Think Ahead ACCA

Consultation on the transposition of the Fourth Money Laundering Directive

A public consultation issued by HM Treasury

Comments from ACCA
November 2016
Ref: TECH-CDR-1438

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 5,700 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.

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ACCA welcomes the opportunity to comment on the proposals issued by HM Treasury. 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

In our response, we have not attempted to answer *all* the questions set out within the consultation document, instead focusing on the areas that are most relevant to our experience of regulating our members. In the UK, anti-money laundering (AML) supervision covers a wide range of businesses and sectors. Among the entities covered by the Fourth Money Laundering Directive (the Directive), ACCA is responsible for the supervision of external accountants (including auditors and tax advisers) and trust or company service providers (TCSPs).

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 for 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. The regulatory impact on SMPs may be disproportionately higher than for other entities.

With this in mind, in transposing the Directive, the Government should ensure that the UK's Money Laundering Regulations (the Regulations) remain principles-based as well as risk-based. The inclusion of lists of procedures and other requirements risks sending the message that behaviours consistent with those lists are all that is required. This obscures the underlying principles and the need to consider risks.

The wide and diverse nature of the regulated sector means that each organisation within each sector will have its own assessment of risk and the appropriate response.

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Therefore, each organisation must operate within a framework that reflects this diversity. This is particularly true in respect of the SMP accountancy sector and TCSPs.

We are confident that the Government will transpose the Directive with due regard for proportionality, given the current review of the AML/CFT regime by the Better Regulation Executive. We support the objectives of the review of improving compliance *and efficiency*, by 'identifying aspects of the supervisory regime that appear to businesses in the regulated sector to be unclear, unnecessarily cumbersome, conflicting or confusing'.[1] In the interests of transparency and consistency, all supervised entities must be subject to the same requirements in respect of fitness and propriety and criminality checks, and so all supervisors must have the same ability to assess the fitness and propriety of their supervised populations.

AREAS FOR SPECIFIC COMMENT

Chapter 3 – Who is covered by the directive?

Question 1: Do you agree with the proposed turnover threshold of financial activity being set at £100,000 as one of the criteria to comply with in order to be exempt from the directive?

Maintaining the link to the VAT threshold has some logic from a business perspective. Aligning thresholds for filing obligations reduces complexity for practitioners, and may also serve to simplify compliance monitoring. Growing businesses would benefit most from this linkage.

However, the ability to revise the AML threshold independently of the VAT threshold would have its own advantages. Apart from enhancing the proportionality of AML supervision, it might be assumed that, as technology advances, the administrative burden of applying VAT requirements will decrease. This might remove one of the justifications for the UK VAT threshold, which is the highest in the EU.

[1] Consultation on the transposition of the Fourth Money Laundering Directive, paragraph 1.23

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A further uncertainty to consider is that the VAT regime in the UK may, in due course, be subject to fundamental changes as a consequence of Brexit reforms. It is impossible to predict what the shape of any future VAT or equivalent may be, or whether its registration threshold might be relevant for AML purposes in future.

On balance, we would agree with the proposal to remove the AML link to the VAT registration threshold, and to set a turnover threshold for AML purposes at £100,000.

Question 2: The government would welcome views on whether a maximum transaction threshold per customer and single transaction should remain at £836 (EUR 1,000).

Firms of accountants will not qualify for this exemption, as we believe that even SMPs cannot be said to be engaged in financial activity on an occasional bases. However, it should be noted that 'financial activity' is not defined in the Directive or the Regulations. We feel we have little to add to the consultation in this respect. Furthermore, we propose that HM Treasury considers other responses to this question sector-by-sector, as the nature of obliged entities (and their AML supervisors) is so diverse.

Chapter 4 – The due diligence requirements and reliance

Question 3: When do you think CDD measures should apply to existing customers while using a risk-based approach?

There are certain events that could reasonably be treated as triggers for re-performing CDD checks. For example, notification of a change of address may indicate a change in risk profile, and so be an appropriate time to verify other information, especially if the client is moving abroad. (In any event, otherwise unexplained address changes, or similar, may be indicators of possible identity fraud, and should always be confirmed with the client). However, the identification of 'trigger events' in the Regulations must not be allowed to undermine the use of objective professional judgement.

