Think Ahead ACCA

Transposition of the Fifth Money Laundering Directive: consultation

A public consultation issued by HM Treasury

Comments from ACCA to HM Treasury
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SUMMARY

ACCA welcomes the invitation to contribute to this public consultation on the Transposition of the Fifth Money Laundering Directive. We have responded only to those questions with relevance to the accountancy sector. The implementation of effective measures to counter money laundering is an important feature of the UK's legislative landscape and a key element in the UK's reputation as a safe and reputable place to do business.

However, it is equally important that the measures are efficient and proportionate. The imposition of undue costs on businesses or their advisers will compromise the attractiveness of the UK as a competitive jurisdiction. Understanding the cost and administrative implications of the proposals is an essential step in developing an appropriate and sustainable suite of measures, and it is disappointing that the consultation on such a wide ranging and important suite of measures has run for just eight weeks. The Consultation Principles E and G[1] indicate that sufficient time should be allowed for the target stakeholders to effectively engage. It is unfortunate that the consultation has taken place across a period when a significant proportion of our membership have been preoccupied with preparations for wholesale reform of VAT administration in the UK as well as background concern for them and their clients about the progress of negotiations in the light of the UK's Article 50 notification. While those factors were unavoidable, allowing 12 or even 16 weeks to collate evidence could have increased the value of the exercise.

Turning to specific aspects of the consultation, we are particularly concerned about the potential impact on trustees, companies, individuals and those who advise all three groups were the TRS system to be extended to cover all express trusts. The existing system suffered a number of significant problems when first implemented, and the scale of additional registrations which might be required if the current proposed definitions are applied to the UK would vastly exceed the demand placed upon that system. There are also concerns that in many instances the parties would not appreciate the need to register and entirely legitimate arrangement, resulting in the potential for an "empty" procedural penalty.

Given the particular role of the trust in the common law system, and the likelihood that across much of the EU arrangements which in the UK are dealt with under trust would instead be dealt with under express contract, we would suggest that HM Treasury revisit the definition. If the intention of the Directive can be achieved without creating

1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf

uncertainty as to which arrangements might be caught, then the relevant changes should be explored.

The increased role of digital technologies in the recording, management and creation of wealth poses challenges for law enforcement as well as offering opportunities for criminals. We welcome the recognition of cryptocurrencies in the proposed new framework, and would urge HM Treasury to retain the flexibility to adapt the regime for future developments in the light of current known problem areas. The boundaries of currency, security instrument and utility token are not always clear, but their potential attractiveness to criminals should bring them within the scope of the regulations. Similarly, technology such as tumbler services can play an important role in disguising the path of funds from one party to another and should also be considered for inclusion.

The scope for criminal activity online is not restricted to laundering of funds, but can also include theft of valuable information and its sale to third parties, or use directly for fraudulent purposes by the thieves. With this in mind, we have concerns about the proportionality of creating a single national database of bank account ownership. The value of this single source of information, were its security to be compromised, would be sufficient to make it a prized target for criminals. The design and population of such a register would need careful and detailed analysis to reflect the likely high level of risk. Given the burden of setting it up for the marginal additional utility, and the significant new risks created, we would question whether this is a proportional measure in the current online security environment.

We would also urge HM Treasury to cooperate and collaborate with other government departments, regulators and international bodies in order to coordinate the various regulatory developments which affect the population of obliged entities. Many accountants are also tax advisers, and have obligations to the tax authorities, as well as access to related tools and networks, in that capacity. Equally, Companies House is currently consulting on changes to the registration of companies and in particular the verification of the identity of directors and beneficial owners. The creation of a UK register on which obliged entities would be entitled to rely would have significant implications for anti-money laundering compliance processes, and the development of a coherent suite of powers and obligations designed to reflect that reality could be a genuine advantage for the UK as a good environment to do business.

AREAS FOR SPECIFIC COMMENT:

Expanding the scope in relation to tax matters

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

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.

The extension of the scope of tax services to include the indirect provision of tax advice, including material aid or assistance with tax affairs, has the scope to significantly increase the obligations on accountancy practices to undertake KYC procedures.

