30 August 2011

Our ref: ICAEW Rep 81/11

The Money Laundering Review
Room 3/15, HM Treasury
1 Horse Guards Road
London SW1A 2HQ

By email: MLR.review@hmtreasury.gsi.gov.uk

Dear Sir

Review of the Money Laundering Regulations 2007: the Government response

ICAEW is pleased to respond to your request for comments on *Review of the Money Laundering Regulations 2007: the Government response.*

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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ICAEW REPRESENTATION

REVIEW OF THE MONEY LAUNDERING REGULATIONS 2007: THE GOVERNMENT RESPONSE

Memorandum of comment submitted in August 2011 by ICAEW, in response to HM Treasury consultation paper Review of the Money Laundering Regulations 2007: the Government response published in June 2011

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Review of the Money Laundering Regulations 2007: the Government response* published by HM Treasury on 7 June 2011. A copy of which is available from this link.

WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter which obliges us to work in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 136,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

4. This response reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

MAJOR POINTS

Support for the initiative

5. Overall comments:

- we welcome HMG's review and its aim of ensuring MLR are as effective and proportionate as possible; and
- we also recognise the approach of HMG is constrained by the need to meet the requirements of the EU 3rd Money Laundering Directive and the standards laid down by the FATF.

6. We are aware of the reviews taking place under the auspices of both the EC and FATF and urge HMG to ensure that the results from those reviews and this review are taken together to produce one set of changes to the MLR. This may cause slight delay to the implementation of any initiatives from this review, but this is considered preferable to the increased cost burden for regulated business that will arise from multiple changes.

7. We recognise the difficulty in assessing costs and benefits of the regime, particularly as at least some elements of the customer due diligence (CDD) required to be undertaken would be likely to figure in any event in the customer take-on processes of many regulated businesses. However, we remain concerned that HMG and other country governments have not taken all available opportunities to provide support to businesses to facilitate cost effective CDD, particularly for smaller and medium sized businesses. The critical omissions are measures to establish country equivalence, the supervisory status of financial institutions in equivalent jurisdictions and the assessment of whether stock exchanges meet the specified disclosure obligations. Without improving support in this regard, smaller and medium sized businesses may effectively be prevented from taking full advantage of the risk-based approach through lack of necessary information to support use of simplified due diligence methods on appropriate customers.

8. There has only been limited support in this area from a list of country equivalence produced from EC discussions. We support HMTs recent efforts to encourage other EC states to invest

more in retaining this list and improving its quality through greater transparency of criteria employed.

GENERAL QUESTIONS

9. As regards the general questions in 2.6, our comments are noted below.

Do you agree that the options are compatible with our international commitments (the FATF Recommendations and EU Directive); and they are otherwise free of legal difficulty?

10. The proposals are considered broadly consistent with international commitments and capable of implementation should they be agreed.

In policy terms, are the options appropriate and consistent with our broader priorities for an effective and proportionate AML regime?

11. Our comments are shown in the detailed responses below.

Will the proposals result in more or less costs for businesses and other interested parties?

12. Our comments are shown in the detailed responses below.

13. As regards the request in paragraph 3.38 for comment on the need, or otherwise, for written policies and procedures, we support the HMT view that it should not require written policies and procedures as a matter of law. This would appear to be a matter for supervisors to consider in the context of the business being examined.

PROPOSALS FOR CONSULTATION

Q1. Should the existing criminal sanctions be wholly or partly repealed?

14. We disagree that the existence of criminal sanctions is the key driver for the apparently risk averse behaviour noted. We are concerned that both HMG and supervisors may mistake the translation of a sound risk based approach into an apparently formulaic set of procedures for front-line staff, for a failure to employ a risk-based approach.

15. In addition, HMG needs to appreciate that the permissive element of allowing a risk-based approach does not actually require a business to adopt such, and nor should it. If a business decides for itself that specifying a single level of customer due diligence is more economic or efficient, or that it is appropriate to obtain certain information to satisfy its own requirements, then HMG and/or supervisors should not seek to interfere unless the chosen level falls short of that required by the regulations.

16. We appreciate that sometimes customers raise concerns over apparently rigid processes, but many of these are likely to be due to a lack of understanding of the regime and the obligations on regulated businesses. HMG has a role to play in terms of public information, and supervisors can also play a valuable role in encouraging businesses to have a clear route for identifying exceptions, and their internal referral for rapid resolution.

17. As regards whether criminal sanctions should be retained, our view is that they should and we support the suggestion in paragraph 3.55 that the existence of offences may aid focus. This focus is likely to be more apparent, and valuable, at senior management levels.

18. However, the penalties should be set as fines only and not include imprisonment. We support the retention of imprisonment as a penalty for the money laundering, tipping off and failure to report offences under The Proceeds of Crime Act 2002 (as amended) but not for the regulatory offences in MLR.

Q2. Should new powers be granted to supervisors allowing them to order or require actions by businesses to mitigate the potential negative impacts from the loss of criminal sanctions?

19. We do not support the grant of additional powers to supervisors as this raises the risk of regimes of varying quality and standards potentially being able to apply significant penalties without judicial safeguards. The test provided by the Courts is considered more appropriate to this area of law.

20. Removal of judicial safeguards through concentration of power in the hands of supervisors may increase costs for businesses.

Q3. Do you agree that the current distinction between Parts 1 and 2 of Schedule 3, e.g. for reliance purposes, should now be removed?

21. Any change to the division of Schedule 3 should be based on factual analysis and we do not have access to sufficient information to be able to comment.

22. However, we feel that further attention needs to be given to the issue of reliance to clarify requirements and make it easier for a wider range of firms to use this mechanism effectively.