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Question 4: What changes to circumstances do you think should warrant obliged entities applying CDD measures to their existing customers? E.g. name, address, vocation, marital status etc.

We have provided an example under question 3 above. However, each change in circumstances will arise in a unique context and, therefore, it is not possible to state which changes will or will not warrant applying CDD measures to an existing customer. In all cases where a professional accountant is involved, the decision whether to apply CDD to an existing customer must be risk-based and rely largely on professional judgement and experience.

If, however, it is decided that some specific circumstances should warrant obliged entities applying CDD measures to existing clients – because they indicate changes to 'core information' – CDD measures should be considered on a 'comply or explain' basis. Such a list of circumstances would have to be accompanied by a clear explanation that other changes in information (while not core) should, on occasions, act as triggers for applying CDD measures to existing clients.

Question 5: How much does it cost your business to carry out CDD checks?

Although this question does not appear to be addressing a professional body, evidence from ACCA practitioners indicates that, for a typical regional practice, costs of between £120 and £180 are not uncommon, but they can run to in excess of £350. Costs depend mainly on the size, complexity and risk profile of the client.

We are aware that costs in large accountancy firms can be considerably higher, partly as a reflection of higher charge-out and salary rates, but also due to the greater complexity of the affairs of some of their clients, and the risk profiles of the clients and the services being sought. However, it is important to realise that large accountancy practices are likely to have in-house systems to assist with CDD and that, for SMPs, the demand on resources (relative to risk) presents a significant regulatory burden.

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Question 6: We welcome responses setting out how you have converted the Euro thresholds into GBP under the existing Money Laundering Regulations, for example, is the currency exchange the subject of a set policy? We would also welcome your views on what would be helpful to you when dealing with a conversion from Euro to GBP.

This is not thought to be an issue relevant to ACCA practitioners. Nevertheless, we suggest that clarity should be a driver for the benefit of all obliged entities and AML supervisors. Therefore, we would support a move towards the Regulations expressing thresholds in GBP as well as in Euro, where possible.

Question 7: Do you agree that the government should remove the list of products subject to SDD as currently set out in Article 13 of the Money Laundering Regulations (2007)? If not, which products would you include in the list? What are the advantages and disadvantages of retaining this list?

We believe that lists should generally be avoided, as they usually threaten the effective exercise of professional judgement. However, a list of products subject to SDD provides clarity. Therefore, we would only support the retention of a list provided it supports the principles behind the various factors to be considered, and it is made clear that those principles are paramount. Otherwise the list would be counter-productive.

4.C Consultation questions – pooled client accounts (questions 8 to 11)

Pooled client accounts are operated by accountants mostly to be able to accept refunds of taxation. Although ACCA (and other professional accountancy bodies) have provisions within their codes of conduct that govern the holding of clients' assets, any funds paid into accountants' client accounts are unlikely to be routed that way specifically as part of a money laundering exercise.

As part of HMRC's moves towards digital communication of all taxation related information, we have suggested to HMRC that the existing practice of notifying only one

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party - the agent - of a tax refund could usefully be replaced by a system in which electronic notification of the amount and timing of any repayment is sent automatically to the taxpayer and the agent.

Question 12: Are there are any other factors and types of evidence of potentially lower risk situations, aside from those listed in Annex II of the directive, that you think should be considered when deciding to apply SDD?

In some sectors (including external accountants), clients who are themselves subject to AML supervision may reasonably be considered to be lower risk, and could accordingly be subject to SDD procedures.

Questions 13 and 14: Are there any other products, factors and types of evidence of potentially higher risk situations, aside from those listed in Annex III of the directive, which you think should be considered when assessing ML/TF risks in respect of EDD?

Are there any high-risk products from sectors other than the Financial Services sector that you think should be included in the Regulations?

ACCA has recently collaborated with other professional bodies that have members responsible for taxation services to update the guidance document *Professional Conduct in Relation to Taxation*[2]. HMRC acknowledges that the guidance is an acceptable basis for dealings between taxation agents and HMRC. We suggest that reference to the guidance may provide a means of starting to consider the risk profile of an individual who might be subject to EDD.