While there may be situations where an intermediary and their third party client have tried to arrange matters so as to access professional advice without triggering KYC procedures, the obligation to investigate the ultimate client where there is significant contact would in most cases result in the obliged entity providing the advice undertaking KYC where detailed or valuable advice is transmitted. The alternative (that the intermediary acts as go between in order to prevent that significant contact) would run the risk of incomplete or inaccurate advice being transmitted, defeating the object of the exercise.

It is however more usual that an accountancy firm might be asked to provide advice on the instruction of another professional adviser, itself an obliged entity. In such circumstances, while the obligation to undertake KYC would of course still be triggered by significant contact or a direct business relationship coming into existence with the ultimate client, the value of additional KYC being undertaken by the specialist adviser regardless of contact levels and despite the existence of the intermediary advisers KYC is not clear.

We would also urge HM Treasury to ensure that the definition of ‘material’ is expanded and clarified in guidance, especially if there is no scope for a specialist adviser to rely upon the KYC undertaken by an introducer obliged entity. Any lack of certainty would drive prudent accountancy practices to undertake KYC in a significant number of situations where it is not currently required, and where the marginal benefit is not readily apparent.

Cryptoassets

Question 12. 5MLD defines virtual currencies as ‘a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded

electronically'. The Government considers that all relevant activity involving exchange, security and utility tokens should be captured for the purposes of AML/CTF regulation, and seeks views on this approach. Is the5MLD definition appropriate or does it need to be amended in order to capture these three types of cryptoassets (as set out in the Cryptoassets Taskforce's framework)? Further, are there assets likely to be considered a virtual currency or cryptoasset which falls within the 5MLD definition, but not within the Taskforce's framework?

Question 13. 5MLD defines a custodian wallet provider as 'an entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies'. The Government considers that all relevant activity involving exchange, security and utility tokens should be captured for the purposes of AML/CTF regulation, and seeks views on this approach. Is the EU Directive definition appropriate or does it need to be amended in order to capture these three types of cryptoassets (as set out in the Cryptoassets Taskforce's framework)? Further, are there wallet services or service providers likely to be considered as such which fall outside this Directive definition, but should come within the UK's regime?

Question 20. The government would welcome views on whether firms involved in the issuance of new cryptoassets through Initial Coin Offerings or other distribution mechanisms should be required to fulfil AML/CTF obligations on their customers (ie, token purchasers), as set out in the regulations.

We welcome the government's proposal to include all three types of crypto-assets within the scope of AML/CTF regulation. In view of the risks posed by ICO activity, whether ultimately classified as utility tokens or security tokens, we welcome the proposal to bring these cryptoassets within the scope of the regulations.

Given the potential for ICO tokens to fall outside the 5MLD definition, we would support the adoption of definitions consistent with the Cryptoassets Taskforce categories set out at paragraph 2.22 of the consultation.

Question 14. Should the FCA be assigned the role of supervisor of cryptoasset exchanges and custodian wallet providers? If not, then which organisation should be assigned this role?

We would support the assignment of the role of supervisor of cryptoasset exchanges and wallet providers to the FCA.

Question 16. The government would welcome views on whether cryptoasset ATMs should be required to fulfil AML/CTF obligations on their customers, as set out in the regulations. If so, at what point should they be required to do this? For example, before an 'occasional transaction' is carried out? Should there be a value threshold for conducting CDD checks? If so, what should this threshold be?

The imposition of AML/CTF obligations on cryptoasset ATM operations would ensure a consistent regime across all mechanisms for transfer and exchange of value in the cryptoasset ecosystem.

While the scale of such operations is currently small, embedding comprehensive and effective AML/CTF procedures in the sector from the outset will cause less disruption than attempting to introduce them later on. With this in mind, a low threshold and broad obligation on the operator of the ATM to carry out CDD would represent a prudent course of action until the risks can be more accurately and comprehensively assessed.

Question 17. The government would welcome views on whether firms offering exchange services between cryptoassets (including value transactions, such as Bitcoin-to-Bitcoin exchange), in addition to those offering exchange services between cryptoassets and fiat currencies, should be required to fulfil AML/CTF obligations on their customers.

Question 18. The government would welcome views on whether firms facilitating peer to-peer exchange services should be required to fulfil AML/CTF obligations on their users, as set out in the regulations. If so, which kinds of peer-to peer exchange services should be required to do so?

