

# HM Treasury

**Reliance under the Money Laundering Regulations 2007 and banking secrecy.**

**Guidance for anti-money laundering supervisors.**

**This paper has been published as an annex to the Minutes of the Money Laundering Advisory Committee meeting on 17<sup>th</sup> March 2009.**

## Summary

1. One of the UK's money laundering supervisors (a professional body) was concerned that a member firm had legal advice that, where a client is introduced to them by a regulated intermediary from an equivalent jurisdiction, they are entitled to rely on CDD carried out by that intermediary and need not know the identity of the client and, as appropriate, the beneficial owner.
2. HM Treasury convened a meeting of interested parties on 15<sup>th</sup> April 2009 to discuss these issues. There was a broad consensus that the approach discussed and summarised below (that in order to meet the requirements of the UK Money Laundering Regulations a business must know the identity of its customer) was correct and that HM Treasury should take steps to make their views widely known.
3. This note has been prepared to assist AML supervisors and represents HM Treasury's interpretation of the regulations. We understand this view represents the agreed position of supervisors who attended the meeting of 15<sup>th</sup> April. It does not represent legal advice to third parties.

## The issue raised

4. The argument is that the introducer (based in Switzerland, a non-EEA jurisdiction that is treated as 'equivalent' in the UK) owes strict and binding duties of confidentiality to the beneficial owners. The introducer would offer to provide, in a letter to the UK firm, that they have complied fully with their MLR-equivalent requirements, and that they will provide an undertaking to that effect. However they will not provide any further details as to the beneficial owners of the customer on the basis of confidentiality.
5. The Money Laundering Regulations 2007 (MLR 2007) permits reliance upon firms that carry on business in a non-EEA state which are subject to requirements equivalent to those laid down in the 3rd money-laundering directive, so that the CDD carried out by that business can be relied upon by the relying firm. Firms in the non-EEA jurisdiction are included in the list of equivalent jurisdictions.

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6. Additionally, it can be argued that in certain circumstances the introducer is (or may be) the customer of the UK business.
7. The supervisor concerned was critical of the view that a business could discharge its responsibilities under the Regulations without knowing the identity of the customer and beneficial owner.
8. Attendees at the meeting endorsed the supervisors view. The point was additionally made that secrecy laws typically did not constitute an absolute prohibition on disclosure but generally precluded disclosure without permission from the person being identified.
9. There was also a discussion of the 'customer' point. This included a reference to the guidance produced by HMRC on the question of 'who is my customer?' There was a general recognition that in practice the approach adopted by HMRC in their guidance would frequently be appropriate. But attendees emphasised that although an introducer or other person carrying out the instructions of the underlying customer might satisfy some of the tests adopted by HMRC, relevant persons should continue to adopt a risk-based approach to the issue of identifying their customer, and consider whether there was an underlying customer for whom in substance work was carried out. Where that was the case firms should carry out CDD checks on the underlying customer.

### The legal provisions

10. HM Treasury briefly reviewed the legislative provisions. Regulation 17 includes provisions on reliance:
  - '(1) A relevant person may rely on a person who falls within paragraph (2) ... to apply any customer due diligence measures provided that-
    - (a) the other person consents to being relied on; and
    - (b) notwithstanding the relevant person's reliance on the other person, the relevant person remains liable for any failure to apply such measures.'
11. In this case, it seems the UK professional firm is relying on a Swiss firm falling within regulation 17(2)(d):
  - 'a person who carries on business in a non-EEA state who is-
    - (i) a credit or financial institution (or equivalent institution), auditor, insolvency practitioner, external accountant, tax adviser or independent legal professional;
    - (ii) subject to mandatory professional registration recognised by law;
    - (iii) subject to requirements equivalent to those laid down in the money laundering directive; and