[2] The profession bodies jointly responsible for preparing the guidance are ACCA, the Association of Accounting Technicians, the Association of Taxation Technicians, the Chartered Institute of Taxation, the Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accountants of Scotland, and the Society of Trust and Estate Practitioners.

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Question 15: What EDD measures do you currently apply to clients operating in high-risk third countries, including those on FATF's black, dark grey and grey lists?

Due to the limited number of occasions on which firms monitored by ACCA will have encountered this situation, it is not possible to provide evidence of the EDD measures typically undertaken. However, on occasions, ACCA UK's Technical Advisory Service receives enquiries from firm concerning EDD measures. The advice given to such enquirers is usually to follow the guidance of the JMLSG.[3] This might include requesting information as to the client's residential status, employment and salary details, and other sources of income or wealth. The firm should consider whether, in some circumstances, evidence of source of wealth or income should be required (for example, if from an inheritance, see a copy of the will).

Question 16: How much does it cost your business to apply EDD measures?

It is rare for ACCA firms (typically SMPs) to encounter the need for EDD measures, and so we are unable to provide evidence in this area. One might assume that time costs of EDD are generally higher than for CDD. This would reflect not only the additional work required, but also the more stringent review processes within a firm whenever a need for EDD has been identified.

Questions 17 and 18: What are your views on the meaning of a 'member organisation'?

What are you views on the meaning of 'federation'?

We can only respond to this question from the perspective of firms of accountants and a professional body that supervises accountants for AML purposes. The Directive does not define 'member organisation' or 'federation', and these terms will mean different

[3] Joint Money Laundering Steering Group

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things in different sectors. Therefore, we strongly recommend that HM Treasury reviews responses to this question on a sector-by-sector basis.

As with many of the AML supervisors in the UK, ACCA is a professional body with regulatory responsibilities, and these responsibilities include AML supervision of its members and firms. We perform our various functions aware of the need to separate our regulatory functions from our representative role (and to be seen to be doing so). On the assumption that the description of 'membership organisation' applies to ACCA (and other supervisors), we do not believe that it would be appropriate (from a third party perspective) for an AML supervisor to perform due diligence measures on behalf of its supervised population.

More generally, the responsibility for due diligence rests with obliged entities. 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 (to avoid duplication and disproportionate requirements), in practice, sharing the results of one's due diligence measures is perceived as presenting unacceptable commercial risk.

A further concern is the lack of clarity in article 25 of the Directive, 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.'

This might appear contradictory. The responsibility of the obliged entity relying on the third party needs to be clarified in the Regulations and fully explained in guidance.

Question 20: Do you rely on third parties to meet some CDD requirements? How much does this cost your business?

Third party reliance can be in respect of document checking services, or full CDD acceptance. It is unusual in the UK for a service provider to offer the opportunity to rely on its CDD process to an unconnected third party.

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In respect of document checking, there is a range of possible costs. £10 per individual search for CDD and £20 per search for EDD (in addition to the firm's chargeable time for staff processing the information) are not untypical. Note also that some firms do not find third party services appropriate where the firm has a significant proportion of clients with 'non-standard' characteristics, such as charities or social housing providers.

Question 21: Should the government set a threshold of the size and nature of the business for the appointment of a compliance officer and employee screening? If so, what should the government take into account?

While an objective minimum threshold will have benefits for clarity and applicability, there is no 'bright line' between the need to implement specific procedures or not to implement them. The exercise of professional judgement must be encouraged, and there is nothing to prevent a business operating to higher standards if assessed as appropriate. While factors such as practice size could serve as criteria to usefully inform guidance (for example, in terms of the number of fee earners), a threshold figure should not be stipulated. Furthermore, no single indicator is likely to be conclusive. Even within particular sectors there can be significant variation between firms in levels of complexity and risks arising from the typical client profile. Identifying other characteristics of the business that might indicate the need for a compliance officer and employee screening would entail the use of lists, and we have already made clear the disadvantages of such an approach.

Question 22: What should be taken into account when screening an employee?