As noted above, HM Treasury should target a comprehensive regulation of all aspects of the cryptoasset ecosystem, including all exchange mechanisms, whether between crypto and fiat currencies or between different crypto currencies. In particular, the current proposals do not seem to cover automated tumbler or mixer services, which pose a particular threat to the traceability of funds. We would urge HMT to consider extension of the regulations to specifically cover these services.

Question 19. The government would welcome views on whether the publication of opensource software should be subject to CDD requirements. If so, under which circumstances should these activities be subject to these requirements? If so, in what circumstances should the legislation deem software users be deemed a customer, or to be entering into a business relationship, with the publisher?

While it is understandable that the government would seek to regulate the supply of non-custodian wallet software and other types of cryptoasset related software, the difficulties of doing so in respect of open source products are likely to be very considerable. The scope for users to access and modify the underlying code allows for unrestricted distribution of the product, and while the initial programmer may comply with the regulation, it would be impossible to restrict subsequent sharing of the product by users, which would compromise the effectiveness of any attempt to regulate users.

If an attempt is made to regulate open-source wallet and cryptoasset software, it should be made clear in the definition that it is only relevant open-source software which is to be subject to CDD requirements.

Question 24. The global, borderless nature of cryptoassets (and the associated services outlined above) raise various cross-border concerns regarding their illicit abuse, including around regulatory arbitrage itself. How concerned should the government be about these risks, and how could the government effectively address these risks?

The global nature of cryptoassets and their existence entirely independent of conventional legal frameworks and regulatory jurisdictions should be a matter of significant concern to the government. Cooperation and coordination with supranational bodies such as FATF as well as direct collaboration with individual governments and expert groups where appropriate will be essential to meeting that challenge.

Question 25. What approach, if any, should the government take to addressing the risks posed by 'privacy coins'? What is the scale and extent of the risks posed by privacy coins? Are they a high-risk factor in all cases? How should CDD obligations apply when a privacy coin is involved?

The cybersecurity regulation environment is fast moving and new products such as privacy coins and stable coins emerge as the needs of and threats to users adapt to advances in technology and market maturity. Although not mentioned explicitly in MLD5 or the report of the Cryptoassets Taskforce, or defined in the consultation, the use of private, anonymous exchange mechanisms is clearly a high-risk factor. Striking the correct balance between the certainty of regulations and the flexibility of guidance will inevitably involve some compromise, but the challenges of emerging concepts do need to be addressed.

Electronic money

Question 37. Should the government apply the CDD exemptions in 5MLD for electronic money (e-money)?

Yes.

Question 38. Should e-money products which do not meet the criteria for the CDD exemptions in Article 12 4MLD as amended be considered for SDD under Article 15?

Yes.

Question 39. Should the government exclude any e-money products from both the CDD exemptions in Article 12, and from eligibility for SDD in Article 15?

If the government were able to identify e-money products which pose a specific AML/CTF risk such that CDD is appropriate then the exemption CDD and scope for SDD to apply instead should be removed, and full CDD be required in respect ot hose high risk products.

Question 42. Should the government allow payments to be carried out in the UK using anonymous prepaid cards? If not, how should anonymous prepaid cards be defined?

Given that there are legitimate, albeit limited, use cases for anonymous prepaid cards, an outright ban would not seem a proportionate response. A limit on the value of transactions which can be settled by anonymous card might however represent an appropriate response to counter the risks posed by them.

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?

It will generally be preferable for detailed guidance to be within the regulation itself, giving certainty for those bound by the regulations. However, in a fast changing environment, it may be necessary to exploit the additional flexibility offered by guidance to update specific details or to accommodate advances in technology which might offer more effective or efficient mechanisms which were not in contemplation wen the regulations were first drafted.

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?

Treasury approval of guidance would in all probability meet the required test for "implicit recognition, approval or acceptance". There seems no good reason why HM Treasury could not, in the approval, make explicit the adoption of the standards in accordance with the Directive so as to put the matter beyond doubt.

It is not clear how the timing would work where HM Treasury relied upon third party guidance to embody the standards, and in order to provide certainty it would be better from HM Treasury to set the standards directly in the regulations, albeit potentially subject to clarification and augmentation by the Treasury's own guidance.

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?