23. To widen the potential for use of reliance, we believe some changes may be advantageous. Whilst the current system may work for large financial institutions who are able to make an investment in establishing a reliance relationship for long term repeat business, this model does not generally work well outside this sphere. Whilst retaining the existing system, we would suggest making it clear that there is another route to achieve the aims of reliance through information sharing without imposing a burdensome record keeping requirement (regulation 19 (4)) on the person being relied on. Whilst this can already be done by agreement under existing provisions, we would propose that the regulations make clear the person with the existing customer relationship may, at their option, respond to a request for reliance from another service provider with a certified copy of documents held (with any necessary consent of their customer and other parties whose confidential information is contained within the documents). This removes the need to comply with the requirement in regulation 19 (4) and provides a valid alternative to achieving the objective of reliance.

24. We would also recommend that the regulations are amended to make explicit the requirement for the person relying under either route to receive, at a minimum, the full name and other identifying details of the customer, and in the case of a customer which is other than a natural person, the full names and other identifying details of those persons specified in regulation 6 (beneficial owners).

Q4. Should a debt purchaser be able to rely on CDD previously performed by the seller in this situation?

25. We make no comment on this question.

Q5. Should there be a general de-minimis exclusion for very small businesses (for example those with below €15,000 VAT-exclusive turnover per annum), or a reduction in the requirements placed on such businesses?

26. We are opposed to any general de minimis exclusion for very small businesses. Such businesses are at risk of abuse by money launderers as with any other business providing the same services and any exemption would be an invitation to criminals to engage with such businesses to the detriment of the regime. Business and fee size is not in all cases a reliable measure of the size or significance of business or transactions that may be advised upon. Very small businesses should be encouraged to employ proportionate and risk based measures suitable to their size and client type.

27. In addition to the points raised above, any de minimis exclusion would be of concern to supervisors as policing the perimeter of their supervisory regime would become more complex and costly. Also, any exemption may give an anti-competitive advantage to those businesses which are exempt compared with those who operate at just over the threshold.

Q6. Do you agree that non-lending credit institutions should be exempt from the Regulations?

28. We do not believe that exempting non-lending credit institutions from the Regulations would significantly weaken the regime.

Q7. Do you agree UK estate agents who arrange for the sale and purchase of overseas property by their clients should be regulated?

29. We agree that UK estate agents who arrange for the sale and purchase of overseas property by their clients should be regulated in the same way as other estate agents operating in the UK.

Q8. Do you agree that "safe custody services" should be more clearly defined, and if so, how?

30. We agree that a better definition should be employed. We believe that interested supervisors should work together to draft the definition.

Q9. Do you agree a right of appeal should be introduced for decisions under the fit and proper test by HMRC?

31. We agree that a right of appeal should be introduced for decisions under the fit and proper test by HMRC.

Q10. Do you agree that all previous criminal conduct should be considered under the fit and proper test for MSB's?

32. We agree that HMRC should be able to consider all previous criminal cautions and convictions (including spent convictions) under fit and proper tests for MSBs.

Q11. Should supervisors be given new powers to impose penalties for the unreasonable failure to allow a supervisor to enter their businesses premises?

Q12. Should there be penalties for the unreasonable failure to provide information?

Q13. Should supervisors be given additional powers to enforce the payment of fees or charges payable under a supervisory arrangement, for example by ensuring all supervisors have powers to de-register a business where there is sustained non-payment?

Q14. Should supervisors be given strengthened powers to de-register a business, where a registration has been obtained by other than bona fide means, or no longer serves the public interest?

Q15. Should supervisors have clear powers to make enquiries of persons who reasonably appear to be relevant persons?

33. Where supervisors are public sector bodies, we agree that in respect of their supervisory activities only, the powers sought under questions 11 to 13 should be granted.

34. In respect of question 14, we are unsure of exactly what is expected to be covered under the 'no longer serves the public interest' test and accordingly cannot agree. We feel it is important

to acknowledge that withdrawal of registration is likely to cause termination of a business and so it should only be undertaken on a clear and objective basis.

35. As regards question 15, we agree provided that 'relevant persons' are limited to those reasonably believed to be involved in the beneficial ownership, or control, of a business, are employed by it or are agents for it.

36. Where the bodies are private sector supervisors, we consider it is a matter for those supervisors to agree with their membership appropriate powers of enforcement (including the matters set out in questions 11 to 15) rather than for HMG to legislate to grant private sector bodies these powers. However, HMG does need to ensure it has the explicit power to remove a body from the list of supervisors should it not obtain, and use, appropriate powers.

Q16. Should the ability of supervisors to exchange information with each other for the purposes of discharging their AML supervisory functions be strengthened, if necessary by the creation of new 'gateways' to allow for the exchange of information?

37. As regards the sharing of information between supervisors, we consider this should be limited to information concerning why a person is no longer supervised by a previous supervisor, plus information concerning unresolved complaints and disciplinary actions pending and completed.

38. In addition to the options proposed by HMT, we consider a significant improvement could be made to reducing regulatory burdens by obliging (rather than at present permitting) multiple supervisors to a single business to confer and agree that one of them will undertake AML supervision and share the results with the other supervisors. This would require the lead supervisor to conduct its activities in respect of the whole business (to the extent regulated) and not only those parts which fall directly under its regulatory remit. In such cases, the ability to review the entire business will need to be a factor in deciding the appropriate lead supervisor.

Q17. Should HMRC or other supervisors have powers to limit or prescribe the language used by regulated businesses to describe their relationship with their AML supervisor (for example to make it clear that supervision applies only to money laundering compliance)?

39. As regards public sector supervisors we agree. As regards private sector supervisors this is not a matter for legislation and is a matter for supervisors to specify as part of their agreement with those they supervise. Again, HMG does need to ensure it has the explicit power to remove a body from the list of supervisors should it not behave appropriately in this role.

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