The overall screening process should be tailored to the firm and the role of the employee. However, as a minimum, it should address the individual's professional qualification and whether they have a criminal record or a regulatory history. Guidance will be required concerning the use of information obtained by way of screening employees. Matters such as whether to employ a particular individual; what

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responsibilities employees should have; and what controls are required over particular employees should all be maters of professional judgement.

Question 23: Should the government set a threshold for the size and nature of the business that requires an independent audit function? If so, what should the government take into account?

Please refer to our response to question 21. The level of risk will depend upon a range of characteristics – the nature of the business (sector), size and complexity of the business, and the size and nature of the client base - and these factors will help to inform the need for an independent audit function. It may be argued that some form of assurance process is always required. However, in the smallest firms, a somewhat cursory review would usually be appropriate.

If the Government determines that there should be a number of factors that would invariably require an independent audit function, these should be set out in guidance. Above all, the Regulations and guidance must ensure that SMPs (and other obliged entities) are encouraged to adopt higher standards, if appropriate, as a result of exercising professional judgement.

Question 24: What do you think constitutes an "independent audit function"?

For the independent audit function to have any effect at all, those performing the function must be independent of those responsible for designing and implementing the firm's AML procedures. However, the independent audit function is only required 'where appropriate with regard to the size and nature of the business'.[4] For some SMPs, a brief self-review would be appropriate and effective. A key feature of the audit or review is that it should be designed to promote constructive improvement in the implementation of AML controls, and so should be viewed more as a 'health check' than a 'fault-finding mission'. The focus should be on identifying strengths and areas for improvement in the

[4] Article 8, paragraph 4(b)

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overall management of AML risk in the business. It should not be allowed to become a 'tick-box' exercise.

In larger and more complex organisations, an 'independent' audit function must be independent of any of the firm's activities that might be exposed to money laundering risk. In practical terms, for an accountancy practice, these activities will often involve the vast majority of the firm's staff. Therefore, the audit function may have to be outsourced. However, for the largest firms, with a fully independent internal audit function, it may be possible to undertake an AML audit in-house. (These firms will, of course, still be subject to independent AML supervision.)

Question 25: How many of the controls listed at paragraph 4.34 are you already carrying out and what is your assessment of the likely costs of these procedures?

ACCA's experience of supervising firms (particularly SMPs), would suggest that ACCA firms have a good understanding of their AML obligations. ACCA submits an annual return on its AML supervisory activities to HM Treasury.

Chapter 9 – Politically Exposed Persons

Question 51: Under the terms of the directive, all PEPs are considered to be high risk. However, obliged entities may use a risk-based approach to both the identification of a PEP and the depth of EDD measures that are applied to them. What risk factors do you think are relevant when deciding how to identify a PEP and adapt EDD measures to them? Would more clarity in guidance be helpful to avoid the disproportionate application of EDD measures to low-risk groups and their families?

Additional clarity and guidance would be helpful to our members when trying to apply a risk-based approach, which includes not disadvantaging any PEP unnecessarily. Factors that might influence the approach to an individual PEP's EDD process would be

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a history of corruption - in either their home country or where they are currently operating - and may include considerations such as their general reputation (from press information). However, a list within the Regulations, which might be interpreted as comprehensive and so encourage a 'tick-box' approach, should be avoided. ACCA members would welcome guidance in respect of situations in which a PEP has been subjected to apparently false charges and/or lost their post as a result of political pressure.

Questions 52 and 53: The directive specifically applies to members of parliament or of similar legislative bodies and to members of the governing bodies of political parties. In the UK the Electoral Commission maintains two registers of political parties: one for Great Britain and a separate register for Northern Ireland. There are over 400 registered political parties, of which the vast majority are very small. Should there be some form of criteria or some examples set out in guidance of the political parties to which this applies, e.g. those having elected members of Parliament, the European Parliament, or the devolved legislatures? If so, what is the reasoning behind the use of these particular criteria or examples? Would guidance on this issue assist and, if so, what should the guidance include to provide clarity?

How will the express inclusion of members of parliament or of similar legislative bodies and members of the governing bodies of political parties interact with the existing rules and regulations for political parties and elected representatives, in particular the Political Parties, Elections and Referendums Act 2000, and what steps should be taken to avoid duplicating these existing regimes?