The imposition of an absolute requirement to verify the required information would constitute a substantial change to the regulation. The current formulation reflects the principle that the regulation should be risk based and proportionate, and allows for the application of different standards to different obliged entities in respect of different clients, based upon the risk assessment of the client and the resources available to the adviser. There may be situations where it is impossible to "determine" some of the information, but risk may be minimised. For example, it may be unclear what law a

corporate body is subject to as its constitution and operations may indicate two possibilities, based on the incorporation or place of effective control tests for residency. However, if both jurisdictions have sufficiently similar regulation in the relevant areas, then the risk will be the same, whatever the final outcome of the tests.

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?

It seems likely that in most cases where it is impossible to identify the beneficial owner, the senior managing official will in any event have already been identified as part of the CDD process for the entity, minimising the impact of such a requirement on the obliged entity. There should be little impact on compliant businesses, who will typically be willing and able to assist with CDD, even if they have been unable to assist with the verification of the Beneficial Owner's identity. The refusal of the senior managing official to cooperate with CDD should in itself be regarded as a high-risk factor, especially where there are any suspicious features in the reasons why it is not possible using reasonable efforts to establish the beneficial owner's identity. Introducing an additional layer of regulation may not in practice generate significant additional protection, but equally would have little or no impact on compliant entities.

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?

Understanding the ownership and control structure of clients would usually be an integral part of the risk based assessment of the client undertaken before accepting the appointment, as much on commercial grounds as for AML/CTF reasons. However, the inclusion of an explicit requirement would then open the door to explicit sanction in the case of relevant persons who do not undertake such an assessment, and should as such act to encourage effective CDD.

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?

Yes

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

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?

In order to clarify the parallel and complementary nature of the different elements of the regulatory regime, the obligations under Reg 31 be made explicit within and for each process. However, in order to avoid the accumulation of burdens on obliged entities, there is no need to duplicate the effect of the current follow up actions for PEPs.

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)?

Yes. The obligations should be kept under review in the light of changes to the legal status of information on the register, and consideration given to recognising the practical implications of delays in completion of registration, especially for entities with complex ownership structures and overseas interests.

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

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

The approaches covered by Box 5B appear appropriate and proportionate, subject to the inclusion in guidance of the specific circumstances in which UK law requires obliged entities to contact clients.

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?

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?

As recognised in the consultation document, expanding the requirement to conduct EDD to arrangements "involving" high risk countries has the scope to catch a wide range of personal and commercial relationships which exist for entirely valid reasons. We would support clarifications as set out in the document for citizens of high risk countries, and also to confirm that where the commercial rationale for "involvement" in the high risk country is clear from the broader CDD and the obliged entity can evidence its reasonable understanding of those relationships then there is no need to undertake EDD.

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

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?

Yes

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?

The current status of information held on the public register at Companies House does not allow obliged entities to rely upon it. We would fully support the current proposals from BEIS to introduce verification by Companies House in order to bring the UK registry in line with the approach of its peers in other jurisdictions.

Until the UK register can be legally relied upon by obliged entities as part of their CDD processes it is not necessary (although it may typically be reasonable) for obliged entities to check the register as part of their CDD. Creating an obligation to report discrepancies which the obliged entity is not required to discover could have the opposite of the intended consequence, and resource constrained businesses seeking to minimise their administrative burdens may choose to avoid the risk of such burdens arising where possible by operating a standard alternative procedure.

It should be borne in mind at all times that the risks targeted by AML/CTF regulation are of significant criminal behaviour, and while deliberate actions or omissions designed to further those aims should be subject to material sanction, minor administrative errors or omissions which do not have any impact on criminal activity should not be subject to significant sanction.

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?

The fight against ML/CTF is a joint effort between all parties, and all involved should be subject to similar proportionate obligations to maximise the effectiveness of the systems in place to prevent it.

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?

The approach to dealing with discrepancies in information needs to be based upon proportionate discretionary processes. It is not immediately clear how a public warning on the register could not create tipping off issues where the provision of inaccurate information to at least one interested party is intentional and the subject is alerted to the fact that the deception has been detected. It is also unclear how such a warning would operate without effectively disbarring the subject from using UK advisers subject to AML/CTF regulation, since there seems no good reason why a compliant entity would not update the register (or revise the information supplied to the adviser) once aware of the difficulties caused.

Trust registration service

Question 64. Do respondents have views on the UK's proposed approach to the definition of express trusts? If so, please explain your view, with reference to specific trust type. Please illustrate your answer with evidence, named examples and propose your preferred alternative approach if relevant.