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- (iv) supervised for compliance with those requirements in a manner equivalent to section 2 of Chapter V of the money laundering directive.'
12. Switzerland appears on the list of equivalent countries agreed by the EU Committee on the Prevention of Money Laundering and Terrorist Financing. So the relevant person is entitled to rely on the Swiss firm if it complies with (i) - (iv). It is not sufficient simply that Switzerland is on the list of equivalent countries: all the requirements of 17(2)(d) must be met. The EU Common Understanding provides 'these third countries are currently considered as having equivalent AML/CTF systems to the EU'.
  13. Footnote 2 to HMT's notice publicising the list of equivalent countries provides:
    - 'Regulation 17(2)(d) imposes four tests, (i) to (iv), all of which must be satisfied if reliance is to be placed on a non-EEA firm. While the equivalence list was specifically developed with simplified due diligence in mind, the UK accepts that it answers the test in 17(2)(d)(iii).'
  14. The equivalence list is relevant for both simplified due diligence and reliance purposes. The equivalence list simply provides that Switzerland has AML requirements equivalent to those of Third Money Laundering Directive.
  15. Assuming a firm may be relied upon, regulation 17(1) provides that a relevant person may rely on it 'to apply any customer due diligence measures'. Customer due diligence measures are defined in regulation 5 as meaning:
    - a. identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;
    - b. identifying, where there is a beneficial owner who is not the customer, the beneficial owner and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the relevant person is satisfied that he knows who the beneficial owner is, including, in the case of a legal person, trust or similar legal arrangement, measures to understand the ownership and control structure of the person, trust or arrangement; and
    - c. obtaining information on the purpose and intended nature of the business relationship.'
  16. 'Know your customer' is a key principle underlying the MLRs, Third Money Laundering Directive and the FATF 40 recommendations.
  17. Third Money Laundering Directive deals with reliance in Section 4. Article 14 provides: 'Member States may permit the institutions and persons covered by this Directive to rely on third parties to meet the

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requirements laid down in Article 8(1)(a) to (c). However, the ultimate responsibility for meeting those requirements shall remain with the institution or person covered by this Directive which relies on the third party.'

18. FATF Recommendation 5 provides that financial institutions should not keep anonymous accounts or accounts in obviously fictitious names, and should undertake customer due diligence measures (recommendation 12 provides that the requirements on financial institutions apply to others, including accountants). Recommendation 9 provides:

'Countries may permit financial institutions to rely on intermediaries or other third parties to perform elements (a) - (c) of the CDD process or to introduce business, provided that the criteria set out below are met. Where such reliance is permitted, the ultimate responsibility for customer identification and verification remains with the financial institution relying on the third party.

19. The criteria that should be met are as follows:

A financial institution relying upon a third party should immediately obtain the necessary information concerning elements (a) - (c) of the CDD process. Financial institutions should take adequate steps to satisfy themselves that copies of identification data and other relevant documentation relating to the CDD requirements will be made available from the third party upon request without delay.

20. Regulation 17 does not use the same language as Third Money Laundering Directive, but it is clear from other provisions of the MLRs that the relevant person is required to know the identity of his customer and any beneficial owner, and the purpose and nature of the business relationship.

21. Regulation 19(6) provides that a relevant person who relies on a third party to apply customer due diligence measures 'must take steps to ensure that the third party will, if requested by the relevant person ... (a) as soon as reasonably practicable make available to him any information about the customer (and any beneficial owner) which the third party obtained when applying customer due diligence measures; and (b) as soon as reasonably practicable forward to him copies of any identification and verification data and other relevant documents on the identity of the customer (and any beneficial owner) which the third party obtained when applying those measures. This means reliance may not be placed on the basis outlined in 4 above as the introducer has made it clear it will not put the person relying into a position where they can comply with Regulation 19(6).

22. Further, regulation 8 provides that a relevant person must conduct ongoing monitoring of the business relationship, defined as 'scrutiny of

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transactions undertaken throughout the course of the relationship (including, where necessary, the source of funds) to ensure that the transactions are consistent with the relevant person's knowledge of the customer, his business and risk profile; and (b) keeping the documents, data or information obtained for the purpose of applying customer due diligence measures up-to-date'. The intention is that the relevant person, who is involved in the business relationship on a day-to-day basis and in a position to identify any issues that arise, is in a position to identify suspicious transactions in accordance with his knowledge of the customer.

23. Regulation 7(3) provides that a relevant person must '(a) determine the extent of customer due diligence measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction; and (b) be able to demonstrate to his supervisory authority that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing.'

24. It is impossible to see how a relevant person can comply with the requirements of the MLRs without knowing the name of the customer or beneficial owner. For example at a practical level, the supplier could not know whether the customer was a PEP or had a beneficial owner if he did not know who the customer actually was?

### Conclusions

25. The intention of the FATF Recommendations, reflected in the Third Money Laundering Directive and the MLR 2007, is clearly that a relevant person must know the identity of his customer and any beneficial owner.

26. Certain third parties, meeting the appropriate standards, may be relied upon to carry out the work of obtaining documents and verifying identity etc, but the relevant person can only properly discharge the responsibilities placed on him by knowing the identify of his customer and (as appropriate) beneficial owner.

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