an applicant seeking approval as a beneficial owner,

¹ ACCA's response to the FCA Consultation on Office for Professional Body Anti-Money Laundering Supervision: a sourcebook for professional body supervisors is available at <https://www.accaglobal.com/gb/en/technical-activities/technical-resources-search/2017/october/guidance-consultation-gc17-7-published-by-the-financial-conduct-.html>



officer, manager (**BOOM**) or sole practitioner (**SP**) in an ACCA supervised firm² to provide a criminal record check³. Therefore, we are disappointed that, despite earlier indications from HMT, the opportunity to explicitly state the requirement, if that is intended, for a criminal record check in the amended Regulations has been overlooked.

We are concerned that the requirement for criminality checks on application, and the indication that it is 'best practice' to renew such checks every five years, will be costly and impractical to implement. As there is no explicit requirement for a criminal record check within the amended legislation, we believe that each PBS should be able to determine what constitutes 'sufficient information' in this context, consistent with the principles of a 'Risk-Based Approach' that the MLRs set out.

As a PBS for anti-money laundering, we believe it is only appropriate for ACCA to comment on the section of the consultation in relation to the OPBAS Sourcebook in respect of criminality checks. For that reason, we have **only responded to Questions 4:1 to 4:6** and have no comments to make in respect of Questions 2:1 to 3:2 in other sections of the consultation.

AREAS FOR SPECIFIC COMMENT

Question 4:1: Do you agree with our expectations of the term 'sufficient information'? If not, why?

ACCA does not agree with the expectations of the term 'sufficient information' outlined in the consultation.

We understand that Regulation 26 is intended to prevent a person with a relevant conviction being approved as a BOOM or SP. However, it does not explicitly and definitively make it a requirement for a criminal record check to be obtained. In our opinion, if HMT's position is that a criminal record check is required then this should have been justified with appropriate evidence and addressed when the amendments were made to the MLRs on 10 January 2020. The matter was highlighted by the PBSs through the Accountancy Affinity Group and HMT subsequently indicated that a clear requirement would be reflected in the legislation. Therefore, currently, the MLRs do not define 'sufficient information' as a criminality check by a disclosure agency.

Whilst we acknowledge the existence of a theoretical risk, we are not aware of evidence of the extent to which the PBSs have approved via self-certification any BOOMs or SPs with relevant convictions who have subsequently been linked with money laundering.

² ACCA automatically supervises firms for Anti-Money Laundering as long as there is one ACCA member or more holding an ACCA Practising Certificate with a combined majority control over the firm.

³ A criminal record check will be required via the Disclosure and Barring Service (DBS), Disclosure Scotland (DS), or Access Northern Ireland (AccessNI).



The risk-based approach outlined in the MLRs means that each PBS should be able to adopt an approach that fits in with its overall AML supervisory framework and which assesses the likelihood and impact of, and hence the money laundering risk posed by, a BOOM or SP with a relevant conviction. The proposals appear to run counter to that risk-based approach.

We are unsure where the requirement for evidence of UK residency within the previous five years arises from, as it is also not a requirement under Regulation 26. We presume that it is to provide assurance that the check is done with the appropriate agency. However, we do not understand why the requirement would be for evidence 'within' and not 'throughout' the five-year period. The applicant may have changed residency so multiple agency checks would be required, or they may have been resident in the UK for only a small part of that time but provide 'evidence' of that residency. As a result, the checks would be incomplete and not fully address the perceived risk. Furthermore, we note that the proposals do not seek to define what 'evidence' means in this context. In our opinion, this aspect of the proposal lacks clarity and purpose, as it appears to only partially address the perceived risk.

Question 4:2: Do you agree with our expectations regarding applicants who are residing or have resided overseas? If not, why?

ACCA would welcome more detail on this.

We are concerned that this could add an unnecessary administrative burden to PBSs as well as those applying as BOOMs or SPs. It also does not address the perceived risk of a relevant offence having been committed in a period of up to 12 months not covered by the check.

The expectation regarding the extent to which a PBS is required to understand the nature of an equivalent check is unclear. In addition, further clarity and guidance is needed on what OPBAS regards as 'robust measures' and the 'alternative information' the applicant would be reasonably expected to source. For example, which jurisdictions are considered equivalent to the UK in this regard? Is there an expectation that some jurisdictions will be deemed riskier and therefore require further information? Are there jurisdictions at more risk of fraudulent documents being produced? Are there jurisdictions more susceptible to corruption where it may not be appropriate to accept a criminal records check? In our opinion, it is unreasonable to expect PBSs to individually maintain such information as this will lead to inconsistent application across the sector.

We believe it would be more appropriate for each PBS to apply a risk-based approach when dealing with applicants who are residing, or have resided, overseas that supports the PBS's overall AML supervisory framework and desired outcomes.



Question 4:3: Do you agree with our expectations regarding the obligation and approach to the monitoring of criminality checks? If not, why?