In general, the scope for any of the risk factors identified elsewhere to operate for political figures in the UK is closely linked to elected office. In our opinion, it is reasonable to relate PEPs to those influential individuals within bodies with material budgeting powers. The Regulations must provide clarity concerning PEPs. Unlike the decisions (of accountancy practices for example) about whether to accept a particular client, how to perform the due diligence, or the circumstances that might require a SAR – all of which require professional judgement – the identification of PEPs is an area in

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which ‘bright lines’ need to be drawn. Our understanding is that ACCA practitioners (and obliged entities generally) do not want a discretion over who might or might not be a PEP. (There are situations in which discretion leads to uncertainty.) The consultation document has made clear that obliged entities should not be performing EDD unnecessarily, simply to compensate for any uncertainty, as this would amount to unnecessary red tape.

Therefore, we would advocate a clear and simple test: Is this person an elected individual (ie possibly susceptible to influence or prone to bias) who has material influence over the way that other people’s money is spent? We suggest that the best proxy for this, in the UK, is to identify whether the person holds elected office with budgetary responsibility. In contrast, election to ceremonial office is unlikely to offer opportunities to launder funds.

Question 54: Does the extent of EDD on the family members of PEPs and individuals who are known to be close associates of PEPs correspond with the measures that are appropriate for the PEP themselves? Which risk factors do you think are relevant?

ACCA fully supports the principle that EDD should be extended to family members and close associates of PEPs. However, the requirement for proportionality implies a risk-based approach and an understanding that, in low risk cases, UK PEPs, their family members and close associates should be treated at the lowest level of EDD.

Question 55: How much does it cost to identify and apply EDD checks to PEPs?

EDD for PEPs would be expected to involve costs similar to those for EDD for any other high risk client. There will, of course, be a cost impact for obliged entities from the increase in volume of EDD checks under the new PEPs regime.

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Question 58: Should the government explicitly include senior members of international sporting federations as a category of PEPs, along with their family members and known to be close associates? How many senior members (in line with the definition of senior management in Article 3(12) of the directive) of international sporting federations would you deal with, along with their family members and known to be close associates? Please provide a source for your estimation if this is not data that you already hold.

In our opinion, it seems wrong to focus on a specific sector. The definition of a PEP should cover those in ISFs and others who might be in a position to abuse their position and power. However, we acknowledge the value of guidance, and would advocate guidance that is in a suitable form, such that it may be easily amended to address emerging issues.

Question 59: How would you define an international sporting federation?

As stated above, we would advocate guidance in this area, rather than requirements that are more permanently established in regulations. However, in answer to this particular question, we suggest that membership or associate membership of SportAccord would capture the majority of relevant organisations.

In addition, in the UK, there are a number of sporting federations that may been perceived as far higher risk, which are responsible for large sums of money. If ISF executives are to be singled out in guidance, consideration should also be given to the inclusion of senior figures in the premier national sporting bodies.

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Chapter 10 – beneficial ownership

Question 60: The government welcomes any views on the issues highlighted in Chapter 10 and the PSC regime in itself.

We have nothing to add to the information set out within the consultation document, except that the benefits (to obliged entities and to the public interest) of the changes must exceed the costs of registration for entities falling within scope of the PSC regime.

10.B Consultation questions – requirements for trustees (questions 61 to 64)

The need to update information should be considered at least annually, and at the point of any significant changes to the trust structure, trustees or beneficiaries.

Many UK trust arrangements, such as family owned farming businesses, will present an extremely low risk. However, the requirement to identify not just changes in beneficial ownership, but also in those with influence over the beneficiaries, will be extremely difficult to carry out and to regulate. A family dispute, for example, can alter the balance of which individuals actually exercise influence over the trustees and beneficiaries (resulting in the need to revise the register). In practice, this could affect, for example, a family farming business operating through a mix of partnership, trust and corporate structures. Scope should be allowed for minor beneficiaries to remain identified as a class rather than as individuals.

Question 65: The government welcomes your views on the approach to beneficial ownership information as set out above.

