



Isle of Man
Government

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Department of Home Affairs

Draft Anti-Money Laundering and Countering the Financing of Terrorism Code 2015

SUMMARY OF RESPONSES TO THE CONSULTATION

2 March 2015

CONTENTS

Section 1 BACKGROUND

Glossary.....	2
The consultation.....	3

Section 2 SUMMARY OF RESPONSES

Introduction	4
Overview.....	4
General feedback.....	4
Responses to consultation questions.....	6

Section 3 OUTCOME OF CONSULTATION

Next steps	8
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Section 1 BACKGROUND

Glossary

The 2014 draft Code: the version of the Draft Anti-Money Laundering and Countering the Financing of Terrorism Code 2014 consulted upon in August 2014

The 2015 Code: the Anti-Money Laundering and Countering the Financing of Terrorism Code 2015 [*SD2015/0102*] most recently consulted upon

AML/CFT legislation: the Island's anti-money laundering and countering of terrorism financing legislation which includes:

- (a) the *Anti-Terrorism and Crime Act 2003*;
- (b) Part 3 of the *Proceeds of Crime Act 2008*;
- (c) the *Terrorism and Other Crime (Financial Restrictions) Act 2014*;
- (d) the *Terrorist Asset-Freezing etc. Act 2010* (of Parliament) as applied to the Island;
- (e) any statutory document currently in operation under any of those enactments for example the *Money Laundering and Terrorist Financing Code 2013*

The Commission means the Financial Supervision Commission

The Department means the Department of Home Affairs

Designated Business: includes estate agents, external accountants (including bookkeepers), auditors, lawyers, lenders, financial leasers, providers of financial guarantees and commitments and high value goods dealers who accept by way of business, as payment for the supply of goods or services, cash in any currency exceeding the value of €15,000 either in one transaction, or a series of linked transactions

DNFBP: Designated Non-Financial Businesses and Professions ("Designated Businesses")

FATF: Financial Action Task Force

IMF: International Monetary Fund

NPOs: Non-Profit Organisations

POCA: the *Proceeds of Crime Act 2008*

TCSP: Trust and Corporate Service Provider

The consultation

The original consultation was in relation to the contents of the 2014 draft Code.

The Department first published proposals for consultation on 15 August 2014 with a closure date of 10 October 2014. Having discovered some businesses and professionals were unaware of the consultation until early October submissions were accepted until the end of October. Following the outcome of that consultation, it was decided to revise aspects of the Code. A further consultation was published on 5 January 2015 and ran to 29 January 2015 which related to the 2015 Code. The consultation document indicated where concerns raised during the first consultation had been addressed.

The consultation, in line with the Isle of Man Government's Code of Practice on Consultation, was sent directly to various persons or organisations, including the following –

- the Law Society
- three law firms
- persons or bodies representing tax and accountancy services
- the Association of Corporate Service providers
- the Isle of Man Bankers Association
- many other persons and businesses in the regulated sector
- Government Offices and Departments concerned with supporting business and preventing money laundering or the financing of terrorism.

The consultation documents were the subject of press releases and published on the Isle of Man Government's consultation website.

Section 2 – SUMMARY OF RESPONSES TO THE SECOND CONSULTATION

Introduction

The revised Anti-Money Laundering and Countering the Financing of Terrorism Code 2015 [SD2015/0102] was published for consultation on 5 January 2015 with a closing date for comments of 29 January 2015. This document provides a summary of the comments that were received in relation to that consultation.

Overview

Over 20 responses were received from various stakeholders, professional bodies and interested persons. Efforts have been made to address concerns, to clarify points of ambiguity and uncertainty and provide direct responses to persons where a more substantive response was considered appropriate.

General feedback

Generally, there were few comments in relation to the 2015 Code itself, and most comments sought clarity in respect of planned guidance to be issued by the Commission and how measures will be implemented in practice. A number of these matters have been explained during meetings between professional bodies and the Commission.

