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TRUSTEES AND THE NEW ANTI-MONEY LAUNDERING REGIME

1 INTRODUCTION

Changes made to the UK anti-money laundering regime from 15 December 2007¹ require trustees or directors of a corporate trustee who are providing their services “by way of business” to comply with certain anti-money laundering requirements. Trustees who fall outside this definition are excluded from the regime.

There are tough penalties for failure to comply with the anti-money laundering regime. For instance, a civil penalty could be imposed on a trustee (or director) who fails to put in place adequate anti-money laundering systems or who fails to report a suspicious transaction.²

2 KEY POINTS

- The new money laundering regime applies to all “trust or company service providers” (TCSP) acting “by way of business” (see section 4).
- All paid trustees or directors of corporate trustees may be acting “by way of business” - not just those who are professional trustees (see sections 5 and 6).
- A TCSP has certain anti-money laundering obligations (see section 7).
- If caught by the ML Regulations, trustees or directors currently providing services need to register with the relevant supervisory authority, HM Revenue & Customs (HMRC) in the case of TCSPs, by 1 April 2008 (see section 8).

¹ The changes stem from the Money Laundering Regulations 2007 (“ML Regulations”) which implement the EC Third Money Laundering Directive in the UK

² Ultimately, failure to comply with the anti-money laundering obligations may amount to a criminal offence

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3 BACKGROUND

Money laundering involves exchanging criminally obtained money or assets for legitimate (or “clean”) money or assets, ultimately removing the link to their criminal origins. It also covers money, however come by, which is used to fund terrorism. The UK’s anti-money laundering regime requires certain providers of services (for further details in the context of occupational pension schemes see sections 5 and 6 below) to put in place anti-money laundering systems to prevent money laundering and report any suspicious transactions.

Systems of controls and procedures will differ according to the size and complexity of each business and the risks involved. Occupational pension schemes are already highly regulated and therefore have been identified as a low risk area for money laundering.

The key elements of the anti-money laundering systems are:

- carrying out “customer due diligence” including verifying customer identity and obtaining information on the purpose and nature of the business relationship;
- monitoring customers’ business activities and reporting suspicious activity to the Serious Organised Crime Agency (SOCA); and
- keeping the right records and ensuring that the appropriate internal management controls are in place.

HMRC is responsible for ensuring compliance with the ML Regulations for TCSPs.

4 WHO DO THE REGULATIONS APPLY TO?

The ML Regulations apply to key institutions such as banks and building societies which act as gatekeepers to the deposit of money. But they also apply to those who see financial transactions as part of their business, including professional advisers, such as lawyers or accountants, and now TCSPs.

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A TCSP is defined in the ML Regulations as “a firm or sole practitioner who by way of business” acts (or arranges for another person to act) as a “director or secretary of a company” or “a trustee of an express trust or similar legal arrangement”. Therefore it is clear that a person or firm acting as either an individual trustee of an occupational pension scheme or director of a trustee company could be a TCSP.

5 “BY WAY OF BUSINESS”

The need to comply with the anti-money laundering regime only bites if the TCSP is acting “by way of business”. This is the most difficult aspect of the new rules as trusteeship comes in a whole range from businesses where it is the core business, through to individuals who have a portfolio of paid appointments, through to individuals who have one trusteeship with a relatively token fee.

At first glance, in the context of trustees of occupational pension schemes, “by way of business” would seem only to refer to professional trustees who charge for their services as a trustee. This view is supported by the HMRC registration forms (see section 8 for further details and links) which suggest that only “professional trustees” holding directorships or trusteeships must register. This clearly applies to trustee companies but does raise a key question for individuals who hold several paid appointments. On which side of the line should they fall?

However, given the draconian penalties which apply for non-compliance (including potential civil penalties³ for failing to register), trustees who do not regard themselves to be running a business as a “professional trustee”, but who are nevertheless paid, should consider very carefully whether they could be said to be acting “by way of business”.

³ Or, ultimately, a possible criminal offence

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6 PAID TRUSTEES

HMRC Guidance

HMRC have produced a guidance note on money laundering⁴ and we have been in contact with HMRC to ask for specific guidance on paid trustees generally. In correspondence with us, HMRC have indicated that if a trustee or director can answer “yes” to both the following questions and they are not providing services “based on sound and recognised business principles”, then that trustee or director will not be a TCSP for the purposes of the legislation:

- Is the trustee a trustee for only one pension scheme?
- Is the fee paid to the trustee determined by the sponsor or trustee board (not the individual TCSP)?