Notwithstanding the proposals to require unincorporated businesses to report information quarterly for tax purposes form April 2018, the 31 January reporting deadline should be retained as long as the UK tax system retains its reliance on the fiscal year. The complexities of attempting to introduce any alternative reporting deadline (especially while the provisions and implications of the new tax regime remain

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unclear) would risk unfair or unintended consequences, without necessarily creating any measurable benefit in the fight against money laundering.

Question 66: The government welcomes your views on clarifying, through appropriate guidance, that a one-off company set up is a business relationship that has an element of duration.

This issue highlights the risks of trying to set out precise rules in an area which fundamentally deals with human behaviour. In such situations, any ambiguity provides scope for creative interpretation. While the red tape aspect is unpalatable, anyone setting up a limited company is entering into a contract with society that confers considerable potential benefits. Therefore, it would appear reasonable that part of the cost of receiving those benefits is being subject to AML procedures. However, the position for obliged entities should be made as clear as possible. (Guidance should also be provided with due regard for the need to minimise the risk of duplication in respect of information gathering.)

Chapter 11 – Reporting obligations

HM Treasury should bear in mind the different nature of suspicious activity reports (SARs) made by accountants, compared to those of banks and other financial sector businesses. Accountancy services will typically involve an on-going relationship between the client and the professional. Therefore, SARs made by accountants will often be based on patterns of behaviour, whereas a bank's automated systems will better facilitate reporting on isolated events. Accountants (especially SMPs) will typically make fewer SARs than financial services providers. The expectation of professional advisers, such as accountants, is that they have the experience and professional judgement to identify behaviours that are unusual or out of character for a particular individual or business, rather than relying on differences across a range of data or an aggregated pool of sectorial information.

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Question 67: The government would welcome your views on retaining documents necessary for the prevention of ML/TF for the additional 5 years. What do you think the advantages and disadvantages are of doing so?

For many accountancy practices, identifying whether a client dealing is an 'occasional transaction' or an on-going 'business relationship' can be problematic. (See our response to question 66 above.) Individuals who engage accountants in respect of their taxation affairs, including compliance procedures, often have an intermittent relationship with their accountant (even though the accountant remains registered with HMRC as agent throughout). Therefore, a difficulty may arise in determining when the relationship ended.

Given the small proportion of relationships that will result in a requirement to check documentation coming to light more than five years after that relationship has ended (as opposed to within the five years, in which case the accountant would retain the information anyway, for the purposes of a current enquiry) and setting that against the costs of retaining significant quantities of information, we believe that the costs would outweigh the benefits. However, we acknowledge that record-keeping is necessary in order for AML supervisors to be able to monitor compliance. Nevertheless, we would consider five years to be excessive.

Chapter 12 – Supervision of obliged entities

Questions 68 and 69: Do you think that where registration is a requirement, the supervisor should be given an express power to refuse to register or to cancel an existing registration?

The government welcomes views on the reasons for a supervisor to refuse a registration or to cancel an existing registration. Are there any other reasons you think should be captured? Do you foresee any problems with the conditions identified?

In the case of ACCA, the ability of a member to continue to practise in the UK depends upon that member holding an ACCA practising certificate. Any of the situations set out

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in paragraph 12.6 of the consultation document could result in the removal of an individual's right to practice, according to the Authorisation Regulations set out within the *ACCA Rulebook*. The purpose of authorising an individual to practise is to be able to monitor that person and require a high standard of behaviour. Therefore, there must exist the sanction or remedy of removing that right to practise.

However, in respect of registration for AML purposes, we must consider carefully the consequences of refusing to register an individual. In the UK, accountancy is not, in itself, a regulated profession. An accountant (perhaps unqualified) is not necessarily required to hold a practising certificate or to have membership of a professional body. Currently, the default supervisor for AML is HMRC. But it might be difficult to prevent someone providing accountancy services if HMRC were to refuse to register them.

It is also worthy of note that many accountants supervised by HMRC are not members of professional bodies, and so are not subject to even self-regulation. It follows that these accountants may lack the framework of guidance, professional development and technical standards that exists within a professional body.