We are concerned about the potential impact on trustees, companies, individuals and those who advise all three groups were the TRS system to be extended to cover all express trusts as currently proposed. Given the particular role of the trust in the common law system, and the likelihood that across much of the EU arrangements which in the UK are dealt with under trust would instead be dealt with under express contract, we would suggest that HM Treasury revisit the definition. There is widespread concern that a number of common UK transactions, such as joint ownership of land, or the holding of a bank account by a parent on behalf of a minor child, would fall within the proposed definition of "express trust" by the completion of standard form documentation which clearly identifies intention, subject matter and beneficiaries.

In the absence of clarity there is a risk that significant numbers of "express trusts" liable to registration would be created, often in cases where the parties would have no knowledge or experience of the AML regime, and no appreciation of the need to register. The result would be widespread failure to comply with the regime, and in the overwhelming majority of such cases there is no reason to suspect that there would be any risk of ML/TF activities.

If all such 'express trusts' were to be registered, then there would be the concern that in the absence of sophisticated software filtering tools (which would involve their own cost and resource implications) then the TRS would be overwhelmed with registration which serve no useful purpose, and would distract resource from those registrations which merit further investigation. Given the technological challenges faced by the initial implementation of the TRS, the prospect of attempting to scale up the capacity of the system to the extent necessary raises very real concerns of further disruption.

We would urge HM Treasury to reconsider if the intention of the Directive can be achieved without creating uncertainty as to which arrangements might be caught, and to capture only those transactions which pose a real ML/TF risk and are not covered by any other type of monitoring (for example, joint ownership of land which is likely to involve solicitors and estate agents).

Question 65. Is the UK's proposed approach proportionate across the constituent parts of the UK? If not, please explain your view, with reference to specific trust types and their function in particular countries.

The operation of trusts under Scots law differs in a number of aspects from the position in England, Wales and Northern Ireland. HM Treasury should seek expert advice from Scottish trust experts in order to properly understand the impact for arrangements arising in Scotland which might be caught under the proposed definition.

Question 66. Do you have any comments on the government's proposed view that any obligation to register an acquisition of UK land or property should mirror existing registration criteria set by each of the UK's constituent parts?

There is sound logic in reflecting the existing obligations in each jurisdiction. It seems likely that such transactions would involve the **use of professional advisers, and retaining processes with which those advisers should be familiar offers clear benefits to all parties.**

Question 67. Do you have views on the government's suggested definition of what constitutes a business relationship between a non-EU trust and a UK obliged entity?

While the definition of "business relationship" is not changed by 5MLD, the additional obligation to register the trust in the UK where its only connection with the UK is the location of the professional adviser does not seem proportionate or effective. It is not clear what benefit the UK would derive from registration of the trust, especially since the UK adviser would in any event be under a duty to conduct KYC and CDD processes in relation to the trust before being able to engage as adviser. Increasing the administrative burden on the Trust of using a UK adviser rather than one located in a jurisdiction which does not impose such an obligation would negatively impact the UK's commercial competitiveness, as well as potentially driving down global standards of AML/CTF measures if the alternative adviser is in a country which is assessed as higher risk for ML/TF factors generally. In the long term, and especially in conjunction with other factors, there is the risk that advisers with international expertise would relocate to markets where the administrative burden is perceived as more proportionate.

Question 70. What is the impact of this requirement for trusts newly required to register? Will there be additional costs, for example paying agents to assist in the registration process, or will trustees experience other types of burdens? If so, please describe what these are and how the burden might affect you.

Trustees can be expected to incur additional costs in for professional advice and in many cases ongoing compliance services. Depending upon the final definition of trusts required to register there could be new registrants with large pools of beneficiaries, including some who would not know or appreciate their status as potential beneficiary. Communicating with those individuals in order to confirm the additional information now required for TRS could pose very significant (and in some cases practically insurmountable) challenges.

Question 71. What are the implications of requiring registration of additional information to confirm the legal identity of individuals, such as National Insurance or passport numbers?

There is no legal obligation on a UK citizen to hold a passport. Similarly, it is perfectly possible for an individual never to have need of or be issued with a NINO. Requiring such levels of detail from potential beneficiaries who may not even have them is unlikely to reflect a proportionate approach.