Examples

However, this still leaves a “grey area” of trustees who fall outside this guidance and, of course, every set of circumstances is different. We felt that it would be helpful to set out a number of examples, building on the HMRC guidance:

- In the case of a pensioner trustee who is paid a small sum set by the sponsor (but more than out-of-pocket expenses), our view is that this trustee is unlikely to be caught by the money laundering regime. A factor could be the amount someone is paid and the proportion that might be of their overall income. And what about an individual who sits on the trustee board of more than one scheme (even if they have the same sponsor)?

⁴ HMRC Notice MLR8 (December 2007) at <http://www.hmrc.gov.uk/mlr/mlr8.pdf>

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- Semi-retired individuals who act as trustees (or directors) of several schemes are probably caught even if they do not hold themselves out as “professional trustees”. Even though they are unlikely to directly set their fee, they normally have the choice of appointments or may have input on their fee by way of negotiation with the sponsor. They are also likely to act for multiple schemes.
- A trustee who is also an employee or director of a sponsor, for example the finance director, is unlikely to be caught. This is because, even though they may be “paid” for their time, it is part of their general remuneration under their contract of employment or service (provided they do not charge separately).

However, HMRC have said that any trustees who are unsure of their status should write to them to ask for a ruling as to whether they are acting as a TCSP and therefore whether they need to register. We would recommend this approach in cases which are unclear, given the penalties for failure to comply.

7 ANTI-MONEY LAUNDERING OBLIGATIONS

Customer due diligence

Any person (or firm) designated as a TCSP must carry out some degree of customer due diligence. There are different levels depending on the circumstances. In the context of pension schemes, provided the TCSP has “reasonable grounds” for believing that the product is “a pension, superannuation or similar scheme which provides retirement benefits to employees, where contributions are made by an employer or by way of deduction from an employee’s wages and the scheme rules do not permit the assignment of a member’s interest⁵ under the scheme”, simplified due diligence will apply.

⁵ Except as permitted by section 44 of the Welfare Reform and Pensions Act 1999 (pension sharing on divorce) or section 91(5) of the Pensions Act 1995 (inalienability of pension rights)

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Fortunately, most occupational pension schemes will fall within this definition. TCSPs will therefore only need to carry out customer due diligence where they “suspect money laundering or terrorist financing”. The HMRC guidance refers to “suspicion” as an “opinion held that is based on information or circumstances but without proof”.

The “customer” in relation to an occupational pension scheme will generally be the trustees who are the legal embodiment of the trust (which otherwise has no legal identity)⁶. In brief, the due diligence requirements are likely to be limited to identifying his or her fellow trustees and the existence of the trust (perhaps by way of copies of definitive documentation).

However, a life assurance only scheme would appear to fall outside of this definition, and so a TCSP would have additional anti-money laundering checks. For example, customer due diligence would need to be carried out on establishing the business relationship.

But there is some good news for TCSPs - customer due diligence should be conducted on a risk-based approach. A risk-based approach means directing resources in accordance with priorities so that the greatest risk receives the highest attention. Also, it may be possible for a TCSP to piggyback on another’s customer due diligence checks, with their consent⁷.

Ongoing monitoring

A TCSP will be also required to carry out an ongoing monitoring role to ensure that the scheme is not being used for money laundering. This is likely to dovetail with a scheme’s obligations to put in place risk management systems and internal controls.

⁶ Unless there are beneficiaries who are entitled to over 25% of the assets

⁷ The list of persons whose checks can be relied on is limited but includes auditors and independent legal professionals

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Reporting Requirement

A TCSP is required to disclose information to SOCA where they know or suspect (or have reasonable grounds for knowing or suspecting) that a person is engaged in money laundering. It is also an offence to “tip off” the person under suspicion that they are being investigated by SOCA.

8 REGISTRATION AND ENQUIRIES

By 1 April 2008, an existing TCSP⁸ must:

- register with HMRC using Form M100 (<http://www.hmrc.gov.uk/mlr/mlr100.pdf>) and pay a registration fee of £95 for the year 2007/8 ; and
- apply to pass a “fit and proper test” using Form M101 (<http://www.hmrc.gov.uk/mlr/mlr101.pdf>) and pay a one-off fee of £50⁹. For example, the form asks whether the applicant has previous criminal convictions or has been previously disqualified from being a director.

⁸ TCSPs set up on or after the 15 December 2007 will need to register before acting

⁹ The fit and proper test will check individuals against a number of objective criteria set out in the ML Regulations