The key to drafting will be recognition that the whole supervisory regime is operating in a context of human behaviours. Any overly restrictive or prescriptive drafting would risk providing a route for some around the Regulations. Some operational discretion is essential for supervisors to have the flexibility to deal with a range of possible circumstances. (This, in turn, requires accountability and review mechanisms for supervisors, in order to ensure transparency and public confidence.)

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Questions 70 and 71: The government welcomes views on whether a supervisor should have the power to add conditions to a registration or whether they should have the power to suspend an existing registration.

The government welcomes views on the test that should be applied by a supervisor when seeking to refuse to register, cancel an existing registration, add conditions to a registration or suspend an existing registration (see 12.8).

In our opinion, the power to impose conditions on a registration should be made available, and it should be exercised with the objective of protecting the public. We would refer the reader to our response above concerning the issue of ACCA practising certificates. ACCA's Authorisation Regulations allow for conditions to be placed on certificates. In urgent cases, interim orders are also available in order to protect the public.

Question 72: Where there is more than one supervisor, we welcome views on preventing the resubmission of an application for registration with another supervisor.

Communication between supervisors, and resources available, are seen as restricting factors. However, communications are made easier through relationships that exist within the AMLSF[5] and the AAG.[6] ACCA supervises firms, rather than individual members, for AML purposes. A firm that includes an ACCA member among its principals, and that wishes to be regulated by ACCA will be the subject of communication between ACCA and its existing professional body (ie its AML supervisor).

However, this is a voluntary arrangement, which is considered a proportionate measure in the public interest. The situation is complicated by the lack of statutory recognition for providers of accountancy services in the UK. Furthermore, where no professional body is prepared to regulate a particular firm, HMRC is currently the default supervisor. The

[5] Anti-Money Laundering Supervisors Forum
[6] Accountants' Affinity Group

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potential burden on HMRC, as the supervisor of accountancy providers who are not regulated by any of the professional bodies, is significant and perhaps without limit.

Question 73: Do you agree with the government's approach to a "person who holds a management function" in paragraph 12.13 - namely those who make decisions about a significant part of the entity's activities or the actual managing or organising of a significant part of those activities? Do you think it will encompass all individuals that should be subject to a fit and proper test?

The test is broad but, to the extent that it applies to accountancy practices (including those meeting the definition of TCSPs) we would expect a regulated entity, as a matter of commercial expediency, to appoint only managers who would meet the fit and proper criteria. Holders of ACCA practising certificates - including all principals in public practice firms - are required to meet 'fit and proper' requirements, in accordance with ACCA's Global Practising Regulations.

Question 75: What are your views on the meaning of "criminals convicted in relevant areas"?

ACCA members in practice are subject to 'fit and proper' requirements. We feel it inappropriate to comment on this question, as other supervisors will have a more relevant perspective. However, we would refer the reader to ACCA's Global Practising Regulations, which set out our understanding of 'fit and proper' in respect of ACCA members.

Question 76: What are your views on the meaning of "associates"?

In our opinion, the PEP definition of 'close associate' would be relatively easy to understand and manage, and there are advantages in simplifying the Regulations with such alignment of the definitions. We also believe that alignment with the PEP definition

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would be more likely to identify risk areas, operating as it does in respect of voluntary relationships rather than involuntary ones.

Question 77: Do you agree the criminality test should be extended to High Value Dealers?

As a matter of general policy, to extend the criminality test to high value dealers would seem appropriate and expedient.

Question 78: What are your views on spent convictions and cautions being taken into account for those new sectors in paragraph 12.18, in particular estate agents, lettings agents, accountants, and if there is to be an extension, HVD's? How would the disclosure of spent convictions and cautions maintain public protection and mitigate risks to the public?

Article 47(3) of the Directive 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'. We would like some guidance concerning what measures might be considered 'necessary'.

The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 allows ACCA, for example, to request disclosure of cautions and convictions (other than protected cautions and convictions), even if they are spent, upon entry to the profession. The disclosure of a spent conviction would not, in itself, be a bar from entering the profession, but ACCA would assess each disclosure on a case by case basis. However, it appears that, pursuant to article 47(3), in certain circumstances, people with criminal convictions could be prevented from being auditors, external accountants and tax advisors (among other professions). To an extent, this would remove professional bodies' decision-making ability when considering someone's suitability to act in a particular role (effectively the bodies' ability to issue practising certificates).