ACCA does not fully agree with this expectation.

As it addresses the same perceived risk, periodic monitoring is not inconsistent with the proposal that agency checks are required on application. However, the effect of the proposal is one of imposing a requirement that, again, is not in the MLRs and takes the risk assessment out of the hands of the PBS. Furthermore, it exposes an apparent weakness in the underlying proposal in that a check is only valid on the day it is performed and the risk increases every day subsequently until the check is reperformed.

Regulation 26 does not make any reference to a five-year cycle for ongoing monitoring and as such it appears that its adoption as 'best practice' is an arbitrary reflection of a perceived risk without any evidence to justify it. Again, in our opinion a fixed renewal cycle goes against the risk-based approach that PBSs are required to adopt in order to address the money laundering risk within their supervised populations. We feel it is for the PBS to decide and adopt an approach that fits its AML supervisory framework and addresses the risk exposure it faces.

Regulation 26(4) and (5) actually places the requirement on the firm to take reasonable care that an approval has not ceased to be valid. Under Regulation 26(10) both the approved person and the firm are required to notify the PBS within 30 days of the conviction of the relevant offence (the approved person) and within 30 days of becoming aware of the conviction (the firm).

As detailed in our response to Question 4:1 above, we feel this requirement will add an unnecessary administrative burden to an AML supervisory framework. Instead, the concern can be adequately addressed by allowing each PBS to adopt its own risk-based approach to the approval of BOOMs and SPs.

Question 4:4: Do you agree with our expectation that the requirements in Regulation 26 are considered to apply to all existing BOOMs and relevant SPs? If not, why?

ACCA does not fully agree with this expectation.

The subject of this consultation is the proposed changes to the OPBAS Sourcebook, not the requirements in Regulation 26 which appear to apply to all applications for approval since the MLRs came into effect.

On that basis, were the expectations of the term 'sufficient information' to be implemented, it would be difficult to argue that they should apply just to future applicants and not retrospectively to existing BOOMs and SPs. Our main objection, set out under Question 4.1, is the lack of evidence that any form of agency check is proportionate to the perceived risk and will, in fact, mitigate it.



Question 4:5: Do you agree with our expectation that a PBS factors into its supervision the fact that an existing BOOM or relevant SP has chosen not to apply for approval under Regulation 26? If not, why?

ACCA agrees that this could be taken into account as part of a PBS's AML supervisory framework. However, we are unclear on the expectations of OPBAS that the PBS 'factors it into its supervision' and how this will be applied in practice.

For example, in the case of a first application, it is unclear how the PBS would determine whether a BOOM or SP had chosen not to apply for approval and was 'operating under the radar' in a seemingly junior role. Once approved, a BOOM or SP remains approved until the PBS is notified, or discovers, that the approval has 'ceased to be valid' under Regulation 26(9). Therefore, if the expectation is in relation to a previously approved BOOM who is notified to the PBS as having ceased to be a BOOM, this does not equate to the description that they have 'chosen not to apply for approval'.

Question 4:6: Are there any other matters you wish to be considered for guidance on compliance with Regulation 26?

ACCA believes the requirements of Regulation 26 are clear and consistent with the risk-based approach required under Regulations 46 and 17. As noted above, if HMT considered that it was necessary, the opportunity to include a specific requirement to undertake criminal records checks was missed when implementing the Money Laundering and Terrorist Financing (Amendment) Regulations 2019, and in our opinion the proposed changes to the Sourcebook are contrary to the risk-based approach.

We would therefore welcome evidence to support the apparent conclusion that the likelihood and impact of the perceived risk are such that the administrative burden engendered by the proposals is proportionate and that they will be effective in reducing the incidence of money laundering. Without such evidence, we believe that the proposals infringe on the requirements that each PBS carries out its own assessment of risk and designs appropriate controls to mitigate that risk to an acceptable level.

The proposals themselves raise a number of questions which we have set out in our responses above and summarise below:

- Why is evidence of UK residency required 'within' and not 'throughout' the proposed five-year period? (Question 4.1)
- What 'evidence' of residency is acceptable? (Question 4.1)
- How would a PBS address the perceived risk of a relevant offence having been committed in a period of up to 12 months within the five-year period if not covered by the check?



(Question 4.2)

- What would be regarded as sufficiently 'robust measures' taken by the applicant to obtain an equivalent check and what 'alternative information' would the PBS reasonably expect the applicant to source in the absence of an equivalent check? (Question 4.2)
- How do the proposals sufficiently mitigate the perceived risk, given that the check is only valid on the day it is performed and the PBS is reliant on self-notification under Regulation 26(10) until the check is reperformed after five years? (Question 4.3)
- In practice, how would a PBS 'factor into its supervision' the fact that an existing BOOM or SP had chosen not to apply for approval? In particular, on initial application, how would the PBS be expected to determine whether a BOOM or SP was 'operating under the radar' in a seemingly junior role? (Question 4.5)