The points below summarise the main areas raised by respondents, and the effects of this on the 2015 Code:

- Paragraph 13(3)(c) provides that where a customer is a legal arrangement, a relevant person must identify and take reasonable measures to verify the identity of trustees, beneficiaries and the settlor. Paragraph 13(3)(d) provides that, where a customer is a foundation, a relevant person must identify and take reasonable measures to verify the founder, beneficiaries and council members. *The addition of the requirement to verify identification was added between the draft 2014 Code and the 2015 Code. The addition of the verification requirement was an oversight and has now been removed to restore the position as it was previously.*
- In the 2014 draft Code paragraph 19 required Specified Non-Profit Organisations to treat donations as occasional transactions. Donations (or a series of linked donations) below 15,000 Euros (or currency equivalent) will not be subject to the verification of identification requirement. *This has now been extended to allow a Specified Non-Profit Organisation dispensation from both identifying and verifying the identity of persons who give donations (or a series of linked donations) below 15,000 Euros (or currency equivalent).*
- Where a potential customer falls within the definition of an 'Acceptable Applicant' at paragraph 20 and is a business defined under paragraph 21(6), one respondent enquired as to which concession takes precedence. The two concessions are distinct from each other, but are not mutually exclusive. What the 'Acceptable Applicant' concession does is to remove the requirement to verify the identification of the customer where that customer qualifies under paragraph 20 and is acting on its own behalf. Where the customer is in turn acting on behalf of its own clients, paragraph 21 states that the relevant person does not need to look through their customer and identify those clients (but must reserve the right to do so). An example of how these concessions could be used together is as follows: a bank may treat an Advocate as an 'Acceptable Applicant'

under paragraph 20 and may also not have to identify the Advocate's clients using a pooled client account held by the bank if the criteria in paragraph 21 are met.

- The 2015 Code adds a concession at paragraph 22 relating to conducting designated business which is generic and does not relate to one or more specific financial transactions. This remained undefined in the consultation while the Department sought to work with affected parties to develop an appropriate definition. *In order to improve clarity, the term "Generic Business" is defined and the concession has been altered to read as:*

"...means designated business carried on by a relevant person that does not involve participation in any financial transactions on behalf of the customer." (emphasis of change added)

The Department will continue to work with the bodies impacted by this concession and develop appropriate guidance to assist those businesses.

- Clarity was sought by a number of respondents regarding the treatment of Politically Exposed Persons ("PEPs"). Under the 2015 Code, a person's PEP status is an additional risk factor, but it does not require that all PEPs must automatically be treated as posing a higher risk of money laundering or terrorist financing. This requirement has not changed from the AML legislation currently in force where relevant persons may apply a risk based approach to higher risk factors such as PEPs and mitigate the risks down to an acceptable level. *The 2015 Code has however made this risk based approach clearer.*
- As noted in the consultation document, the most fundamental change in the 2015 Code is the inclusion of the concessions at paragraphs 21 and 22. A number of queries were raised by respondents on the matter.

A few respondents queried the extent of the concession under paragraph 21 highlighting that allowing its use for higher risk customers is contrary to FATF Recommendation 1 which disallows simplified due diligence measures for higher risk customers. The Department and the Commission are conscious of this fact and have attempted to integrate a risk based approach to a suggestion made in the previous consultation. Industry responded by stating that segregation of higher and standard risk business would be unworkable and put the Island in a non-competitive position internationally. As such, the industry's concerns have been heard and it has been determined to allow this concession to apply to customers regardless of their risk rating.

Responses to consultation questions

Q1. Is the extent of persons who may avail themselves of the “persons in the regulated sector acting on behalf of a third party” concession appropriate?

Respondents generally agreed that this concession is appropriate.