Even where it is known that the information exists, confirming it for the register may be impractical. In the case of pension schemes the class of potential beneficiaries can easily exceed 100,000 where a large group had undertaken a number of mergers and acquisitions and inherited a range of schemes on different bases. Whilst records for active and pensioner members should include a NINO, records for deferred members may be incomplete or held in formats which make the extraction of the relevant information exceptionally burdensome.

Question 72. Does the proposed deadline for existing unregistered trusts of 31 March 2021 cause any unintended consequences for trustees or their agents? If so, please describe these, and suggest an alternative approach and reasons for it.

Provided there is sufficient notice to existing trustees and their agents then the timeframe should be achievable provided the registration mechanism itself operates effectively. However, we note both the issues with the existing TRS system, and also the potential expense and difficulty of communicating the registration requirement to every single trustee if the full range of ‘express trusts’ is brought within the registration requirement.

Question 73. Does the proposed 30 day deadline for trusts created on or after 1 April 2020 cause any unintended consequences for trustees or their agents? If so, please describe these, and suggest an alternative approach and reasons for it.

There is potential for a 30 day time limit to pose significant practical issues for large or complex trusts, especially where overseas interests are involved. For smaller trusts, which may even be created inadvertently, while registration itself should not take too

long once awareness of the need to register exists, it is not clear in the absence of dedicated professional advice how the trustees would become aware of that obligation.

Question 74. Given the link with tax-based penalties is broken, do you agree a bespoke penalty regime is more appropriate? Do you have views on what a replacement penalty regime should look like?

The obligations under the registration provisions are quite different in character to those under the tax regime, and in particular the consequences of failure to comply strictly with the regulation will in most cases have no substantive impact, for example where a small express trust fails to register purely as a result of unintentional omission. Although tax penalties are themselves under a process of overhaul, it is unlikely that any new model would better fit the AML sphere than the existing one. In order to maintain consistency and comparability between similar regimes, the late filings penalty regime at Companies House may be more appropriate.

Question 76. Do you have any comments on the proposed definition of legitimate interest? Are there any further tests that should be applied to determine whether information can be shared?

The three elements set out at paragraph 9.45 would, applied cumulatively, represent the basis of a proportionate and appropriate test. Under the first leg, we would suggest that “active involvement” be restricted to individuals whose involvement is subject to a specific statutory regime, for example law enforcement officers operating under authority of the court. In the case of eg journalists HM Treasury should consider whether some form of accreditation or affiliation and acceptance of a sanctions regime where information is used inappropriately would be a proportionate counterbalance to discourage abuse or frivolous access requests from individuals who might not have a proper understanding or appreciation of the sensitivity and nature of the information held on the register. With that in mind, and in view of the ease with which information can be shared and replicated using modern technology, there should be strict safeguards against bulk requests or fishing expeditions.

Question 78. Do you have any views on possible definitions of ‘other legal entity’? Should this be defined in legislation?

“Other legal entity” should be defined in the legislation, to give certainty to trustees. This will be particularly important if the self-declaration proposal is implemented.

Question 79. Does the proposed use of the PSC test for ‘corporate and other legal entity’, which are designed for corporate entities, present any difficulties when applied to noncorporate entities?

The corporate PSC test, designed for business ventures, may not be appropriate for collective or cooperative undertakings with restricted aims and objects, or where the powers of the members are restricted by the legal form of the undertaking. For the test to be readily applicable to that wider range of aims and structures it should operate

more broadly on the areas of transactions and structure and the ability to influence the future shape of either.

Question 80. Do you see any risks or opportunities in the proposal that each trust makes a self-declaration of its status? If you prefer an alternative way of identifying such trusts, please say what this is and why.

The risks from a false self-declaration should be managed by the existence of an appropriate penalty regime and communication of its existence to trustees. Provided this safeguard is in place then the benefits of self-declaration should outweigh the risks, and the considerable cost and administrative burden to all trusts of requiring full verification would be avoided.

Question 82. Do you agree with, or have any comments upon, the envisaged minimum scope of application of the national register of bank account ownership?

We recognise the potential benefits of a single searchable register of bank account ownership for the entire jurisdiction. However, its creation and maintenance would be a significant undertaking, and it would represent an ongoing security risk given the potential for access to the register to be compromised.