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The implementation of article 47(3) must balance the appropriate protection of the public with the need to rehabilitate members of that same public. While spent convictions may remain relevant in the field of AML regulation, they should simply be 'taken into account' in the considered decision whether to authorise. This follows a principles-based approach, but also recognises principles of fairness.

Question 79: Are there any specific offences you consider relevant in relation to the risk of money laundering and terrorist financing?

Consideration should be given to the possibility, especially in relation to overseas PEPs, that a particular conviction might not have been secured in accordance with the same levels of judicial independence or process as would apply in the UK. In addition, identifying a particular offence does not take into account its magnitude or seriousness. Therefore, AML supervisors must (where possible) be able to exercise discretion.

Question 80: Should the government extend the criminality test to other entities covered by the directive?

The concept of criminal liability for non-natural persons is entirely novel in many jurisdictions, and remains complex and inconsistent across most others. For many jurisdictions the only non-natural person criminal liability in local jurisprudence attaches in respect of breaches of the provisions of the OECD Anti-bribery Convention[7]. Accordingly, it would appear that the extension of the criminality test to other entities could create an inconsistent landscape for non-natural persons subject to the Directive's requirements.

[7] http://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf

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Questions 81 and 82: Do you think that a transitional period is needed to complete the criminality tests?

Do you think a transitional period of two years affords sufficient time to complete the criminality test on the appropriate existing persons who are already on the supervisors' registers?

Yes, we believe that a transitional period is required. In introducing criminality tests for persons already on supervisors' registers, there must be an expectation that some tests will disclose relevant convictions. Supervisors will need to be absolutely clear about the implications of such findings, and the transitional period must be sufficiently long to permit the appropriate responses.

Chapter 13 – Administrative sanctions

Most of the UK's AML supervisors have regulatory policies and procedures that include sanctioning provisions. In the case of the accountancy bodies in the UK, they are subject to regulatory oversight only in respect of services provided under statute (such as auditing, insolvency and incidental investment business). Therefore, the general practice of accountancy is said to be self-regulating. ACCA understands the importance of rigorous regulation to the ACCA brand. Therefore, its policies and procedures pay due regard to the principles of better regulation. We believe that AML supervisors must be given the flexibility to regulate members and firms according to these better regulation principles. Sanctions need to be targeted and proportionate, and accountability and transparency are important safeguards that ensure that regulation is performed in the public interest.

ACCA's Disciplinary Committee deals with any disciplinary matters referred to it by an independent assessor, following an investigation by ACCA of an allegation made against an ACCA member or firm. The Admissions and Licensing Committee deals with all licensing issues. (There is also an Appeal Committee, which hears appeals from decisions of the Disciplinary Committee and the Admissions and Licensing Committee.) All Committees are independent of ACCA.

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It is important that sanctions are seen as proportionate. Given the potential seriousness of money-laundering offences, we would not propose that a maximum penalty be written into the Regulations. However, it would not be appropriate for AML supervisors to adopt such powers themselves.

In respect of ACCA members and firms, ACCA's complaints and Disciplinary Regulations provide that the Disciplinary Committee may make any one or more of the following orders:

- that no further action be taken
- that a member/firm be reprimanded or severely reprimanded or admonished
- that a member/firm be fined a sum not exceeding £50,000
- that a member/firm pay compensation to the complainant a sum not more than £1,000
- that a member/firm waive or reduce his/its fees to the complainant by a specific sum.

In the case of a member only, the Disciplinary Committee may order that the member be excluded from membership.

In addition, the Disciplinary Committee may order that a member or firm be referred to the Admissions and Licensing Committee. The purpose of this would be that the Admissions and Licensing Committee has the ability to remove a practising certificate (or a firm's audit licence). Orders of the Admissions and Licensing Committee are made with the objective of protecting the public, where (through ACCA's monitoring procedures or otherwise) the member's or firm's work is found not to be of the required standard.

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