One respondent requested that TCSPs should be allowed to dispense with the identification of beneficial owners where they are providing services to a business listed in paragraph 21(6). The concession was restricted on the basis that TCSPs should always identify and verify the identity of their customers and those persons their customers are acting on behalf of. While there is a commercial and logistical rationale for the concession to apply to deposit takers and investment businesses, a TCSP should always be able to identify and verify the identity of any person their customer is acting on behalf of.

Q2. Is the extent of persons to whom the “persons in the regulated sector acting on behalf of a third party” concession applies (Businesses listed under paragraph 21(6)) appropriate?

Again, respondents generally agreed although some sectors stated that paragraph 21(6) should be extended to cover all DNFBPs even if there is no AML/CFT oversight, while others felt this should be narrowed to cover only more mature business sectors. The Department is not minded to extend or narrow the concession at this time, particularly noting criticism contained within the previous IMF report in 2008 which specifically highlighted the concession was too generous and applied to businesses which are not subject to AML/CFT oversight.

Q3. Are the conditions attached to the proposed simplified measures under paragraph 21 and 22 appropriate and can they reasonably be met?

The testing requirement detailed under paragraph 21(5) was queried by some respondents. Businesses are assured the extent of testing will be clarified in associated guidance which is being developed by the Commission alongside industry bodies. The requirement is simply to test its customer’s procedures and that the business can obtain due diligence information when required at least once a year which would appear to be proportionate to the risk faced by the implementation of this concession.

Queries were raised as to the scope of paragraph 21. Paragraph 21 allows a business to conduct any regulated activity with a business listed under paragraph 21(6). In the case of a bank this includes the provision of pooled bank accounts or designated accounts.

Finally, one respondent stated that the proposed concession was adequate for their business; however, the respondent contended paragraph 21 gives too much discretion to the business applying the concession and that the Code should require relevant business to use this concession. The Department considers it would not be appropriate to use legislation to force businesses to apply concessions where under normal circumstances the business should be allowed to take a risk based approach and apply its own judgement regarding the use of such concessions.

Other comments

One respondent advised that the definition of “Business Relationship” appears to only cover those persons who are involved in a financial transaction. This may give certain DNFBPs a level of ambiguity as to the application of the Code for their business. The definition has been amended to clarify that where the purpose of the arrangement is to facilitate the carrying out of

business in the regulated sector on a frequent, habitual or regular basis, a business relationship will be deemed to have been formed.

There appeared to be some confusion over the matters which a relevant person must consider as higher risk under paragraph 15(4) and those factors which may pose an increased risk under paragraph 15(5). While not detailed in the current Code, the Commission's guidance states that those factors set out in paragraph 15(5) should be treated as higher risk. Where a customer is linked to a country which is the subject of an international warning or is the subject of countermeasures, the Island has no discretion to allow a risk based approach in these cases and those persons MUST be treated as posing a higher risk for money laundering or terrorist financing. In all other cases it is considered factors listed under paragraph 15(4) are risk factors in themselves, but relevant persons may be able to take a risk based approach and mitigate the risk to an acceptable level, provided that approach can be reasonably and objectively justified.

One respondent highlighted that the definition of "lawyer" should cross refer to the business of a lawyer under Schedule 4 to the Proceeds of Crime Act 2008, which is narrower than the ordinary definition of a lawyer. A cross reference to the business of a lawyer under Schedule 4(1)(1)(h) to the Proceeds of Crime Act 2008 has been inserted.

Section 3 OUTCOME OF CONSULTATION

The Commission and the Department have been in regular contact with a number of professional bodies and industry representatives from the finance and designated non-financial business and professional sectors to work towards a solution to the concerns raised in consultation whilst also ensuring that the revised proposals are within the risk appetite of the Government.

Next steps

The importance to the industry of appropriate guidance on AML/CFT legislation is recognised. The Commission and the Department will continue to work with professional bodies to develop user friendly guidance, which is kept relevant and up to date.

The Department will lay the 2015 Code before the March 2015 sitting of Tynwald with the provisions in the Code coming into operation on 1 April 2015.

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Department of Home Affairs



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