The identification information held in any such register should be kept to a bare minimum, both to reduce the administrative burden of populating and maintaining it and to reduce the attractiveness of accessing the register to criminals. The concerns noted at Question 71 above about identifiers such as passport number or NINO would apply equally here.

The register should definitely only include accounts open on the date of transposition or opened after that date. Unless the transposition date coincides with some other reporting deadline for the banks, creating the definitive list as at that date is likely to impose a significant additional burden.

Question 85. Do you agree with, or have any comments upon, the envisaged approach to access to information included on the national register of bank account ownership?

We agree that the approach set out at paragraph 10.10 is appropriate and proportionate, subject to clarification of the scope of “strategic intelligence collection”.

Question 87. Do you agree with, or have any comments upon, the envisaged frequency with which firms will be required to update information contained on the register? Do you have any comments on the advantages/disadvantages of the register being established via a ‘submission’ mechanism, rather than as a ‘retrieval’ mechanism?

The frequency with which information would need to be updated appears reasonable. With that in mind, the “submission” method would appear more appropriate than a

“retrieval” one, which would involve either retransmission of unchanged data or the creation of some additional flag readable by the register holder to identify the status of information relative to its status as at the previous retrieval operation.

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)?

Yes. We fully support the continued publication of the annual report on the supervisory regime.

Pooled client accounts

Question 91. Are there differences in the ML/TF risks posed by pooled client accounts held by different types of businesses?

Yes. Conveyancers and law firms will typically hold large sums of client monies, being the principle consideration due on major transactions, such as house buying or large commercial deals. The parties to such transactions are usually private entities. Accountants and tax advisers on the other hand rarely hold client monies other than tax refunds, which will typically be for far smaller amounts. Moreover, the source of those funds is a government department, further reducing the scope for ML/TF.

Question 94. Do you agree with our proposed changes to enforcement powers under regulations 25 & 60?

We have no objections to the proposed changes for FCA and HMRC to publish written notices.

Question 95. Do you agree with our proposed amendment to the definition of ‘officer’?

We have no objections to the proposed changes to the definition of officer.

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

This is already covered in the OPBAS Sourcebook and we do not see the need for changes to the MLRS. The proposed requirement is vague and open to interpretation. If there are specific additional requirements that the Professional Body Supervisors need to adhere to, these need to be adequately articulated, the risk/rationale explained and the requirement set out in the Sourcebook. Professional Body Supervisors are not regulated firms and for this reason we do not think it is appropriate to use the example of Principle 11 requirement on FCA-regulated firms.

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

It is not clear what risk or issue the proposed amendment is designed to address and the suggested solution. The wording is poorly articulated and there seems to be missing information.

Criminality checks

Question 103/104[2] Do the proposed requirements sufficiently mitigate the risk of criminals acting in regulated roles?–

ACCA is opposed to this requirement as it is proportionate and risk based. As a one-off exercise at the approval stage, the requirement has little risk mitigating value as any BOOMs committing relevant criminal offences after being approved will go undetected.

We believe that these checks should be the responsibility of obliged entities as transferring the responsibility for checking to the supervisory authorities would send a message to firms that they are not required to be vigilant. In the case of sole practices, we believe that self-declaration is adequate. Professional Body Supervisors should then perform testing on a risk bases to assess whether firms' checks or self-declarations are adequate.

If the proposed requirement is implemented, we expect greater clarity regarding the exact information/evidence to be provided by the BOOM as part of the application and whether this applies to BOOMs already approved under a different approach. Fundamentally, it is unclear whether the requirement will apply retrospectively and how often it must be repeated. We strongly believe that if implemented, the new requirement should only apply to new BOOMs.

There need to be further clarification on what is the "duty on supervisors to take necessary measures for ensuring compliance with that requirement". The wording of paragraph 14.11 refers to 'professional body supervisors' which seems to open the door for exemption to HMRC as the default supervisor.

The requirement will put an unreasonable demand on resources but have very little benefit. Any information received by a PBS on beneficial owner, officer or manager (BOOM) must be reviewed and acted upon as appropriate. It would not be sufficient for that information to simply be placed on file. In addition we are concerned that, in practice, a person falling foul of Reg. 26 would simply take a more junior role in the practice or practise 'under the radar'.

[2] We note there is an inconsistency in numbering between the questions set out in the body text of the consultation and the summary of questions at Annex B